

To be Argued by:
ROBERT J. KRAKOW
(Time Requested: 15 Minutes)

New York Supreme Court
Appellate Division – Second Department

**Appellate
Case No.:
2019-04455**

In the Matter of

C.F., on her own behalf and on behalf of her minor children;
M.F., on her own behalf and on behalf of her minor children;
B.D., on her own behalf and on behalf of her minor children;
M.N., on her own behalf and on behalf of her minor child; and
A.L., on her own behalf and on behalf of her minor child,

Petitioners-Appellants,

– against –

THE NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL
HYGIENE and DR. OXIRIS BARBOT, M.D., in her Official Capacity as
Commissioner of the New York City Department of Health and Mental Hygiene,

Respondents-Respondents,

as and for a proceeding brought pursuant to Article 78 of the CPLR.

BRIEF FOR PETITIONERS-APPELLANTS

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Preliminary Statement

Appellants-Petitioners appeal from an order and judgment of the Supreme Court, Kings County (Hon. Lawrence Knipel, J.) dated and entered April 18, 2019, which denied the petitioners' request, by order to show cause, for an order of the court granting a temporary restraining order, a preliminary injunction, and declaratory relief, and dismissed petitioners' hybrid proceeding pursuant to CPLR Articles 78 and 30 to vacate order(s) of the respondents declaring a public health emergency pursuant to [New York City Health Code Sec. 3.01](#), and which order(s) of the respondents further deemed individuals not vaccinated against measles to be a "nuisance" and directed mandatory vaccinations of any non-vaccinated or non-immune individuals residing, working, or attending school within certain zip codes in Brooklyn, New York, and which declared non-compliance to be in violation of [New York City Health Code Sec. 3.05](#), punishable by, *inter alia*, imprisonment.

Questions Presented

1. Can Nuisance Law Be Used to Criminalize Biological Status, and Does Non-Vaccination Constitute a "Nuisance"? This brief answers these questions in the Negative.

2. Did Petitioners-Appellants fail to raise statutory exemptions to mandatory vaccination and constitutional free exercise of religion claims? This brief answers these questions in the Negative.
3. Did Supreme Court Err in Declining to Enjoin or Vacate the Emergency Orders? This brief answers this question in the Affirmative.
4. Are the Fines to Be Imposed Excessive? This brief answers this question in the Affirmative.
5. Did Supreme Court Err in Dismissing the Proceeding? This brief answers this question in the Affirmative.

Statement of Facts

In the last quarter of the year 2018, an outbreak of the measles virus occurred in parts of Brooklyn, New York, amounting to some 267 cases in the neighborhood of Williamsburg by the time Supreme Court rendered its decision on April 18, 2019. (R10)

[References to “R” followed by a number are to pagination in the Record on Appeal filed together with the brief in this matter.]

On or about April 9, 2019, Orders were issued (hereinafter, the “emergency orders”, R64-72) of Commissioner Oxiris Barbot, M.D., New York City Department of Health and Mental Hygiene (“DOH”).

The emergency orders command that all persons over six months of

age who work, reside or attend school within specified zip codes "*shall be vaccinated against measles*" if they are not vaccinated or not immune to the measles. The emergency orders deemed any unvaccinated person a "nuisance," as defined in [New York City Administrative Code §17-142](#). The emergency orders used as a predicate the Commissioner's finding that the presence of any unvaccinated person in Williamsburg "creates an unnecessary and avoidable risk of continuing the outbreak and was therefore a nuisance". (R65, 68, 71)

In a hybrid proceeding pursuant to CPLR Articles 78 and 30, Appellants sought a temporary restraining order, preliminary injunction, and a declaratory judgment vacating the Orders as, *inter alia*, beyond the powers of the Commissioner or *ultra vires* because the emergency Orders had an insufficient factual predicate, specifically, that there was insufficient evidence of a measles epidemic or dangerous outbreak to justify the respondents' extraordinary measures. For instance, rather than using available legal mechanisms such as isolation or quarantine under [Public Health Law § 2100](#), respondents imposed not only severe criminal and civil

penalties for not vaccinating but have stated that persons not vaccinated "shall be vaccinated against measles," thus introducing the specter of unjustifiable forced vaccination to Williamsburg and the City of New York.

Moreover, the petition below sought relief for respondents' actions that were disproportionate to the provable factual circumstances and that failed to use the least restrictive means that would likely control measles yet balance the rights to individual autonomy, informed consent and free exercise of religion. The respondents took those dramatic steps without a blueprint for implementation, itself suggesting that a true public health emergency did not exist.

Appellants submitted affidavits attesting to the basis for and sincerity of their religious opposition to vaccination (R131-45).

Appellants also submitted affidavits from scientific and medical experts tending to show the risks inhering in a mandatory or forced vaccination program, especially one hastily applied (R114-130).

For instance, as Dr. Richard Moskowitz explains in his affidavit (R124), people who are not vaccinated with measles pose no threat to

people who are vaccinated. Dr. Moskowitz explains that because people who are recently vaccinated “shed” the virus, which can infect other people, they are likely a greater threat to public health than people who are unvaccinated.

Dr. Moskowitz explains that “small localized outbreaks of ordinary childhood diseases, including the current outbreaks in Brooklyn” are insufficient to override the rights of individuals, including the right to informed consent regarding medical interventions, and including the right to practice their religion, which are enshrined in the public laws of New York, the Nuremberg Code of Human rights, and the Helsinki Code.

Dr. Tina Kimmel, a former long-time and experienced public health official and research scientist in California, explained in her affidavit (R114), that unvaccinated people who have not been exposed to measles cannot possibly spread the virus to the general population, especially persons who have been vaccinated. She also explains that the “Commissioner’s arbitrary order that all residents be vaccinated contravenes the principle of Informed Consent.” The “arbitrary order also contravenes the international norms of cooperation between the

government and the governed.” Dr. Kimmel points out that “[b]y arbitrarily criminalizing families being sensitive to their own medical needs, the Commissioner runs the risk of MMR being given to people for who the vaccine is known to be dangerous to their life and health.” Dr. Kimmel states (R115):

According to the vaccine manufacturer’s own package insert, this includes any individual with a hypersensitivity or anaphylactoid reaction to eggs, gelatin, neomycin or any other component of the vaccine; anyone with a fever above a low-grade fever, or with an individual or family history of cerebral injury, convulsions, or any other condition of stress due to fever; anyone who is nursing pregnant, or will become pregnant within three months of receiving the vaccine; anyone with blood dyscrasia, leukemia, lymphoma of any type, or other malignant neoplasm; anyone who is immunosuppressed or receiving any of several kinds of immunosuppressive therapy, or with a family history of congenital or hereditary immunodeficiency; anyone with dys- or hypogammaglobulinemia, or with current or a history of thrombocytopenia; anyone with untreated tuberculosis or who will be having a tuberculin test in the near future; or anyone who has had a blood or plasma transfusion or administration of human immune globulin within the last three months.
https://www.merck.com/product/usa/pi_circulars/m/mmr_ii/mmr_ii_pi.pdf.

Dr. Kimmel also states that the Commissioner lacks the authority

to override an individual's religious beliefs.

Dr. Kimmel states (R116):

Rather than issuing pointless and overbroad impositions, NYC Department of Health (DOH) should be working to end the measles outbreak by following standard public health practices. Strangely, these practices do not appear to have been implemented. They include: enforced isolation of cases until they are, no longer infectious (in the case of measles, four days after the rash appears); contact tracing; with vaccination only of nonimmune contacts ("ring vaccination"). The Commissioner could suggest or even order a quarantine of these contacts for the maximum incubation period, although measles is not considered a dangerous enough disease to be quarantinable by the US Federal Centers for Disease Control and Prevention. All of these measures are simple and effective ways that would actually stop the spread of measles in NYC, which do not abridge the civil rights of families who had had no exposure to the virus.

Dr. Jane Orient explained in her affidavit (R117) that the relevant measles outbreak in Brooklyn is not "a clear and present danger to the public health. Violations of medical ethics and human rights are neither necessary nor sufficient to prevent or contain measles outbreaks. It is contrary to public policy, medical ethics and respect for human rights to force vaccination on persons who do not give their voluntary informed consent."

Dr. Orient and Dr. Fitzpatrick explained that vaccines themselves cause injuries, as recognized by the Supreme Court of the United States in enacting the Vaccine Injury Compensation Program, which has paid more than \$4 billion dollars to vaccine-damaged persons. The manufacturer's own package insert sets forth facts documenting the existence of vaccine injury and the risks and contraindications of the MMR vaccine (R103).

Dr. Shira Miller stated in her affidavit (R121) that "It has not been proven that the MMR vaccine is less of a nuisance {New York Code§ 17-142 " ... dangerous to human life or detrimental to health ... ") than measles infection". Dr. Miller explained, as follows:

It has not been scientifically demonstrated that the MMR vaccine poses less risk of death or permanent disability than measles because it has not been proven that the risk of death or permanent disability from the MMR vaccine is less than 1 in 10,000.

Dr. Miller explained that for the reasons outlined in her affidavit:

it has not been proven that the MMR vaccine is safer than measles, and there is insufficient evidence to demonstrate that mandatory measles mass vaccination in the United States results in a net public health benefit. Furthermore, vaccinating others with the MMR vaccine is not necessary in order to protect

immunocompromised persons. As such, governmental mandatory measles vaccination orders are both unscientific and unethical and have no justification as a method for managing measles outbreaks.

Thus, it is the law and policy of the United States that vaccines carry known risks of harm.

In the course of their response, Respondents submitted an affirmation of DOH Deputy Commissioner Demetre Daskalakis, M.D., M.P.H., signed on April 16, 2019 (R205). DOH opined that while in some cases a person will develop a rash and/or fever following receipt of the MMR vaccine, the fever and rash are both less serious than with natural measles and non-transmissible, meaning other people cannot contract this measles by coming in contact a vaccinated person. (R212)

The emergency orders appear to have been lifted by the Board on or about September 3, 2019.

Summary of the Supreme Court Order and Decision (R4-12)

The court posited that the “pivotal question” at bar was “whether Respondent has a rational, non-pretextual basis for declaring a public health emergency” and issuing the challenged orders (R6).

The court found that a recent outbreak “represent[s] the most significant spike in the incidences of measles in the United States in many years and that the Williamsburg section of Brooklyn is at its epicenter”. (R6) The court disagreed with the rationale of an April 5, 2019 Supreme Court decision in Rockland County, New York, “wherein the court looks to the percentage of overall population affected to determine whether there is an epidemic” (R10 [citing *WD v. County of Rockland*, Index No. 31785/2019 {April 5, 2019}]). Instead, the court here relied upon the Merriam-Webster Dictionary definition of an “epidemic”, “commonly defined as an outbreak of disease that spreads quickly and affects many individuals at the same time” (R10).

At the time of the decision, the court below relied upon “Department of Health records [that] indicate 267 cases in Williamsburg alone.” (R10). The court thus concluded that “there presently exists an emergent measles epidemic in the area [sic] codes in or bordering the Williamsburg neighborhood of Brooklyn, sufficient to warrant the declaration of a public health emergency”. (R7)

Accordingly, the court then considered “the remedy provided in the orders, namely directing MMR [measles, mumps, rubella]

vaccination and imposition of various penalties [] for a failure to do so”.

(R7) The court regarded the mandating of vaccination to be the least restrictive method available to contain the outbreak and therefore the orders were not arbitrary or capricious. (R7)

The court characterized the Appellants-Petitioners’ remaining contentions as falling within the three categories of scientific, religious, and moral (R7). As for scientific objection, the court regarded the opinions of Petitioners-Appellants’ experts to be speculative and outside the “mainstream” insofar as they suggested that the MMR vaccine is “ineffective”, “of greater risk than non-vaccination”, and “propagates the very disease it was designed to prevent” (R7)

As for religious objection, the court held that the right of Appellants-Petitioners to be admitted to school without vaccination pursuant to [Public Health Law Sec. 2164\(a\)](#) does not apply to a public health emergency. Moreover, it disregarded the affidavits of Petitioners as “insufficient to raise” the issue because there was no submission by a religious official. (R8)

Finally, as to moral objections, the court deemed informed consent to be inapplicable by analogy to a firefighter who need not obtain

consent in order to a extinguish a house fire. (R8-9) Moreover, there was no specter of forcible vaccination. (R8)

The court denied the injunctive relief sought and dismissed the hybrid proceeding. (R9)

ARGUMENT

Point I

Nuisance Law Cannot be Used to Criminalize Biological Status;
In any Event, Non-vaccination Does Not Constitute a “Nuisance”,
[U.S. Const., Amends. I, XIV](#); [N.Y. Const., art.1, secs. 1,3,6,8,11](#);
CPLR Articles 30, 78;
[New York City Administrative Code secs. 17-109, 17-142](#)

A. Nuisance Law Cannot Be Used to Criminalize Biological Status

As a matter of substantive due process, equal protection of the law, and the rights reserved to citizens of the State of New York and the United States, nuisance law cannot be employed by the government to criminalize the natural, unaltered biological state of citizens. [U.S. Const., Amends. I, XIV](#); [New York Const., art. 1, secs. 1,3,6,8,11](#).

“New 'substantive due process' rules [are] those that place, as a matter of constitutional interpretation, certain kinds of primary, private individual conduct beyond the power of the criminal law-making

authority to proscribe”. [Mackey v. United States, 401 U.S. 667, 692, 91 S.Ct. 1160 \(1971\)](#) [footnote omitted, bracketed material supplied] [Harlan, J., concurring in judgments in part and dissenting in part]. These rules include, *inter alia*, “basic civil rights of man” (see, [Loving v. Virginia, 388 U.S. 1, 12 \[1967\]](#) [marriage]) and the rights to privacy and to be let alone and to engage in activities, such as possessing pornography at home, that might otherwise be deemed a crime were they to be undertaken elsewhere. See, e.g., [Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243 \(1969\)](#).

Notably, the sanctioning scheme at issue in the case at bar even reaches to non-activity undertaken at home. Thus, citizens dwelling in their own homes within the neighborhood of Williamsburg, Brooklyn, and simply continuing to maintain their natural, human, non-vaccinated biological state, fall within the command of the sanctions.

Lest our society devolve into a dystopia, whereby greater and greater alterations of the natural human body are demanded by a future government, the approach taken by DOH should be turned aside at this juncture. We do not as a society want the government to dictate, under the guise of public “health”, medical or genetic enhancements of

humanity, with the ensuing imposition of imprisonment, coercive fines, or other penalties.

There is no doubt that the sanctioning scheme in this case carries criminal penalties. Even taking at face value the representations by the government below (and unsupported by the terms of the emergency orders themselves) that only civil penalties would be imposed by administrative tribunals, those penalties are so onerous that they amount to criminal sanction. See, e.g., [New York City Charter Sec. 558\(d\)](#) (any violation of health code punishable as misdemeanor); [New York City Administrative Code 17-143](#) (willful omission to abate nuisance is a misdemeanor); [New York City Health Code 3.09](#) and [3.11\(a\), \(d\)](#) (even civil penalties for nuisance can be deemed to be continuing violations of \$2,000 each, and \$10,000 if violation directly causes serious harm to any person); [New York Public Health Law 12-b\(1\), \(2\)](#) (punished as misdemeanor and fines up to \$10,000 for willful violation of lawful order or regulation). Such fines – quite apart from imprisonment, which was explicitly referred to in the initial emergency order – could quickly bankrupt many of the appellant families. Fines in and of themselves are considered retributive. See, [Ciafone v. Kenyatta](#),

[27 AD3d 143, 150 \(2d Dept. 2005\)](#) (law permitting suit for restitution not criminal in character).

Accordingly, as a matter of due process, merely dwelling in a natural state in one's home, or even going about one's business in the neighborhood, cannot be permitted to subject one to criminal sanctions, rectified only by an alteration of one's body to satisfy the government. Public health is in the government's interest, but if it must undertake to alter people's humanity, this must be accomplished by education and civil enforcement alone, with fines that are manageable to citizens. The mere DOH fiat that unvaccinated individuals are "unnecessary", and thus a nuisance, cannot be permitted to undermine this approach.

Moreover, just as the strictest scrutiny is applied under equal protection to distinctions based on race, a faux-biological basis, so must it be applied to people who decline to alter their bodies at the government's behest. Cf. [Loving v. Virginia, supra, 388 U.S. at 11](#) ("most rigid scrutiny" applied to criminal prohibitions on basis of race [internal citation omitted]).

Here, it is plain that the application of a "nuisance" statute should not sweep into the criminal orbit a mere human "presence" in

Williamsburg, Brooklyn. The outbreak of measles at issue may have posed a modest health concern, but the DOH had a number of alternatives in limiting its extent. In any event, while health officials have historically had recourse to mandatory vaccination among its options, what appellants object to in this instance is the criminalization of their status. There is no compelling government interest in criminalizing biological status.

But as will be demonstrated in the next section of this point of argument, these citizens do not constitute a “nuisance”, at all.

B. Non-Vaccination Does Not Constitute a “Nuisance”

The New York City Board of Health (hereinafter, the “Board”) is empowered to regulate vaccinations and take vaccination measures under a specific delegation of power pursuant to [New York City Administrative Code section 17-109](#). “Significantly, although Administrative Code Sec. 17-109 is now codified as New York City legislation, it was originally enacted by the state legislature and ‘reflect[s] the policy of the State that’ the Board has the authority to regulate vaccinations in New York City” [bracketed material in original]. [Garcia v. New York City Department of Health and Mental](#)

Hygiene, 31 NY3d 601, 620-21 (2018), citing, Matter of Patrolmen's Benevolent Assn. of City of N.Y., Inc., v. New York State Pub. Empl. Relations Bd., 6 NY3d 563, 574 (2006).

The Court of Appeals explained last year:

Further, Administrative Code Sec. 17-109 specifically delegates to the Board the power to regulate vaccinations and adopt vaccination measures to reduce the spread of infectious disease. The provision dates back to an 1866 act of the state legislature creating a predecessor to the existing Department and Board, which empowered that predecessor agency to “take measures and supply agents, and afford inducements and facilities for general and gratuitous vaccination and disinfection ... as in its opinion the protection of the public health may require” (L 1866, ch 74, Secs. 16, 20). Over the course of many decades, the State has repeatedly reaffirmed the authority of the Department (in its various forms) to regulate vaccinations (see L 1974, ch 635, Sec. 1; L 1897, ch 378, Sec. 1225 [established New York City Charter and Board of Health, and bestowed upon Board the power to “take measures, and supply agents and offer inducements and facilities for general and gratuitous vaccination”]; L 1901, ch 466, Sec. 1225; L 1937, ch 929, Sec. 556-6.0 [enacted the New York City Administrative Code with vaccination provision]).

Garcia v. DOH, supra, 31 NY3d at 613 (bracketed material in original).

In the case at bar, however, the Commissioner issued an order that made not a single reference to the authorizing statute embodied in

[Section 17-109](#). Instead, the Commissioner resorted to the Board's overarching power to regulate matters affecting health in the city of New York under [New York City Charter section 556](#) and its responsibility to control communicable diseases and "for supervising the abatement of nuisances". (R64)

The Commissioner then went on to "find" that "the presence of any person in Williamsburg lacking the MMR vaccine [unless medically contra-indicated or immunity is established] creates an unnecessary and avoidable risk of continuing the [measles] outbreak and is therefore a nuisance, as defined in New York City Administrative Code Sec. 17-142". (R65)

At the outset, the Commissioner's purpose in issuing this ever-changing string of orders was ill-conceived and exceeded any necessary response.

First, the orders were a moving target, emphasizing and de-emphasizing criminal penalties, without ever actually eliminating them, and correcting a series of errors in specifying the geographic areas affected by the orders. Characterizing non-vaccination (i.e., just

living as a person) as a nuisance was criminalized in the orders by threats of imprisonment and recourse to nuisance law.

It is likely that the threat of imprisonment was an express purpose of resorting to nuisance law, whereas vaccination avoidance has been historically penalized by civil enforcement of fines. *See, e.g., [Garcia v. NYCDOH, supra, 31 NY3d at 612](#)* (in connection with mandate of flu vaccine, Board advanced legislative purpose “by imposing fines to ensure that the cost of admitting unvaccinated, non-exempt children in day care programs is too significant for a provider to risk non-compliance”). Notably, failure to abate a nuisance under the applicable codes constitutes a misdemeanor, a crime punishable by a year’s imprisonment and onerous fines. *See, [New York City Administrative Code Sec. 17-143](#)* (willful omission to abate nuisance is misdemeanor); *[Penal Law 55.10\(2\)\(b\)](#)* (unclassified misdemeanor outside chapter is deemed classified as “A”).

It is also significant that the Commissioner’s order provided 48 hours’ notice to tens of thousands of affected individuals. These souls were, under the terms of the order, almost immediately deemed nuisances in their own homes subject to, at a minimum, onerous fines of

\$1,000, if the government's self-placed limitations are to be credited.

Compare, [People v. Nemadi, 140 Misc.2d 712 \(Sup. Ct. NY Co. 1988\)](#)

(observing that the window guard provisions promulgated by the Department of Health involved an “elaborate pattern of individualized notice and response forms, of apartment inspections and Health Department assistance [...] designed to eliminate, or reduce to a minimum, those circumstances from occurring which would provide a subjective basis for noncompliance”).

Thus, the order was meant to be highly coercive and to override countervailing liberty interests, in a departure from historical recourse to civil enforcement, limited to fines, and an ordered system of notice and assistance to affected individuals. This outcome is anticipated by the terms of the order, which deemed the presence of unvaccinated individuals to be “unnecessary” in the eyes of the Commissioner.

Second, the state legislature, both through its statutory schemes and through statements accompanying at least one bill, has expressed an unwillingness to require vaccination by adults (other than those in school settings), and the orders at issue in the case at bar appear to be a political maneuver to avoid these conflicting approaches.

By distinguishing the status of petitioner-appellants as a “nuisance”, the Board separated these citizens from consensus legislative vaccination schemes. Mandatory vaccination of school children in New York is a method by which “herd” immunity is maintained over generations, as children grow into vaccinated adults. See, [*F.F. ex rel Y.F. v. State of New York*, 2019 NY Slip Op 29261, p.10 \(Sup. Ct. Albany Co., June 23, 2019\)](#) (Hartman, J.) (“New York's legislature has chosen to target school-aged children, both for their immediate protection while they are in close, daily proximity to each other and as the primary means to achieve community immunity from vaccine-preventable diseases.”) With limited exceptions, this approach has been the standard for well over a century. See, e.g., [*Viemeister v. White*, 179 NY 235, 238 \(1904\)](#) (“question is whether the Legislature is prohibited by the Constitution from enacting that such children as have not been vaccinated shall be excluded from the public schools”); [*Garcia v. NYCDOH*, *supra*, 31 NY3d at 613-14](#) (“the Board has mandated smallpox vaccinations of minors since 1866”). These schemes have minimized encroachment upon individual liberty while enhancing the safety of vulnerable youngsters.

In the course of amending New York legislation last decade, this consensus preference was articulated. Language was added in the year 2004 to [Public Health Law Sec. 613\(1\)\(c\)](#) to the effect that the statutory language of the subdivision was not to be construed as authorizing mandatory vaccination (except of students) by the New York State Department of Health. Thereby, “the legislature intended to grant NYSDOH authority to oversee voluntary adult immunization programs, while ensuring that its grant of authority would not be construed as extending to the adoption of mandatory adult immunizations (see Letter from Richard N. Gottfried, Chair, Assembly Comm on Health, to Richard Platkin, Counsel to Governor, July 16, 2004, Bill Jacket, L 2004, ch 207 at 5, 2004 NY Legis Ann at 179)”. [Garcia v. NYCDOH, supra, 31 NY3d at 620.](#)

While the Court of Appeals clarified that the New York City Board of Health was nevertheless empowered to implement mandatory flu vaccination rules to school children, the language and legislative history is an expression of the historical consensus preference to avoid mandatory adult immunization in New York State. By redesignating the presence of petitioners in their own homes and workplaces as a

“nuisance”, the Board avoided New York’s consensus approach and implemented a punitive, draconian, and coercive scheme in its place.

Third, those among the petitioners who were minors had bona fide religious exemptions, at the time, from vaccination under New York law ([Public Health Law Sec. 2164\[9\]](#)), and the Board appears to have attempted to override their state-granted, state-recognized privileges and rights.

The minor petitioners had exemptions from vaccination pursuant to an express legislative scheme ([Public Health Law 2164\[9\]](#); [New York Constitution, art. 1, Secs. 1, 3, 6, 11](#) [due process; free religious exercise; equal protection; and general guaranties for the protection of the rights, privileges, and liberties of the citizen]). While the exemption applied to schooling, so did the Board’s order, encompassing those who attended school in Williamsburg, a significant overlap and interference with a statutory right. Recourse by the Board to “nuisance” law falsely distinguished those petitioners from right-holders under a statutory scheme and transformed them into tortfeasors operating outside the bounds of the law.

The court below confounded its review of the hybrid proceeding by concluding that the petitioners' own representations of their religious values were of no consequence absent the submission of affidavits from organized religious clergy (Op. at 5). This simply is not the correct standard. As a coordinate court recently observed:

[A]s a constitutional matter, the phrase 'religious belief' must be construed broadly to encompass not just the tenets of organized religions, but also views of sub-groups or individuals derived from organized religions, and religious views that are wholly individual, unconnected to any organized religion (see *Mason v General Brown Cent. School Dist.*, 851 F2d {47} at 50 {2d Cir. 1988}; *Matter of Sherr v Northport-East Northport Union Free School Dist.*, 672 F Supp 81, 97-98 [EDNY 1987]).

[*F.F. ex rel Y.F. v. State of New York, supra*, p. 9 \(Sup. Ct. Albany Co., June 23, 2019\)](#) (Hartman, J.) (denying preliminary injunction in connection with legislation eliminating religious exemption to vaccination for school children {bracketed material supplied}).

Furthermore, appellants' constitutional free exercise of religion rights continue even absent such a statutory religious exemption to vaccination.

In sum, the Board's recasting of its traditional authority, and the vilification of New Yorkers as criminals and tortfeasors, corroded the

character of the legislative scheme by which the people have long been governed. This exceeded “the limits of necessity” in the exercise of the government’s police power, and the Commissioner has since the time of issuance of these orders stated that the Board would repeat its approach in the future. Accordingly, the orders were issued beyond the government’s authority and therefore do not withstand review pursuant to [CPLR 7803](#). See, *Matter of Belle Harbor Realty Corp. v. Kerr*, 35 NY2d 507, 511-12 (1974) (municipality may not invoke police power to protect public health by acting beyond the “limits of necessity”, citing, [Arverne Bay Constr. Co. v. Thatcher](#), 278 NY 222, 230 [1938] and [People ex rel. St. Albans-Springfield Corp. v. Connell](#), 257 NY 73 [1931]).

Even if within the bounds of “dire necessity” (see [Matter of Belle Harbor Realty, supra](#), 35 NY2d at 511-12), however, the Commissioner’s designation of the presence of persons living, working, or attending school in Williamsburg as a “nuisance” simply does not withstand scrutiny. As a matter of review, the designation falls outside of the Board’s jurisdiction; moreover, it is irrational and thus arbitrary and capricious, and constitutes an abuse of discretion. See, [Pell v. Board of Education](#), 34 NY2d 222, 230 (1974) (“Arbitrary action is without sound

basis in reason and is generally taken without regard to the facts”; abuse of discretion occurs when “there is no rational basis for the exercise of discretion”).

Historically, the State’s right to require vaccination has been a function of its police power, rather than application of nuisance law. (See, e.g., [*Jacobson v. Massachusetts*, 25 S.Ct. 358, 361 \(1905\)](#) (in context of state statute requiring vaccination, “police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety”[underline supplied]); [*Viemeister v. White*, *supra*, 179 NY at 238, 241](#) [promotion of public health a function of the police power]). Nor does local law differ in this respect. Cf., [*People v. Nemadi*, *supra*, 140 Misc.2d 712, 531 N.Y.S.2d 693, 698](#) (“Article IX, Section 2[c] of the New York Constitution and Section 10[1][ii] of the Municipal Home Rule Law confer broad authority on localities to legislate pursuant to the police power”).

Indeed, a review of the “nuisance” scheme within the New York City Administrative Code plainly indicates an intention to regulate the conditions of property, or most broadly, “things”, not persons in their

natural and peaceable state. For example, [section 17-144](#), governing “who is liable”, plainly relates to property and those who control it. Notably, the statutory definition of “nuisance” in [New York City Administrative Code Sec. 17-142](#) (R65) relies upon the common law meaning of public nuisance: “The word ‘nuisance’, shall be held to embrace public nuisance, as known at common law or in equity jurisprudence; whatever is dangerous to human life or detrimental to health ... All such nuisances are hereby declared illegal.”

Notably, historical common law development of the tort of “nuisance” derives from damages to interests in real property:

The word [“nuisance”] surfaced as early as the twelfth century in the assize of nuisance, which provided redress where the injury was not a disseisin but rather an indirect damage to the land or an interference with its use and enjoyment. Three centuries later the remedy was replaced by the common-law action on the case for nuisance, invoked only for damages upon the invasion of interests in the use and enjoyment of land, as well as of easements and profits. If abatement by judicial process was desired, resort to equity was required. Along with the civil remedy protecting rights in land, there developed a separate principle that an infringement of the right of the crown, or of the general public, was a crime and, in time, this class of offenses was so enlarged as to include any “act not warranted by law, or omission to

discharge a legal duty, which inconveniences the public in the exercise of rights common to all Her Majesty's subjects" (Stephen, General View of Criminal Law of England (1890), p. 105). At first, interference with the rights of the public was confined to the criminal realm but in time an individual who suffered special damages from a public nuisance was accorded a right of action. (See Restatement, Torts, notes preceding § 822, pp. 217-218; Prosser, Torts (4th ed.), pp. 572-573.)

Copart Industries, Inc. v. Consolidated Edison Co., 41 NY2d 564, 394

NYS2d 169, 171-72 (1977) [bracketed material and underline supplied].

The gradual evolution of the concept of a "public nuisance" thus required evidence of an omission to perform a legal duty. Instead, in the case at bar, the petitioners had natural and state-granted rights and liberties, rather than an affirmative duty. To term the presence of a non-vaccinated citizen a "nuisance" that must be "abated", and that non-vaccination is a culpable omission, is to assume that there is a mandatory vaccination regimen in place; however, as discussed, other than for school children, that is not the method the legislature has chosen to employ in New York. There simply is no pre-existing general duty (to either the State or fellow citizens) to vaccinate in New York, the omission of which is culpable under a nuisance theory; nor can it

reasonably said that any harm supposed to result from non-vaccination is “intentional”. See, [*Copart, supra*, 394 N.Y.S.2d at 172-74](#) (nuisance must be founded upon negligence, intentional conduct, or ultrahazardous activity); see also, [*Melker v. City of New York*, 190 NY 481, 488 \(1908\)](#) (“We are not aided by the classification into public and private nuisances, because the difference between them does not depend on the nature of the thing done, but on the fact that one affects the public at large and the other a limited number only.”)

That the Board attempted to manufacture that duty or intent by fiat, referencing the doing of “any act which is or may be detrimental to the public health” (R65, citing [New York City Health Code sec. 3.07](#)), is an end run around both the legislature and the courts of New York, is overbroad and vague, and is contrary to ordered liberty. Nor is it even a rule, pursuant to authority, but rather an executive proclamation.

Moreover, permitting the Board to proclaim non-vaccination as an offense against the state, and thus a public nuisance, is to usurp the judicial function to develop the common law. Indeed, New York case law offers no precedent where individuals have been branded criminals for failing to vaccinate. On the contrary, New York precedent

specifically states that even an individual who is contagious with smallpox may not be considered a nuisance. “We cannot admit that a person sick of an infectious or contagious disease, in his own house, or in suitable apartments at a public hotel or boarding house, is a nuisance.” [*Boom v. Utica*, 2 Barb. 104, 109 \(1848\), 1848 N.Y. App. Div. LEXIS 79 \(NY Sup Ct 1848\)](#). In light of this unchallenged precedent, it is inconceivable that perfectly healthy individuals making lawful choices may be treated as criminals for nuisance.

Respondents have twisted New York State nuisance law to novel and potentially dangerous ends. Precedent cases regarding nuisance are about buildings and human acts of commission and omission, not biological status. [*Copart Indus. v. Consolidated Edison Co. of N.Y.* 41 N.Y.2d 564, 568 \(1977\)](#). Conduct that courts have found to constitute nuisance includes permitting excessive emissions from power plants, improper use of pesticides, pollution of waterways, and making unreasonably loud noise. *See, e.g., id.*, [*State v. Fermenta ASC Corp.*, 166 Misc.2d 524, 630 N.Y.S.2d 884 \(Sup. Ct. Suffolk Co. 1995\)](#), [*State v. Waterloo Stock Car Raceway, Inc.*, 96 Misc.2d 350, 409 N.Y.S.2d 40 \(Sup. Ct. Seneca Co. 1978\)](#). None of

the precedents resemble respondents' use of the definition here.

If this Court were to permit respondents to apply this novel, overbroad, and vague definition for nuisance, where would it end? Would those who fail to get annual flu shots be criminally liable for nuisance? What about the parents of children with attention deficit disorder? Should they be criminally liable if the children are not on pharmaceutical medications? This Court should not permit respondents to criminalize non-vaccination by executive fiat.

Point II

Appellants Successfully Claimed
Religious Exemptions Pursuant to
[Public Health Law 2164\(9\)](#), [U.S. Const., Amends. I, XIV](#);
[N.Y. State Const. art. 1, sec. 3](#);
and have a valid Free Exercise of Religion Claim

The court below erred in concluding that affidavits of Petitioners was insufficient to convey sincerely held religious beliefs, absent statements from a rabbi or clergyman (Op. at 5). As a coordinate court recently observed:

[A]s a constitutional matter, the phrase 'religious belief' must be construed broadly to encompass not just the tenets of organized religions, but also views of sub-groups or individuals derived from organized religions, and religious views that are wholly individual, unconnected to any organized

religion (see *Mason v General Brown Cent. School Dist.*, 851 F2d {47} at 50; *Matter of Sherr v Northport-East Northport Union Free School Dist.*, 672 F Supp 81, 97-98 [EDNY 1987]).

[*F.F. ex rel Y.F. v. State of New York*, 2019 NY Slip Op 29261, \(Sup. Ct. Albany Co., June 23, 2019\)](#) (Hartman, J.) (denying preliminary

injunction in connection with legislation eliminating religious exemption to vaccination for school children).

Indeed, New York has long afforded liberal consideration to religious outliers. As another court opined:

There does not appear to be any rational basis or legitimate purpose in requiring a person to be registered member of an organized church as opposed to one who can prove that he genuinely practices and lives his religious tenets in order to qualify for this religious exemption. (*Shapiro v. Thompson*, 394 U.S. 618, 626, 89 S.Ct. 1322, 22 L.Ed.2d 600.) In fact, the latter could be more sincerely a proponent of a religious faith than the former. Mere church membership or attendance does not guarantee the everyday practice of such religious beliefs. Thus, if the Legislature desires to exempt for religious grounds a certain class of persons, it must do so on a logical and non-discriminatory basis. (*Welsh v. United States*, 398 U.S. 333, 90 S.Ct. 1792, 26 L.Ed.2d 308; *United States v. Seeger*, 380 U.S. 163, 85 S.Ct. 850, 13 L.Ed.2d 733; *United States v. Macintosh*, 283 U.S. 605, 51 S.Ct. 570, 75 L.Ed. 1302.)

[*Maier v. Besser*, 73 Misc.2d 241, 244-45 \(Sup. Ct. Onondaga Co. 1972\).](#)

Accordingly, the court's determination (R8) that the affidavits were "insufficient to raise a religious exemption under [Public Health Law] 2164(9)" was erroneous.

Moreover, applying strict scrutiny to the issuance of the emergency orders (see, [*Empl. Div. Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 881-82 \[1990\]](#) [neutral statute subject to strict scrutiny due to "hybrid" rights of parenting and religion]), it is clear that they unduly inhibit the exercise of religion. Alternative public health approaches, such as the imposition of brief periods of isolation and quarantine, were not pursued, nor was the approach pursued in Rockland County whereby students were briefly barred from attending school. Moreover, it would appear that the measles outbreak dissipated naturally and not from the overbearing, if ineffective, efforts of DOH. It is patent that the emergency orders violated appellants' free exercise of religion and their rights to parent and make health decisions on behalf of their children.

Additionally, for reasons discussed elsewhere in this brief, there is reason to question whether the government had a compelling interest, at all. The risk inhering in the progress of the disease of measles in this

case has not been shown to outweigh the established risks of vaccination, even when undertaken in an ordered, supervised fashion. (*See*, Argument, Point III, *infra*.) An effort to protect public health is not an excuse to criminalize biological status. (*See*, Argument, Point I[A], ante.) Accordingly, mandatory vaccination, if recourse is necessary, requires an ordered, civil approach through reasonable fines and education.

Point III

Supreme Court Erred in Declining to Enjoin
or Vacate the Emergency Orders,
[U.S. Const., Amends. I, XIV](#); [N.Y. Const., art 1, secs. 1,3,6,11](#);
National Childhood Vaccine Injury Act; NY CPLR Arts. 63, 78

“It is well established that the decision to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court (see [Doe v Axelrod](#), 73 NY2d 748, 750 [1988]). In exercising that discretion, however, the Supreme Court must consider several factors, including whether the moving party has established (1) a likelihood of success on the merits, (2) irreparable harm if the injunction is denied, and (3) a balance of the equities in favor of the injunction (see [CPLR 6301, 6312](#) [a]; [Grant Co. v Srogi](#), 52 NY2d 496, 517; [Clarion Assoc. v Colby Co.](#), 276 AD2d 461 [2d Dept. 2000]).” [Matter of Merscorp, Inc. v.](#)

[Romaine, 295 AD2d 431, 432-33, 743 N.Y.S.2d 562 \(App. Div., 2d Dept. 2002](#) [bracketed material supplied]).

It is respectfully submitted that the Supreme Court failed to set forth specific findings with respect to the tripartite test for injunctive relief and improvidently exercised its discretion in denying the motion for preliminary injunctive relief. *See, id.* In the case at bar, while the emergency orders may have been lifted, their impact and effect still weigh on the community of Williamsburg and its citizens.

Likelihood of Success on the Merits

At the outset, even if the Appellants are deemed not likely to ultimately succeed, the court below should have granted a temporary restraining order and preliminary injunction. *See, Matter of Merscorp, Inc. v. Romaine, supra, 295 AD2d at 434* (Goldstein, J. [concurring in the result] [despite improbability of success on the merits, lower court failed to take into consideration other factors impacting determination, and in any case of first impression, status quo should be maintained by grant of injunction]).

In any event, Appellants are likely to ultimately succeed on the merits because the emergency orders were framed outside of the State's

delegation of jurisdiction to DOH and were arbitrary and capricious *ab initio*.

The Risk of Irreparable Harm From The MMR Vaccination Is Sufficient To Issue Immediate Injunctive Relief And Vacate The Emergency Orders

A. The Petitioners Face Imminent Harm Due to the Severe Penalties Imposed by the Emergency Orders

By their very terms, threatening onerous, thousand dollar fines for noncompliance, with the specter of imprisonment not off the table, the emergency orders pose an immediate threat of irreparable harm to petitioners. By doing nothing – simply by continuing to parent the way they have for years, with approval from the State under [Public Health Law §2164\(9\)](#) that recognizes their religious exemptions, petitioners will be harmed. Petitioners will be punished for their status as persons who choose not to vaccinate.

In addition, the utter disrespect for petitioners' religious beliefs will irreparably damage petitioners. They are being asked to choose between continuing to reside in Williamsburg or face, for themselves and their children, mandatory vaccination.

The petitioners are irreparably harmed by the stigma that has

attached to petitioners by the emergency order's labeling them a legal "nuisance" and rendering petitioners prone to scorn from their neighbors and other members of the community. As set forth below, the reports of the petitioners' experts show that petitioners are not a threat to anyone. They have not contracted measles, nor can they transmit measles. The respondents' failure to quarantine (see, [Public Health Law Sec. 2100](#)) those who do have measles has needlessly permitted the panic among public health officials, which has transmitted panic to the public.

Petitioners will thus be harmed in their standing in the community, in their legal standing as law-abiding citizens who have been criminalized for their status (*see*, Argument, Point I[A], *ante*), and in the damage and persecution heaped upon them, all unnecessarily, by the emergency Orders.

Additionally, the emergency orders open appellants up to litigation by their neighbors and visitors in Williamsburg, namely private suits sounding in public nuisance. The Court of Appeals has explained that, "although an individual cannot institute an action for public nuisance as such, he may maintain an action when he suffers

special damage from a public nuisance (Restatement, Torts, notes preceding § 822, p. 217; *Wakeman v. Wilbur*, 147 N.Y. 657, 663-664, 42 N.E. 341, 342)”. [*Copart Industries, Inc., supra*, 394 NYS2d 169, 172 \(1977\)](#).

B. There Is A Risk of Harm To the Petitioners

As Dr. Richard Moskowitz explained in his Affidavit (R124), people who are not vaccinated with measles pose no threat to people who are vaccinated. Dr. Moskowitz explained that because people who are recently vaccinated “shed” the virus, which can infect other people, they are likely a greater threat to public health than people who are unvaccinated.

Dr. Moskowitz explained that “small localized outbreaks of ordinary childhood diseases, including the current outbreaks in Brooklyn” are insufficient to override the rights of individuals, including the right to informed consent regarding medical interventions, and including the right to practice their religion, which are enshrined in the public laws of New York, the Nuremberg Code of Human rights, the Helsinki Code.

Dr. Tina Kimmel explained in her affidavit (R114), that unvaccinated people who have not been exposed to measles cannot possibly spread the virus to the general population, especially persons who have been vaccinated. She also explains that the “Commissioner’s arbitrary order that all residents be vaccinated contravenes the principle of Informed Consent.” The “arbitrary order also contravenes the international norms of cooperation between the government and the governed.” Dr. Kimmel points out that “[b]y arbitrarily criminalizing families being sensitive to their own medical needs, the Commissioner runs the risk of MMR being given to people for who the vaccine is known to be dangerous to their life and health.”

Dr. Kimmel states:

Rather than issuing pointless and overbroad impositions, NYC Department of Health (DOH) should be working to end the measles outbreak by following standard public health practices. Strangely, these practices do not appear to have been implemented. They include: enforced isolation of cases until they are, no longer infectious (in the case of measles, four days after the rash appears); contact tracing; with vaccination only of nonimmune contacts ("ring vaccination"). The Commissioner could suggest or even order a quarantine of these contacts for the maximum incubation period, although measles is not considered a dangerous enough disease to be

quarantinable by the US Federal Centers for Disease Control and Prevention . All of these measures are simple and effective ways that would actually stop the spread of measles in NYC, which do not abridge the civil rights of families who had had no exposure to the virus.

Dr. Jane Orient and Dr. Fitzpatrick explained that vaccines themselves cause injuries, as recognized by the Supreme Court of the United States in enacting the Vaccine Injury Compensation Program, which has paid more than \$4 billion dollars to vaccine-damaged persons. The manufacturer's own package insert sets forth facts documenting the existence of vaccine injury and the risks and contraindications of the MMR vaccine.

Dr. Shira Miller stated in her affidavit (R121) that "It has not been proven that the MMR vaccine is less of a nuisance {New York Code§ 17-142 " ... dangerous to human life or detrimental to health ... ") than measles infection". Dr. Miller explained, as follows:

It has not been scientifically demonstrated that the MMR vaccine poses less risk of death or permanent disability than measles because it has not been proven that the risk of death or permanent disability from the MMR vaccine is less than 1 in 10,000.

Dr. Miller explained that for the reasons outline in her affidavit:

it has not been proven that the MMR vaccine is safer than measles, and there is insufficient evidence to demonstrate that mandatory measles mass vaccination in the United States results in a net public health benefit. Furthermore, vaccinating others with the MMR vaccine is not necessary in order to protect immunocompromised persons. As such, governmental mandatory measles vaccination orders are both unscientific and unethical and have no justification as a method for managing measles outbreaks.

The legislative history of the National Childhood Vaccine Injury Act shows that as of 1983 it “was known that about one half of one percent of apparently normal infants experience a serious adverse reaction to vaccine. See S. Hrg. 98-1060, at 21 (1984).” [*Oliver v. Sec’y of Health & Human Servs.*, 900 F.3d 1357, 1364 \(Fed. Cir. 2018\)](#), reh. den., [911 F.3d 1381](#). In 1983, one half of one percent of children translated to approximately 20,000 children whom Congress acknowledged would be seriously harmed by routine vaccination.

The fact that the MMR can cause injury to children and adults is well-recognized. In the Vaccine Injury Compensation Program formed under the 1986 National Childhood Vaccine Injury Act (NCVIA or the “Vaccine Act”), there is a Table promulgated by rule by the Secretary of Health and Human Services. [42 U.S.C.A. § 300aa-14](#); [42 C.F.R. § 100.3](#).

The Vaccine Injury Table includes the following serious adverse outcomes or injuries resulting from the MMR vaccine, causation for which is presumed under the Vaccine Act: anaphylaxis, encephalopathy, encephalitis, shoulder injury related to vaccine administration, vasovagal syncope, chronic arthritis, thrombocytopenic purpura, and vaccine-strain measles viral disease in an immunodeficient recipient. [42 C.F.R. § 100.3\(a\)](#) III and IV.

According to statistics of the Federal Health Resources & Services Administration (“HRSA”), the sub-agency within the Department of Health and Human Services that administers the Vaccine Injury Compensation Program (“VICP”), more than \$4.1 Billion dollars have been paid to 6,465 vaccine-injured persons since 1988. Source HRSA, URL: <https://www.hrsa.gov/sites/default/files/hrsa/vaccine-compensation/data/monthly-stats-april-2019.pdf>.

This significant number of compensated vaccine injury cases exists even though the Department of Health and Human Services has failed to comply with its statutory mandate to publicize the VICP. The Vaccine Act directs: “The Secretary shall undertake reasonable efforts to inform the public of the availability of the Program.” [42 U.S.C.A. §](#)

[300aa-10](#). Furthermore, a 2014 Government Accountability Office

(“GAO”) report to Congress found the following:

In its 2006 VICP strategic plan, HRSA noted that one of the critical issues facing the program from 2005 to 2010 was that many parents, the general public, attorneys, and health care professionals were not aware VICP existed.

GAO Report on VICP: <https://www.gao.gov/assets/670/667136.pdf> at 31.

The GAO report found, “Without awareness of the program, individuals who might otherwise receive compensation for a vaccine-related injury or death could be denied compensation because of a failure to file their claim within the statutory deadlines.” *Id.* The GAO report also found that because HRSA’s mission of promoting vaccines conflicts with its statutory mission to promote the VICP, efforts at promotion have been limited. *Id.* As a result, there are likely far fewer vaccine injury claims submitted to the VICP than otherwise would be the case because the public is unaware of it.

In addition, a study of the Vaccine Adverse Event Reporting System (“VAERS”) (R162), the voluntary vaccine injury reporting system established under the Vaccine Act, reported to HHS that “fewer than 1% of vaccine adverse events are reported.” (R167)

Thus, the true incidence of vaccine injuries in the United States is unknown. It is well- documented, however, that vaccine injuries are grossly underreported. The fact that vaccine injuries occur, including MMR vaccine-caused injuries, is undisputed and uncontroversial.

The United States Court of Federal Claims has found that the understanding of vaccine injury is a “field [of medicine] bereft of complete and direct proof of how vaccines affect the human body.”

[*Althen v. Sec'y of Health & Human Servs.*, 418 F.3d 1274, 1280 \(Fed. Cir. 2005\)](#).

Pursuant to the Vaccine Act, the Supreme Court of the United States has held that because vaccines are “unavoidably unsafe,” vaccine manufacturers are immune from liability for design defects. [*Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 131 S.Ct. 1068 \(2011\)](#).

For this reason, lawsuits for vaccine injury against vaccine manufacturers are all but nonexistent in the United States, despite the fact that tens of thousands of vaccine injuries occur every year. Against this backdrop evidencing vaccine injury, and notwithstanding the risk of serious harm from vaccination, and without any reference to such risk, the emergency Orders have declared that the MMR vaccine is “safe

and effective,” a patently and dangerously misleading statement.

The manufacturer’s package insert for the MMR vaccine lists multiple risks of adverse effects. (R103-13. The MMR vaccine insert contains information suggesting that giving the MMR vaccine before 12 months of age is neither effective nor safe. The package insert for the MMR vaccine actually states, “Safety and effectiveness of mumps and rubella vaccine in infants less than 12 months of age have not been established.” (R104)

The MMR package insert warns against MMR vaccination of adolescent and young adult females who may be or are about to become pregnant. (“Women of childbearing age should be advised not to become pregnant for 3 months after vaccination....”). (R105)

The MMR package insert states that the vaccine presents the risk of adverse reactions affecting the nervous system, including seizures and brain injury.

Contrary to representations by respondents and public health authorities, the data show that in the 1970’s, at a time when measles vaccination was nearly as widespread as it is today and when outbreaks were more common and widespread than the Williamsburg outbreak,

measles deaths were “estimated to be approximately 1.0 deaths per 10,000 measles cases.” (R152 [medical journal article titled, *Measles Mortality: A Retrospective Look At the Vaccine Era*, American Journal of Epidemiology, The Johns Hopkins University, 1975]).

According to the CDC, there have been two deaths from measles in 2012 and none thereafter throughout the United States. By comparison, there have been 13 deaths from pertussis and 141 deaths from tetanus during the same period. Notably, there were 667 measles cases in 2014. (R174-177) also at URL:

<https://www.cdc.gov/vaccines/pubs/pinkbook/downloads/appendices/E/reported-cases.pdf>

By contrast, the Centers for Disease Control reports the following mortality rate from smallpox on its website: "Smallpox was a devastating disease. On average, 3 out of every 10 people who got it died. Those who survived were usually left with scars, which were sometimes severe." URL:

<https://www.cdc.gov/smallpox/history/history.html>.

The World Health Organization (“WHO”) has classified adverse drug events that occur at a frequency of 1:1000 to 1:10,000 as “rare.” It

considers an adverse drug event that happens at a frequency of less than 1:10,000 as “very rare.” It classifies an adverse event that happens at a frequency greater than 1:1000 but less than 1:100 as “uncommon (infrequent).”

URL:https://www.who.int/medicines/areas/quality_safety/safety_efficiency/trainingcourses/definitions.pdf.

The rate for measles mortality at 1 in 10,000 infections, which likely prevails today given contemporary standards of nutrition and sanitation by WHO classifications for drugs adverse events, would be a “rare” to “very rare,” or at the very worst “uncommon (infrequent).” Thus, the rate of measles mortality, which is rare or very rare under WHO definitions, or at the worst uncommon or infrequent, cannot be easily compared with the death rate of 1 in 3 people infected with smallpox during outbreaks, as the CDC reports.

Respondents have reported no deaths associated with the Williamsburg measles outbreak or in the zip codes named in the emergency orders.

The risk of harm associated with measles infection for a healthy preschool child in the United States is less than the risk of harm

associated with the MMR vaccine. (See Exhibit 6 to the Krakow Affirmation, (R99 [Affidavit of Dr. Hendrieka Fitzpatrick, M.D.] Unvaccinated people pose no increased risk of measles to people who have been vaccinated. (R102)

By forcing children to receive the MMR vaccination, especially those under 12 months of age, the emergency Orders enhance the risk of harm from injury by the MMR vaccination. By coercing adults to receive the MMR vaccination, the emergency Orders enhance the risk of harm from injury by the MMR vaccination. By coercing children and adults to receive the MMR vaccination, the emergency Orders fail to reduce the risk of measles to people who have been vaccinated.

Vaccinating people with the MMR vaccine and allowing them to associate immediately with other people in public actually enhances the risk of harm to the public because the measles can spread through viral shedding of those recently vaccinated.

The emergency Orders' mandate of measles vaccination restricted to four shifting and ill- defined zip codes is medically nonsensical, will fail to prevent measles outbreaks, and thus represents an irrational public health intervention.

For these reasons, to promote and serve public health the emergency Orders should be immediately and permanently enjoined and/or vacated.

Balance of Equities

It is respectfully submitted that the balance of equities weighs in Appellants' favor. The measles outbreak was likely to self-extinguish as the affected community maintained herd immunity. Moreover, immunizations could not practically be carried out in the time frame directed by the emergency orders, and as they occurred, new cases of the measles were likely to develop as a consequence of an increasing number of vaccinations. Limited isolation and quarantine techniques were never implemented.

Moreover, the imposition upon Appellants' and the community's religious liberty was never weighed by Supreme Court, as it erroneously dismissed as inadequate the Appellants' submissions regarding their religious beliefs. Additionally, the Board's branding of Appellants as tortfeasors or criminals, just for living peaceably in their own homes, is harmful in and of itself.

Finally, measles is not sufficiently dangerous in most cases to warrant such emergency decrees, and any risk as may have existed did not outweigh the established risk of harm by directed vaccination.

Accordingly, the Court should issue an injunction or vacate the emergency orders after the fact.

Point IV

The Fines to be Imposed are Excessive Pursuant to [CPLR Sec. 7803\(3\)](#), [U.S. Const., Amends. VIII, XIV](#), [Timbs v. Indiana, 139 S.Ct. 682 \(2019\)](#), [New York State Constitution, art. 1, sec. 5](#)

Respondents represented below that the fines to be imposed civilly for violation of the Board's order to vaccinate would amount to \$1,000 (see, Resp. Opposing Brief below, p. 2, fn.3). Nevertheless, the fines at issue here potentially amount to tens of thousands of dollars and may be imposed on a daily basis (see discussion of fines and criminalization in Point 1[A], *ante*). Imposition of a class "A" misdemeanor, with its attendant prison term, is also a potential recourse by the government.

Such penalties are subject to review pursuant to CPLR Article 78 and should be deemed excessive. See, [Bovino v. Scott, 22 NY2d 214, 216 \(1968\)](#) (appellate division and court of appeals both maintain this power of review). [CPLR Sec. 7803\(3\)](#) states, inter alia, that a reviewing court

may consider whether a determination constituted an abuse of discretion “as to the measure or mode of penalty or discipline imposed”.

It is respectfully submitted that the penalty contemplated by Respondent constitutes an abuse of discretion. As argued below by Appellants-Petitioners, the penalty for non-vaccination considered in the seminal case of [*Jacobson v. Massachusetts*, 25 S.Ct. 358 \(1905\)](#) was \$5, which in today’s dollars is roughly \$125. In the case at bar, the penalty, as represented by Respondents, stands at eight times that amount (\$1,000). This entails a coercive penalty calculated to override Appellants’ liberty interests and rights.

Moreover, this case presents an opportunity for the Court to roll back government overreach and undertake a more balanced approach to a government response to purportedly emergent conditions.

The penalty scheme at issue follows the briefest of periods, 48 hours, permitting citizens within the affected zip codes to comply. Moreover, it is aimed at individuals, not businesses; the Appellants are families, multiple members of which are in non-compliance, potentially multiplying the fines. Such fines could readily bankrupt the families appealing herein.

The severity of the fine to be imposed accords with the Commissioner's fiat that the failure to vaccinate is "unnecessary", but not in line with New York State's statutory scheme (which generally does not mandate adult vaccination) or the statutory exemption Appellant minors held under [Public Health Law Sec 2164\(9\)](#), permitting them to attend school without vaccination, or Appellants' continuing, constitutional rights to free exercise of religion.

According to the U.S. Census Bureau, the median household annual income in the United States was \$56,516 in 2015 (<https://www.census.gov/library/publications/2016/demo/p60-256.html>, last accessed September 12, 2019 at 5:30 p.m.). The fine at issue amounts to nearly 2% of such a household's annual income, even assuming only a single penalty per household. As previously stated, the observant families petitioning below, some with more than one non-compliant child, are even more vulnerable to such economic hardship. These penalties are out of line with both the costs of vaccination and the purported benefit of a fractional contribution to herd immunity.

Accordingly, the Board abused its discretion in setting this standard for the fines to be imposed.

Finally, it cannot be overlooked that the statutory sanctions, as applied to a non-vaccinated child or adult, are excessive (and cruel and unusual) in constitutional terms. Imprisonment, expressly referred to in the first version of the emergency order, and never taken off the table by subsequent orders (which referred broadly to penalties), is entirely out of line in persuading an individual, who is exercising parenting and educational rights, and free exercise of religion, to become vaccinated. The fines at issue here, in whatever form, are so onerous that they would impose inordinate financial hardship, if not bankruptcy. *See, [Timbs v. Indiana, supra, 139 S.Ct. 682](#)* (extending excessive fines clause to the States; observing that historic abuse of fines includes disproportionality to the offense and to what can reasonably be borne by the offender).

Accordingly, the Court should declare, or remand for such purpose, that Respondents may not pursue \$1,000 fines (or in excess thereof) and are limited to civil enforcement of fines at a rate in accordance with such penalties as were historically imposed for non-vaccination in all cases arising from the emergency orders herein. *See,*

e.g., [*Jacobson v. Massachusetts*, supra, 25 S.Ct. 258](#) (\$5 fine exacted), amounting to approximately \$125 in today's currency.

Point V

The Supreme Court erred in Dismissing the Proceeding

Supreme Court (Knipel, J.) ordered that “the relief requested in the instant Order to Show Cause is denied, and the hybrid proceeding [pursuant to CPLR Articles 78 and 30] is dismissed”. Op. at 6 (bracketed material supplied).

The court below erred in “dismissing” the hybrid proceeding because a motion for declaratory relief pursuant to Article 30 results not in dismissal but a declaration in favor of a party. See, [*Garcia v. NYCDOH*, supra, 31 NY3d at 621 n.4](#), citing, [*200 Genesee St. v. City of Utica*, 6 NY3d 761 \(2006\)](#), and [*Lanza v. Wagner*, 11 NY2d 317](#), cert. den., [*371 U.S. 901 \(1962\)*](#).

Furthermore, the relief sought by Appellants in connection with the Article 78 proceeding was preliminary, in the form of a request for a temporary restraining order and preliminary injunction. (R20)

Accordingly, it is respectfully request that the Court reverse the dismissal in the court below in this regard and grant such other and further relief as it may deem just, proper, and equitable.


Conclusion

Petitioners-Appellants respectfully request that the Court reverse the dismissal of the hybrid proceeding and enjoin and/or vacate the Board's emergency order(s) retroactively, declare in Appellants' favor, or in the alternative, remand to the Supreme Court with instructions to determine the hybrid proceeding subsequent to its denial of a temporary injunction, and to grant such other and further relief that may be just, proper, and equitable.

Dated: New York, New York
October 18, 2019

Respectfully submitted,

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**PRINTING SPECIFICATIONS STATEMENT
PURSUANT TO 22 NYCRR § 1250.8(f) and (j)**

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New York Supreme Court
Appellate Division – Second Department

In the Matter of

C.F., on her own behalf and on behalf of her minor children;
M.F., on her own behalf and on behalf of her minor children;
B.D., on her own behalf and on behalf of her minor children;
M.N., on her own behalf and on behalf of her minor child; and
A.L., on her own behalf and on behalf of her minor child,

Petitioners-Appellants,

– against –

THE NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE
and DR. OXIRIS BARBOT, M.D., in her Official Capacity as Commissioner
of the New York City Department of Health and Mental Hygiene,

Respondents-Respondents,

as and for a proceeding brought pursuant to Article 78 of the CPLR.

1. The index number of the case in the court below is 508356/19.
2. The full names of the original parties are as above. There have been no changes.
3. The action was commenced in Supreme Court, Kings County.
4. The action was commenced on or about April 15, 2019, by the filing of an Article 78 Verified Petition. The Affirmation in Opposition in lieu of an Answer was served thereafter.
5. The nature and object of the action is as follows: Article 78 Proceeding / Administrative Review and Declaratory Judgment.
6. The appeal is from a Decision and Order of the Honorable Lawrence Knipel, entered on April 18, 2019.
7. This appeal is being perfected on a full reproduced record.

CITATIONS

6 N.Y.3d 761
Court of Appeals of New York.

200 GENESEE ST. CORP., Respondent,
v.
CITY OF UTICA et al., Appellants, et al.,
Defendants.

Jan. 10, 2006.

Synopsis

Background: Claimant sued city, seeking declaration that it was entitled to 235 covered spaces in parking garage pursuant to agreement with city. The Supreme Court, Oneida County, Anthony F. Shaheen, J., entered summary judgment for city, and claimant appealed. The Supreme Court, Appellate Division, 20 A.D.3d 889, 798 N.Y.S.2d 814, reversed, and city appealed.

The Court of Appeals held that claimant was not entitled to 235 covered parking spaces in garage.

Appellate Division order reversed.

Attorneys and Law Firms

***289 Linda Sullivan Fatata, Corporation Counsel, Utica (William M. Borrill of counsel), for appellants.

Saunders, Kahler, Amoroso & Locke, L.L.P., Utica (Gregory J. Amoroso of counsel), for respondent.

The order of the Appellate Division should be reversed, with costs, defendants' motion for summary judgment granted, and judgment granted declaring that plaintiff is not entitled to 235 "covered" parking spaces under its 1979 contract with the City of Utica.

We agree with Supreme Court that the 1979 contract clearly and unambiguously provides that defendant agreed to provide plaintiff with up to 235 unreserved and unallocated parking spaces. The contract is silent on the location of those spaces and the number of floors in the parking garage. Inasmuch as the contract was negotiated between sophisticated business people negotiating at arm's length, Supreme Court appropriately refrained from reading language into the contract that the parties agreed the City would provide plaintiff with 235 "covered" parking spaces (*see Vermont Teddy Bear Co. v. 538 Madison Realty Co.*, 1 N.Y.3d 470, 475, 775 N.Y.S.2d 765, 807 N.E.2d 876 [2004]). Because this is a declaratory judgment action, Supreme Court should have declared the rights of the parties rather than simply dismissing the complaint (*see Lanza v. Wagner*, 11 N.Y.2d 317, 340, 229 N.Y.S.2d 380, 183 N.E.2d 670 [1962], *appeal dismissed* 371 U.S. 74, 83 S.Ct. 177, 9 L.Ed.2d 163, *cert. denied* 371 U.S. 901, 83 S.Ct. 205, 9 L.Ed.2d 164 [1963]).

Chief Judge KAYE and Judges G.B. SMITH, CIPARICK, ROSENBLATT, GRAFFEO and R.S. SMITH concur in memorandum.

Judge READ taking no part.

On review of submissions pursuant to section 500.11 of the Rules of the Court of Appeals (22 NYCRR 500.11), order reversed, etc.

All Citations

6 N.Y.3d 761, 844 N.E.2d 742, 811 N.Y.S.2d 288, 2006 N.Y. Slip Op. 00106

*762 **743 OPINION OF THE COURT

MEMORANDUM.

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418 F.3d 1274
United States Court of Appeals,
Federal Circuit.

Margaret ALTHEN, Petitioner–Appellee,
v.
SECRETARY OF HEALTH AND HUMAN
SERVICES, Respondent–Appellant.

No. 04–5146.

|
July 29, 2005.

Synopsis

Background: Claimant filed suit under National Childhood Vaccine Act alleging that she suffered optic neuritis and acute-disseminated encephalomyelitis (ADEM) as direct result of tetanus toxoid (TT) vaccination. The Court of Federal Claims, Golkiewicz, Chief Special Master, 2003 WL 21439669, denied claim, and claimant appealed. The United States Court of Federal Claims, Susan G. Braden, J., 58 Fed.Cl. 270, 62 Fed. R. Evid. Serv. 1386, reversed and government appealed.

Holdings: The Court of Appeals, Mayer, Circuit Judge, held that:

National Childhood Vaccine Act did not preclude causation in fact from being established by claimant in absence of peer reviewed literature, and

claimant was entitled to relief under National Childhood Vaccine Act.

Affirmed.

Attorneys and Law Firms

*1276 Kevin P. Conway, Conway, Homer & Chin–Caplan, P.C., Boston, Massachusetts, argued for petitioner-appellee. On the brief was Ronald C. Homer.

Anne Murphy, Attorney, Appellate Staff, Civil Division, United States Department of Justice, Washington, DC, argued for respondent-appellant. On the brief were Peter D. Keisler, Assistant Attorney General, and Barbara C. Biddle and William G. Cole, Attorneys. Of counsel was Elizabeth H. Saindon, Attorney, Office of the General Counsel,

United States Department of Health and Human Services, of Rockville, Maryland.

Before MAYER, CLEVINGER, and SCHALL, Circuit Judges.

Opinion

MAYER, Circuit Judge.

The Secretary of Health and Human Services (“government”) appeals the judgment of the United States Court of Federal Claims reversing the special master’s denial of Margaret Althen’s claim under the National Childhood Vaccine Injury Act of 1986, 42 U.S.C. § 300aa–1 to –34 (“Vaccine Act”), for loss of vision caused by a tetanus toxoid (“TT”) vaccination. *Althen v. Sec’y of Health & Human Servs.*, 58 Fed.Cl. 270 (2003) (“*Althen II*”). Because Althen met the statutory burden for establishing causation by a preponderance of the evidence, we affirm.

Background

On March 28, 1997, Margaret Althen, aged 49, received TT and hepatitis A vaccinations. Notwithstanding prior diagnoses of hypothyroidism and Duane’s Syndrome,¹ Althen enjoyed good health. On April 15, 1997, she sought medical treatment for an incessant headache, painful eye movements, and blurred vision in her right eye, which progressed in four days to a complete loss of sight in that eye. An ophthalmologist initially diagnosed Althen’s condition as right optic neuritis, inflammation of the optic nerve, which was confirmed by an April 21, 1997, magnetic resonance image. After subsequent complaints of vision impairment in her right eye and numbness in her right hand, she was diagnosed with significant right optic neuritis on May 23, 1997. On June 4, 1997, Althen was admitted *1277 to the hospital after suffering from fever, confusion and neck stiffness. After several days of testing, she was discharged with a diagnosis of acute disseminated encephalomyelitis (“ADEM”),² right optic neuritis and congenital Duane’s syndrome.

Althen was again admitted to the hospital on July 2, 1997, because of dizziness and gait instability. On July 8, 1997, she was discharged after being diagnosed as possibly

suffering from encephalitis³ or ADEM. By June 4, 1998, her physician concluded that she had developed ADEM. On July 27, 1998, and January 7, 1999, Althen experienced optic neuritis in her left eye. On August 6, 2000, she suffered a brain seizure. A brain biopsy showed evidence of inflammation in the central nervous system, and she was diagnosed with vasculitis with secondary tissue destruction and demyelination consistent with primary angiitis.⁴

Althen initiated her Vaccine Act claim on March 31, 2000. A special master of the Court of Federal Claims held an evidentiary hearing on June 14, 2002, and in a June 3, 2003, decision denied compensation upon determining that the TT vaccination did not cause Althen's illness. Despite the testimony of Dr. Derek R. Smith, a board-certified neurologist with a subspecialty in neuroimmunology, that the TT shot caused her injury and that the onset of her optic neuritis occurred within a medically-accepted time period for causal connection, the special master found that because Althen did not provide peer-reviewed literature that demonstrated " 'a suspected or potential association' between the tetanus toxoid vaccine and the alleged injuries" as required by *Stevens v. Secretary of Health and Human Services*, No. 99-594V, 2001 WL 387418 (Fed.Cl.2001), she did not prove causation-in-fact. *Althen v. Sec'y of Health & Human Servs.*, No. 00-170V, 2003 WL 21439669, at *14 (Fed. Cl. Sp. Mstr. June 3, 2003) ("*Althen I*") (emphasis in original).

Althen sought review of the decision by the Court of Federal Claims, arguing that the special master erred as a matter of law by imposing the *Stevens* test to heighten her evidentiary burden. After concluding that the *Stevens* test was not in accordance with law and the special master's reliance on it was in error, the court reversed, holding that Althen had proven causation in fact under the preponderant evidence standard set forth in the Vaccine Act. The court remanded to the special master for an award of compensation to Althen. The government appeals, and we have jurisdiction under 42 U.S.C. § 300aa-12(f).

Discussion

Under the Vaccine Act, the Court of Federal Claims reviews the special master's decision to determine if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" 42 U.S.C. § 300aa-12(e)(2)(B). Because *1278 we review the trial court's legal determination that the special master acted in a manner not in accordance with law *de novo*, we effectively

review the special master's decision under the same standard. *See Hines v. Sec'y of Health & Human Servs.*, 940 F.2d 1518, 1524 (Fed.Cir.1991). While we owe no deference to either the special master or the trial court on questions of law, *Whitcotton v. Sec'y of Health & Human Servs.*, 81 F.3d 1099, 1106 (Fed.Cir.1996), we review the trial court's factual findings for clear error, *Hines*, 940 F.2d at 1523.

The Act provides for the establishment of causation in one of two ways: through a statutorily-prescribed presumption of causation upon a showing that the injury falls under the Vaccine Injury Table ("Table injury"), *see* 42 U.S.C. § 300aa-14(a); or where the complained-of injury is not listed in the Vaccine Injury Table ("off-Table injury"), by proving causation in fact, *see* 42 U.S.C. §§ 300aa-13(a)(1), -11(c)(1)(C)(ii)(I). Althen sought redress for her illness under the Vaccine Act's compensatory provision for off-Table injury. She must prove by a preponderance of the evidence that the TT vaccination caused her malady. *See Shyface v. Sec'y of Health & Human Servs.*, 165 F.3d 1344, 1352-53 (Fed.Cir.1999); *Hines*, 940 F.2d at 1525; *see also* 42 U.S.C. § 300aa-13(a)(1). To meet the preponderance standard, she must "show a medical theory causally connecting the vaccination and the injury." *Grant v. Sec'y of Health & Human Servs.*, 956 F.2d 1144, 1148 (Fed.Cir.1992) (citations omitted). A persuasive medical theory is demonstrated by "proof of a logical sequence of cause and effect showing that the vaccination was the reason for the injury[.]" the logical sequence being supported by "reputable medical or scientific explanation [.]" *i.e.*, "evidence in the form of scientific studies or expert medical testimony[.]" *Grant*, 956 F.2d at 1148. Althen may recover if she shows "that the vaccine was not only a but-for cause of the injury but also a substantial factor in bringing about the injury." *Shyface*, 165 F.3d at 1352-53. Although probative, neither a mere showing of a proximate temporal relationship between vaccination and injury, nor a simplistic elimination of other potential causes of the injury suffices, without more, to meet the burden of showing actual causation. *See Grant*, 956 F.2d at 1149. Concisely stated, Althen's burden is to show by preponderant evidence that the vaccination brought about her injury by providing: (1) a medical theory causally connecting the vaccination and the injury; (2) a logical sequence of cause and effect showing that the vaccination was the reason for the injury; and (3) a showing of a proximate temporal relationship between vaccination and injury. If Althen satisfies this burden, she is "entitled to recover unless the [government] shows, also by a preponderance of evidence, that the injury was in fact caused by factors unrelated to the vaccine." *Knudsen v. Sec'y of Health & Human Servs.*, 35 F.3d 543, 547 (Fed.Cir.1994) (alteration in original) (citation omitted).

The government urges us to reinstate the special master's initial ruling under the arbitrary or capricious standard of review. It posits that the trial court's finding of causation, based upon its acceptance of Dr. Smith's theory of causation over that of the government's witnesses whose testimony the special master found more credible, was an improper reweighing of the evidence. While the government is correct that the trial court and this court review the special master's factual findings under the arbitrary and capricious standard, the trial court based its reversal on a conclusion that the decision was not in accordance with law. See *1279 *Althen II*, 58 Fed.Cl. at 279. That was, of course, a legal conclusion based appropriately on *de novo* review. Thus, the true issues presented here are whether the special master's finding that Althen had not established by a preponderance of the evidence a causal connection between her illness and her TT vaccination is in accordance with law; and if not, whether the Court of Federal Claims erred as a matter of law by finding causation under the proper standard.

I.

The disputed *Stevens* test requires that a claimant provide proof of: (1) medical plausibility; (2) confirmation of medical plausibility from the medical community and literature; (3) an injury recognized by the medical plausibility evidence and literature; (4) a medically-acceptable temporal relationship between the vaccination and the onset of the alleged injury; and (5) the elimination of other causes. *Stevens*, 2001 WL 387418, at *23–26. The special master found that Althen's evidence satisfied prong one, but that, because she did not provide peer-reviewed literature linking the TT vaccine to her injuries, she did not satisfy prong two. *Althen I*, 2003 WL 21439669, at *14. He found that “[w]ithout some objective confirmation that the vaccine administered is potentially associated with the injury alleged, petitioner's causal claims are mere speculation and thus insufficient.” *Id.* at *12. The government argues that although the *Stevens* test contravenes law the special master's application of prong two did not impermissibly alter Althen's burden of proof.⁵

We see no “objective confirmation” requirement in the Vaccine Act's preponderant evidence standard. The statute's language is clear; section 300aa–13(a)(1) instructs that a petitioner must prove causation in fact by a “preponderance of the evidence,” substantiated by medical records *or* medical opinion, as to each factor contained in

section 300aa–11(c)(1).⁶ In turn, section 300aa–11(c)(1)(C)(ii)(I) requires a claimant to provide evidence showing that she “sustained, or had significantly aggravated, any illness, disability, injury, or condition not set forth in the Vaccine Injury Table but which was caused by a vaccine referred to in subparagraph (A)[.]” This court has interpreted the “preponderance of the evidence” standard referred to in the Vaccine Act as one of proof by a simple preponderance, of “more probable than not” causation. See *Hellebrand v. Sec'y of Health & Human Servs.*, 999 F.2d 1565, 1572–73 (Fed.Cir.1993) (defining *1280 “preponderance” in the context of a Table injury case). The government's suggestion that prong two of *Stevens* does not impermissibly raise Althen's burden, ignores the legal and practical effect of that test: by requiring medical literature, it contravenes section 300aa–13(a)(1)'s allowance of medical opinion as proof. This prevents the use of circumstantial evidence envisioned by the preponderance standard and negates the system created by Congress, in which close calls regarding causation are resolved in favor of injured claimants. See *Knudsen v. Sec'y of Health & Human Servs.*, 35 F.3d 543, 549 (Fed.Cir.1994) (explaining that “to require identification and proof of specific biological mechanisms would be inconsistent with the purpose and nature of the vaccine compensation program”). While this case involves the possible link between TT vaccination and central nervous system injury, a sequence hitherto unproven in medicine, the purpose of the Vaccine Act's preponderance standard is to allow the finding of causation in a field bereft of complete and direct proof of how vaccines affect the human body.

The government's postulate that the “heavy lifting” referred to in *Lampe v. Secretary of Health and Human Services*, 219 F.3d 1357, 1360 (Fed.Cir.2000) (quoting *Hodges v. Secretary of Health & Human Services*, 9 F.3d 958, 961 (Fed.Cir.1993)), signifies this court's desire to raise the preponderance standard in vaccine cases to that of direct proof similarly fails. *Hodges* described the difference between causation in the Table— and off-Table contexts:

Bring the case within the timetable and specifications of a Table Injury and the statute does the heavy lifting—causation is conclusively presumed. Failing that, the heavy lifting must be done by the petitioner, and it is heavy indeed. Given the statutory burden of persuasion placed upon the petitioner, 42 U.S.C. § 300aa–

13(a)(1) ... it is not surprising that petitioners have a difficult time proving [off-Table cases].

9 F.3d at 961. This observation was merely a recognition that, as later stated in *Grant*, 956 F.2d at 1147, “[t]he Vaccine Table, in effect, determines by law that the temporal association of certain injuries with the vaccination suffices to show causation.” By comparison, in off-Table injury cases, it is the preponderance standard, as opposed to operation of law, that does the “heavy lifting” of establishing causation. While it may be true that proof of causation by preponderant evidence is not as “easy” as proof of causation by operation of law, neither *Hodges* nor *Lampe* instructs that the preponderance standard itself is to be made more onerous in vaccine cases. Nor is it to be made more difficult merely because our cases have referred to it as “heavy lifting.”

The special master’s role is to apply the law. Questions of law regarding the interpretation or implementation of the Vaccine Act are matters for the courts. *See La Buy v. Howes Leather Co.*, 352 U.S. 249, 256, 77 S.Ct. 309, 1 L.Ed.2d 290 (1957) (“The use of masters is to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause, and not to displace the court.”) (quotation marks and citation omitted). While *La Buy* described the special master’s role in the Article III courts as set out in Federal Rule of Civil Procedure 53(b), the special master’s role in the Article I Court of Federal Claims is similarly limited by the Vaccine Act. *See Knudsen*, 35 F.3d at 549 (“The sole issues for the special master are ... whether it has been shown by a preponderance of the evidence that a vaccine caused [an] injury or that the ... injury is a table injury, and *1281 whether it has not been shown by a preponderance of the evidence that a factor unrelated to the vaccine caused the ... injury.”) (emphasis added) (citing 42 U.S.C. § 300aa–13(a)(1), (b)(1) (2000)); *see also Hodges*, 9 F.3d at 961 (“Congress assigned to a group of specialists, the Special Masters ..., the unenviable job of sorting through these painful cases and, based upon their accumulated expertise in the field, judging the merits of the individual claims.”) To require Althen to provide medical documentation would contravene the plain language of the statute.

We hold today that the special master’s application of the *Stevens* test was contrary to law. The special master’s role is to assist the courts by judging the merits of individual claims on a case-by-case basis, not to craft a new legal standard to be used in causation-in-fact cases. Moreover, given our holding that prong two of the *Stevens* test contravenes the plain language of the statute, prong three of the test (requiring an injury recognized by the medical

plausibility evidence and literature) cannot fare any better. If the Vaccine Act does not require Althen to provide medical documentation of plausibility, then it cannot require her to demonstrate that her specific injury is recognized by said medical documentation of plausibility. The remainder of the *Stevens* test-requiring that the claimant provide proof of medical plausibility, a medically-acceptable temporal relationship between the vaccination and the onset of the alleged injury, and the elimination of other causes-is merely a recitation of this court’s well-established precedent.

II.

The next question is whether the trial court erred by finding that the TT vaccination caused Althen’s illness. The government argues that, even if we refuse to uphold the special master’s initial decision, the trial court nonetheless was wrong to make its own factual findings rather than remanding for a re-evaluation of the evidence under the proper legal test. We disagree.

As a preliminary matter, because the special master’s decision was not in accordance with law, the trial court was permitted to review the evidence anew and come to its own conclusion. 42 U.S.C. § 300aa–12(e)(2)(B);⁸ *Saunders v. Sec’y of Health & Human Servs.*, 25 F.3d 1031, 1033 (Fed.Cir.1994). So long as the record contained sufficient evidence upon which to base predicate findings of fact and the ultimate conclusion of causation, which it did, the trial court was not required to remand. The court did not, as the government asserts, controvert a special master’s finding regarding alternate causation; no such finding was made. *See Althen I*, 2003 WL 21439669, at *14 n. 44 (“Whether the hepatitis A vaccine played a role in Mrs. Althen’s onset of a demyelinating disorder remains an open question which the court need not address given petitioner’s failure to satisfy Prong Two of *Stevens*.”). The court did not err in finding no alternative causation; the government’s witnessing *1282 doctors provided no evidence rebutting Dr. Smith’s testimony of the lack of a known causal relationship between the hepatitis A vaccination and central nervous system demyelinating disorder. *See* 42 U.S.C. §§ 300aa–13(a)(1)(B), –13(a)(2) (2000) (outlining the government’s burden of proving that “factors unrelated[.]” e.g., the hepatitis A vaccination, were “principally responsible” for causing Althen’s injury).

Althen established by a preponderance of the evidence that the TT vaccination caused her central nervous system

demyelinating disorder. Her proffered evidence, which the trial court accepted as more convincing, provided the requisite showings of a medical theory causally connecting the vaccination and the injury, a logical sequence of cause and effect showing that the vaccination was the reason for the injury, and a proximate temporal relationship between the TT vaccination and her injury. There is no error in the court's conclusion that the government failed to prove that factors unrelated to the vaccine were principally responsible for Althen's ailment.

Conclusion

Accordingly, the judgment of the United States Court of Federal Claims is affirmed.

AFFIRMED.

All Citations

418 F.3d 1274

Footnotes

- 1 Duane's Syndrome is a hereditary eye movement disorder which limits the ability to move the eye outward toward the ear (abduction) and, in most cases, the ability to move the eye inward toward the nose (adduction). Dorland's Medical Dictionary 1816 (30th ed. 2003) (Dorland's). This ailment caused Althen to experience double vision when looking to the left.
- 2 ADEM is a demyelinating disease affecting the nerve fibers in the nervous system which "occurs most commonly following an acute viral infection ... but may occur without a recognizable antecedent.... It is believed to be a manifestation of an autoimmune attack on the myelin of the central nervous system. Clinical manifestations include fever, headache, vomiting, and drowsiness progressing to lethargy and coma; tremor, seizures, and paralysis may also occur[.]" Dorland's at 610.
- 3 Encephalitis is inflammation of the brain. Dorland's at 608.
- 4 Vasculitis is an inflammation of the blood or lymph vessels. Dorland's at 2009. Angiitis is isolated vasculitis of the central nervous system. *Id.* at 82. Althen's illness is generally referred to as a central nervous system demyelinating disorder.
- 5 The government opposed the special master's use of the *Stevens* test, both in its brief and at oral argument where it asserted that application of the test is not always consistent with the statute because, in some cases, prong two sets the evidentiary barrier too low.
- 6 Section 300aa-13(a)(1) states, in relevant part:
 - (a) General rule.
 - (1) Compensation shall be awarded under the Program to a petitioner if the special master or court finds on the record as a whole—
 - (A) that the petitioner has demonstrated by a *preponderance of the evidence* the matters required in the petition by section 2111(c)(1) [42 U.S.C. § 300aa-11(c)(1)], and
 - (B) that there is not a preponderance of the evidence that the illness, disability, injury, condition, or death described in the petition is due to factors unrelated to the administration of the vaccine described in the petition.

The special master or court may not make such a finding based on the claims of a petitioner alone, unsubstantiated by *medical records or by medical opinion*.

42 U.S.C. § 300aa-13(a)(1) (2000) (emphases added).
 - 7 Tetanus toxoid vaccine is referred to in the Vaccine Injury Table, subparagraph (A).
 - 8 Section 300aa-12(e)(2)(B) states, in relevant part:
 - (2) Upon the filing of a motion [to review the special master's decision], the [United States Court of Federal Claims] shall have jurisdiction to undertake a review of the record of the proceedings and may thereafter—

...

 - (B) set aside any findings of fact or conclusion of law of the special master found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law *and issue its own findings of fact and conclusions of law* [.]

42 U.S.C. § 300aa-12(e)(2)(B) (emphasis added).

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278 N.Y. 222
Court of Appeals of New York.

ARVERNE BAY CONST. CO.
v.
THATCHER, Com'r of Buildings, et al.

May 24, 1938.

Synopsis

Action by the Arverne Bay Construction Company against Edwin H. Thatcher as Commissioner of Buildings of the Borough of Brooklyn, City of New York, and another, to secure an adjudication that the restrictions placed on the usage of plaintiff's property by a zoning ordinance were unconstitutional. From a judgment of the Appellate Division, 253 App.Div. 285, 2 N.Y.S.2d 112, reversing a judgment of the Special Term, declaring the zoning resolution confiscatory, unconstitutional, and void, the plaintiff appeals.

Judgment of Appellate Division reversed and judgment of Special Term affirmed.

****588 *223** Appeal from Supreme Court, Appellate Division, Second Department.

Attorneys and Law Firms

John P. McGrath, of Brooklyn, for appellant.

***224** William C. Chanler, Corp. Counsel, of New York City (Paxton Blair and Francis J. Bloustein, both of New York City, of counsel), for respondents.

Opinion

***225** LEHMAN, Judge.

The plaintiff is the owner of a plot of vacant land on the northerly side of Linden boulevard in the borough of Brooklyn. Until 1928 the district in which the property is situated was classified as an 'unrestricted' zone, under the Building Zone Resolution of the city of New York (New York Code of Ordinances, Appendix B). Then, by amendment of the ordinance and the 'Use District Map,' the district was placed in a residence zone. The plaintiff, claiming that its property could not be used properly or

profitably for any purpose permitted in residence zone and that, in consequence, the zoning ordinance imposed unnecessary hardship upon it, applied to the ****589** Board of Standards and Appeals, under section 21 of the Building Zone Resolution, for a variance which would permit the use of the premises for a gasoline service station. The application was denied, and, upon review in certiorari proceedings, the courts sustained the determination of the board. *People ex rel. Arverne Bay Construction Co. v. Murdock*, 247 App.Div. 889, 286 N.Y.S. 785; affirmed, 271 N.Y. 631, 3 N.E.2d 457.

Defeated in its attempt to obtain permission to put its property to a profitable use, the plaintiff has brought this action to secure an adjudication that the restrictions placed upon the use of its property by the zoning ordinance result in deprivation of its property without due process of law and that, in so far as the ordinance affects its property, the ordinance violates the provisions of the Constitution of the United States and the Constitution of the State of New York. U.S.C.A.Const. Amend. 14; Const.N.Y. art. 1, § 6. In this action it demands as a right what has been refused to it as a favor. The defendant challenges the right of the plaintiff to urge the invalidity of the zoning ordinance after denial of an ***226** application for a variance made under its provisions. At the outset, and before considering the merits of the plaintiff's cause of action, we must dispose of this challenge to the plaintiff's right to maintain this action.

The application for the favor of a variance is an appeal primarily to the discretion of the board, conferred upon it by the ordinance. It necessarily assumes the validity of the ordinance. A successful attack upon the validity of the ordinance destroys the foundation of any discretion conferred by the statute. To invoke the discretion of the board, an owner of property must show 'unnecessary hardship.' When that has been shown the board may grant 'a special privilege' denied to others differently situated. *People ex rel. Fordham Manor Reformed Church v. Walsh*, 244 N.Y. 280, 155 N.E. 575. Without such 'special privilege,' strict enforcement of a general rule restricting the use of all property within a district might work such hardship upon a particular owner that in effect it would deprive the owner of his property without compensation. The power to grant a variation might give such flexibility to the rule or its application that a property owner can, without violation of its terms, make reasonable use of his property. *Dowsey v. Village of Kensington*, 257 N.Y. 221, 177 N.E. 427, 86 A.L.R. 642.

The rule established by that case is this: To sustain an attack upon the validity of the ordinance an aggrieved property owner must show that if the ordinance is enforced the consequent restrictions upon his property preclude its

use for any purpose to which it is reasonably adapted. Thus it must appear either that the ordinance does not authorize a variation of the general rule which would admit of such use or that such variation has been refused by the administrative board in the exercise of a discretion which the ordinance confers upon it. Only two possible questions can be presented for decision upon an application for a variation: First, does the ordinance confer upon the administrative board power to grant the variation *227 which is asked; second, if the board has power to grant it, does the exercise of a wise discretion call for the use of the power in the particular case? The issue whether without such variation the strict enforcement of the general rule would work such hardship as to constitute the taking of property without due process of law is not directly presented upon an application for a variation, and it follows that the denial of the application cannot be a binding adjudication that, without such variation, enforcement of the general rule will not deprive the applicant of his property without due process of law. True, where the board in the exercise of its discretion denies an application for a variation which it has *power* to grant, argument may be made that a refusal to exercise such discretion can, legally, be based only upon a finding that even without such variation there is no unnecessary hardship, and that the enforcement of the general rule would not deprive the owner of his property or preclude a reasonable use of the property. Then the same considerations which induced the board to deny the application might constrain the court to decide that the statute is valid. None the less, the questions presented would not be identical and the denial of the application for a variance would not be a conclusive adjudication of the validity of the statute; and that would be true even though the courts had, upon review by certiorari, **590 sustained the determination of the board. We proceed, then, to a consideration of the merits of the plaintiff's claim, and in our discussion it will appear that in this case the denial of the application for a variation may have been based upon considerations which cannot affect the judgment of the court in passing upon the validity of the ordinance in so far as it applies to the plaintiff's property.

The amendment to the zoning ordinance, about which complaint is made, changed from an unrestricted zone to a residential district the property abutting on Linden boulevard for a distance of four miles, with the exception *228 of a small section at a railroad crossing. The district is almost undeveloped. There had been no building construction in that area for many years prior to the amendment. The chairman of the building zone commission which drafted the zoning ordinance, testifying as an expert witness for the defendant, described the district as in a 'transition state from the farms as I knew them thirty

and forty years ago south of this location.' There are some old buildings used for non-conforming purposes, left from the days when the district was used for farming. There are only three buildings in Linden boulevard in a distance of about a mile. One of these buildings is a cow stable and a second building is used as an office in connection with the dairy business conducted there. A gasoline station erected on that boulevard would, it is plain, not adversely affect the health, morals, safety or general welfare of the people who now live in that neighborhood. Justification, if any, for the ordinance restricting the use of the property on Linden boulevard to residential purposes must be found in the control over future development which will result from such restrictions.

Without zoning restrictions, the self-interest of the individual property owners will almost inevitably dictate the form of the development of the district. The plaintiff claims, and has conclusively shown at the trial, that at no time since the amendment of the zoning resolution could its property be profitably used for residential purposes. The expert witness for the city, to whose testimony we have already referred and whose qualifications are universally recognized, admits that such a residential improvement would, even now after the lapse of ten years, be 'premature.' The property, then, must for the present remain unimproved and unproductive, a source of expense to the owner, or must be put to some non-conforming use. In a district otherwise well adapted for residences a gasoline station or other non-conforming use of property may render neighboring property less *229 desirable for use as a private residence. The development of a district for residential purposes might best serve the interests of the city as a whole and, in the end, might perhaps prove the most profitable use of the property within such district. A majority of the property owners might conceivably be content to bear the burden of taxes and other carrying charges upon unimproved land in order to reap profit in the future from the development of the land for residential purposes. They could not safely do so without reasonable assurance that the district will remain adapted for residence use and will not be spoilt for such purpose by the intrusion of structures used for less desirable purposes. The zoning ordinance is calculated to provide such assurance to property owners in the district and to constrain the property owners to develop their land in manner which in the future will prove of benefit to the city. Such considerations have induced the Appellate Division to hold that the ordinance is valid.

There is little room for disagreement with the general rules and tests set forth in the opinion of the Appellate Division. The difficulty arises in the application of such rules and tests to the particular facts in this case. We are not disposed to define the police power of the State so narrowly that it would exclude reasonable restrictions placed upon the use

of property in order to aid the development of new districts in accordance with plans calculated to advance the public welfare of the city in the future. We have said that 'the need for vision of the future in the governance of cities has not lessened with the years. The dweller within the gates, even more than the stranger from afar, will pay the price of blindness.' *Hesse v. Rath*, 249 N.Y. 436, 438, 164 N.E. 342. We have, indeed, recognized that long-time planning for zoning purposes may be a valid exercise of the police power, but at the same time we have pointed out that the power is ****591** not unlimited. 'We are not required to say that a merely ***230** temporary restraint of beneficial enjoyment is unlawful where the interference is necessary to promote the ultimate good either of the municipality as a whole or of the immediate neighborhood. Such problems will have to be solved when they arise. If we assume that the restraint may be permitted, the interference must be not unreasonable, but on the contrary must be kept within the limits of necessity.' *People ex rel. St. Albans-Springfield Corporation v. Connell*, 257 N.Y. 73, 83, 177 N.E. 313, 316. The problem presented upon this appeal is whether or not the zoning ordinance as applied to the plaintiff's property is unreasonable.

Findings of the trial judge, sustained by evidence presented by the plaintiff, establish that, in the vicinity of the plaintiff's premises, the city operates an incinerator which 'gives off offensive fumes and odors which permeate plaintiff's premises.' About 1,200 or 1,500 feet from the plaintiff's land, 'a trunk sewer carrying both storm and sanitary sewage empties into an open creek * * *. The said creek runs to the south of plaintiff's premises and gives off nauseating odors which permeate the said property.' The trial judge further found that other conditions exist which, it is plain, render the property entirely unfit, at present, for any conforming use. Though the defendant urges that the conditions are not as bad as the plaintiff's witnesses have pictured, yet as the Appellate Division has said: 'It must be conceded, upon the undisputed facts in this case, that this property cannot, presently or in the immediate future, be profitably used for residential purposes.' 253 App.Div. 285, 286, 2 N.Y.S.2d 112, 114.

We may assume that the zoning ordinance is the product of far-sighted planning calculated to promote the general welfare of the city at some future time. If the State or the city, acting by delegation from the State, had plenary power to pass laws calculated to promote the general welfare, then the validity of the ordinance ***231** might be sustained; for 'we have nothing to do with the question of the wisdom or good policy of municipal ordinances.' *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 393, 47 S.Ct. 114, 120, 71 L.Ed. 303, 54 A.L.R. 1016. The legislative power of the State is, however, not plenary, but is limited by the Constitution of the United States and by

the Constitution of the State. It may not take private property without compensation even for a public purpose and to advance the general welfare. *Eaton v. Sweeny*, 257 N.Y. 176, 177 N.E. 412. 'The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. *Hairston v. Danville & Western R. Co.*, 208 U.S. 598, 605, 28 S.Ct. 331, 52 L.Ed. 637, 13 Ann.Cas. 1008. When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.' *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 160, 67 L.Ed. 322, 28 A.L.R. 1321.

In the prevailing opinion in that case, Mr. Justice Holmes pointed out that 'the general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking' (page 415, 43 S.Ct. page 160). Whether a regulation does go too far is 'a question of degree—and therefore cannot be disposed of by general propositions,' and here Mr. Justice Holmes gave warning that 'we are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change' (page 416, 43 S.Ct. page 160). The dissent of Mr. Justice Brandeis in that case is not based upon difference of opinion in regard to general principles, but upon different evaluation of the degree of the restrictions there challenged.

232** The warning of Mr. Justice Holmes should perhaps be directed rather to Legislatures than to courts; for the courts have not hesitated to declare statutes invalid wherever regulation has gone so far that it is clearly unreasonable and must be 'recognized as taking,' and unless regulation does clearly go so far the courts may not deny force to the regulation. We have already pointed out that in the case which *592** we are reviewing, the plaintiff's land cannot at present or in the immediate future be profitably or reasonably used without violation of the restriction. An ordinance which *permanently* so restricts the use of property that it cannot be used for any reasonable purpose goes, it is plain, beyond regulation, and must be recognized as a taking of the property. The only substantial difference, in such case, between restriction and actual taking, is that the restriction leaves the owner subject to the burden of payment of taxation, while outright confiscation would relieve him of that burden.

The situation, of course, might be quite different where it

appears that within a reasonable time the property can be put to a profitable use. The temporary inconvenience or even hardship of holding unproductive property might then be compensated by ultimate benefit to the owner or, perhaps, even without such compensation, the individual owners might be compelled to bear a temporary burden in order to promote the public good. We do not pass upon such problems now, for here no inference is permissible that within a reasonable time the property can be put to a profitable use or that the present inconvenience or hardship imposed upon the plaintiff is temporary. True, there is evidence that the neighborhood is improving and that some or all of the conditions which now render the district entirely unsuitable for residence purposes will in time be removed. Even so, it is conceded that prognostication that the district will in time become suited for residences rests upon hope and not upon certainty, and no estimate can be made of the time which must elapse before the hope becomes fact.

***233** During the nine years from 1928 to 1936, when concededly the property was unsuitable for any conforming use, the property was assessed at \$18,000, and taxes amounting to \$4,566 were levied upon it, in addition to assessments of several thousand dollars; yet, so far as appears, the district was no better suited for residence purposes at the time of the trial in 1936 than it was when the zoning ordinance was amended in 1928. In such case the ordinance is clearly more than a temporary and reasonable restriction placed upon the land to promote the general welfare. It is in substance a taking of the land prohibited by the Constitution of the United States and by the Constitution of the State.

We repeat here what under similar circumstances the court said in *People ex rel. St. Albans-Springfield Corporation v. Connell*, supra, page 83, 177 N.E. page 316: 'we are not required to say that a merely temporary restraint of beneficial enjoyment is unlawful where the interference is

necessary to promote the ultimate good either of the municipality as a whole or of the immediate neighborhood.' There the court held that the 'ultimate good' could be attained and a 'productive use' allowed by a variation of the zoning ordinance that 'will be temporary and provisional and readily terminable.' Here the application of the plaintiff for any variation was properly refused, for the conditions which render the plaintiff's property unsuitable for residential use are general and not confined to plaintiff's property. In such case, we have held that the general hardship should be remedied by revision of the general regulation, not by granting the special privilege of a variation to single owners. *Levy v. Board of Standards and Appeals of City of New York*, 267 N.Y. 347, 196 N.E. 284. Perhaps a new ordinance might be evolved by which the 'ultimate good' may be attained without depriving owners of the productive use of their property. That is a problem for the legislative authority, not for the courts. Now we hold only that the present regulation as applied to plaintiff's property is not valid.

***234** The judgment of the Appellate Division should be reversed and that of the Special Term affirmed, with costs in this court and in the Appellate Division.

CRANE, C. J., and O'BRIEN, HUBBS, LOUGHRAN, FINCH, and RIPPEY, JJ., concur.

Judgment accordingly.

All Citations

278 N.Y. 222, 15 N.E.2d 587, 117 A.L.R. 1110

35 N.Y.2d 507
Court of Appeals of New York.

In the Matter of BELLE HARBOR REALTY
CORP., Respondent,

v.

Andrew P. KERR, as Administrator of the Housing
and Development Administration, et al.,
Appellants.

Dec. 20, 1974.

Synopsis

Article 78 proceeding was brought to annul city's revocation of its approval of application for construction of nursing home. The Supreme Court, Queens County, Harold J. Crawford, J., dismissed petition, and petitioner appealed. The Supreme Court, Appellate Division, 43 A.D.2d 727, 350 N.Y.S.2d 698, reversed, and city appealed. The Court of Appeals, Wachtler, J., held that city's revocation was inappropriately annulled where no determination had been made whether revocation was warranted as necessary to prevent a condition dangerous to public health and welfare.

Order of the Appellate Division reversed.

Samuel Rabin, J., did not participate.

Attorneys and Law Firms

***508 ***161 **698** Adrian P. Burke, Corp. Counsel, New York City (Leonard Koerner, L. Kevin Sheridan and Jesse J. Fine, New York City, of counsel), for appellants.

***509** Jesse I. Levine and J. Stanley Shaw, New York City, for respondent.

Opinion

WACHTLER, Judge.

Early in 1972, the Belle Harbor Realty Corp. (Belle Harbor) submitted to the City of New York a new building application for the construction of a four-story nursing home. To secure a written permit from the Commissioner of Buildings as required by the Administrative Code (Administrative Code of City of New York, s C26—109.1) a builder must first obtain approval of his building plans

from the appropriate ***510** departments (Administrative Code, s C26—108.8). This procedure is designed to insure compliance with the requirements of the Building Code and other applicable laws and regulations. Between July 6 and September 25, 1972 the requisite approvals were issued to Belle Harbor by the Department of Buildings, the Department of Water Resources and the State Board of Social Welfare.

Prior to the issuance of the written permit, citizens concerned with the inadequacy of existing sewerage facilities commenced an action against the city and Belle Harbor seeking to enjoin the city from issuing the permit (Oetjen v. Sigman, Index No. 1296 11/72). The city cross-moved for dismissal contending that the petitioners lacked standing and that the issuance of the work permits was a ministerial act in light of the approvals evidencing Belle Harbor's compliance *****162** with all the building and zoning requirements. This motion was granted and the complaint was dismissed.

Shortly thereafter in response to numerous complaints of sewer backups the city investigated the sewerage facilities at the proposed site. The city discovered that the municipal sanitary sewers which would serve the proposed home had been installed in 1889, had six inch rather than eight inch pipes, and required the repeated removal of sand indicative of open joints. The sum of this inquiry was that the sewers were 'grossly inadequate' for present use and therefore new sewer connections were inadvisable.

On the basis of this information the city notified Belle Harbor that the prior approvals were revoked. The city also indicated that plans were being made to consider a new sewer system for the area.

Belle Harbor reacted by commencing this article 78 proceeding to annul the city's revocation of its approval of the new building application and to compel the city to reissue all approvals and to issue all permits necessary to complete the construction ****699** of the proposed nursing home. Belle Harbor contended that the city had succumbed to community pressure thereby abdicating its civic professional responsibility. Moreover, Belle Harbor asserted that the revocations by the city was a delaying tactic until such time as the city council could act on proposed zoning changes which would adversely affect the ***511** construction of a nursing home in that area. The city responded by denying that it had bowed to political pressure. The city contended that the original approval for the sewer connections was given at a time when it did not know about the deteriorated condition of the sewers; consequently such approval was a mistake susceptible of revocation in the proper exercise of its police power.

Special Term agreed finding that the revocation of approvals and refusal to issue the permits were occasioned through a reasonable exercise of police power and dismissed the petition.

The Appellate Division reversed and directed the city to issue the requisite approvals and permits. Relying on *Westwood Forest Estates v. Village of South Nyack* (23 N.Y.2d 424, 297 N.Y.S.2d 129, 244 N.E.2d 700) the Appellate Division majority held that it was impermissible for the city to punish a single landowner because of its own failure to construct adequate sewerage facilities.

We disagree with the Appellate Division majority and find that *Westwood Forest Estates* (supra) is not dispositive of the case at bar. In *Westwood* we held that a village could not utilize its zoning power to prohibit the new construction of multiple dwellings in order to avoid complying with State and county antipollution efforts. The situation before us is distinguishable in that it involves the general police power rather than the zoning power, and the sanitation problem ***163 is one of immediate direct impact rather than a generalized one. In contrast to the sewer system in *Westwood* which was operating at only 75% Of capacity and was indisputable adequate, the system in *Belle Harbor* is alleged to be ‘an already overloaded, overflowing, backing-up, antiquated sewer system.’

While we have consistently recognized the right of a municipality pursuant to its police powers to prevent conditions dangerous to public health and welfare (see, e.g., *Matter of Wulfsohn v. Burden*, 241 N.Y. 288, 150 N.E. 120; *Shepard v. Village of Skaneateles*, 300 N.Y. 115, 89 N.E.2d 619; *Rodgers v. Village of Tarrytown*, 302 N.Y. 115, 96 N.E.2d 731; 1 *Rathkopf*, *Law of Zoning and Planning*, ch. 2 (1973 Supp.)) we have also insisted that any such restrictions or limitations must be kept “within the limits of necessity”. (*Arverne Bay Constr. Co. v. Thatcher*, 278 N.Y. 222, 230, 15 N.E.2d 587, 591; *People ex rel. St. Albans-Springfield Corp. v. Connell*, 257 N.Y. 73, 177 N.E.

313.)

*512 Consequently a municipality may not invoke its police powers solely as a pretext to assuage strident community opposition. To justify interference with the beneficial enjoyment of property the municipality must establish that it has acted in response to a dire necessity, that its action is reasonably calculated to alleviate or prevent the crisis condition, and that it is presently taking steps to rectify the problem. When the general police power is invoked under such circumstances it must be considered an emergency measure and is circumscribed by the exigencies of that emergency.

The order of the Appellate Division should be reversed without costs, and the petition dismissed without prejudice to the commencement of a proceeding within 30 days from the date hereof to determine whether the revocation of the necessary building approvals was warranted as necessary to prevent a condition dangerous to public health and welfare or whether such **700 revocation was based solely on a pretext that the construction would create a condition dangerous to public health and welfare.

BREITEL, C.J., and JASEN, GABRIELLI, JONES and STEVENS, JJ., concur.

SAMUEL RABIN, J., taking no part.

Order reversed, etc.

All Citations

35 N.Y.2d 507, 323 N.E.2d 697, 364 N.Y.S.2d 160

2 Barb. 104
Supreme Court, General Term, New York.

BOOM
v.
THE CITY OF UTICA.

January Term, 1848.

*104 PRATT, GRIDLEY, and ALLEN, Justices.

References under the act of 1845, though of actions of tort, and to a sole referee, were intended by the legislature to be placed, in all respects, upon the same footing as cases which were formerly referable under the old statute. And the supreme court has the power to review the report of the referee in such a case, and to set it aside if erroneous.

The officers of a municipal corporation are the mere agents of the corporation; and if they transcend the boundaries of their duties, as prescribed by the charter, the corporation is no more bound by their acts than any individual is bound by the unauthorized act of his agent.

This principle applies to cases arising upon a breach of contract, as well as to those which are founded upon a wrong.

A municipal corporation is liable for a tortious act, as a trespass, committed by an agent pursuant to its directions, in relation to matters within the scope of the objects of its incorporation; but not for any unauthorized acts of its officers, though done *colore officii*.

Under the provision in the charter of the city of Utica, authorizing the common council to make and publish ordinances, by-laws, &c. for the purpose of abating and removing *nuisances*, they have no power to direct the removal of a person sick of an infectious or contagious disease from one place to another, without his consent.

A person sick of an infectious or contagious disease, in his own house, or in suitable apartments at a public hotel or boarding house, is not a *nuisance*.

There is nothing in the act incorporating the city of Utica conferring on the common council any of the powers of a board of health. Nor is there any other act now in force creating any such board, or vesting any such authority in the common council of that city.

The common council of the city of Utica has no power to

order the forcible seizure of a person's house, and its occupation as a pest-house, without his consent and against his will.

A municipal corporation cannot be made liable for an act of its agent, by a ratification thereof, where the act complained of was of such a nature that the corporation did not possess the power to authorize the doing of it by the agent.

MOTION by the defendants to set aside the report of a sole referee. The action was trespass on the case, brought by the plaintiff, against the defendants for placing, or causing to be placed, certain persons having the small pox in a house in the plaintiff's possession, without his consent, and against his will. The facts, as they appeared in evidence before the referee, are *105 fully stated in the opinion of the court. The referee made a report in favor of the plaintiff for \$75.

Attorneys and Law Firms

T. H. Flandrau & O. G. Kellogg, for the defendants.

T. E. Clarke & E. J. Richardson, for the plaintiff.

Opinion

By the Court, GRIDLEY, J.

A preliminary objection is raised in this cause to the right to review the decision of the referee; upon the ground that the case was not referable under the statute. Prior to the act of 1845, this would doubtless have been a good objection. (*See* 19 *Wend.* 108; 5 *Id.* 535.) But by that act, (*Sess. L. of* 1845, p. 163,) it is provided that actions of tort may be referred, by consent of the parties, and that such reference shall be subject to the provisions contained in the revised statutes, on the subject of referring actions at law. We are of the opinion that a reference under the act of 1845, though of an action of tort, and to a sole referee, was intended by the legislature to be placed, in all respects, upon the same footing as cases which were formerly referable under the old statute; and therefore that there is no legal objection to reviewing the report of the referee in this case, and setting it aside if it be erroneous.

The plaintiff was the occupant of the premises in question in this suit, under a lease executed by the city to him, bearing date the first day of April, 1840, at an annual rent of \$10. Upon the premises stood an old house, which was, without the consent of the plaintiff, taken possession of by

Harry Bushnell, then an alderman of the city, by placing therein one Richard Evans and his family, two members of which were sick of the small pox. Evans was an immigrant from North Wales, who had recently arrived in the city with his family, and while he was staying on a visit at the house of one Davis, two of his children were taken sick. Soon after the happening of this calamity, he took rooms at the United States Hotel, where he had been staying a day or two when he was removed to the house in question by Bushnell, who claimed to act in behalf of a committee *106 of the common council of the city of Utica. The only evidence, however, of any authority to act in the premises, was furnished by George Tracy, who testified that he and Bushnell were aldermen of the city of Utica, in the year 1840. That it was mentioned in a meeting of the common council in the month of May, in that year, that certain persons in the second ward were sick of the small pox; whereupon Bushnell and himself and others, whose names he did not remember, were appointed a committee "to procure a place and remove the family to it." There was no written resolution on the subject, nor any memorandum of any such action of the board, in the minutes. The reason assigned by the witness for the omission to enter the resolution and the appointment of the committee, in the minutes was, the fear that it would create an alarm in the country.

The removal of the family occurred upon a stormy day, in the month of April, and one of the children who were sick, according to the testimony of the attending physician, died within a few days, from the exposure it suffered during the removal. The expenses of fitting up the house, medical attendance, & c. were paid out of the city funds; but there was no evidence that this payment was in pursuance of any resolution of the board, or that the officer who furnished the funds had any knowledge of the circumstances attending the removal, or of the unlawful seizure and occupation of the plaintiff's house. It was under these circumstances, and for this act of Alderman Bushnell, that the plaintiff sought redress by an action upon the case against the city. The house when thus taken possession of was not in the actual occupation of the plaintiff, and was not in tenantable condition till repaired; but the family continued to remain in the house for a few weeks after the death of the child; and some evidence was given to show that the plaintiff was prevented from a full enjoyment of the lot for the purposes of pasturage and cultivation, by the fact that it was deemed dangerous to approach the house in which a patient was sick of a contagious disease. The referee, upon the evidence before him, reported for the plaintiff the sum of *107 \$75. We cannot but think this a somewhat extravagant estimate of damages, sustained by a loss of the temporary occupation of premises, the yearly rent of which was fixed by the parties themselves, in the lease, at \$10 only.

A more important question, however, arising upon this report is, whether the plaintiff is entitled to recover *at all*. Had the action been brought against the individual who committed the trespass, or who directed it to be committed, there could be no doubt of the right to recover an ample compensation for this unauthorized appropriation of the property of another. But the plaintiff has sought his remedy *against the city*; and the question presented for our consideration is one of great interest to those who live under the government of municipal corporation, and who are liable to contribute to the public burdens created by their acts. It is doubtless expedient that the officers of such corporations should possess a liberal grant of powers, to enable them to make ample provision for the public welfare, and to discharge with advantage to their constituents the duties incident to their trust. It is equally important, also, that the nature and extent of those powers should be clearly defined and well understood by themselves and the public; and they should be careful neither to exceed nor abuse them, by the adoption of measures beyond the scope of the authority conferred upon them. It is declared by the second section of the act of incorporation, that "the *inhabitants* of said city shall be a corporation, by the name of the City of Utica." By virtue of other sections the *inhabitants* thus constituting the corporation elect various officers, who are charged by the same act with definite powers and duties. The mayor and aldermen, when chosen by the electors, constitute the common council of the city; and this body is invested with much the most numerous and important class of powers granted by the act. Nevertheless, these officers are the mere agents of the corporation, and their powers and duties are specified in the charter, with great clearness and precision; and when these agents of the corporation transcend the boundaries prescribed for them by the statute, the city is no more bound by their acts than any individual *108 is bound by the unauthorized acts of his agent. This principle applies to cases arising upon a breach of contract, as well as those which are founded upon a wrong. The case of *Hodges v. The City of Buffalo*, (2 Denio, 110,) illustrates this doctrine as applicable to the former class of cases. In that case the city was sued for the expense incurred upon a contract with the keeper of a hotel, made by a committee authorized by a resolution of the common council, "to co-operate with the citizens generally, for making proper arrangements for celebrating the anniversary of our independence." And the supreme court held that the common council had assumed the exercise of powers not conferred by the charter, and therefore that the city was not liable upon this contract of its agents. With respect to actions against a corporation sounding in tort, it is laid down that the corporation is liable for a tortious act, as a trespass, committed by an agent pursuant to its directions, *in relation to matters within the scope of the objects of its incorporation*; but not for any unauthorized acts of its

officers, though done *colore officii*. (See *Angell & Ames on Corporations*, 250, 330.) The revised statutes, (1 R. S. 599, § 1,) declare the general powers incident to every corporation; and in the third section it is enacted that with the exceptions of those general powers and such as are expressly given in its charter, “No corporation shall possess or exercise any corporate powers except such as are necessary to the exercise of the powers so enumerated and given.”

The question therefore arises whether a power to do the act which is the occasion of this suit, is conferred by the act incorporating the city of Utica.

The only powers granted by the act of incorporation, which can with any plausibility be regarded as embracing a right to do the act in question, are those conferred by the 14th subdivision of the 38th section. By that section the common council are clothed with powers “to make, establish, publish and modify, amend and repeal ordinances, rules, regulations and by-laws” for the following purposes, enumerating twenty-two in all; *109 and the 14th being stated in the following words: “*To abate and remove nuisances.*”

We think that the provision in question furnishes no authority or justification for doing the act complained of; for several decisive reasons. (1.) The power conferred upon the common council is merely *legislative*, to ““*make and publish ordinances,*” &c. for the purpose of abating and removing nuisances. It is a mere grant of authority to adopt general rules and regulations respecting the removal of nuisances; by designating what officers shall be charged with the duty; the mode of procedure, with all other details necessary to carry out the object of the enactment. Such is the clear and obvious interpretation of the provision in question. (2.) We cannot admit that a person sick of an infectious or contagious disease, in his own house, or in suitable apartments at a public hotel or boarding house, is a *nuisance*. It has indeed been held in a case reported in 4 *Maule & Selw.* 73, that an indictment for nuisance would lie against a person “for knowingly, unlawfully and injuriously conveying a child sick of the small pox through the public street;” thus exposing passengers to take the infection. That was, however, a very different case from the one now under consideration. Every public nuisance is indictable. (4 *Black. Com.* 166.) But I apprehend that it will not be pretended that an indictment would have lain in this case against the children, or their father, or the proprietor of the hotel in which they were sick. Such a doctrine would punish as criminals the unfortunate victims of disease, and would be abhorrent to every principle of justice and humanity.

We do not mean, however, to deny the largest powers, and

the most liberal discretion, to boards of health duly and legally constituted, to preserve the public health and prevent the spreading of a contagious disease by the severest quarantine and hospital regulations. But that question does not arise here. There is nothing in the act of incorporation conferring on the common council any of the powers of a board of health. Nor is there any other act now in force creating any such board, or vesting any such authority in the common council of *110 the city of Utica. The original act passed June 22d, 1832, upon the appearance of the Asiatic cholera in this country, and incorporated into the second edition of the revised statutes, (1 R. S. 444,) expired by its own limitation, and was afterwards renewed from year to year for several successive years. Since which time it has not been, and is not now, in force.

The right here contended for must therefore be supported, if at all, by an authority independent of any regulation authorized by a board of health. In other words, the removal must be justified on the ground that the sick children, lying in their beds at the hotel, were a nuisance, and their removal authorized by the 38th section of the charter. To this proposition we cannot assent. Indeed the removal was a most imprudent and unjustifiable act, creating the very danger sought to be avoided, and the author of it was perhaps indictable under the decision cited from *Maule & Selwyn*; and, if the physician is to be believed, in its consequences resulting in the death of one of the unfortunate patients. (3.) But the act for which this suit is brought, is not merely the removal of persons sick of an infectious disease. And though we concede that the common council had a right to order such removal, it by no means follows that they possessed the power to order a *forcible seizure and occupation of the plaintiff's house*. It was true that he was not in the *actual occupation* of the house at the time; but he had the *legal possession* of it under a valid lease. And the act of taking possession of that empty tenement was just as clear and palpable an invasion of the plaintiff's rights, as though he and his family had been forcibly ejected to make room for Evans and his family. In truth, if the exercise of such a power can be justified, then no man's house is safe from the intrusions of patients reeking with contagion, whenever the common council shall see fit to occupy it for such a purpose. Such a power can never be assumed or exercised, where the law forms any protection for the rights of the citizens; nor under any government less absolute than a naked despotism. But (4.) To the credit of the common council of the city there is no evidence that they ever assumed to exercise this power. They *111 only authorized their committee to *procure a suitable place and remove the sick persons to it*. This means, upon every fair intendment, to procure a place by lawful means, by contract, or by the consent of the owner. The board never intended that the committee should

commit a trespass, in procuring a place for this unfortunate family. It is insisted, however, that upon the authority of what is said in *Thayer v. Boston*, (19 Pick. 511,) the common council affirmed and ratified the acts of this committee, by defraying the expense of repairs and of medical attendance and provisions furnished to the family. To this argument there are two answers. (1.) There is no evidence that the common council, by any resolution or legal action, ever authorized the payment of these particular expenses. Much less that they did so with a full knowledge of the unlawful trespasses which had been committed upon the rights of the plaintiff; and if they did, it would not necessarily follow that they intended to adopt the trespass as their own. (2.) We would say as the court said in reply to a similar argument in *Hodges v. Buffalo*, (2 Denio, 113.) “It cannot be maintained that a corporation can, by a subsequent ratification, make good an act of its agent, which it could not have directly empowered him to do.” This very case cited from Pickering is a direct authority for holding, that the city is not liable, unless the common council had the power to authorize the doing of the act complained of.

The view already taken of this case we regard as entirely conclusive, and upon the clearest ground of law. And it may be summed up in few words. The city cannot be made liable for this unlawful occupation of the plaintiffs’ house by Alderman Bushnell, because 1st. The common council had no power to authorize such an act. And 2dly. They never did authorize it. This leaves the plaintiff to his remedy against those who, without authority, were the actors and directors in the commission of the trespass.

We have, however, been met by an argument *ab inconvenienti*; to the effect, that, unless this power is possessed by the common council, there can be no protection of the public *112 health against the ravages of a contagious disease. We answer to this argument, (1.) That

granting the truth of the proposition, it is a good reason for asking the legislature to confer the power upon the common council; but none for its unauthorized and illegal exercise. (2.) We cannot agree that it is *necessary* or *expedient* to confer a power upon any body of men to seize the property of another, and appropriate it, without his consent, to such a purpose as this. Proper places for hospitals have always been obtained and always may be, without the commission of a trespass. (3.) There is already an ample provision made for the exigency of a case precisely like this. By the 22d section of the general act for preserving the public health (1 R. S. 444,) it is provided, that “Any two justices of the peace in any town of this state, may cause all persons who shall be sick of any infectious or pestilential disease, and not being residents of such town, by an order in writing, to be removed to such place of safety within the town as they shall deem necessary for the preservation of the public health.” The 24th section of the charter of Utica clothes justices of the peace in the city with all the powers possessed by the like officers in the several towns of the state. And the 64th section declares that the city shall be considered as a town for all purposes not otherwise provided for in the act of incorporation.

We have thus assigned, at some length, the reasons which have brought us to the conclusion, that the referee in this case erred; on account of the importance which we attach to a more general and accurate knowledge of the legal limitations of the powers ordinarily exercised by the boards of municipal corporations.

Report set aside.

All Citations

2 Barb. 104

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22 N.Y.2d 214
Court of Appeals of New York.

In the Matter of Vincent J. BOVINO, Respondent,
v.
Martin SCOTT, as Fire Commissioner of the Fire
Department of the City of New York, Appellant.

June 5, 1968.

Synopsis

Proceeding to review determination of Fire Commissioner's dismissing a fireman. The matter was transferred to the Appellate Division by an order of the Supreme Court at Special Term, New York County, and the Appellate Division of the Supreme Court in the First Judicial Department, 27 A.D.2d 912, 278 N.Y.S.2d 961, entered order which modified, on the facts and in exercise of discretion, and, as modified, affirmed a determination of Commissioner and there was an appeal. The Court of Appeals, Bergan, J., held that Appellate Division's action in reducing dismissal of city fireman from his position as fireman, first grade, to a six month's suspension was too substantial a revision under the facts in record, and order would be modified by reducing measure of discipline imposed by Fire Commissioner to a two-year suspension.

Order modified and, as modified, affirmed.

Jasen, Scileppi and Breitel, JJ., dissented.

Attorneys and Law Firms

***409 **346 *215 J. Lee Rankin, Corporation Counsel (Stanley Buchsbaum and Jesse I. Levine, New York City, of counsel), for appellant.

Michael I. Winter, Brooklyn, and Abraham H. Geffner, New York City, for respondent.

Opinion

*216 BERGAN, Judge.

Both the Appellate Division and this court are vested with power, pursuant to CPLR 7803 (subd. 3), to deal as a matter of law with the measure of discipline imposed on a subordinate civil service employee (Matter of Bell v. Waterfront Comm., 20 N.Y.2d 54, 63, 281 N.Y.S.2d 753,

761, 228 N.E.2d 758, 764; *217 Matter of Donohue v. New York State Police, 19 N.Y.2d 954, 281 N.Y.S.2d 357, 227 N.E.2d 409; Matter of Walker v. Murphy, 15 N.Y.2d 650, 255 N.Y.S.2d 869, 204 N.E.2d 201).

The provisions of the Administrative Code of the City of New York (s 487a—12.0), stating the measure of discipline in alternative terms of dismissal or suspension for 10 days for each offense in the case of charges heard by the Fire Commissioner, yield to the inconsistent provisions of CPLR 7803 (subd. 3) establishing judicial power to review the 'measure' of 'discipline'. The reduction by the Appellate Division of the punishment to a six months' suspension is, however, too substantial a revision under the facts in this record.

The order should be modified by reducing the measure of discipline imposed by the respondent Fire Commissioner to a suspension of two years, and, as modified, affirmed, without costs.

JASEN, Judge (dissenting).

The Fire Commissioner's finding that petitioner was guilty of the charges herein is supported by substantial evidence. The findings of ***410 guilt, sustained by the Appellate Division and all the members of this court, relate to most flagrant wrongdoing. Perhaps the most serious offense was the unauthorized obtaining and selling, over a period of two and a half years, of police **347 and fire badges without may concern for their ultimate use. The dangers to the public inherent in the unauthorized possession and use of police and fire badges are too obvious to require elucidation. Another activity of the petitioner is almost as serious. He was found guilty of being engaged in various extra-departmental employments and businesses without obtaining the necessary approval of the Fire Department, one of which involved the selling of fire extinguishers, an activity expressly prohibited by the department's regulations. One may well imagine the persuasive effect a fireman, as a salesman, might have on a potential buyer of fire extinguishers. Lastly, the petitioner was found guilty of exhibiting pornographic films and snapshots, as well as possession of other objectionable material.

To authorize a major offender, such as the petitioner, who has clearly demonstrated his lack of fitness to hold the position, to remain as a fireman, subject only to a suspension, and to permit him to retire after the expiration of the suspension period would go far towards destroying

the Fire Commissioner's *218 ability to maintain appropriate discipline in his department. (People ex rel. Guiney v. Valentine, 274 N.Y. 331, 333—334, 8 N.E.2d 880, 881—882.)

The test on review is whether the discipline imposed is “so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one’s sense of fairness.” (Matter of McDermott v. Murphy, 15 A.D.2d 479, 222 N.Y.S.2d 111, affd. 12 N.Y.2d 780, 234 N.Y.S.2d 723, 186 N.E.2d 570.)

The court may by way of review determine only whether the Fire Commissioner has abused his discretion in imposing the measure of punishment. The penalty of dismissal was not an abuse of discretion under the circumstances. I find no sound basis for concluding that the dismissal of the petitioner was ‘shocking to one’s sense of fairness.’

Finally, I find no authority for reducing the penalty imposed herein, unless there was an ‘abuse of discretion as to the measure or mode of penalty or discipline imposed’. (CPLR 7803, subd. 3.) Section 487a—12.0 of the Administrative Code of the City of New York provides for two kinds of punishment: forfeiture of pay for not more than ten days for each offense, or dismissal. Clearly, the minimal punishment was intended to cover minor infractions of the rules but, where, as here, there is evidence of substantial wrongdoing, the legislative authority has decreed that the offender cannot be retained on the rolls.

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Here, we are concerned with a member of a uniformed force where discipline is essential to its function. It is much more reasonable to conclude ***411 that the legislators decided that, except for minor infractions, the punishment to be imposed for conduct involving moral turpitude was dismissal. Indeed, the courts should have no greater power, when it comes to the extent of punishment, than has the Fire Commissioner pursuant to statute. (Administrative Code of City of New York, s 487a—12.0.)

I would reverse the Appellate Division and confirm the Fire Commissioner’s determination in all respects.

FULD, C.J., and BURKE and KEATING, JJ., concur with BERGAN, J.

JASEN, J., dissents and votes to reverse and reinstate the determination of the Fire Commissioner in a separate opinion in which SCILEPPI and BREITEL, JJ., concur.

Order modified, without costs, in accordance with the opinion herein and, as so modified, affirmed.

All Citations

22 N.Y.2d 214, 239 N.E.2d 345, 292 N.Y.S.2d 408

131 S.Ct. 1068
Supreme Court of the United States

Russell BRUESEWITZ, et al., Petitioners,
v.
WYETH LLC, fka Wyeth, Inc., fka Wyeth
Laboratories, et al.

No. 09–152.

|
Argued Oct. 12, 2010.

|
Decided Feb. 22, 2011.

Synopsis

Background: Parents of minor who allegedly suffered series of seizures and resulting developmental delay after receiving dose of diphtheria-tetanus-pertussis (DTP) vaccine brought products liability action against vaccine manufacturer after rejecting judgment of the United States Court of Federal Claims. Manufacturer filed motion for summary judgment. The United States District Court for the Eastern District of Pennsylvania, Michael M. Baylson, J., 508 F.Supp.2d 430, granted motion. Parents appealed. The United States Court of Appeals of the Third Circuit, Smith, Circuit Judge, 561 F.3d 233, affirmed. Certiorari was granted.

The Supreme Court, Justice Scalia, held that National Childhood Vaccine Injury Act (NCVIA) preempts all design-defect claims against vaccine manufacturers brought by plaintiffs who seek compensation for injury or death caused by vaccine side effects.

Affirmed.

Justice Breyer filed concurring opinion.

Justice Sotomayor, joined by Justice Ginsburg, filed dissenting opinion.

Justice Kagan took no part in consideration or decision of the case.

****1070 Syllabus***

The National Childhood Vaccine Injury Act of 1986 (NCVIA or Act) created a no-fault compensation program to stabilize a vaccine market adversely affected by an

increase in vaccine-related tort litigation and to facilitate compensation to claimants who found pursuing legitimate vaccine-inflicted injuries too costly and difficult. The Act provides that a party alleging a vaccine-related injury may file a petition for compensation in the Court of Federal Claims, naming the Health and Human Services Secretary as the respondent; that the court must resolve the case by a specified deadline; and that the claimant can then decide whether to accept the court's judgment or reject it and seek tort relief from the vaccine manufacturer. Awards are paid out of a fund created by an excise tax on each vaccine dose. As a *quid pro quo*, manufacturers enjoy significant tort-liability protections. Most importantly, the Act eliminates manufacturer liability for a vaccine's unavoidable, adverse side effects.

Hannah Bruesewitz's parents filed a vaccine injury petition in the Court of Federal Claims, claiming that Hannah became disabled after receiving a diphtheria, tetanus, and pertussis (DTP) vaccine manufactured by Lederle Laboratories (now owned by respondent Wyeth). After that court denied their claim, they elected to reject the unfavorable judgment and filed suit in Pennsylvania state court, alleging, *inter alia*, that the defective design of Lederle's DTP vaccine caused Hannah's disabilities, and that Lederle was subject to strict liability and liability for negligent design under Pennsylvania common law. Wyeth removed the suit to the Federal District Court. It granted Wyeth summary judgment, holding that the relevant Pennsylvania law was preempted by 42 U.S.C. § 300aa–22(b)(1), which provides that “[n]o vaccine manufacturer shall be liable in a civil action for damages arising from a vaccine-related injury or death associated with the administration of a vaccine after October 1, 1988, if the injury or death resulted from side effects that were unavoidable even though the vaccine was properly prepared and was accompanied by proper directions and warnings.” The Third Circuit affirmed.

Held: The NCVIA pre-empts all design-defect claims against vaccine manufacturers ****1071** brought by plaintiffs seeking compensation for injury or death caused by a vaccine's side effects. Pp. 1075 – 1082.

(a) Section 300aa–22(b)(1)'s text suggests that a vaccine's design is not open to question in a tort action. If a manufacturer could be held liable for failure to use a different design, the “even though” clause would do no work. A vaccine side effect could always have been avoidable by use of a different vaccine not containing the harmful element. The language of the provision thus suggests the design is not subject to question in a tort action. What the statute establishes as a complete defense must be

unavoidability (given safe manufacture and warning) with respect to the particular design. This conclusion is supported by the fact that, although products-liability law establishes three grounds for liability—defective manufacture, inadequate directions or warnings, and defective design—the Act mentions only manufacture and warnings. It thus seems that the Act’s failure to mention design-defect liability is “by deliberate choice, not inadvertence.” *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168, 123 S.Ct. 748, 154 L.Ed.2d 653. P. 1076.

(b) Contrary to petitioners’ argument, there is no reason to believe that § 300aa–22(b)(1)’s term “unavoidable” is a term of art incorporating Restatement (Second) of Torts § 402A, Comment *k*, which exempts from strict-liability rules “unavoidably unsafe products.” “Unavoidable” is hardly a rarely used word, and cases interpreting comment *k* attach special significance only to the term “unavoidably unsafe products,” not the word “unavoidable” standing alone. Moreover, reading the phrase “side effects that were unavoidable” to exempt injuries caused by flawed design would require treating “even though” as a coordinating conjunction linking independent ideas when it is a concessive, subordinating conjunction conveying that one clause weakens or qualifies the other. The canon against superfluity does not undermine this Court’s interpretation because petitioners’ competing interpretation has superfluity problems of its own. Pp. 1076 – 1078.

(c) The structure of the NCVIA and of vaccine regulation in general reinforces what § 300aa–22(b)(1)’s text suggests. Design defects do not merit a single mention in the Act or in Food and Drug Administration regulations that pervasively regulate the drug manufacturing process. This lack of guidance for design defects, combined with the extensive guidance for the two liability grounds specifically mentioned in the Act, strongly suggests that design defects were not mentioned because they are not a basis for liability. The Act’s mandates lead to the same conclusion. It provides for federal agency improvement of vaccine design and for federally prescribed compensation, which are other means for achieving the two beneficial effects of design-defect torts—prompting the development of improved designs, and providing compensation for inflicted injuries. The Act’s structural *quid pro quo* also leads to the same conclusion. The vaccine manufacturers fund an informal, efficient compensation program for vaccine injuries in exchange for avoiding costly tort litigation and the occasional disproportionate jury verdict. Taxing their product to fund the compensation program, while leaving their liability for design defect virtually unaltered, would hardly coax them back into the market. Pp. 1078 – 1080.

561 F.3d 233, affirmed.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C.J., and KENNEDY, THOMAS, BREYER, and ALITO, JJ., joined. BREYER, J., filed a concurring opinion, *post*, pp. 1082 – 1086. **1072 SOTOMAYOR, J., filed a dissenting opinion, in which GINSBURG, J., joined, *post*, pp. 1086 – 1101. KAGAN, J., took no part in the consideration or decision of the case.

Attorneys and Law Firms

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Benjamin J. Horwich, for United States as amicus curiae, by special leave of the Court, supporting the Respondents.

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Opinion

Justice SCALIA delivered the opinion of the Court.

*226 We consider whether a pre-emption provision enacted in the National Childhood Vaccine Injury Act of 1986 (NCVIA)¹ bars state-law design-defect claims against vaccine manufacturers.

I

A

For the last 66 years, vaccines have been subject to the same federal premarket approval process as prescription drugs, and compensation for vaccine-related injuries has been left largely to the States.² Under that regime, the elimination of communicable diseases through vaccination became “one of the greatest achievements” of public health in the 20th century.³ But in the 1970’s and 1980’s vaccines became, one might say, victims of their own success. They had been so effective in preventing infectious diseases that the public became much less alarmed at the threat of those diseases,⁴ and much more concerned with the risk of injury from the vaccines themselves.⁵

227** Much of the concern centered around vaccines against diphtheria, tetanus, and pertussis (DTP), which were blamed for children’s disabilities and developmental delays. This led to a massive increase in vaccine-related tort litigation. Whereas between 1978 and 1981 only nine products-liability suits were filed against DTP manufacturers, *1073** by the mid-1980’s the suits numbered more than 200 each year.⁶ This destabilized the DTP vaccine market, causing two of the three domestic manufacturers to withdraw; and the remaining manufacturer, Lederle Laboratories, estimated that its potential tort liability exceeded its annual sales by a factor of 200.⁷ Vaccine shortages arose when Lederle had production problems in 1984.⁸

Despite the large number of suits, there were many complaints that obtaining compensation for legitimate vaccine-inflicted injuries was too costly and difficult.⁹ A significant number of parents were already declining vaccination for their children,¹⁰ and concerns about compensation threatened to depress vaccination rates even further.¹¹ This was a source of concern to public health officials, since vaccines are effective in preventing outbreaks of disease only if a large percentage of the population is vaccinated.¹²

***228** To stabilize the vaccine market and facilitate compensation, Congress enacted the NCVIA in 1986. The Act establishes a no-fault compensation program “designed to work faster and with greater ease than the civil tort system.” *Shalala v. Whitecotton*, 514 U.S. 268, 269, 115 S.Ct. 1477, 131 L.Ed.2d 374 (1995). A person injured by a vaccine, or his legal guardian, may file a petition for compensation in the United States Court of Federal Claims, naming the Secretary of Health and Human Services as the respondent.¹³ A special master then makes an informal adjudication of the petition within (except for two limited exceptions) 240 days.¹⁴ The Court of Federal Claims must review objections to the special master’s decision and enter final judgment under a similarly tight statutory deadline.¹⁵ At that point, a claimant has two options: to accept the

court’s judgment and forgo a traditional tort suit for damages, or to reject the judgment and seek tort relief from the vaccine manufacturer.¹⁶

Fast, informal adjudication is made possible by the Act’s Vaccine Injury Table, which lists the vaccines covered under the Act; describes each vaccine’s compensable, adverse side effects; and indicates how soon after vaccination those side effects should first manifest themselves.¹⁷ Claimants who show that a listed injury first manifested itself at the appropriate time are prima facie entitled to compensation. ****1074** ¹⁸ No showing of causation is necessary; the Secretary bears the burden of disproving causation.¹⁹ A claimant may also recover for unlisted side effects, and for listed side effects that occur at times other than those specified in the Table, but ***229** for those the claimant must prove causation.²⁰ Unlike in tort suits, claimants under the Act are not required to show that the administered vaccine was defectively manufactured, labeled, or designed.

Successful claimants receive compensation for medical, rehabilitation, counseling, special education, and vocational training expenses; diminished earning capacity; pain and suffering; and \$250,000 for vaccine-related deaths.²¹ Attorney’s fees are provided, not only for successful cases, but even for unsuccessful claims that are not frivolous.²² These awards are paid out of a fund created by an excise tax on each vaccine dose.²³

The *quid pro quo* for this, designed to stabilize the vaccine market, was the provision of significant tort-liability protections for vaccine manufacturers. The Act requires claimants to seek relief through the compensation program before filing suit for more than \$1,000.²⁴ Manufacturers are generally immunized from liability for failure to warn if they have complied with all regulatory requirements (including but not limited to warning requirements) and have given the warning either to the claimant or the claimant’s physician.²⁵ They are immunized from liability for punitive damages absent failure to comply with regulatory requirements, “fraud,” “intentional and wrongful withholding of information,” or other “criminal or illegal activity.”²⁶ And most relevant to ***230** the present case, the Act expressly eliminates liability for a vaccine’s unavoidable, adverse side effects:

“No vaccine manufacturer shall be liable in a civil action for damages arising from a vaccine-related injury or death associated with the administration of a vaccine after October 1, 1988, if the injury or death resulted from side effects that were unavoidable even though the vaccine was properly prepared and was accompanied by proper directions and warnings.”²⁷

B

The vaccine at issue here is a DTP vaccine manufactured by Lederle Laboratories. It first received federal approval in 1948 and received supplemental approvals in 1953 and 1970. Respondent Wyeth purchased Lederle in 1994 and stopped manufacturing the vaccine in 1998.

Hannah Bruesewitz was born on October 20, 1991. Her pediatrician administered doses of the DTP vaccine according to the Center for Disease Control's recommended childhood immunization schedule. ****1075** Within 24 hours of her April 1992 vaccination, Hannah started to experience seizures.²⁸ She suffered over 100 seizures during the next month, and her doctors eventually diagnosed her with "residual seizure disorder" and "developmental delay."²⁹ Hannah, now a teenager, is still diagnosed with both conditions.

In April 1995, Hannah's parents, Russell and Robalee Bruesewitz, filed a vaccine injury petition in the United States Court of Federal Claims, alleging that Hannah suffered from on-Table residual seizure disorder and encephalopathy injuries.³⁰ A Special Master denied their claims on various grounds, though they were awarded \$126,800 in attorney's ***231** fees and costs. The Bruesewitzes elected to reject the unfavorable judgment, and in October 2005 filed this lawsuit in Pennsylvania state court. Their complaint alleged (as relevant here) that defective design of Lederle's DTP vaccine caused Hannah's disabilities, and that Lederle was subject to strict liability, and liability for negligent design, under Pennsylvania common law.³¹

Wyeth removed the suit to the United States District Court for the Eastern District of Pennsylvania, which granted Wyeth summary judgment on the strict-liability and negligence design-defect claims, holding that the Pennsylvania law providing those causes of action was pre-empted by 42 U.S.C. § 300aa-22(b)(1).³² The United States Court of Appeals for the Third Circuit affirmed.³³ We granted certiorari. 559 U.S. 991, 130 S.Ct. 1734, 176 L.Ed.2d 211 (2010).

II

A

We set forth again the statutory text at issue:

"No vaccine manufacturer shall be liable in a civil action for damages arising from a vaccine-related injury or death associated with the administration of a vaccine after October 1, 1988, if the injury or death resulted from side effects that were unavoidable even though the vaccine was properly prepared and was accompanied by proper directions and warnings."³⁴

The "even though" clause clarifies the word that precedes it. It delineates the preventative measures that a vaccine manufacturer *must* have taken for a side effect to be considered "unavoidable" under the statute. Provided that there ***232** was proper manufacture and warning, any remaining side effects, including those resulting from design defects, are deemed to have been unavoidable. State-law design-defect claims are therefore pre-empted.

If a manufacturer could be held liable for failure to use a different design, the word "unavoidable" would do no work. A side effect of a vaccine could *always* have been avoidable by use of a differently designed vaccine not containing the harmful element. The language of the provision thus suggests that the *design* of the vaccine is a given, not subject to question in the tort action. What the statute establishes ****1076** as a complete defense must be unavoidability (given safe manufacture and warning) *with respect to the particular design*. Which plainly implies that the design itself is not open to question.³⁵

A further textual indication leads to the same conclusion. Products-liability law establishes a classic and well known triumvirate of grounds for liability: defective manufacture, inadequate directions or warnings, and defective design.³⁶ If all three were intended to be preserved, it would be strange to mention specifically only two, and leave the third to implication. It would have been much easier (and much more natural) to provide that manufacturers would be liable ***233** for "defective manufacture, defective directions or warning, and defective design." It seems that the statute fails to mention design-defect liability "by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168, 123 S.Ct. 748, 154 L.Ed.2d 653 (2003). *Expressio unius, exclusio alterius*.

B

The dissent's principal textual argument is mistaken. We agree with its premise that " 'side effects that were unavoidable' must refer to side effects caused by a vaccine's *design*."³⁷ We do not comprehend, however, the second step of its reasoning, which is that the use of the conditional term "if" in the introductory phrase "if the injury or death resulted from side effects that were unavoidable" "plainly implies that some side effects stemming from a vaccine's design are 'unavoidable,' while others are avoidable."³⁸ That is not so. The "if" clause makes total sense whether the design to which "unavoidable" refers is (as the dissent believes) any feasible design (making the side effects of the design used for the vaccine at issue avoidable), or (as we believe) the particular design used for the vaccine at issue (making its side effects unavoidable). Under the latter view, the condition established by the "if" clause is that the vaccine have been properly labeled and manufactured; and under the former, that it have been properly *designed*, labeled, and manufactured. Neither view renders the "if" clause a nullity. Which of the two variants must be preferred is addressed by our textual analysis, and is in no way determined by the "if" clause.

Petitioners' and the dissent's textual argument also rests upon the proposition that the word "unavoidable" in § 300aa-22(b)(1) is a term of art that incorporates comment *k* to **1077 Restatement (Second) of Torts § 402A (1963-1964).³⁹ The Restatement *234 generally holds a manufacturer strictly liable for harm to person or property caused by "any product in a defective condition unreasonably dangerous to the user."⁴⁰ Comment *k* exempts from this strict-liability rule "unavoidably unsafe products." An unavoidably unsafe product is defined by a hodgepodge of criteria and a few examples, such as the Pasteur rabies vaccine and experimental pharmaceuticals. Despite this lack of clarity, petitioners seize upon one phrase in the comment *k* analysis, and assert that by 1986 a majority of courts had made this a *sine qua non* requirement for an "unavoidably unsafe product": a case-specific showing that the product was "quite incapable of being made safe for [its] intended ... use."⁴¹

We have no need to consider the finer points of comment *k*. Whatever consistent judicial gloss that comment may have been given in 1986, there is no reason to believe that § 300aa-22(b)(1) was invoking it. The comment creates a special category of "unavoidably unsafe products," while the statute refers to "side effects that were unavoidable." That the latter uses the adjective "unavoidable" and the former the adverb "unavoidably" does not establish that Congress *235 had comment *k* in mind. "Unavoidable" is hardly a rarely used word. Even the cases petitioners cite

as putting a definitive gloss on comment *k* use the precise phrase "unavoidably unsafe product";⁴² none attaches special significance to the term "unavoidable" standing alone.

The textual problems with petitioners' interpretation do not end there. The phrase "even though" in the clause "even though the vaccine was properly prepared and [labeled]" is meant to signal the unexpected: unavoidable side effects persist *despite* best manufacturing and labeling practices.⁴³ But petitioners' reading **1078 eliminates any opposition between the "even though" clause—called a concessive subordinate clause by grammarians—and the word "unavoidable."⁴⁴ Their reading makes pre-emption turn equally on unavoidability, proper preparation, and proper labeling. Thus, the dissent twice refers to the requirements of proper preparation and proper labeling as "two additional prerequisites" for pre-emption independent of unavoidability.⁴⁵ The primary textual justification for the dissent's position depends *236 on that independence.⁴⁶ But linking independent ideas is the job of a coordinating junction like "and," not a subordinating junction like "even though."⁴⁷

Petitioners and the dissent contend that the interpretation we propose would render part of § 300aa-22(b)(1) superfluous: Congress could have more tersely and more clearly preempted design-defect claims by barring liability "if ... the vaccine was properly prepared and was accompanied by proper directions and warnings." The intervening passage ("the injury or death resulted from side effects that were unavoidable even though") is unnecessary. True enough. But the rule against giving a portion of text an interpretation which renders it superfluous does not prescribe that a passage which could have been more terse does not mean what it says. The rule applies only if verbosity and prolixity can be eliminated by giving the offending passage, or the remainder of the text, a competing interpretation. That is not the case here.⁴⁸ To be sure, petitioners' and the dissent's interpretation gives independent meaning to the intervening passage (the supposed meaning of comment *k*); but it does so only at the expense of rendering the remainder of the provision superfluous. Since a vaccine is not "quite incapable of being made safer for [its] intended use" if manufacturing defects could have been eliminated or better warnings provided, *237 the entire "even though" clause is a useless appendage.⁴⁹ It would suffice to say "if the injury or death resulted from side effects that were unavoidable"—full stop.

III

The structure of the NCVIA and of vaccine regulation in general reinforces ****1079** what the text of § 300aa–22(b)(1) suggests. A vaccine’s license spells out the manufacturing method that must be followed and the directions and warnings that must accompany the product.⁵⁰ Manufacturers ordinarily must obtain the Food and Drug Administration’s (FDA) approval before modifying either.⁵¹ Deviations from the license thus provide objective evidence of manufacturing defects or inadequate warnings. Further objective evidence comes from the FDA’s regulations—more than 90 of them⁵²—that pervasively regulate the manufacturing process, down to the requirements for plumbing and ventilation systems at each manufacturing facility.⁵³ Material noncompliance with any one of them, or with any other FDA regulation, could cost the manufacturer its regulatory-compliance defense.⁵⁴

Design defects, in contrast, do not merit a single mention in the NCVIA or the FDA’s regulations. Indeed, the FDA has never even spelled out in regulations the criteria it uses to decide whether a vaccine is safe and effective for its intended use.⁵⁵ And the decision is surely not an easy one. Drug manufacturers often could trade a little less efficacy ***238** for a little more safety, but the safest design is not always the best one. Striking the right balance between safety and efficacy is especially difficult with respect to vaccines, which affect public as well as individual health. Yet the Act, which in every other respect micromanages manufacturers, is silent on how to evaluate competing designs. Are manufacturers liable only for failing to employ an alternative design that the FDA has approved for distribution (an approval it takes years to obtain⁵⁶)? Or does it suffice that a vaccine design has been approved in other countries? Or could there be liability for failure to use a design that exists only in a lab? Neither the Act nor the FDA regulations provide an answer, leaving the universe of alternative designs to be limited only by an expert’s imagination.

Jurors, of course, often decide similar questions with little guidance, and we do not suggest that the absence of guidance alone suggests pre-emption. But the lack of guidance for design defects combined with the extensive guidance for the two grounds of liability specifically mentioned in the Act strongly suggests that design defects were not mentioned because they are not a basis for liability.

The mandates contained in the Act lead to the same conclusion. Design-defect torts, broadly speaking, have two beneficial effects: (1) prompting the development of improved designs, and (2) providing compensation for inflicted injuries. The NCVIA provides other means for

achieving both effects. We have already discussed the Act’s generous compensation scheme. And the Act provides many means of improving vaccine design. It directs the Secretary of Health and Human Services to promote “the development of childhood vaccines that result in fewer and less serious adverse reactions.”⁵⁷ It establishes a National Vaccine ****1080** Program, whose Director is “to achieve optimal prevention of human infectious diseases ... and to achieve optimal prevention against ***239** adverse reactions.”⁵⁸ The Program is to set priorities for federal vaccine research, and to coordinate federal vaccine safety and efficacy testing.⁵⁹ The Act requires vaccine manufacturers and healthcare providers to report adverse side effects,⁶⁰ and provides for monitoring of vaccine safety through a collaboration with eight managed-care organizations.⁶¹ And of course whenever the FDA concludes that a vaccine is unsafe, it may revoke the license.⁶²

These provisions for federal agency improvement of vaccine design, and for federally prescribed compensation, once again suggest that § 300aa–22(b)(1)’s silence regarding design-defect liability was not inadvertent. It instead reflects a sensible choice to leave complex epidemiological judgments about vaccine design to the FDA and the National Vaccine Program rather than juries.⁶³

And finally, the Act’s structural *quid pro quo* leads to the same conclusion: The vaccine manufacturers fund from their sales an informal, efficient compensation program for vaccine injuries;⁶⁴ in exchange they avoid costly tort litigation and ***240** the occasional disproportionate jury verdict.⁶⁵ But design-defect allegations are the most speculative and difficult type of products-liability claim to litigate. Taxing vaccine manufacturers’ product to fund the compensation program, while leaving their liability for design defect virtually unaltered, would hardly coax manufacturers back into the market.

The dissent believes the Act’s mandates are irrelevant because they do not spur innovation in precisely the same way as state-law tort systems.⁶⁶ That is a novel suggestion. Although we previously have expressed doubt that Congress would quietly pre-empt products-liability claims without providing a federal substitute, see *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486–488, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996) (plurality opinion), we have never suggested we would be skeptical of pre-emption unless the congressional substitute operated like the tort system. We decline to adopt that stance today. The dissent’s belief that the FDA and the National Vaccine Program cannot alone spur adequate vaccine innovation is probably questionable, but surely beside the point.

****1081 IV**

Since our interpretation of § 300aa–22(b)(1) is the only interpretation supported by the text and structure of the NCVIA, even those of us who believe legislative history is a legitimate tool of statutory interpretation have no need to resort to it. In any case, the dissent’s contention that it would contradict our conclusion is mistaken.

The dissent’s legislative history relies on the following syllogism: A 1986 House Committee Report states that § 300aa–22(b)(1) “sets forth the principle contained in Comment k of Section 402A of the Restatement of Torts (Second),”⁶⁷ in 1986 comment *k* was “commonly understood” to require a ***241** case-specific showing that “no feasible alternative design” existed; Congress therefore must have intended § 300aa–22(b)(1) to require that showing.⁶⁸ The syllogism ignores unhelpful statements in the 1986 Report and relies upon a term of art that did not exist in 1986.

Immediately after the language quoted by the dissent, the 1986 Report notes the difficulty a jury would have in faithfully assessing whether a feasible alternative design exists when an innocent “young child, often badly injured or killed,” is the plaintiff.⁶⁹ Eliminating that concern is why the 1986 Report’s authors “strongly believ[e] that Comment k is appropriate and necessary as the policy for civil actions seeking damages in tort.”⁷⁰ The dissent’s interpretation of § 300aa–22(b)(1) and its version of “the principle in Comment K” adopted by the 1986 Report leave that concern unaddressed.

The dissent buries another unfavorable piece of legislative history. Because the 1986 Report believes that § 300aa–22(b)(1) should incorporate “the principle in Comment K” and because the Act provides a generous no-fault compensation scheme, the 1986 Report counsels injured parties who cannot prove a manufacturing or labeling defect to “pursue recompense in the compensation system, not the tort system.”⁷¹ That counsel echoes our interpretation of § 300aa–22(b)(1).

Not to worry, the dissent retorts, a Committee Report by a later Congress “authoritative[ly]” vindicates its ***242** interpretation.⁷² Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation. See *Jones v. United States*, 526 U.S. 227, 238, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999); *United States v. Mine Workers*, 330 U.S. 258, 281–282, 67 S.Ct.

677, 91 L.Ed. 884 (1947). Real (pre-enactment) legislative history is persuasive to some because it is thought to shed light on what legislators understood an ambiguous statutory text to mean when they voted to enact ****1082** it into law. See *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 568, 125 S.Ct. 2611, 162 L.Ed.2d 502 (2005). But post-enactment legislative history by definition “could have had no effect on the congressional vote,” *District of Columbia v. Heller*, 554 U.S. 570, 605, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008).

It does not matter that § 300aa–22(b)(1) did not take effect until the later Congress passed the excise tax that funds the compensation scheme,⁷³ and that the supposedly dispositive Committee Report is attached to that funding legislation.⁷⁴ Those who voted on the relevant statutory language were not necessarily the same persons who crafted the statements in the later Committee Report; or if they were did not necessarily have the same views at that earlier time; and no one voting at that earlier time could possibly have been informed by those later statements. Permitting the legislative history of subsequent funding legislation to alter the meaning of a statute would set a dangerous precedent. Many provisions of federal law depend on appropriations or include sunset provisions;⁷⁵ they cannot be made the device for unenacted statutory revision.

***243** That brings us to the second flaw in the dissent’s syllogism: Comment *k* did not have a “commonly understood meaning”⁷⁶ in the mid-1980’s. Some courts thought it required a case-specific showing that a product was “unavoidably unsafe”; many others thought it categorically exempted certain types of products from strict liability.⁷⁷ When “all (or nearly all) of the” relevant judicial decisions have given a term or concept a consistent gloss, we presume Congress intended the term or concept to have that meaning when it incorporated it into a later-enacted statute. *Merck & Co. v. Reynolds*, 559 U.S. 633, 659, 130 S.Ct. 1784, 1802, 176 L.Ed.2d 582 (2010) (SCALIA, J., concurring in part and concurring in judgment). The consistent gloss represents the public understanding of the term. We cannot make the same assumption when widespread disagreement exists among the lower courts. We must make do with giving the term its most plausible meaning using the traditional tools of statutory interpretation. That is what we have done today.

* * *

For the foregoing reasons, we hold that the National Childhood Vaccine Injury Act pre-empts all design-defect claims against vaccine manufacturers brought by plaintiffs who seek compensation for injury or death caused by vaccine side effects. The judgment of the Court of Appeals is affirmed.

It is so ordered.

Justice KAGAN took no part in the consideration or decision of this case.

Justice BREYER, concurring.

I join the Court's judgment and opinion. In my view, the Court has the better of the purely textual argument. But the textual question considered alone is a close one. Hence, *244 like the dissent, I would look to **1083 other sources, including legislative history, statutory purpose, and the views of the federal administrative agency, here supported by expert medical opinion. Unlike the dissent, however, I believe these other sources reinforce the Court's conclusion.

I

House Committee Report No. 99-908 contains an "authoritative" account of Congress' intent in drafting the pre-emption clause of the National Childhood Vaccine Injury Act of 1986 (NCVIA or Act). See *Garcia v. United States*, 469 U.S. 70, 76, 105 S.Ct. 479, 83 L.Ed.2d 472 (1984) ("[T]he authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill"). That Report says that "if" vaccine-injured persons

"cannot demonstrate under applicable law either that a vaccine was improperly prepared or that it was accompanied by improper directions or inadequate warnings [they] should pursue recompense in the compensation system, not the tort system." H.R.Rep. No. 99-908, pt. 1, p. 26 (1986), U.S.Code Cong. & Admin.News, 1986, pp. 6344, 6365 (hereinafter H.R. Rep. or Report).

The Report lists two specific kinds of tort suits that the

clause does not pre-empt (suits based on improper manufacturing and improper labeling), while going on to state that compensation for other tort claims, e.g., design-defect claims, lies in "the [NCVIA's no-fault] compensation system, not the tort system." *Ibid.*

The strongest contrary argument rests upon the Report's earlier description of the statute as "set[ting] forth the principle contained in Comment k" (of the Restatement Second of Torts' *strict liability* section, 402A) that "a vaccine manufacturer should not be liable for injuries or deaths resulting from *unavoidable* side effects." *Id.*, at 25, U.S.Code Cong. & Admin.News, 1986, at p. 6364 (emphasis added). But the appearance of the word "unavoidable" in this last-mentioned sentence cannot provide petitioners with much help. That is because nothing in the Report suggests that *245 the statute means the word "unavoidable" to summon up an otherwise unmentioned third exception encompassing suits based on design defects. Nor can the Report's reference to comment *k* fill the gap. The Report itself refers, not to comment *k*'s details, but only to its "*principle*," namely, that vaccine manufacturers should *not* be held liable for unavoidable injuries. It says nothing at all about who—judge, jury, or federal safety agency—should decide whether a safer vaccine could have been designed. Indeed, at the time Congress wrote this Report, different state courts had come to very different conclusions about that matter. See Cupp, *Rethinking Conscious Design Liability for Prescription Drugs: The Restatement (Third) Standard Versus a Negligence Approach*, 63 Geo. Wash. L.Rev. 76, 79 (1994-1995) ("[C]ourts [had] adopted a broad range of conflicting interpretations" of comment *k*). Neither the word "unavoidable" nor the phrase "the principle of Comment *k*" tells us which courts' view Congress intended to adopt. Silence cannot tell us to follow those States where juries decided the design-defect question.

II

The legislative history describes the statute more generally as trying to protect the lives of children, in part by ending "the instability and unpredictability of the childhood vaccine market." H.R. Rep., at 7, U.S.Code Cong. & Admin.News, 1986, at p. 6348; see *ante*, at 1072 – 1073. As the Report makes clear, routine vaccination is "one of the most spectacularly effective public health initiatives this country has ever undertaken." H.R. Rep., at **1084 4, U.S.Code Cong. & Admin.News, 1986, at p. 6345. Before

the development of routine whooping cough vaccination, for example, “nearly all children” in the United States caught the disease and more than 4,000 people died annually, most of them infants. U.S. Dept. of Health and Human Services, Centers for Disease Control and Prevention, What Would Happen if We Stopped Vaccinations? <http://www.cdc.gov/vaccines/vac-gen/whatisstop.htm> (all Internet materials as visited Feb. 17, 2011, and available in Clerk of Court’s case file); *246 Preventing Tetanus, Diphtheria, and Pertussis Among Adolescents: Use of Tetanus Toxoid, Reduced Diphtheria Toxoid and Acellular Pertussis Vaccines, 55 Morbidity and Mortality Weekly Report, No. RR-3, p. 2 (Mar. 24, 2006) (hereinafter Preventing Tetanus) (statistics for 1934–1943), <http://www.cdc.gov/mmwr/PDF/rr/rr5503.pdf>; U.S. Dept. of Health and Human Services, Centers for Disease Control and Prevention, Epidemiology and Prevention of Vaccine-Preventable Diseases 200 (11th ed. rev. May 2009). After vaccination became common, the number of annual cases of whooping cough declined from over 200,000 to about 2,300, and the number of deaths from about 4,000 to about 12. Preventing Tetanus 2; House Committee on Energy and Commerce, Childhood Immunizations, 99th Cong., 2d Sess., 10 (Comm. Print 1986) (hereinafter Childhood Immunizations).

But these gains are fragile; “[t]he causative agents for these preventable childhood illnesses are ever present in the environment, waiting for the opportunity to attack the unprotected individual.” Hearing on S. 827 before the Senate Committee on Labor and Human Resources, 99th Cong., 1st Sess., pt. 2, pp. 20–21 (1985) (hereinafter Hearings) (testimony of the American Academy of Pediatrics); see California Dept. of Public Health, Pertussis Report (Jan. 7, 2011), www.cdph.ca.gov/programs/immunize/Documents/PertussisReport2011-01-07.pdf (In 2010, 8,383 people in California caught whooping cough, and 10 infants died). Even a brief period when vaccination programs are disrupted can lead to children’s deaths. Hearings 20–21; see Gangarosa et al., Impact of Anti-Vaccine Movements on Pertussis Control: The Untold Story, 351 Lancet 356–361 (Jan. 31, 1998) (when vaccination programs are disrupted, the number of cases of whooping cough skyrockets, increasing by orders of magnitude).

In considering the NCVIA, Congress found that a sharp increase in tort suits brought against whooping cough and other vaccine manufacturers between 1980 and 1985 had *247 “prompted manufacturers to question their continued participation in the vaccine market.” H.R. Rep., at 7, U.S.Code Cong. & Admin.News, 1986, at p. 6345; Childhood Immunizations 85–86. Indeed, two whooping cough vaccine manufacturers withdrew from the market,

and other vaccine manufacturers, “fac[ing] great difficulty in obtaining [products liability] insurance,” told Congress that they were considering “a similar course of action.” H.R. Rep., at 6, U.S.Code Cong. & Admin.News, 1986, at p. 6345; Childhood Immunizations 68–70. The Committee Report explains that, since there were only one or two manufacturers of many childhood vaccines, “[t]he loss of any of the existing manufacturers of childhood vaccines ... could create a genuine public health hazard”; it “would present the very real possibility of vaccine shortages, and, in turn, increasing numbers of unimmunized children, and, perhaps, a resurgence of preventable diseases.” H.R. Rep., at 5, U.S.Code Cong. & Admin.News, 1986, at p. 6346. At the same time, Congress sought to provide generous compensation to those whom vaccines injured—as determined by an expert compensation program. *Id.*, at **1085 5, 24, U.S.Code Cong. & Admin.News, 1986, at pp. 6346, 6365.

Given these broad general purposes, to read the pre-emption clause as preserving design-defect suits seems anomalous. The Department of Health and Human Services (HHS) decides when a vaccine is safe enough to be licensed and which licensed vaccines, with which associated injuries, should be placed on the Vaccine Injury Table. 42 U.S.C. § 300aa-14; *ante*, at 1073 – 1074; A Comprehensive Review of Federal Vaccine Safety Programs and Public Health Activities 13–15, 32–34 (Dec.2008), <http://www.hhs.gov/nvpo/nvac/documents/vaccine-safety-review.pdf>. A special master in the Act’s compensation program determines whether someone has suffered an injury listed on the Injury Table and, if not, whether the vaccine nonetheless caused the injury. *Ante*, at 1073 – 1074; § 300aa-13. To allow a jury in effect to second-guess those determinations is to substitute less expert for more expert judgment, thereby threatening manufacturers with liability (indeed, strict liability) in instances where any conflict between experts and nonexperts is likely *248 to be particularly severe—instances where Congress intended the contrary. That is because potential tort plaintiffs are unlikely to bring suit unless the specialized compensation program has determined that they are not entitled to compensation (say, because it concludes that the vaccine did not cause the injury). Brief for United States as *Amicus Curiae* 28 (“99.8% of successful Compensation Program claimants have accepted their awards, foregoing any tort remedies against vaccine manufacturers”). It is difficult to reconcile these potential conflicts and the resulting tort liabilities with a statute that seeks to diminish manufacturers’ products liability while simultaneously augmenting the role of experts in making compensation decisions.

III

The United States, reflecting the views of HHS, urges the Court to read the Act as I and the majority would do. It notes that the compensation program's listed vaccines have survived rigorous administrative safety review. It says that to read the Act as permitting design-defect lawsuits could lead to a recurrence of "exactly the crisis that precipitated the Act," namely, withdrawals of vaccines or vaccine manufacturers from the market, "disserv[ing] the Act's central purposes," and hampering the ability of the agency's "expert regulators, in conjunction with the medical community, [to] control the availability and withdrawal of a given vaccine." Brief for United States as *Amicus Curiae* 30, 31.

The United States is supported in this claim by leading public health organizations, including the American Academy of Pediatrics, the American Academy of Family Physicians, the American College of Preventive Medicine, the American Public Health Association, the American Medical Association, the March of Dimes Foundation, the Pediatric Infectious Diseases Society, and 15 other similar organizations. Brief for American Academy of Pediatrics et al. as *Amici* *249 *Curiae* (hereinafter AAP Brief). The American Academy of Pediatrics has also supported the retention of vaccine manufacturer tort liability (provided that federal law structured state-law liability conditions in ways that would take proper account of federal agency views about safety). Hearings 14–15. But it nonetheless tells us here, in respect to the specific question before us, that the petitioners' interpretation of the Act would undermine its basic purposes by threatening to "halt the future production and development of childhood vaccines in this country," *i.e.*, by "threaten[ing] a resurgence of the very problems which ... **1086 caused Congress to intervene" by enacting this statute. AAP Brief 24 (internal quotation marks omitted).

I would give significant weight to the views of HHS. The law charges HHS with responsibility for overseeing vaccine production and safety. It is "likely to have a thorough understanding" of the complicated and technical subject matter of immunization policy, and it is comparatively more "qualified to comprehend the likely impact of state requirements." *Geier v. American Honda Motor Co.*, 529 U.S. 861, 883, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000) (internal quotation marks omitted); see *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 506, 116 S.Ct. 2240,

135 L.Ed.2d 700 (1996) (BREYER, J., concurring in part and concurring in judgment) (the agency is in the best position to determine "whether (or the extent to which) state requirements may interfere with federal objectives"). HHS' position is particularly persuasive here because expert public health organizations support its views and the matter concerns a medical and scientific question of great importance: how best to save the lives of children. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed. 124 (1944).

In sum, congressional reports and history, the statute's basic purpose as revealed by that history, and the views of the expert agency along with those of relevant medical and scientific associations, all support the Court's conclusions. I consequently agree with the Court.

Justice SOTOMAYOR, with whom Justice GINSBURG joins, dissenting.

***250** Vaccine manufacturers have long been subject to a legal duty, rooted in basic principles of products liability law, to improve the designs of their vaccines in light of advances in science and technology. Until today, that duty was enforceable through a traditional state-law tort action for defective design. In holding that § 22(b)(1) of the National Childhood Vaccine Injury Act of 1986 (Vaccine Act or Act), 42 U.S.C. § 300aa–22(b)(1), pre-empts all design defect claims for injuries stemming from vaccines covered under the Act, the Court imposes its own bare policy preference over the considered judgment of Congress. In doing so, the Court excises 13 words from the statutory text, misconstrues the Act's legislative history, and disturbs the careful balance Congress struck between compensating vaccine-injured children and stabilizing the childhood vaccine market. Its decision leaves a regulatory vacuum in which no one ensures that vaccine manufacturers adequately take account of scientific and technological advancements when designing or distributing their products. Because nothing in the text, structure, or legislative history of the Vaccine Act remotely suggests that Congress intended such a result, I respectfully dissent.

A

Section 22 of the Vaccine Act provides “[s]tandards of responsibility” to govern civil actions against vaccine manufacturers. 42 U.S.C. § 300aa–22. Section 22(a) sets forth the “[g]eneral rule” that “State law shall apply to a civil action brought for damages for a vaccine-related injury or death.” § 300aa–22(a). This baseline rule that state law applies is subject to three narrow exceptions, one of which, § 22(b)(1), is at issue in this case. Section 22(b)(1) provides:

251** “No vaccine manufacturer shall be liable in a civil action for damages arising from a vaccine-related injury or death associated with the administration of a vaccine after October 1, 1988, if the injury or death resulted from side effects *1087** that were unavoidable even though the vaccine was properly prepared and was accompanied by proper directions and warnings.” § 300aa–22(b)(1).

The provision contains two key clauses: “if the injury or death resulted from side effects that were unavoidable” (the “if” clause), and “even though the vaccine was properly prepared and was accompanied by proper directions and warnings” (the “even though” clause).

Blackletter products liability law generally recognizes three different types of product defects: design defects, manufacturing defects, and labeling defects (e.g., failure to warn).¹ The reference in the “even though” clause to a “properly prepared” vaccine “accompanied by proper directions and warnings” is an obvious reference to two such defects—manufacturing and labeling defects. The plain terms of the “even though” clause thus indicate that § 22(b)(1) applies only where neither kind of defect is present. Because § 22(b)(1) is invoked by vaccine manufacturers as a defense to tort liability, it follows that the “even though” clause requires a vaccine manufacturer in each civil action to demonstrate that its vaccine is free from manufacturing and labeling defects to fall within the liability exemption of § 22(b)(1).²

Given that the “even though” clause requires the absence of manufacturing and labeling defects, the “if” clause’s reference to “side effects that were unavoidable” must refer to ***252** side effects caused by something other than manufacturing and labeling defects. The only remaining kind of product defect recognized under traditional products liability law is a design defect. Thus, “side effects that were unavoidable” must refer to side effects caused by

a vaccine’s *design* that were “unavoidable.” Because § 22(b)(1) uses the conditional term “if,” moreover, the text plainly implies that some side effects stemming from a vaccine’s design are “unavoidable,” while others are avoidable. See Webster’s Third New International Dictionary 1124 (2002) (“if” means “in the event that,” “so long as,” or “on condition that”). Accordingly, because the “if” clause (like the “even though” clause) sets forth a condition to invoke § 22(b)(1)’s defense to tort liability, Congress must also have intended a vaccine manufacturer to demonstrate in each civil action that the particular side effects of a vaccine’s design were “unavoidable.”

Congress’ use of conditional “if” clauses in two other provisions of the Vaccine Act supports the conclusion that § 22(b)(1) requires an inquiry in each case in which a manufacturer seeks to invoke the provision’s exception to state tort liability. In § 22(b)(2), Congress created a presumption that, for purposes of § 22(b)(1), “a vaccine shall be presumed to be accompanied by proper directions and warnings if the vaccine manufacturer shows that it complied in all material respects with” federal labeling requirements. 42 U.S.C. § 300aa–22(b)(2). Similarly, in § 23(d)(2), Congress created an exemption from punitive damages “[i]f ... the manufacturer shows that it complied, in all material respects,” with applicable federal laws, unless it engages in “fraud,” “intentional and wrongful withholding of information” from federal regulators, or “other criminal or illegal activity.” § 300aa–23(d)(2). It ****1088** would be highly anomalous for Congress to use a ***253** conditional “if” clause in §§ 22(b)(2) and 23(d)(2) to require a specific inquiry in each case while using the same conditional “if” clause in § 22(b)(1) to denote a categorical exemption from liability. Cf. *Erlenbaugh v. United States*, 409 U.S. 239, 243, 93 S.Ct. 477, 34 L.Ed.2d 446 (1972) (“[A] legislative body generally uses a particular word with a consistent meaning in a given context”).

Indeed, when Congress intends to pre-empt design defect claims categorically, it does so using categorical (e.g., “all”) and/or declarative language (e.g., “shall”), rather than a conditional term (“if”). For example, in a related context, Congress has authorized the Secretary of Health and Human Services to designate a vaccine designed to prevent a pandemic or epidemic as a “covered countermeasure.” 42 U.S.C. §§ 247d–6d(b), (i)(1), (i)(7)(A)(i). With respect to such “covered countermeasure[s],” Congress provided that subject to certain exceptions, “a covered person *shall* be immune from suit and liability under Federal and State law with respect to *all* claims for loss caused by, arising out of, relating to, or resulting from the administration to or the use by an individual of a covered countermeasure,” § 247d–6d(a)(1) (emphasis added), including specifically claims relating to “the design” of the countermeasure, §

247d–6d(a)(2)(B).

The plain text and structure of the Vaccine Act thus compel the conclusion that § 22(b)(1) pre-empts some—but not all—design defect claims. Contrary to the majority’s and respondent’s categorical reading, petitioners correctly contend that, where a plaintiff has proved that she has suffered an injury resulting from a side effect caused by a vaccine’s design, a vaccine manufacturer may invoke § 22(b)(1)’s liability exemption only if it demonstrates that the side effect stemming from the particular vaccine’s design is “unavoidable,” and that the vaccine is otherwise free from manufacturing and labeling defects.³

*254 B

The legislative history confirms petitioners’ interpretation of § 22(b)(1) and sheds further light on its pre-emptive scope. The House Energy and Commerce Committee Report accompanying the Vaccine Act, H.R.Rep. No. 99–908, pt. 1 (1986), U.S.Code Cong. & Admin.News, 1986, p. 6344 (hereinafter 1986 Report), explains in relevant part:

*“Subsection (b)—Unavoidable Adverse Side Effects; Direct Warnings.—*This provision sets forth the principle contained in Comment k of Section 402A of the Restatement of Torts (Second) that a vaccine manufacturer should not be liable for injuries or deaths resulting from unavoidable side effects even though the vaccine was properly prepared and accompanied by proper directions and warnings.

“The Committee has set forth Comment K in this bill because it intends that the principle in Comment K regarding ‘unavoidably unsafe’ products, i.e., those products which in the present state of human skill and knowledge cannot be made safe, apply to the vaccines covered in the bill and that such products not be the subject of liability in the tort system.” *Id.*, at 25–26, U.S.Code Cong. & Admin.News, 1986, at pp. 6366–68.

****1089** The 1986 Report expressly adopts comment *k* of § 402A of the Restatement of Torts (Second) (1963–1964) (hereinafter Restatement), which provides that “unavoidably unsafe” products—*i.e.*, those that “in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use”—are not defective.⁴ As “[a]n ***255** outstanding example” of an “[u]navoidably unsafe” product, comment *k* cites “the vaccine for the Pasteur treatment of rabies, which not

uncommonly leads to very serious and damaging consequences when it is injected”; “[s]ince the disease itself invariably leads to a dreadful death, both the marketing and the use of the vaccine are fully justified, notwithstanding the unavoidable high degree of risk which they involve.” *Id.*, at 353. Comment *k* thus provides that “seller[s]” of “[u]navoidably unsafe” products are “not to be held to strict liability” provided that such products “are properly prepared and marketed, and proper warning is given.” *Ibid.*

As the 1986 Report explains, Congress intended that the “principle in Comment K regarding ‘unavoidably unsafe’ products” apply to the vaccines covered in the bill. 1986 Report 26, U.S.Code Cong. & Admin.News, 1986, at p. 6367. That intent, in turn, is manifested in the plain text of § 22(b)(1)—in particular, Congress’ use of the word “unavoidable,” as well as the phrases “properly prepared” and “accompanied by proper directions and warnings,” which were taken nearly verbatim from comment *k*. 42 U.S.C. § 300aa–22(b)(1); see Restatement 353–354 (“Such a[n] unavoidably unsafe] product, properly prepared, and accompanied ***256** by proper directions and warning, is not defective”). By the time of the Vaccine Act’s enactment in 1986, numerous state and federal courts had interpreted comment *k* to mean that a product is “unavoidably unsafe” when, given proper manufacture and labeling, no feasible alternative design would reduce the safety risks without compromising the product’s cost and utility.⁵ Given ****1090** Congress’ expressed intent ***257** to codify the “principle in Comment K,” 1986 Report 26, U.S.Code Cong. & Admin.News, 1986, at p. 6367, the term “unavoidable” in § 22(b)(1) is best understood as a term of art, which incorporates the commonly understood meaning of “unavoidably unsafe” products under comment *k* at the time of the Act’s enactment in 1986. See *McDermott Int’l, Inc. v. Wilander*, 498 U.S. 337, 342, 111 S.Ct. 807, 112 L.Ed.2d 866 (1991) (“[W]e assume that when a statute uses ... a term [of art], Congress intended it to have its established meaning”); *Morissette v. United States*, 342 U.S. 246, 263, 72 S.Ct. 240, 96 L.Ed. 288 (1952) (same).⁶ Similarly, courts applying comment *k* had long required manufacturers invoking the defense to demonstrate that their products were not only “unavoidably unsafe” but also properly manufactured and labeled.⁷ By requiring “prope[r] prepar[ation]” and “proper directions and warnings” in § 22(b)(1), Congress plainly intended to incorporate these additional comment *k* requirements.

The 1986 Report thus confirms petitioners’ interpretation of § 22(b)(1). The 1986 Report makes clear that “side effects that were unavoidable” in § 22(b)(1) refers to side effects stemming from a vaccine’s design that were “unavoidable.” By explaining what Congress meant by the

term ***258** “unavoidable,” moreover, the 1986 Report also confirms that whether a side ****1091** effect is “unavoidable” for purposes of § 22(b)(1) involves a specific inquiry in each case as to whether the vaccine “in the present state of human skill and knowledge cannot be made safe,” 1986 Report 26, U.S.Code Cong. & Admin.News, 1986, at p. 6367—*i.e.*, whether a feasible alternative design existed that would have eliminated the adverse side effects of the vaccine without compromising its cost and utility. See Brief for Kenneth W. Starr et al. as *Amici Curiae* 14–15 (“If a particular plaintiff could show that her injury at issue was avoidable ... through the use of a feasible alternative design for a specific vaccine, then she would satisfy the [plain] language of the statute, because she would have demonstrated that the side effects were *not* unavoidable”). Finally, the 1986 Report confirms that the “even though” clause is properly read to establish two additional prerequisites—proper manufacturing and proper labeling—to qualify for § 22(b)(1)’s liability exemption.⁸

259** In addition to the 1986 Report, one other piece of the Act’s legislative history provides further confirmation of the petitioners’ textual reading of § 22(b)(1). When Congress enacted the Vaccine Act in 1986, it did not initially include a source of payment for the no-fault compensation program the Act established. The Act thus “made the compensation program and accompanying tort reforms contingent on the enactment of a tax to provide funding for the compensation.” 1987 Report 690, U.S.Code Cong. & Admin.News, 1987, at p. 2313–690. In 1987, Congress passed legislation to fund the compensation program. The House Energy and Commerce Committee Report⁹ accompanying that legislation *1092** specifically stated that “the codification of Comment (k) of The Restatement (Second) of Torts was not intended to decide as a matter of law the circumstances in which a vaccine should be deemed unavoidably unsafe.” *Id.*, at 691, U.S.Code Cong. & Admin.News, 1987, at p. 2313–690. The Committee noted that “[a]n amendment to establish ... that a manufacturer’s failure to develop [a] safer vaccine was not grounds for liability was rejected by the Committee during ***260** its original consideration of the Act.” *Ibid.* In light of that rejection, the Committee emphasized that “there should be no misunderstanding that the Act undertook to decide as a matter of law whether vaccines were unavoidably unsafe or not,” and that “[t]his question is left to the courts to determine in accordance with applicable law.” *Ibid.*

To be sure, postenactment legislative history created by a subsequent Congress is ordinarily a hazardous basis from which to infer the intent of the enacting Congress. See *Sullivan v. Finkelstein*, 496 U.S. 617, 631–632, 110 S.Ct. 2658, 110 L.Ed.2d 563 (1990) (SCALIA, J., concurring in

part). But unlike ordinary postenactment legislative history, which is justifiably given little or no weight, the 1987 Report reflects the intent of the Congress that enacted the funding legislation necessary to give operative effect to the principal provisions of the Vaccine Act, including § 22(b)(1).¹⁰ Congress in 1987 had a number of options before it, including adopting an entirely different compensation scheme, as the Reagan administration was proposing;¹¹ establishing different limitations on tort liability, including eliminating design defect liability, as pharmaceutical industry leaders were advocating;¹² or not funding the ***261** compensation program at all, which would have effectively nullified the relevant portions of the Act. Because the tort reforms in the 1986 Act, including § 22(b)(1), had no operative legal effect unless and until Congress provided funding for the compensation program, the views of the Congress that enacted that funding legislation are a proper and, indeed, authoritative guide to the meaning of ****1093** § 22(b)(1). Those views, as reflected in the 1987 Report, provide unequivocal confirmation of petitioners’ reading of § 22(b)(1).

In sum, the text, structure, and legislative history of the Vaccine Act are fully consistent with petitioners’ reading of § 22(b)(1). Accordingly, I believe § 22(b)(1) exempts vaccine manufacturers from tort liability only upon a showing by the manufacturer in each case that the vaccine was properly manufactured and labeled, and that the side effects stemming from the vaccine’s design could not have been prevented by a feasible alternative design that would have eliminated the adverse side effects without compromising the vaccine’s cost and utility.

II

In contrast to the interpretation of § 22(b)(1) set forth above, the majority’s interpretation does considerable violence to the statutory text, misconstrues the legislative history, and draws the wrong conclusions from the structure of the Vaccine Act and the broader federal scheme regulating vaccines.

***262 A**

As a textual matter, the majority's interpretation of § 22(b)(1) is fundamentally flawed in three central respects. First, the majority's categorical reading rests on a faulty and untenable premise. Second, its reading functionally excises 13 words from the statutory text, including the key term "unavoidable." And third, the majority entirely ignores the Vaccine Act's default rule preserving state tort law.

To begin, the majority states that "[a] side effect of a vaccine could *always* have been avoidable by use of a differently designed vaccine not containing the harmful element." *Ante*, at 1075. From that premise, the majority concludes that the statute must mean that "the *design* of the vaccine is a given, not subject to question in the tort action," because construing the statute otherwise would render § 22(b)(1) a nullity. *Ibid.* A tort claimant, according to the majority, will always be able to point to a differently designed vaccine not containing the "harmful element," and if that were sufficient to show that a vaccine's side effects were not "unavoidable," the statute would pre-empt nothing.

The starting premise of the majority's interpretation, however, is fatally flawed. Although in the most literal sense, as the majority notes, a side effect can always be avoided "by use of a differently designed vaccine not containing the harmful element," *ibid.*, this interpretation of "unavoidable" would effectively read the term out of the statute, and Congress could not have intended that result. Indeed, § 22(b)(1) specifically uses the conditional phrase "if the injury or death resulted from side effects that were unavoidable," which plainly indicates that Congress contemplated that there would be some instances in which a vaccine's side effects are "unavoidable" and other instances in which they are not. See *supra*, at 1087. The majority's premise that a vaccine's side effects can always be "avoid[ed]" by use of a differently designed vaccine not containing the harmful element," *ante*, at 1075, entirely ignores the fact that removing the "harmful *263 element" will often result in a less effective (or entirely ineffective) vaccine. A vaccine, by its nature, ordinarily employs a killed or weakened form of a bacteria or virus to stimulate antibody production;¹³ removing that bacteria **1094 or virus might remove the "harmful element," but it would also necessarily render the vaccine inert. As explained above, the legislative history of the Vaccine Act and the cases interpreting comment *k* make clear that a side effect is "unavoidable" for purposes of § 22(b)(1) only where there is no feasible alternative design that would eliminate the side effect of the vaccine without compromising its cost and utility. See *supra*, at 1089. The majority's premise—that side effects stemming from a vaccine's design are always avoidable—is thus belied by the statutory text and

legislative history of § 22(b)(1). And because its starting premise is invalid, its conclusion—that the design of a vaccine is not subject to challenge in a tort action—is also necessarily invalid.

The majority's reading suffers from an even more fundamental defect. If Congress intended to exempt vaccine manufacturers categorically from all design defect liability, it more logically would have provided: "No vaccine manufacturer shall be liable in a civil action for damages arising from a vaccine-related injury or death associated with the administration of a vaccine after October 1, 1988, if the vaccine was properly prepared and was accompanied by proper directions and warnings." There would have been no need for Congress to include the additional 13 words "the injury or death resulted from side effects that were unavoidable even though." See *TRW Inc. v. Andrews*, 534 U.S. 19, 31, 122 S.Ct. 441, 151 L.Ed.2d 339 (2001) (noting "cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall *264 be superfluous, void, or insignificant" (internal quotation marks omitted)).

In *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 125 S.Ct. 1788, 161 L.Ed.2d 687 (2005), this Court considered an analogous situation where an express pre-emption provision stated that certain States "shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter." *Id.*, at 436, 125 S.Ct. 1788 (quoting 7 U.S.C. § 136v(b) (2000 ed.)). The *Bates* Court stated:

"Conspicuously absent from the submissions by [respondent] and the United States is any plausible alternative interpretation of 'in addition to or different from' that would give that phrase meaning. Instead, they appear to favor reading those words out of the statute, which would leave the following: 'Such State shall not impose or continue in effect any requirements for labeling or packaging.' This amputated version of [the statute] would no doubt have clearly and succinctly commanded the pre-emption of *all* state requirements concerning labeling. That Congress added the remainder of the provision is evidence of its intent to draw a distinction between state labeling requirements that are pre-empted and those that are not." 544 U.S., at 448–449, 125 S.Ct. 1788.

As with the statutory interpretation rejected by this Court in *Bates*, the majority's interpretation of § 22(b)(1) functionally excises 13 words out of the statute, including the key term "unavoidable." See *Duncan v. Walker*, 533 U.S. 167, 174, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001)

(“We are especially unwilling” to treat a statutory term as surplusage “when the term occupies so pivotal a place in the statutory scheme”). Although the resulting “amputated version” of the statutory provision ****1095** “would no doubt have clearly and succinctly commanded the pre-emption of *all* state” design defect claims, the fact “[t]hat ***265** Congress added the remainder of the provision” is strong evidence of its intent not to pre-empt design defect claims categorically. *Bates*, 544 U.S., at 449, 125 S.Ct. 1788; see also *American Home Prods. Corp. v. Ferrari*, 284 Ga. 384, 393, 668 S.E.2d 236, 242 (2008) (“ ‘If Congress had intended to deprive injured parties of a long available form of compensation, it surely would have expressed that intent more clearly’ ” (quoting *Bates*, 544 U.S., at 449, 125 S.Ct. 1788)), cert. pending, No. 08–1120.

Strikingly, the majority concedes that its interpretation renders 13 words of the statute entirely superfluous. See *ante*, at 1078 (“The intervening passage (‘the injury or death resulted from side effects that were unavoidable even though’) is unnecessary. True enough”). Nevertheless, the majority contends that “the rule against giving a portion of text an interpretation which renders it superfluous ... applies only if verbosity and prolixity can be eliminated by giving the offending passage, or the remainder of the text, a competing interpretation.” *Ibid.* According to the majority, petitioners’ reading of § 22(b)(1) renders the “even though” clause superfluous because, to reach petitioners’ desired outcome, “[i]t would suffice to say ‘if the injury or death resulted from side effects that were unavoidable’—full stop.” *Ante*, at 1078. As explained above, however, the “even though” clause establishes two additional prerequisites—proper manufacturing and proper labeling—to qualify for § 22(b)(1)’s exemption from liability. Contrary to the majority’s contention, then, the “even though” clause serves an important function by limiting the scope of the pre-emption afforded by the preceding “if” clause.¹⁴

***266** The majority’s only other textual argument is based on the *expressio unius, exclusio alterius* canon. According to the majority, because blackletter products liability law generally recognizes three different types of product defects, “[i]f all three were intended to be preserved, it would be strange [for Congress] to mention specifically only two”—namely, manufacturing and labeling defects in the “even though” clause—“and leave the third to implication.” *Ante*, at 1076. The majority’s argument, however, ignores that the default rule under the Vaccine Act is that state law is preserved. As explained above, § 22(a) expressly provides that the “[g]eneral rule” is that “State law shall apply to a civil action brought for damages for a vaccine-related injury or death.” 42 U.S.C. § 300aa–22(a). Because § 22(a) already preserves state-law design

defect claims (to the extent the exemption in § 22(b)(1) does not apply), there was no need for Congress separately and expressly ****1096** to preserve design defect claims in § 22(b)(1). Indeed, Congress’ principal aim in enacting § 22(b)(1) was not to preserve manufacturing and labeling claims (those, too, were already preserved by § 22(a)), but rather, to federalize comment *k*-type protection for “unavoidably unsafe” vaccines. The “even though” clause simply functions to limit the applicability of that defense. The lack of express language in § 22(b)(1) specifically preserving design defect claims thus cannot fairly be understood as impliedly (and categorically) pre-empting such traditional ***267** state tort claims, which had already been preserved by § 22(a).¹⁵

The majority also suggests that if Congress wished to preserve design defect claims, it could have simply provided that manufacturers would be liable for “defective manufacture, defective directions or warning, and defective design.” *Ante*, at 1076 (internal quotation marks omitted). Putting aside the fact that § 22(a) already preserves design defect claims (to the extent § 22(b)(1) does not apply), the majority’s proposed solution would not have fully effectuated Congress’ intent. As the legislative history makes clear, Congress used the term “unavoidable” to effectuate its intent that the “principle in Comment K regarding ‘unavoidably unsafe’ products ... apply to the vaccines covered in the bill.” 1986 Report 26, U.S. Code Cong. & Admin. News, 1986, at p. 6367; see also 1987 Report 691. At the time of the Vaccine Act’s enactment in 1986, at least one State had expressly rejected comment *k*,¹⁶ while many others had not addressed ***268** the applicability of comment *k* specifically to vaccines or applied comment *k* to civil actions proceeding on a theory other than strict liability (*e.g.*, negligence¹⁷). A statute that simply stated that vaccine manufacturers would be liable for “defective design” would be silent as to the availability of a comment *k*-type defense for “unavoidably unsafe” vaccines, and thus ****1097** would not have fully achieved Congress’ aim of extending greater liability protection to vaccine manufacturers by providing comment *k*-type protection in all civil actions as a matter of federal law.

B

The majority’s structural arguments fare no better than its textual ones. The principal thrust of the majority’s position is that, since nothing in the Vaccine Act or the FDA’s regulations governing vaccines expressly mentions design

defects, Congress must have intended to remove issues concerning the design of FDA-licensed vaccines from the tort system. *Ante*, at 1078 – 1079. The flaw in that reasoning, of course, is that the FDA’s silence on design defects existed long before the Vaccine Act was enacted. Indeed, the majority itself concedes that the “FDA has never even spelled out in regulations the criteria it uses to decide whether a vaccine is safe and effective for its intended use.”¹⁸ *Ibid*. And yet it is undisputed that prior to the Act, vaccine manufacturers *269 had long been subject to liability under state tort law for defective vaccine design. That the Vaccine Act did not itself set forth a comprehensive regulatory scheme with respect to design defects is thus best understood to mean not that Congress suddenly decided to change course *sub silentio* and preempt a longstanding, traditional category of state tort law, but rather, that Congress intended to leave the status quo alone (except, of course, with respect to those aspects of state tort law that the Act expressly altered). See 1987 Report 691 (“It is not the Committee’s intention to preclude court actions under applicable law. The Committee’s intent at the time of considering the Act ... was ... to leave otherwise applicable law unaffected, except as expressly altered by the Act”).

The majority also suggests that Congress necessarily intended to pre-empt design defect claims since the aim of such tort suits is to promote the development of improved designs and provide compensation for injured individuals, and the Vaccine Act “provides other means for achieving both effects”—most notably through the no-fault compensation program and the National Vaccine Program. *Ante*, at 1079 – 1080, and nn. 57–60 (citing 42 U.S.C. §§ 300aa–1, 300aa–2(a)(1)–(3), 300aa–3, 300aa–25(b), 300aa–27(a)(1)). But the majority’s position elides a significant difference between state tort law and the federal regulatory scheme. Although the Vaccine Act charges the Secretary of Health and Human Services with the obligation to “promote the development of childhood vaccines” and “make or assure improvements in ... vaccines, and research on vaccines,” § 300aa–27(a), neither the Act nor any other provision of federal law places a legal *duty* on vaccine manufacturers to improve the design of their vaccines to account for scientific and technological advances. Indeed, the FDA does not condition approval of a vaccine on it being the most optimally designed among reasonably available alternatives, nor does it (or any other federal entity) ensure that licensed vaccines keep pace with technological and scientific *270 advances.¹⁹ Rather, the function of ensuring that vaccines **1098 are optimally designed in light of existing science and technology has traditionally been left to the States through the imposition of damages for design defects. Cf. *Bates*, 544 U.S., at 451, 125 S.Ct. 1788

(“ ‘[T]he specter of damage actions may provide manufacturers with added dynamic incentives to continue to keep abreast of all possible injuries stemming from use of their product[s] so as to forestall such actions *271 through product improvement’ ”); *Wyeth v. Levine*, 555 U.S. 555, 578 – 579, 129 S.Ct. 1187, 1203, 173 L.Ed.2d 51 (2009) (noting that the FDA has “traditionally regarded state law as a complementary form of drug regulation” as “[s]tate tort suits uncover unknown drug hazards and provide incentives for drug manufacturers to disclose safety risks promptly”).²⁰ The importance of the States’ traditional regulatory role is only underscored by the unique features of the vaccine market, in which there are “only one or two manufacturers for a majority of the vaccines listed on the routine childhood immunization schedule.” Brief for Respondent 55. The normal competitive forces that spur innovation and improvements to existing product lines in other markets thus operate with less force in the vaccine market, particularly for vaccines that have already been released and marketed to the public. Absent a clear statutory mandate to the contrary, there is no reason to think that Congress intended in the vaccine context to eliminate the traditional incentive and deterrence functions served by state tort liability in favor of a federal regulatory scheme providing only **1099 carrots and no sticks.²¹ See *Levine*, 555 U.S., at 575, 129 S.Ct., at 1201 (“The *272 case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there is between them” (internal quotation marks and alteration omitted)).

III

In enacting the Vaccine Act, Congress established a carefully wrought federal scheme that balances the competing interests of vaccine-injured persons and vaccine manufacturers. As the legislative history indicates, the Act addressed “two overriding concerns”: “(a) the inadequacy—from both the perspective of vaccine-injured persons as well as vaccine manufacturers—of the current approach to compensating those who have been damaged by a vaccine; and (b) the instability and unpredictability of the childhood vaccine market.” 1986 Report 7, U.S.Code Cong. & Admin.News, 1986, at p. 6348. When viewed in the context of the Vaccine Act as a whole, § 22(b)(1) is just one part of a broader statutory scheme that balances the need for compensating vaccine-injured children with added

liability protections for vaccine manufacturers to ensure a stable childhood vaccine market.

The principal innovation of the Act was the creation of the no-fault compensation program—a scheme funded entirely through an excise tax on vaccines.²² Through that program, *273 Congress relieved vaccine manufacturers of the burden of compensating victims of vaccine-related injuries in the vast majority of cases²³—an extremely significant economic benefit that “functionally creat[es] a valuable insurance policy for vaccine-related injuries.” Reply Brief for Petitioners 10. The structure and legislative history, moreover, point **1100 clearly to Congress’ intention to divert would-be tort claimants into the compensation program, rather than eliminate a longstanding category of traditional tort claims. See 1986 Report 13, U.S. Code Cong. & Admin. News, 1986, at p. 6354 (“The Committee anticipates that the speed of the compensation program, the low transaction costs of the system, the no-fault nature of the required findings, and the relative certainty and generosity of the system’s awards will divert a significant number of potential plaintiffs from litigation”). Indeed, although complete pre-emption of tort claims would have eliminated the principal source of the “unpredictability” in the vaccine market, Congress specifically chose *not* to pre-empt state tort claims categorically. See 42 U.S.C. § 300aa–22(a) (providing as a “[g]eneral rule” that “State law shall apply to a civil action brought for damages for a vaccine-related injury or death”). That decision reflects Congress’ recognition that court actions are essential because they provide injured persons with significant procedural tools—including, most importantly, civil discovery—that are not available in administrative proceedings under the compensation program. See §§ 300aa–12(d)(2)(E), (d)(3). *274 Congress thus clearly believed there was still an important function to be played by state tort law.

Instead of eliminating design defect liability entirely, Congress enacted numerous measures to reduce manufacturers’ liability exposure, including a limited regulatory compliance presumption of adequate warnings, see § 300aa–22(b)(2), elimination of claims based on failure to provide direct warnings to patients, § 300aa–22(c), a heightened standard for punitive damages, § 300aa–23(d)(2), and, of course, immunity from damages

for “unavoidable” side effects, § 300aa–22(b)(1). Considered in light of the Vaccine Act as a whole, § 22(b)(1)’s exemption from liability for unavoidably unsafe vaccines is just one part of a broader statutory scheme that reflects Congress’ careful balance between providing adequate compensation for vaccine-injured children and conferring substantial benefits on vaccine manufacturers to ensure a stable and predictable childhood vaccine supply.

The majority’s decision today disturbs that careful balance based on a bare policy preference that it is better “to leave complex epidemiological judgments about vaccine design to the FDA and the National Vaccine Program rather than juries.” *Ante*, at 1080.²⁴ To be sure, reasonable minds can disagree about the wisdom of having juries weigh the relative costs and benefits of a particular vaccine design. But whatever the merits of the majority’s policy preference, the decision to bar all design defect claims against vaccine manufacturers is one that Congress must make, not this Court.²⁵ By *275 construing **1101 § 22(b)(1) to pre-empt all design defect claims against vaccine manufacturers for covered vaccines, the majority’s decision leaves a regulatory vacuum in which no one—neither the FDA nor any other federal agency, nor state and federal juries—ensures that vaccine manufacturers adequately take account of scientific and technological advancements. This concern is especially acute with respect to vaccines that have already been released and marketed to *276 the public. Manufacturers, given the lack of robust competition in the vaccine market, will often have little or no incentive to improve the designs of vaccines that are already generating significant profit margins. Nothing in the text, structure, or legislative history remotely suggests that Congress intended that result.

I respectfully dissent.

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

¹ 42 U.S.C. § 300aa–22(b)(1).

- 2 See P. Hutt, R. Merrill, & L. Grossman, Food and Drug Law 912–913, 1458 (3d ed.2007).
- 3 Centers for Disease Control, Achievements in Public Health, 1900–1999: Impact of Vaccines Universally Recommended for Children, 48 Morbidity and Mortality Weekly Report 243, 247 (Apr. 2, 1999).
- 4 See Mortimer, Immunization Against Infectious Disease, 200 Science 902, 906 (1978).
- 5 See National Vaccine Advisory Committee, A Comprehensive Review of Federal Vaccine Safety Programs and Public Health Activities 2–3 (Dec.2008) (hereinafter NVAC), <http://www.hhs.gov/nvpo/nvac/documents/vaccine-safety-review.pdf> (as visited Feb. 18, 2011, and available in Clerk of Court’s case file).
- 6 See Sing & Willian, Supplying Vaccines: An Overview of the Market and Regulatory Context, in Supplying Vaccines: An Economic Analysis of Critical Issues 45, 51–52 (M. Pauly, C. Robinson, S. Sepe, M. Sing, & M. Willian eds.1996).
- 7 See *id.*, at 52.
- 8 See Centers for Disease Control, Diphtheria–Tetanus–Pertussis Vaccine Shortage, 33 Morbidity and Mortality Weekly Report 695–696 (Dec. 14, 1984).
- 9 See Apolinsky & Van Detta, Rethinking Liability for Vaccine Injury, 19 Cornell J.L. & Pub. Pol’y 537, 550–551 (2010); T. Burke, Lawyers, Lawsuits, and Legal Rights: The Battle Over Litigation in American Society 146 (2002).
- 10 Mortimer, *supra*, at 906.
- 11 See Hagan, Vaccine Compensation Schemes, 45 Food Drug Cosm. L.J. 477, 479 (5th ed. 1990).
- 12 See R. Merrill, Introduction to Epidemiology 65–68 (2010).
- 13 See 42 U.S.C. § 300aa–11(a)(1).
- 14 See § 300aa–12(d)(3).
- 15 See § 300aa–12(e), (g).
- 16 See § 300aa–21(a).
- 17 See § 300aa–14(a); 42 CFR § 100.3 (2009) (current Vaccine Injury Table).
- 18 See 42 U.S.C. §§ 300aa–11(c)(1), 300aa–13(a)(1)(A).
- 19 See § 300aa–13(a)(1)(B).
- 20 See § 300aa–11(c)(1)(C)(ii).
- 21 See § 300aa–15(a).
- 22 See § 300aa–15(e).
- 23 See § 300aa–15(i)(2); 26 U.S.C. §§ 4131, 9510.

24 See 42 U.S.C. § 300aa-11(a)(2).

25 See § 300aa-22(b)(2), (c). The immunity does not apply if the plaintiff establishes by clear and convincing evidence that the manufacturer was negligent, or was guilty of fraud, intentional and wrongful withholding of information, or other unlawful activity. See §§ 300aa-22(b)(2), 300aa-23(d)(2).

26 § 300aa-23(d)(2).

27 § 300aa-22(b)(1).

28 See *Bruesewitz v. Secretary of Dept. of Health and Human Servs.*, No. 95-0266V, 2002 WL 31965744, *3 (Ct.Cl., Dec. 20, 2002).

29 561 F.3d 233, 236 (C.A.3 2009).

30 See *Bruesewitz*, *supra*, at *1.

31 See 561 F.3d, at 237. The complaint also made claims based upon failure to warn and defective manufacture. These are no longer at issue.

32 See *id.*, at 237-238.

33 *Id.*, at 235.

34 42 U.S.C. § 300aa-22(b)(1).

35 The dissent advocates for another possibility: “[A] side effect is ‘unavoidable’ ... where there is no feasible alternative design that would eliminate the side effect of the vaccine without compromising its cost and utility.” *Post*, at 1094 (opinion of SOTOMAYOR, J.). The dissent makes no effort to ground that position in the text of § 300aa-22(b)(1). We doubt that Congress would introduce such an amorphous test by implication when it otherwise micromanages vaccine manufacturers. See *infra*, at 1093. We have no idea how much more expensive an alternative design can be before it “compromis[es]” a vaccine’s cost or how much efficacy an alternative design can sacrifice to improve safety. Neither does the dissent. And neither will the judges who must rule on motions to dismiss, motions for summary judgment, and motions for judgment as a matter of law. Which means that the test would probably have no real-world effect.

36 W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* 695 (5th ed.1984); *Restatement (Third) of Torts* § 2 (1999).

37 *Post*, at 1087.

38 *Ibid.*

39 See Brief for Petitioners 29.

40 *Restatement* § 402A, at 347.

41 *Id.*, Comment *k*, at 353; petitioners cite, *inter alia*, *Kearl v. Lederle Labs.*, 172 Cal.App.3d 812, 828-830, 218 Cal.Rptr. 453, 463-464 (1985); *Belle Bonfils Mem. Blood Bank v. Hansen*, 665 P.2d 118, 122 (Colo.1983).

Though it is not pertinent to our analysis, we point out that a large number of courts disagreed with that reading of comment *k*, and took it to say that manufacturers did not face strict liability for side effects of properly manufactured prescription drugs that were accompanied by adequate warnings. See, e.g., *Brown v. Superior Court*, 227 Cal.Rptr. 768, 772-775 (Cal.App.1986) (officially republished), *aff’d* 44 Cal.3d 1049, 245 Cal.Rptr. 412, 751 P.2d 470 (1988); *McKee v. Moore*, 648 P.2d 21, 23 (Okla.1982); *Stone*

v. Smith, Kline & French Labs., 447 So.2d 1301, 1303–1304 (Ala.1984); *Lindsay v. Ortho Pharmaceutical Corp.*, 637 F.2d 87, 90–91 (C.A.2 1980) (applying N.Y. law); *Wolfgruber v. Upjohn Co.*, 72 App. Div.2d 59, 61, 423 N.Y.S.2d 95, 96 (1979); *Chambers v. G.D. Searle & Co.*, 441 F.Supp. 377, 380–381 (D.Md.1975); *Basko v. Sterling Drug, Inc.*, 416 F.2d 417, 425 (C.A.2 1969) (applying Conn. law).

42 See, e.g., *Johnson v. American Cyanamid Co.*, 239 Kan. 279, 285, 718 P.2d 1318, 1323 (1986); *Feldman v. Lederle Labs.*, 97 N.J. 429, 440, 446–447, 479 A.2d 374, 380, 383–384 (1984); *Belle Bonfils Mem. Blood Bank, supra*, at 121–123; *Cassisi v. Maytag Co.*, 396 So.2d 1140, 1144, n. 4, 1146 (Fla.App.1981); *Racer v. Utterman*, 629 S.W.2d 387, 393 (Mo.App.1981).

43 The dissent’s assertion that we treat “even though” as a synonym for “because” misses the subtle distinction between “because” and “despite.” See *post*, at 1095, n. 14. “Even though” is a close cousin of the latter. See Webster’s New International Dictionary 709, 2631 (2d ed.1957). The statement “the car accident was unavoidable despite his quick reflexes” indicates that quick reflexes could not avoid the accident, and leaves open two unstated possibilities: (1) that other, unstated means of avoiding the accident besides quick reflexes existed, but came up short as well; or (2) that quick reflexes were the only possible way to avoid the accident. Our interpretation of § 300aa–22(b)(1) explains why we think Congress meant the latter in this context. (Incidentally, the statement “the car accident was unavoidable because of his quick reflexes” makes no sense.)

44 See W. Follett, *Modern American Usage: A Guide* 61 (1966).

45 *Post*, at 1091, 1095.

46 *Post*, at 1087 – 1088.

47 The dissent responds that these “additional prerequisites” act “in a concessive, subordinating fashion,” *post*, at 1095, n. 14 (internal quotation marks and brackets omitted). But that is no more true of the dissent’s conjunctive interpretation of the present text than it is of *all* provisions that set forth additional requirements—meaning that we could eliminate “even though” from our English lexicon, its function being entirely performed by “and.” No, we think “even though” has a distinctive concessive, subordinating role to play.

48 Because the dissent has a superfluity problem of its own, its reliance on *Bates v. Dow Agrosiences LLC*, 544 U.S. 431, 125 S.Ct. 1788, 161 L.Ed.2d 687 (2005), is misplaced. See *id.*, at 449, 125 S.Ct. 1788 (adopting an interpretation that was “the only one that makes sense of each phrase” in the relevant statute).

49 That is true regardless of whether § 300aa–22(b)(1) incorporates comment *k*. See Restatement § 402A, Comment *k*, at 353, 354 (noting that “unavoidably unsafe products” are exempt from strict liability “with the qualification that they are properly prepared and marketed, and proper warning is given”).

50 See 42 U.S.C. § 262(a), (j); 21 CFR §§ 601.2(a), 314.105(b) (2010).

51 See § 601.12.

52 See §§ 211.1 *et seq.*, 600.10–600.15, 600.21–600.22, 820.1 *et seq.*

53 See §§ 211.46, 211.48.

54 See 42 U.S.C. § 300aa–22(b)(2).

55 Hutt, Merrill, & Grossman, *Food and Drug Law*, at 685, 891.

56 See Sing & Willian, *Supplying Vaccines*, at 66–67.

57 42 U.S.C. § 300aa–27(a)(1).

58 § 300aa–1.

59 See §§ 300aa–2(a)(1)–(3), 300aa–3.

60 See § 300aa–25(b).

61 See NVAC 18–19.

62 See 21 CFR § 601.5(b)(1)(vi) (2010).

63 The dissent quotes just part of this sentence, to make it appear that we believe complex epidemiological judgments ought to be assigned in that fashion. See *post*, at 1099 – 1100. We do not state our preference, but merely note that it is Congress’s expressed preference—and in order to preclude the argument that it is absurd to think Congress enacted such a thing, we assert that the choice is reasonable and express some of the reasons why. Leaving it to the jury may (or may not) be reasonable as well; we express no view.

64 See 42 U.S.C. § 300aa–15(i)(2); § 323(a), 100 Stat. 3784. The dissent’s unsupported speculation that demand in the vaccine market is inelastic, see *post*, at 1099, n. 22, sheds no light on whether Congress regarded the tax as a *quid pro quo*, most Members of Congress being neither professional economists nor law-and-economics scholars.

65 See 42 U.S.C. §§ 300aa–11(a)(2), 300aa–22.

66 See *post*, at 1097 – 1099.

67 H.R.Rep. No. 99–908, pt. 1, p. 25 (1986), U.S.Code Cong. & Admin.News, 1986, pp. 6344, 6366 (hereinafter 1986 Report).

68 *Post*, at 1089 – 1090.

69 1986 Report, at 26, U.S.Code Cong. & Admin.News, 1986, at p. 6367; see *ibid.* (“[E]ven if the defendant manufacturer may have made as safe a vaccine as anyone reasonably could expect, a court or jury undoubtedly will find it difficult to rule in favor of the ‘innocent’ manufacturer if the equally ‘innocent’ child has to bear the risk of loss with no other possibility of recompense”).

70 *Ibid.*

71 *Ibid.*

72 *Post*, at 1092 – 1093. This is a courageous adverb since we have previously held that the only authoritative source of statutory meaning is the text that has passed through the Article I process. See *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 568, 125 S.Ct. 2611, 162 L.Ed.2d 502 (2005).

73 § 323(a), 100 Stat. 3784.

74 H.R.Rep. No. 100–391, pt. 1, p. 701 (1987), U.S.Code Cong. & Admin.News, 1987, pp. 2313–1, 2313–375.

75 See, e.g., §§ 401, 403(a), 110 Stat. 3009–655 to 3009–656, 3009–659 to 3009–662, as amended, note following 8 U.S.C. § 1324a (2006 ed., Supp. III) (E–Verify program expires Sept. 30, 2012).

76 *Post*, at 1090.

77 See n. 39, *supra*; *post*, at 1089 – 1090, n. 5.

1 W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts 695 (5th ed.1984).

2 See *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984); *Brown v. Earthboard Sports USA, Inc.*, 481 F.3d 901, 912 (C.A.6 2007) (“[F]ederal preemption is an affirmative defense upon which the defendants bear the burden of proof” (quoting *Fifth Third Bank v. CSX Corp.*, 415 F.3d 741, 745 (C.A.7 2005))).

3 This leaves the question of what precisely § 22(b)(1) means by “unavoidable” side effects, which I address in the next section.

4 Comment *k* provides as follows:

“*Unavoidably unsafe products.* There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs. An outstanding example is the vaccine for the Pasteur treatment of rabies, which not uncommonly leads to very serious and damaging consequences when it is injected. Since the disease itself invariably leads to a dreadful death, both the marketing and the use of the vaccine are fully justified, notwithstanding the unavoidable high degree of risk which they involve. Such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it *unreasonably* dangerous. The same is true of many other drugs, vaccines, and the like, many of which for this very reason cannot legally be sold except to physicians, or under the prescription of a physician. It is also true in particular of many new or experimental drugs as to which, because of lack of time and opportunity for sufficient medical experience, there can be no assurance of safety, or perhaps even of purity of ingredients, but such experience as there is justifies the marketing and use of the drug notwithstanding a medically recognizable risk. The seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.” Restatement 353–354.

5 See, e.g., *Smith ex rel. Smith v. Wyeth Labs., Inc.*, No. Civ. A 84–2002, 1986 WL 720792, *5 (S.D.W.Va., Aug.21, 1986) (“[A] prescription drug is not ‘unavoidably unsafe’ when its dangers can be eliminated through design changes that do not unduly affect its cost or utility”); *Kearl v. Lederle Labs.*, 172 Cal.App.3d 812, 830, 218 Cal.Rptr. 453, 464 (1985) (“unavoidability” turns on “(i) whether the product was designed to minimize—to the extent scientifically knowable at the time it was distributed—the risk inherent in the product, and (ii) the availability ... of any alternative product that would have *as effectively* accomplished the *full intended purpose* of the subject product”), disapproved in part by *Brown v. Superior Ct.*, 44 Cal.3d 1049, 245 Cal.Rptr. 412, 751 P.2d 470 (1988); *Belle Bonfils Memorial Blood Bank v. Hansen*, 665 P.2d 118, 122 (Colo.1983) (“[A]pplicability of comment *k* ... depends upon the co-existence of several factors,” including that “the product’s benefits must not be achievable in another manner; and the risk must be unavoidable under the present state of knowledge”); see also 1 L. Frumer & M. Friedman, *Products Liability* §§ 8.07[1]–[2], pp. 8–277 to 8–278 (2010) (comment *k* applies “only to defects in design,” and there “must be no feasible alternative design which on balance accomplishes the subject product’s purpose with a lesser risk” (internal quotation marks omitted)). To be sure, a number of courts at the time of the Vaccine Act’s enactment had interpreted comment *k* to preclude design defect claims categorically for certain kinds of products, see *Hill v. Searle Labs.*, 884 F.2d 1064, 1068 (C.A.8 1989) (collecting cases), but as indicated by the sources cited above, the courts that had construed comment *k* to apply on a case-specific basis generally agreed on the basic elements of what constituted an “unavoidably unsafe” product. See also n. 8, *infra*. The majority’s suggestion that “judges who must rule on motions to dismiss, motions for summary judgment, and motions for judgment as a matter of law” are incapable of adjudicating claims alleging “unavoidable” side effects, *ante*, at 1076, n. 35, is thus belied by the experience of the many courts that had adjudicated such claims for years by the time of the Vaccine Act’s enactment.

6 The majority refuses to recognize that “unavoidable” is a term of art derived from comment *k*, suggesting that “‘[u]navoidable’ is hardly a rarely used word.” *Ante*, at 1077. In fact, however, “unavoidable” is an extremely rare word in the relevant context. It appears exactly *once* (i.e., in § 300aa–22(b)(1)) in the entirety of Title 42 of the U.S.Code (“Public Health and Welfare”), which governs, *inter alia*, Social Security, see 42 U.S.C. § 301 *et seq.*, Medicare, see § 1395 *et seq.*, and several other of the Federal Government’s largest entitlement programs. The singular rarity in which Congress used the term supports the conclusion that “unavoidable” is a term of art.

7 See, e.g., *Brochu v. Ortho Pharmaceutical Corp.*, 642 F.2d 652, 657 (C.A.1 1981); *Needham v. White Labs., Inc.*, 639 F.2d 394, 402 (C.A.7 1981); *Reyes v. Wyeth Labs.*, 498 F.2d 1264, 1274–1275 (C.A.5 1974); *Davis v. Wyeth Labs.*, 399 F.2d 121, 127–129 (C.A.9 1968); *Feldman v. Lederle Labs.*, 97 N.J. 429, 448, 479 A.2d 374, 384 (1984); see also *Toner v. Lederle Labs.*, 112 Idaho 328, 336, 732 P.2d 297, 305 (1987).

8 Respondent suggests an alternative reading of the 1986 Report. According to respondent, “the principle in Comment K” is simply that of nonliability for “unavoidably unsafe” products, and thus Congress’ stated intent in the 1986 Report to apply the “principle in Comment K” to “the vaccines covered in the bill” means that Congress viewed the covered vaccines as a class to be “‘unavoidably unsafe.’” 1986 Report 25–26, U.S.Code Cong. & Admin.News, 1986, at pp. 6366–6367; Brief for Respondent 42. The concurrence makes a similar argument. *Ante*, at 1082 – 1083 (opinion of BREYER, J.). This interpretation finds some support in the 1986 Report, which states that “if [injured individuals] cannot demonstrate under applicable law either that a vaccine was improperly prepared or that it was accompanied by improper directions or inadequate warnings [they] should pursue recompense in the compensation system,

not the tort system.” 1986 Report 26, U.S.Code Cong. & Admin.News, 1986, at p. 6367. It also finds some support in the pre-Vaccine Act case law, which reflected considerable disagreement in the courts over “whether comment k applies to pharmaceutical products across the board or only on a case-by-case basis.” Ausness, Unavoidably Unsafe Products and Strict Products Liability: What Liability Rule Should Be Applied to the Sellers of Pharmaceutical Products? 78 Ky. L.J. 705, 708, and n. 11 (1989–1990) (collecting cases). This interpretation, however, is undermined by the fact that Congress has never directed the Food and Drug Administration (FDA) or any other federal agency to review vaccines for optimal vaccine design, see *infra*, at 1097, and n. 19, and thus it seems highly unlikely that Congress intended to eliminate the traditional mechanism for such review (*i.e.*, design defect liability), particularly given its express retention of state tort law in the Vaccine Act, see 42 U.S.C. § 300aa–22(a). In any event, to the extent there is ambiguity as to how precisely Congress intended the “principle in Comment K” to apply to the covered vaccines, that ambiguity is explicitly resolved in petitioners’ favor by the 1987 House Energy and Commerce Committee Report, H.R.Rep. No. 100–391, pt. 1, pp. 690–691, U.S.Code Cong. & Admin.News, 1987, pp. 2313–1, 2313–375 (hereinafter 1987 Report). See *infra* this page and 1092 – 1093.

- 9 The Third Circuit’s opinion below expressed uncertainty as to whether the 1987 Report was authored by the House Budget Committee or the House Energy and Commerce Committee. See 561 F.3d 233, 250 (2009). As petitioners explain, although the Budget Committee compiled and issued the Report, the Energy and Commerce Committee wrote and approved the relevant language. Title IV of the 1987 Report, entitled “Committee on Energy and Commerce,” comprises “two Committee Prints approved by the Committee on Energy and Commerce for inclusion in the forthcoming reconciliation bill.” 1987 Report 377, 380.
- 10 The majority suggests that the 1987 legislation creating the funding mechanism is akin to appropriations legislation and that giving weight to the legislative history of such legislation “would set a dangerous precedent.” *Ante*, at 1082. The difference, of course, is that appropriations legislation ordinarily funds congressional enactments that already have operative legal effect; in contrast, operation of the tort reforms in the 1986 Act, including § 22(b)(1), was expressly conditioned on the enactment of a separate tax to fund the compensation program. See § 323(a), 100 Stat. 3784. Accordingly, this Court’s general reluctance to view appropriations legislation as modifying substantive legislation, see, *e.g.*, *TVA v. Hill*, 437 U.S. 153, 190, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978), has no bearing here.
- 11 See 1987 Report 700 (describing the administration’s alternative proposal).
- 12 See, *e.g.*, Hearings on Funding of the Childhood Vaccine Program before the Subcommittee on Select Revenue Measures of the House Committee on Ways and Means, 100th Cong., 1st Sess., 85 (1987) (“[T]he liability provisions of the 1986 Act should be amended to assure that manufacturers will not be found liable in the tort system if they have fully complied with applicable government regulations. In particular, manufacturers should not face liability under a ‘design defect’ theory in cases where plaintiffs challenge the decisions of public health authorities and federal regulators that the licensed vaccines are the best available way to protect children from deadly diseases” (statement of Robert B. Johnson, President, Lederle Labs. Div., American Cyanamid Co.)).
- 13 See American Academy of Pediatrics, Questions and Answers About Vaccine Ingredients (Oct.2008), <http://www.aap.org/immunization/families/faq/Vaccineingredients.pdf> (all Internet materials as visited Feb. 18, 2011, and available in Clerk of Court’s case file).
- 14 In this manner, the “even though” clause functions in a “concessive subordinat[ing]” fashion, *ante*, at 1077 – 1078, in accord with normal grammatical usage. According to the majority, however, the “even though” clause “clarifies the word that precedes it” by “delineat[ing]” the conditions that make a side effect “unavoidable” under the statute. *Ante*, at 1075 – 1076. The majority’s interpretation hardly treats the clause as “concessive,” and indeed strains the meaning of “even though.” In the majority’s view, proper manufacturing and labeling are the sole prerequisites that render a vaccine’s side effects unavoidable. Thus, an injurious side effect is unavoidable *because* the vaccine was properly prepared and labeled, not “even though” it was. The two conjunctions are not equivalent: The sentence “I am happy *even though* it is raining” can hardly be read to mean that “I am happy *because* it is raining.” In any event, the more fundamental point is that petitioners’ interpretation actually gives meaning to the words “even though,” whereas the majority concedes that its interpretation effectively reads those words entirely out of the statute. See *supra* this page.
- 15 This Court, moreover, has long operated on “the assumption that the historic police powers of the States are not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” *Altria Group, Inc. v. Good*, 555 U.S. 70, 77, 129 S.Ct. 538, 543, 172 L.Ed.2d 398 (2008) (internal quotation marks and alteration omitted). Given the long history of state regulation of vaccines, see Brief for Petitioners 3–6, the presumption provides an additional reason not to read § 22(b)(1) as pre-empting all design defect claims, especially given Congress’ inclusion of an express saving clause in the same statutory section, see 42 U.S.C. § 300aa–22(a), and its use of the conditional “if” clause in defining the pre-emptive scope of the provision. See *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449, 125 S.Ct. 1788, 161 L.Ed.2d 687 (2005) (“In areas of traditional state regulation, we assume that a federal statute has not supplanted state law unless Congress has made such an intention clear and manifest” (internal quotation marks omitted)).

- 16 See *Collins v. Eli Lilly Co.*, 116 Wis.2d 166, 197, 342 N.W.2d 37, 52 (1984) (“We conclude that the rule embodied in comment k is too restrictive and, therefore, not commensurate with strict products liability law in Wisconsin”). *Collins* did, however, “recognize that in some exigent circumstances it may be necessary to place a drug on the market before adequate testing can be done.” *Ibid*. It thus adopted a narrower defense (based on “exigent circumstances”) than that recognized in other jurisdictions that had expressly adopted comment k.
- 17 See, e.g., *Kearl*, 172 Cal.App.3d, at 831, n. 15, 218 Cal.Rptr., at 465, n. 15 (“[T]he unavoidably dangerous product doctrine merely exempts the product from a strict liability design defect analysis; a plaintiff remains free to pursue his design defect theory on the basis of negligence”); *Toner*, 112 Idaho, at 340, 732 P.2d, at 309–310 (“The authorities universally agree that where a product is deemed unavoidably unsafe, the plaintiff is deprived of the advantage of a strict liability cause of action, but may proceed under a negligence cause of action”).
- 18 See 42 U.S.C. § 262(a)(2)(C)(i)(I) (“The Secretary shall approve a biologics license application ... on the basis of a demonstration that ... the biological product that is the subject of the application is safe, pure, and potent”).
- 19 See, e.g., *Hurley v. Lederle Labs.*, 863 F.2d 1173, 1177 (C.A.5 1988) (“[T]he FDA is a passive agency: it considers whether to approve vaccine designs only if and when manufacturers come forward with a proposal”); *Jones v. Lederle Labs.*, 695 F.Supp. 700, 711 (E.D.N.Y.1988) (“[T]he agency takes the drugs and manufacturers as it finds them. While its goal is to oversee inoculation with the best possible vaccine, it is limited to reviewing only those drugs submitted by various manufacturers, regardless of their flaws”). Although the FDA has authority under existing regulations to revoke a manufacturer’s biologics licenses, that authority can be exercised only where (as relevant here) “[t]he licensed product is not safe and effective for all of its intended uses.” 21 CFR § 601.5(b)(1)(vi) (2010); see § 600.3(p) (defining “safety” as “relative freedom from harmful effect to persons affected, directly or indirectly, by a product when prudently administered, taking into consideration the character of the product in relation to the condition of the recipient at the time”). The regulation does not authorize the FDA to revoke a biologics license for a manufacturer’s failure to adopt an optimal vaccine design in light of existing science and technology. See Conk, *Is There a Design Defect in the Restatement (Third) of Torts: Products Liability?* 109 Yale L.J. 1087, 1128–1129 (1999–2000) (“The FDA does not claim to review products for optimal design.... FDA review thus asks less of drug ... manufacturers than the common law of products liability asks of other kinds of manufacturers”). At oral argument, counsel for *amicus* United States stated that the Centers for Disease Control and Prevention (CDC) routinely performs comparative analyses of vaccines that are already on the market. See Tr. of Oral Arg. 44–45; *id.*, at 52–53 (describing CDC’s comparison of Sabin and Salk polio vaccines). Neither the United States nor any of the parties, however, has represented that CDC examines whether a safer alternative vaccine *could have been designed* given practical and scientific limits, the central inquiry in a state tort law action for design defect. CDC does not issue biologics licenses, moreover, and thus has no authority to require a manufacturer to adopt a different vaccine design.
- 20 Indeed, we observed in *Levine* that the FDA is perpetually understaffed and underfunded, see 555 U.S., at 578, n. 11, 129 S.Ct., at 1203 n. 11, and the agency has been criticized in the past for its slow response in failing to withdraw or warn about potentially dangerous products, see, e.g., L. Leveton, H. Sox, & M. Stoto, *Institute of Medicine, HIV and the Blood Supply: An Analysis of Crisis Decisionmaking* (1995) (criticizing FDA response to transmission of AIDS through blood supply). These practical shortcomings reinforce the conclusion that “state law offers an additional, and important, layer of consumer protection that complements FDA regulation.” *Levine*, 555 U.S., at 579, 129 S.Ct., at 1202.
- 21 The majority mischaracterizes my position as expressing a general “skept[ic]ism” of pre-emption unless the congressional substitute operate[s] like the tort system.” *Ante*, at 1080. Congress could, of course, adopt a regulatory regime that operates differently from state tort systems, and such a difference is not necessarily a reason to question Congress’ pre-emptive intent. In the specific context of the Vaccine Act, however, the relevant point is that this Court should not lightly assume that Congress intended *sub silentio* to displace a longstanding species of state tort liability where, as here, Congress specifically included an express saving clause preserving state law, there is a long history of state-law regulation of vaccine design, and pre-emption of state law would leave an important regulatory function—*i.e.*, ensuring optimal vaccine design—entirely unaddressed by the congressional substitute.
- 22 The majority’s suggestion that “vaccine manufacturers fund from their sales” the compensation program is misleading. *Ante*, at 1080. Although the manufacturers nominally pay the tax, the amount of the tax is specifically included in the vaccine price charged to purchasers. See CDC Vaccine Price List (Feb. 15, 2011), <http://www.cdc.gov/vaccines/programs/vfc/cdc-vac-price-list.htm>. Accordingly, the only way the vaccine manufacturers can be said to actually “fund” the compensation program is if the cost of the excise tax has an impact on the number of vaccines sold by the vaccine manufacturer. The majority points to no evidence that the excise tax—which ordinarily amounts to 75 cents per dose, 26 U.S.C. § 4131(b)—has any impact whatsoever on the demand for vaccines.
- 23 See Brief for United States as *Amicus Curiae* 28 (“Department of Justice records indicate that 99.8% of successful Compensation Program claimants have accepted their awards, forgoing any tort remedies against vaccine manufacturers”); S. Plotkin, W. Orenstein, & P. Offit, *Vaccines* 1673 (5th ed.2008) (noting that “[v]irtually all ... petitioners, even those who were not awarded compensation”

under the compensation program, choose to accept the program's determination).

24 JUSTICE BREYER's separate concurrence is even more explicitly policy driven, reflecting his own preference for the "more expert judgment" of federal agencies over the "less expert" judgment of juries. *Ante*, at 1085.

25 Respondent notes that there are some 5,000 petitions alleging a causal link between certain vaccines and autism spectrum disorders that are currently pending in an omnibus proceeding in the Court of Federal Claims (Vaccine Court). Brief for Respondent 56–57. According to respondent, a ruling that § 22(b)(1) does not pre-empt design defect claims could unleash a "crushing wave" of tort litigation that would bankrupt vaccine manufacturers and deplete vaccine supply. *Id.*, at 28. This concern underlies many of the policy arguments in respondent's brief and appears to underlie the majority and concurring opinions in this case. In the absence of any empirical data, however, the prospect of an onslaught of autism-related tort litigation by claimants denied relief by the Vaccine Court seems wholly speculative. As an initial matter, the Special Masters in the autism cases have thus far uniformly rejected the alleged causal link between vaccines and autism. See Brief for American Academy of Pediatrics et al. as *Amici Curiae* 20–21, n. 4 (collecting cases). To be sure, those rulings do not necessarily mean that no such causal link exists, cf. Brief for United States as *Amicus Curiae* 29 (noting that injuries have been added to the Vaccine Injury Table for existing vaccines), or that claimants will not ultimately be able to prove such a link in a state tort action, particularly with the added tool of civil discovery. But these rulings do highlight the substantial hurdles to recovery a claimant faces. See *Schafer v. American Cyanamid Co.*, 20 F.3d 1, 5 (C.A.1 1994) ("[A] petitioner to whom the Vaccine Court gives nothing may see no point in trying to overcome tort law's yet more serious obstacles to recovery"). Trial courts, moreover, have considerable experience in efficiently handling and disposing of meritless products liability claims, and decades of tort litigation (including for design defect) in the prescription-drug context have not led to shortages in prescription drugs. Despite the doomsday predictions of respondent and the various *amici* cited by the concurrence, *ante*, at 1085 – 1086, the possibility of a torrent of meritless lawsuits bankrupting manufacturers and causing vaccine shortages seems remote at best. More fundamentally, whatever the merits of these policy arguments, the issue in this case is what Congress has decided, and as to that question, the text, structure, and legislative history compel the conclusion that Congress intended to leave the courthouse doors open for children who have suffered severe injuries from defectively designed vaccines. The majority's policy-driven decision to the contrary usurps Congress' role and deprives such vaccine-injured children of a key remedy that Congress intended them to have.

27 A.D.3d 143

Supreme Court, Appellate Division, Second
Department, New York.

Salvatore CIAFONE, respondent,

v.

Ibn KENYATTA, appellant;

Eliot Spitzer, etc., intervenor-respondent.

Dec. 19, 2005.

Synopsis

Background: Victim of crime brought action against assailant under Son of Sam law to recover damages from proceeds assailant obtained from settlement of medical malpractice action. The Supreme Court, Westchester County, W. Denis Donovan, J., denied defendant's motion to dismiss and defendant appealed.

Holdings: The Supreme Court, Appellate Division, S. Miller, J., held that:

Son of Sam law did not evince an intent to punish;

Son of Sam law was not punitive in effect; and

Son of Sam law did not violate the contract clause.

Affirmed.

Attorneys and Law Firms

****116** Stevens, Hinds & White, P.C., New York, N.Y. (Lennox S. Hinds of counsel), for appellant.

Calano & Calano, LLP, New York, N.Y. (Edward A. Frey of counsel), for respondent.

Eliot Spitzer, Attorney-General, Albany, N.Y. (Wayne L. Benjamin and Dorothy E. Hill of counsel), intervenor-respondent pro se in his statutory capacity pursuant to Executive Law § 71.

BARRY A. COZIER, J.P., SONDR A MILLER, WILLIAM F. MASTRO, and PETER B. SKELOS, JJ.

Opinion

S. MILLER, J.

***144** Executive Law § 632-a, commonly known as the “Son of Sam” Law, broadly permits a crime victim to recover damages from his or her assailant. In this case, in 1974, the plaintiff Salvatore Ciafone (hereinafter the plaintiff), then a New York City Transit Authority Police Officer, was shot by the defendant, Ibn Kenyatta. In 2001, while incarcerated for his crimes, the defendant recovered more than \$600,000 from a settlement of a medical malpractice action. The plaintiff was notified of this recovery and commenced this action as permitted by the Son of Sam Law. The questions presented on this appeal stem from the sequence of these events. The defendant argues that insofar as applied to his case, the Son of Sam Law violates the Constitutional prohibition against ex post facto laws and the contract clause of the United States Constitution. The Supreme Court disagreed and denied his motion to dismiss the complaint. We affirm.

I.

On January 30, 1974, the plaintiff observed the defendant attempt to jump a turnstile at the 149th Street IRT subway station ***145** in the Bronx. In apprehending the defendant, a struggle ensued, and the plaintiff was knocked to the ground. The defendant wrested the plaintiff's service revolver and shot at the plaintiff six times; five of the shots hit the plaintiff in the legs. As a result of his injuries, the plaintiff could not return to work as a police officer for 10 months. The New York State Workers' Compensation Board determined that the plaintiff had lost 15 percent of the use of his right leg and 17 ½ percent of the use of his left leg.

The defendant was tried and convicted of attempted murder and criminal possession of a weapon and, as modified on appeal, sentenced to an indeterminate term of 15 years to life in prison (see *People v. Kenyatta*, 52 A.D.2d 783, 383 N.Y.S.2d 20). He has been incarcerated since January 1974.

In 2000 the defendant commenced a medical malpractice action against, among others, employees of the New York State Department of Correctional Services and various medical personnel, alleging that he was misdiagnosed and that his kidney failure went untreated, resulting in permanent disability and the potential need for a kidney

transplant. That claim was ultimately settled in accordance with a January 2001 stipulation, pursuant to which the defendant was awarded, inter alia, a lump sum of \$133,500 into a supplemental needs trust, and the sum of \$500,000, to be deposited into his inmate account.

****117** On November 15, 2002, pursuant to Executive Law § 632-a(2)(c), the New York State Crime Victims Board (hereinafter the Board) notified the plaintiff of the impending payment to the defendant. In or about January 2003, the plaintiff and his wife commenced this action against the defendant to recover damages arising from the 1974 shooting.

In lieu of serving an answer, the defendant moved to dismiss the complaint, contending, inter alia, that Executive Law § 632-a, as amended, violated the ex post facto clause of the United States Constitution (*see* U.S. Const., art. I, § 9), as the law afforded crime victims new rights to sue that did not exist at the time of his conviction, and that the statute violated the contract clause of the United States Constitution (*see* U.S. Const., art. I § 10), as it impaired an existing contract between the defendant and the State of New York. The Supreme Court, among other things, denied the motion. We affirm.

***146 IIA.**

The defendant argues that Executive Law § 632-a is unconstitutional in that it violates the ex post facto clause of the United States Constitution (*see* U.S. Const., art. I § 9). Specifically, he contends that the law facilitates a kind of restitution which traditionally has been associated with punishment for crime. Thus, the defendant concludes, the statute, which imposes restitutionary sentences on those convicted of crimes, imposes further punishment upon convicted criminals after they have already been tried and convicted. This argument is without merit.

Like all laws enacted by the people through their elected representatives, Executive Law § 632-a is entitled to a presumption of constitutionality (*see Matter of Moran Towing Corp. v. Urbach*, 99 N.Y.2d 443, 448, 757 N.Y.S.2d 513, 787 N.E.2d 624; *Cohen v. State of New York*, 94 N.Y.2d 1, 8, 698 N.Y.S.2d 574, 720 N.E.2d 850). Thus, the defendant bears a heavy burden in demonstrating that the law is unconstitutional.

Executive Law § 632-a was initially enacted to permit crime victims to recover any profits earned by a convicted

defendant from the commission of the crime (*see New York State Crime Victims Bd. v. Abbott*, 212 A.D.2d 22, 24, 627 N.Y.S.2d 629). A prior version of the statute limited victims to recovery of “profits from a crime,” meaning property or income generated from the crime itself (Executive Law former § 632-a[1][b]). However, that version was declared unconstitutional (*see Simon & Schuster v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 112 S.Ct. 501, 116 L.Ed.2d 476). Thus, in 2001, the legislature enacted the present statute to permit victims to bring an action within three years of the discovery of any “funds of a convicted person” (Executive Law § 632-a[3]). “Funds of a convicted person” are defined as “all funds and property received from any source by a person convicted of a specified crime” (Executive Law § 632-a[1][c]).

In analyzing whether a civil statute constitutes an ex post facto law, the threshold issue is whether the law is penal in purpose or effect—that is, whether it was enacted with an intent to punish (*see Smith v. Doe*, 538 U.S. 84, 123 S.Ct. 1140, 155 L.Ed.2d 164). Even if the court finds that it was not intended to punish, a court must further determine whether the scheme of the statute is so punitive as to negate any presumption that it is civil in nature (*id.* at 92, 123 S.Ct. 1140).

Contrary to the defendant’s contentions, the Son of Sam Law does not evince an intent to punish. To begin with, the ***147** categorization of a particular proceeding ****118** as civil or criminal “ ‘is first of all a question of statutory construction’ ” (*Kansas v. Hendricks*, 521 U.S. 346, 361, 117 S.Ct. 2072, 138 L.Ed.2d 501, quoting *Allen v. Illinois*, 478 U.S. 364, 368, 106 S.Ct. 2988, 92 L.Ed.2d 296). Here, the statute is a part of the Executive Law, rather than the Penal Law, and thus is civil in nature (*Kansas v. Hendricks, supra*). Moreover, the statute’s “Declaration of Policy and Legislative Intent” specifically states that the intent of the statute is to provide “aid, care, and support” for crime victims (Executive Law § 620). The legislative memorandum similarly stated that the law is to “ensure that convicted criminals who have or gain the ability to pay are held financially accountable to their victims” (Governor’s Mem. approving L. 2001, ch. 62, 2001 N.Y. Legis. Ann., at 45).

Hence, given the construction of the statute, its purpose is to provide the opportunity for restitution to victims, not to impose punishment upon convicted criminals. Indeed, in light of the statutory construction and legislative history, only “the clearest proof” may be adduced to show that the statute is intended to be punitive and is therefore unconstitutional (*see Flemming v. Nestor*, 363 U.S. 603, 617, 80 S.Ct. 1367, 4 L.Ed.2d 1435). The defendant has not demonstrated such clear proof.

The defendant's argument that restitution is akin to punishment is unavailing. That a law has some detrimental effect upon a particular group does not render punitive a law that is chiefly civil in nature. For example, in *De Veau v. Braisted*, 363 U.S. 144, 160, 80 S.Ct. 1146, 4 L.Ed.2d 1109, the United States Supreme Court found that a law prohibiting felons from working for waterfront unions was not an ex post facto law, stating:

"The question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation, such as the proper qualifications for a profession.... The proof is overwhelming that New York sought not to punish ex-felons, but to devise what was felt to be a much-needed scheme of regulation of the waterfront, and for the effectuation of that scheme it became important whether individuals had previously been convicted of a felony."

Similarly, the strictures imposed upon individuals under Executive Law § 632-a may, as a by-product of the legislation, result *148 in a consequence upon those convicted of crimes, but those strictures chiefly advance a separate legislative aim, i.e., providing the opportunity for restitution to crime victims. That convicts are adversely affected does not change the chief thrust of the law.

IIB.

The foregoing demonstrates that the Son of Sam Law was not intended to punish convicted felons. Nevertheless, we must now determine if the statute is punitive in effect. In *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644, the Supreme Court enunciated seven indicators of whether a statute is punitive in effect: (1) whether the sanction involved an affirmative disability or

restraint, (2) whether it has historically been regarded as a punishment, (3) whether it comes into play only on a finding of scienter, (4) whether its operation will promote the traditional aims of punishment—retribution and deterrence, (5) whether the behavior to which it applies is already a crime, (6) whether an alternative purpose to which it may rationally be connected is assignable for it, and (7) whether it appears **119 excessive in relation to the alternative purpose assigned (*id.* at 168–169, 83 S.Ct. 554). We examine each of these factors *seriatim*.

1. Affirmative Disabilities or Restraints

Executive Law § 632-a does not impose any affirmative disabilities or restraints on the defendant. Rather, the statute merely permits a crime victim to sue his or her assailant for civil damages. This provision is no more punitive than the obligation imposed on any tortfeasor to pay compensatory damages to one whom he or she has injured (*see Sharapata v. Town of Islip*, 56 N.Y.2d 332, 452 N.Y.S.2d 347, 437 N.E.2d 1104). Moreover, the statute does not involve an affirmative disability or restraint as that term is normally understood in the law (*see Hudson v. United States*, 522 U.S. 93, 104, 118 S.Ct. 488, 139 L.Ed.2d 450). Indeed, the scheme imposed by the statute, under which a crime victim may recover compensatory funds, is "certainly nothing approaching the 'infamous punishment' of imprisonment." (*id.*, quoting *Flemming v. Nestor*, *supra* at 617, 80 S.Ct. 1367). To be sure, as the Attorney-General correctly notes, the statute's effect is far less harsh than that imposed by other statutes that have been deemed non-punitive (*see De Veau v. Braisted*, *supra* at 160, 80 S.Ct. 1146 [prohibiting felons from working for waterfront unions]; *Smith v. Doe*, *supra*; *Doe v. Pataki*, 120 F.3d 1263, *cert. denied* 522 U.S. 1122, 118 S.Ct. 1066, 140 L.Ed.2d 126 [requiring registration of convicted sex offenders]).

*149 2. Historical Punishment

The defendant argues that the forfeiture of property has been regarded as punishment, and therefore, Executive Law § 632-a is punitive in nature. He is incorrect. The thrust of the Son of Sam Law is not to provide restitution to crime victims, but rather to provide the *opportunity* for restitution; recovery is not automatic. Indeed, the legislative history states that the statute "makes ... meaningful amendments to ensure that victims of serious crimes have *every reasonable opportunity* to obtain

financial compensation from the persons who committed crimes against them” (Governor’s Mem. approving L. 2001, ch. 62, 2001 N.Y. Legis. Ann., *supra* at 43 [emphasis added]) and that the law “give[s] crime victims and their families the tools they need to pursue justice” (*id.* at 45). Merely providing a mechanism through which a crime victim can pursue a money judgment is not historically regarded as punishment, particularly where the victim, after filing suit, must prove his or her claim by a preponderance of the evidence.

The cases upon which the defendant relies are inapposite. Each one, from other jurisdictions, holds that restitution is punitive where it is ordered by a court or assessed as part of a criminal judgment, and that it may not be imposed ex post facto (*see e.g. Spielman v. State*, 298 Md. 602, 471 A.2d 730; *Matter of Appeal in Maricopa County Juvenile Action No. J-92130*, 139 Ariz. 170, 677 P.2d 943). Thus, for example, it would be improper for the defendant to summarily be found to owe restitution in a sum certain where such “punishment” was not theretofore adjudicated. In the instant case, however, the court did not order restitution. Nor could it do so, as the Son of Sam Law simply enables a crime victim to *seek* restitution from his attacker. Thus, in contrast to the cases cited by the defendant, no court has imposed restitution in this case—rather, the court has merely permitted the plaintiff to pursue recovery in accordance with the statute.

****120 3. Scienter**

Contrary to the defendant’s claims, not all of the crimes specified in Executive Law § 632-a(1)(e), upon which a victim may sue for damages, require scienter. As the Attorney-General correctly notes, criminally negligent homicide, which requires no scienter, is a “Specified crime” that triggers the operation of the statute (Executive Law § 632-a[1][e][i][C]). Thus, the third indicator of a punitive statute militates against a finding that the Son of Sam Law is an ex post facto law.

***150 4. Retribution and Deterrence**

The defendant argues that the Executive Law promotes deterrence or retribution because the statute makes available to victims any money realized by an ex-inmate who has been released from custody and who is no longer on parole or probation, whenever the cause of action is based on conditions or events arising during imprisonment

(*see* Executive Law § 632-a[1][c][iii][A], [B]). Further, the defendant contends, an ex-offender may be re-imprisoned if he fails to report his available income to the Crime Victims Board; this provision, the defendant argues, is further evidence of the statute’s retributive nature. Again, however, the defendant’s arguments are without merit.

Despite the fact that the statute permits a crime victim to reach money that is available to the inmate, the statute permits the commencement of an action only within three years of discharge from state supervision, and only if the funds are derived from an award in a lawsuit where the cause of action accrued before the offender is released from prison, or before his parole ends (*see* Executive Law § 632-a[1][c][iii][A]). As the Attorney-General correctly points out, “this provision merely serves the stated legislative goal of ensuring that funds acquired by convicted persons while they are wards of the state are not shielded from recovery by crime victims in private damages actions.”

Moreover, as noted above, the statute does not impose a fine, which could fairly be termed a retributive action. Rather, the statute simply allows an injured party an avenue through which to pursue compensation for an injury. Thus, the statute does not serve a retributive or deterrent effect so much as it assists victims in recovering compensation for their injuries. Indeed, it is difficult to understand how accrual of a cause of action *after* conviction of a crime could serve any deterrent effect. Similarly, it is difficult to assign deterrent effect to the statute where the cause of action may never even accrue at all—that is, where the inmate never receives funds sufficient to compensate his or her victim.

In any event, even if deterrence is, in fact, an objective of Executive Law § 632-a, “the mere presence of this purpose is insufficient to render a sanction criminal, as deterrence ‘may serve civil as well as criminal goals’ ” (*Hudson v. United States*, *supra* at 105, 118 S.Ct. 488, quoting *United States v. Ursery*, 518 U.S. 267, 292, 116 S.Ct. 2135, 135 L.Ed.2d 549).

5. Whether the Behavior is Already a Crime

***151** As accurately noted by the Supreme Court, the fact that Executive Law § 632-a promotes a civil penalty for those already convicted of a crime does not lead inexorably to the conclusion that the statute is punitive. As other courts have noted, “that the Act may be ‘tied to criminal activity’ is ‘insufficient to render the statute punitive’ ” (*Kansas v. Hendricks*, *supra* at 362, 117 S.Ct. 2072, quoting *United States v. Ursery*, *supra* at 292, 116 S.Ct. 2135). Indeed, as

noted above, other statutes that impose greater penalties than Executive Law § 632–a have been deemed ****121** by courts to be non-punitive (*see De Veau v. Braisted, supra* at 160, 80 S.Ct. 1146; *Smith v. Doe, supra*; *Doe v. Pataki, supra*).

Department of Revenue of Montana v. Kurth Ranch, 511 U.S. 767, 114 S.Ct. 1937, 128 L.Ed.2d 767, upon which the defendant relies, is readily distinguishable. In that case, the Supreme Court found that a state law imposing a tax on possession and storage of dangerous drugs collected after fines and forfeitures had been satisfied, generated government revenues and therefore was actually a second punishment imposed by the state in violation of the double jeopardy clause (*id.* at 781, 114 S.Ct. 1937). On the other hand, as noted *supra*, the Son of Sam Law merely allows for the possibility of restitution by a private party; it is not punishment by the state to raise revenue.

6. Narrowly Drawn and Rationally Connected

As the Supreme Court of the United States has noted, “[t]here can be little doubt, on the other hand, that the State has a compelling interest in ensuring that victims of crime are compensated by those who harm them” (*Simon & Schuster v. Members of N.Y. State Crime Victims Bd., supra* at 118, 112 S.Ct. 501). The Son of Sam Law advances that interest and is rationally connected to the state’s objective, as it provides a mechanism for compensation of crime victims.

Additionally, the Son of Sam Law is not excessive in relation to its assigned purpose. As the plaintiff correctly notes, and as has been noted *supra*, the statute does not result in an automatic forfeiture of any funds; instead, the statute merely allows a crime victim to seek redress for the injury that his assailant inflicted upon him. Whether the victim eventually succeeds in receiving redress is left to the judgment of a jury.

It is further noted that almost all legislation entails classifications, for one purpose or another, that work to the advantage or disadvantage of the affected groups (*see Romer v. Evans*, 517 U.S. 620, 632, 116 S.Ct. 1620, 134 L.Ed.2d 855). These classifications do not, in and of themselves, render a law unconstitutional. Rather, to survive ***152** constitutional scrutiny, a law need have only a rational relationship to a legitimate state interest; this is so even if the law appears unwise or works to the detriment of one group or the other (*id.*). Thus, the defendant must demonstrate that the effect of Executive Law § 632–a is not merely unwise or unfair but serves no legitimate

governmental purpose. The defendant has failed to so demonstrate.

III.

The defendant also argues that the Son of Sam Law impinges upon his rights guaranteed by the contract clause of the United States Constitution (*see* U.S. Const., art. I, § 10). Referring to his contractual stipulation with the State settling his malpractice claim, the defendant argues that Executive Law § 632–a impermissibly expands the property that was subject to attachment for a debt not existing at the time of the contract, and permits the plaintiff to satisfy any judgment out of that property. The defendant argues that insofar as the Son of Sam Law exposes his medical malpractice recovery to the plaintiffs’ claims, it interferes with the provision in the stipulation which grants him the exclusive use of the funds deposited into his inmate account “for the limited purpose of satisfying any liens or judgments that may exist against [his] Inmate account.... Upon satisfaction of such liens and judgments, [the defendant] may withdraw all ****122** remaining funds for his sole and exclusive disposal.” There is no merit to this argument.

Article I (§ 10[1]) of the U.S. Constitution provides: “No state shall ... pass any ... Law impairing the Obligation of Contracts.” The Supreme Court has set forth criteria for determining when there is a violation of the contract clause: “Generally, we first ask whether the change in state law has operated as a substantial impairment of a contractual relationship ... This inquiry has three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial” (*General Motors Corp. v. Romein*, 503 U.S. 181, 186, 112 S.Ct. 1105, 117 L.Ed.2d 328, [internal quotation and citations omitted]). Even if the law substantially impairs a contract, however, it will not be deemed unconstitutional where it is justified by “a significant and legitimate public purpose ... such as the remedying of a broad and general social or economic problem” (*Energy Reserves Group v. Kansas Power and Light Co.*, 459 U.S. 400, 412, 103 S.Ct. 697, 74 L.Ed.2d 569; *see Crane Neck Assn. v. New York City/Long Is. *153 County Servs. Group*, 61 N.Y.2d 154, 167, 472 N.Y.S.2d 901, 460 N.E.2d 1336, *cert. denied* 469 U.S. 804, 105 S.Ct. 60, 83 L.Ed.2d 11 [“the state may impair ... contracts by subsequent legislation or regulation so long as it is reasonably necessary to further an important public purpose and the measures taken that impair the contract are

reasonable and appropriate to effectuate that purpose”]. Moreover, to show that a statute substantially impairs a contractual relationship, a plaintiff must show that the legislature has thwarted his legitimate contractual expectation (see *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, *supra* at 416, 103 S.Ct. 697; *Sal Tinnerello & Sons v. Town of Stonington*, 141 F.3d 46, 53, *cert. denied* 525 U.S. 923, 119 S.Ct. 278, 142 L.Ed.2d 230).

To begin with, the Son of Sam Law does not operate upon the contract itself, but only against the property that was the subject of the stipulation settling the defendant’s malpractice claim. The law therefore does not impair the performance of the contract, especially where, as here, the government actually did perform its obligations under the contract by depositing the money into the plaintiff’s inmate account (see *Opgal, Inc. v. Burns*, 20 Misc.2d 803, 189 N.Y.S.2d 606). Rather, the law merely exposes that malpractice recovery to the plaintiff if he or she proves his or her right to recover damages from the defendant.

In any event, assuming that Executive Law 632—a impairs the settlement contract between the plaintiff and the state, the impairment was reasonable and necessary to accomplish a legitimate public purpose—namely, the recompense of crime victims, which, as noted *supra*, has been held to be a compelling state interest (see *Simon & Schuster v. Members of N.Y. State Crime Victims Bd.*,

supra; *Condell v. Bress*, 983 F.2d 415, *cert. denied* 507 U.S. 1032, 113 S.Ct. 1849, 1851, 123 L.Ed.2d 473, 474).

IV.

As the foregoing demonstrates, the defendant’s constitutional arguments are plainly lacking in merit. Accordingly, the order denying his motion to dismiss the complaint should be affirmed.

ORDERED that the order is affirmed, with costs.

COZIER, J.P., MASTRO and SKELOS, JJ., concur.

All Citations

27 A.D.3d 143, 807 N.Y.S.2d 114, 2005 N.Y. Slip Op. 09668

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McKinney's Consolidated Laws of New York Annotated
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Civil Practice Law and Rules (Refs & Annos)

Chapter Eight. Of the Consolidated Laws

Article 63. Injunction (Refs & Annos)

McKinney's CPLR § 6301

§ 6301. Grounds for preliminary injunction and temporary restraining order

Currentness

A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff. A temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had.

Credits

(L.1962, c. 308.)

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 78. Proceeding Against Body or Officer (Refs & Annos)

McKinney's CPLR § 7803

§ 7803. Questions raised

Effective: September 1, 2003

Currentness

The only questions that may be raised in a proceeding under this article are:

1. whether the body or officer failed to perform a duty enjoined upon it by law; or
2. whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or
3. whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or
4. whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.
5. A proceeding to review the final determination or order of the state review officer pursuant to subdivision three of section forty-four hundred four of the education law shall be brought pursuant to article four of this chapter and such subdivision; provided, however, that the provisions of this article shall not apply to any proceeding commenced on or after the effective date of this subdivision.

Credits

(L.1962, c. 308. Amended L.1962, c. 318, § 26; L.2003, c. 492, § 2, eff. Sept. 1, 2003.)

McKinney's Consolidated Laws of New York Annotated
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Civil Practice Law and Rules (Refs & Annos)

Chapter Eight. Of the Consolidated Laws

Article 63. Injunction (Refs & Annos)

McKinney's CPLR Rule 6312

Rule 6312. Motion papers; undertaking; issues of fact

Effective: August 14, 2019

Currentness

(a) Affidavit; other evidence. On a motion for a preliminary injunction the plaintiff shall show, by affidavit and such other evidence as may be submitted, that there is a cause of action, and either that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action and tending to render the judgment ineffectual; or that the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff.

(b) Undertaking. Except as provided in section 2512 and in actions brought under section two hundred sixty-five-a of the real property law, prior to the granting of a preliminary injunction, the plaintiff shall give an undertaking in an amount to be fixed by the court, that the plaintiff, if it is finally determined that he or she was not entitled to an injunction, will pay to the defendant all damages and costs which may be sustained by reason of the injunction, including:

1. if the injunction is to stay proceedings in another action, on any ground other than that a report, verdict or decision was obtained by actual fraud, all damages and costs which may be, or which have been, awarded in the other action to the defendant as well as all damages and costs which may be awarded him or her in the action in which the injunction was granted; or,

2. if the injunction is to stay proceedings in an action to recover real property, or for dower, on any ground other than that a verdict, report or decision was obtained by actual fraud, all damages and costs which may be, or which have been, awarded to the defendant in the action in which the injunction was granted, including the reasonable rents and profits of, and any wastes committed upon, the real property which is sought to be recovered or which is the subject of the action for dower, after the granting of the injunction; or,

3. if the injunction is to stay proceedings upon a judgment for a sum of money on any ground other than that the judgment was obtained by actual fraud, the full amount of the judgment as well as all damages and costs which may be awarded to the defendant in the action in which the injunction was granted.

(c) Issues of fact. Provided that the elements required for the issuance of a preliminary injunction are demonstrated in the plaintiff's papers, the presentation by the defendant of evidence sufficient to raise an issue of fact as to any of such elements shall not in itself be grounds for denial of the motion. In such event the court shall make a determination by hearing or otherwise whether each of the elements required for issuance of a preliminary injunction exists.

Credits

(L.1962, c. 308. Amended L.1996, c. 24, § 1; L.2019, c. 167, § 6, eff. Aug. 14, 2019.)

276 A.D.2d 461

Supreme Court, Appellate Division, Second
Department, New York.

CLARION ASSOCIATES, INC., Respondent,
v.
D.J. COLBY CO., INC., Appellant.

Oct. 2, 2000.

Synopsis

Independent insurance agent brought suit for breach of fiduciary duty against general insurance agent, with whom independent agent had previously placed its customers, and sought injunctive relief. The Supreme Court, Suffolk County, Oliver, J., granted preliminary injunction barring general agent from soliciting business from independent agent's customers. General agent appealed. The Supreme Court, Appellate Division, held that while preliminary injunction was warranted, facts alleged did not justify injunction barring general agent from soliciting business from potential customers who were not individuals or entities for whom insurance had been placed by independent agent with general agent.

Affirmed as modified.

Attorneys and Law Firms

****100** Westermann, Hamilton & Sheehy, Garden City, N.Y. (David Westermann, Jr., and Christopher J. Sheehy of counsel), for appellant.

Goldstein, Rubinton, Goldstein & DiFazio, P.C., Huntington, N.Y. (Arthur Goldstein and Steven R. Schoenfeld of counsel), for respondent.

CORNELIUS J. O'BRIEN, J.P., MYRIAM J. ALTMAN, GABRIEL M. KRAUSMAN and ROBERT W. SCHMIDT, JJ.

Opinion

MEMORANDUM BY THE COURT.

***461** In an action, *inter alia*, to recover damages for breach of fiduciary duty, the defendant appeals from (1) a decision of the Supreme Court, Suffolk County (Oliver, J.), dated March 26, 1999, and (2) so much of an order of the same

court dated May 18, 1999, as, upon the decision, and upon the plaintiff posting an undertaking in the amount of \$50,000, granted the plaintiff's motion for a preliminary injunction to the extent of preliminarily enjoining the defendant from (a) using or disclosing information in the plaintiff's book of expirations for solicitation or generation of business, (b) soliciting business by any advertisement directed to the plaintiff's ***462** customers (who were defined as those individuals or entities for whom insurance was placed by the plaintiff with the defendant), except that it was permitted to place advertisements in terms directed to the industry or individuals generally, and not directed to groups or organizations, (c) directly soliciting business, after obtaining names of individual potential customers from public documents, only, primarily, or disproportionately from those individual potential customers for whom the plaintiff is the agent, (d) directly soliciting business, after obtaining names of individual potential customers from public documents, in terms other than generally applicable terms or with reference to the plaintiff, or with reference to renewal of a policy with the defendant or the Hartford Insurance Company, and (e) soliciting business from any group or organization that is the plaintiff's customer, unless such group or organization contacts it after viewing a permissible advertisement.

ORDERED that the appeal from the decision is dismissed, as no appeal lies from a decision (*see, Schicchi v. Green Constr. Corp.*, 100 A.D.2d 509, 472 N.Y.S.2d 718); and it is further,

ORDERED that the order is modified by (a) deleting so much of the third decretal paragraph thereof as enjoined the defendant from placing advertisements in terms directed to groups or organizations, (b) deleting so much of the fourth decretal paragraph thereof as enjoined the defendant from directly soliciting business, after obtaining the names of individual potential customers from public documents, only, primarily, or disproportionately from those individual potential customers for whom the plaintiff is the agent, and substituting therefor a provision enjoining the defendant from directly soliciting business from the plaintiff's individual customers, and (c) deleting so much of the fourth decretal paragraph thereof as enjoined the defendant from directly soliciting business, after obtaining names of individual potential customers from public documents, in terms other than generally applicable terms; as so modified, the order is affirmed insofar as appealed from, without costs or disbursements.

To obtain preliminary injunctive relief, the movant must demonstrate a likelihood of success on the merits, irreparable harm in the absence of an injunction, and a

balancing of the equities in its favor (*see, Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860, 552 N.Y.S.2d 918, 552 N.E.2d 166; *W.T. Grant Co. v. Srogi*, 52 N.Y.2d 496, 438 N.Y.S.2d 761, 420 N.E.2d 953; CPLR 6301, 6312 [a]). In the instant case, the plaintiff, an independent insurance agent, demonstrated that (1) there exists a likelihood of success on the merits on its claim that the defendant, a general insurance **101 agent, misappropriated and utilized confidential information in *463 contacting and soliciting the customers contained in the plaintiff's book of expirations (*see generally, Matter of Corning*, 108 A.D.2d 96, 488 N.Y.S.2d 477; *National Fire Ins. Co. of Hartford v. Sullard*, 97 App.Div. 233, 89 N.Y.S. 934), (2) the continued improper contact and solicitation of its customers would result in irreparable harm (*see, Laro Maintenance Corp. v. Culkin*, 255 A.D.2d 560, 681 N.Y.S.2d 79; *Nassau Soda Fountain Equip. Corp. v. Mason*, 118 A.D.2d 764, 500 N.Y.S.2d 154; *Wyndham Co. v. Wyndham Hotel Co.*, 176 Misc.2d 116, 126, 670 N.Y.S.2d 995, *affd.* 261 A.D.2d 242, 691 N.Y.S.2d 34), and (3) the failure to grant preliminary injunctive relief

would cause greater injury to it than the imposition of the injunction would cause to the defendant (*see generally, McLaughlin, Piven, Vogel v. W.J. Nolan & Co.*, 114 A.D.2d 165, 174, 498 N.Y.S.2d 146).

To the extent that the preliminary injunction enjoined the defendant from soliciting business from potential customers who are not individuals or entities for whom insurance had been placed by the plaintiff with the defendant, it is not justified by the facts alleged (*see, e.g., Peekskill Coal & Fuel Oil Co. v. Martin*, 279 App.Div. 669, 108 N.Y.S.2d 30). Accordingly, the scope of the preliminary injunction is limited to the extent indicated.

All Citations

276 A.D.2d 461, 714 N.Y.S.2d 99, 2000 N.Y. Slip Op. 08316

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McKinney's Consolidated Laws of New York Annotated
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Constitution of the State of New York (Refs & Annos)
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Article I. Bill of Rights (Refs & Annos)
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McKinney's Const. Art. 1, § 8

§ 8. [Freedom of speech and press; criminal prosecutions for libel]

Effective: January 1, 2002

Currentness

Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.

Credits

(As amended Nov. 6, 2001, eff. Jan. 1, 2002.)

Notes of Decisions (975)

McKinney's Const. Art. 1, § 8, NY CONST Art. 1, § 8

Current through L.2019, chapter 373. Some statute sections may be more current, see credits for details.

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Constitution of the State of New York (Refs & Annos)
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Article I. Bill of Rights (Refs & Annos)
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McKinney's Const. Art. 1, § 6

§ 6. [Grand jury; waiver of indictment; right to counsel; informing accused; double jeopardy; self-incrimination; waiver of immunity by public officers; due process of law]

Effective: January 1, 2002

Currentness

<Notes of Decisions for Const. Art. 1, § 6 are displayed in multiple documents.>

No person shall be held to answer for a capital or otherwise infamous crime (except in cases of impeachment, and in cases of militia when in actual service, and the land, air and naval forces in time of war, or which this state may keep with the consent of congress in time of peace, and in cases of petit larceny under the regulation of the legislature), unless on indictment of a grand jury, except that a person held for the action of a grand jury upon a charge for such an offense, other than one punishable by death or life imprisonment, with the consent of the district attorney, may waive indictment by a grand jury and consent to be prosecuted on an information filed by the district attorney; such waiver shall be evidenced by written instrument signed by the defendant in open court in the presence of his or her counsel. In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him or her. No person shall be subject to be twice put in jeopardy for the same offense; nor shall he or she be compelled in any criminal case to be a witness against himself or herself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his or her present office or of any public office held by him or her within five years prior to such grand jury call to testify, or the performance of his or her official duties in any such present or prior offices, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years from the date of such refusal to sign a waiver of immunity against subsequent prosecution, or to answer any relevant question concerning such matters before such grand jury, and shall be removed from his or her present office by the appropriate authority or shall forfeit his or her present office at the suit of the attorney-general.

The power of grand juries to inquire into the wilful misconduct in office of public officers, and to find indictments or to direct the filing of informations in connection with such inquiries, shall never be suspended or impaired by law. No person shall be deprived of life, liberty or property without due process of law.

Credits

(Amended Nov. 8, 1938; Nov. 3, 1959; Nov. 6, 1973, eff. Jan. 1, 1974; Nov. 6, 2001, eff. Jan. 1, 2002.)

Notes of Decisions (4141)

§ 6. [Grand jury; waiver of indictment; right to counsel;..., NY CONST Art. 1, § 6

McKinney's Const. Art. 1, § 6, NY CONST Art. 1, § 6

Current through L.2019, chapter 373. Some statute sections may be more current, see credits for details.

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Constitution of the State of New York (Refs & Annos)
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Article I. Bill of Rights (Refs & Annos)
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McKinney's Const. Art. 1, § 3

§ 3. [Freedom of worship; religious liberty]

Effective: January 1, 2002

Currentness

The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all humankind; and no person shall be rendered incompetent to be a witness on account of his or her opinions on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state.

Credits

(As amended Nov. 6, 2001, eff. Jan. 1, 2002.)

Notes of Decisions (315)

McKinney's Const. Art. 1, § 3, NY CONST Art. 1, § 3

Current through L.2019, chapter 373. Some statute sections may be more current, see credits for details.

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Constitution of the State of New York (Refs & Annos)
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Article I. Bill of Rights (Refs & Annos)
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McKinney's Const. Art. 1, § 1

§ 1. [Rights, privileges and franchise secured; uncontested primary elections]

Effective: January 1, 2002

Currentness

No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his or her peers, except that the legislature may provide that there shall be no primary election held to nominate candidates for public office or to elect persons to party positions for any political party or parties in any unit of representation of the state from which such candidates or persons are nominated or elected whenever there is no contest or contests for such nominations or election as may be prescribed by general law.

Credits

(Amended Nov. 3, 1959, eff. Jan. 1, 1960; Nov. 6, 2001, eff. Jan. 1, 2002.)

Notes of Decisions (111)

McKinney's Const. Art. 1, § 1, NY CONST Art. 1, § 1

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Constitution of the State of New York (Refs & Annos)
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Article I. Bill of Rights (Refs & Annos)
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McKinney's Const. Art. 1, § 11

§ 11. [Equal protection of laws; discrimination in civil rights prohibited]

Effective: January 1, 2002

Currentness

No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.

Credits

(Adopted Nov. 8, 1938, eff. Jan. 1, 1939. Amended Nov. 6, 2001, eff. Jan. 1, 2002.)

Notes of Decisions (1471)

McKinney's Const. Art. 1, § 11, NY CONST Art. 1, § 11

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Article I. Bill of Rights (Refs & Annos)
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McKinney's Const. Art. 1, § 5

§ 5. [Bail; fines; punishments; detention of witnesses]

Effective: January 1, 2002

Currentness

Excessive bail shall not be required nor excessive fines imposed, nor shall cruel and unusual punishments be inflicted, nor shall witnesses be unreasonably detained.

Credits

(As amended Nov. 6, 2001, eff. Jan. 1, 2002.)

Notes of Decisions (310)

McKinney's Const. Art. 1, § 5, NY CONST Art. 1, § 5

Current through L.2019, chapter 373. Some statute sections may be more current, see credits for details.

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United States Code Annotated

Constitution of the United States

Annotated

Amendment I. Religion; Speech and the Press; Assembly; Petition

U.S.C.A. Const. Amend. I-Full text

Amendment I. Establishment of Religion; Free Exercise of Religion; Freedom of Speech and the Press; Peaceful
Assembly; Petition for Redress of Grievances

Currentness

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

<Historical notes and references are included in the full text document for this amendment.>

<For Notes of Decisions, see separate documents for clauses of this amendment:>

<USCA Const Amend. I--Establishment clause; Free Exercise clause>

<USCA Const Amend. I--Free Speech clause; Free Press clause>

<USCA Const Amend. I--Assembly clause; Petition clause>

U.S.C.A. Const. Amend. I-Full text, USCA CONST Amend. I-Full text
Current through P.L. 116-65.

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United States Code Annotated

Constitution of the United States

Annotated

Amendment VIII. Excessive Bail, Fines, Punishments
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U.S.C.A. Const. Amend. VIII

Amendment VIII. Excessive Bail, Fines, Punishments

Currentness

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Notes of Decisions (6615)

U.S.C.A. Const. Amend. VIII, USCA CONST Amend. VIII

Current through P.L. 116-65.

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United States Code Annotated
Constitution of the United States
Annotated
Amendment XIV. Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

U.S.C.A. Const. Amend. XIV-Full Text

AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Currentness

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; 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.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

<Section 1 of this amendment is further displayed in separate documents according to subject matter,>

<see USCA Const Amend. XIV, § 1-Citizens>

<see USCA Const Amend. XIV, § 1-Privileges>

<see USCA Const Amend. XIV, § 1-Due Proc>

<see USCA Const Amend. XIV, § 1-Equal Protect>

<sections 2 to 5 of this amendment are displayed as separate documents,>

<see USCA Const Amend. XIV, § 2,>

<see USCA Const Amend. XIV, § 3,>

<see USCA Const Amend. XIV, § 4,>

<see USCA Const Amend. XIV, § 5,>

U.S.C.A. Const. Amend. XIV-Full Text, USCA CONST Amend. XIV-Full Text
Current through P.L. 116-65.

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41 N.Y.2d 564

Court of Appeals of New York.

COPART INDUSTRIES, INC., Appellant,

v.

CONSOLIDATED EDISON COMPANY OF NEW
YORK, INC., Respondent.

April 7, 1977.

Synopsis

Operator of automobile servicing business sought damages from power company on ground that emissions from power plant caused damage to cars on plaintiff's premises and that plaintiff had to cease doing business because of the emissions. The Supreme Court, New York County, Irving H. Saypol, J., entered judgment dismissing the complaint and plaintiff appealed. The Supreme Court, Appellate Division, 52 A.D.2d 791, 383 N.Y.S.2d 201, affirmed and plaintiff appealed. The Court Appeals, Cooke, J., held that: (1) where plaintiff introduced evidence that defendant operated its plant in a negligent manner in regard to emission controls, trial court did not err in instructing on nuisance based on negligence even though complaint did not frame issue in terms of negligence; (2) contributory negligence may be a defense where the nuisance is based on negligent conduct; (3) plaintiff was not prejudiced by instruction that contributory negligence was not a defense to wilful or intentional invasion of plaintiff's rights.

Affirmed.

Fuchsberg, J., filed dissenting opinion.

Attorneys and Law Firms

*565 ***170 **969 Joseph Calderon and Stanley H. Schneider, New York City, for appellant.

Joseph J. Klem, New York City, for respondent.

Opinion

COOKE, Justice.

"There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance'. It has meant all things to all men" (Prosser, Torts (4th ed.), p.

571). From a point someplace within this oft-noted thicket envisioned by Professor Prosser, this appeal emerges.

Plaintiff leased a portion of the former Brooklyn Navy Yard for a period of five years commencing September 1, 1970. On the demised premises during the ensuing eight or nine months it conducted a storage and new car preparation business, the latter entailing over 50 steps ranging from services such as checking brakes to vehicle cleaning, catering to automobile dealers in the metropolitan area of New York City. Adjacent to the navy yard was defendant's Hudson Avenue plant, engaged in the production of steam and electricity since about 1926. This generating system had five smokestacks and during *566 the time in question its burners were fired with oil having a sulphur content of 1% or less. Prior to 1968, coal had been the fuel employed and the main boiler was equipped with an electrostatic precipitator to remove or control the discharged fly ash. Upon conversion to oil, the precipitator had been deactivated.

Based on allegations that noxious emissions from defendant's nearby stacks caused damage to the exterior of autos stored for its customers such as to require many to be repainted, that reports were received in early 1971 from patrons of paint discoloration and pitting, and that dealers served by **970 plaintiff terminated their business by early May, plaintiff contends that because of said ***171 emissions it was caused to cease doing business on May 28, 1971. This action was instituted seeking \$1,300,000 for loss of investment and loss of profit, under three causes of action respectively asserting "a deliberate and willful violation of the rights of plaintiff, constituting a nuisance", a "wrongful and unlawful trespass" and violations of "New York City, New York State and federal laws, regulations and guidelines with respect to air pollution." A fourth cause demanded exemplary and punitive damages of \$1,000,000 because of defendant's "wrongful and illegal acts."

The case came on for jury trial in 1974. As a result of rulings made at junctures prior to submission for verdict, the third and fourth causes of action were dismissed and the second was merged with the first. After pointing out that plaintiff "framed his case on a branch of the law of wrongdoing called nuisance", the trial court charged nuisance based on negligence and nuisance grounded on an intentional invasion of plaintiff's rights. Negligence was defined and it was pointed out that, although contributory negligence may be a defense where the basis of the nuisance is merely negligent conduct, it would not be where the wrongdoing is founded on the intentional, deliberate misconduct of defendant. Contending that "nuisance is entirely separate and apart from negligence" and that "defendant's intent or negligence is not * * * an

essential element of the cause of action of nuisance”, plaintiff excepted to the portions of the charge relating to said subjects.

The jury found in defendant’s favor and judgment was entered dismissing the complaint. The Appellate Division, by a divided court, affirmed, (52 A.D.2d 791, 383 N.Y.S.2d 201) the majority stating that (p. 792, 383 N.Y.S.2d p. 202) “nuisance is a concept susceptible of more than *567 one meaning”, that “(w)hile an absolute nuisance need not contain within its definition a flavoring of negligence, a qualified nuisance may”, that “the testimony, especially that of the experts, as developed at trial, showed an inextricable intertwining of negligence with the nuisance claimed, though the complaint did not so frame the issue”, that “the proof portrayed the alleged wrong as ‘a ’ nuisance,’ though dependent upon negligence’ ”, and that, therefore under the circumstances, the instructions to the jury on the issue of negligence were correct. The dissenters, on the other hand, urged that (p. 793, 383 N.Y.S.2d p. 203) “(p)utting aside the possibility that there could be liability without fault, and in the absence of proof of negligence by the defendant * * * a cause of action in nuisance ‘does not involve the element of negligence as one of its essential factors’ ”, that the “charge which mingled elements of nuisance and negligence could have been confusing to the jury” and that the “possibility of confusion was compounded by an instruction that the plaintiff, to succeed, was required to prove that the injury to its property was intentionally inflicted.” On appeal to this court, plaintiff maintains that the trial court erred in charging (1) that plaintiff was required to prove an intent of the defendant to cause damages, and (2) that plaintiff had a burden of proof as to defendant’s negligence and plaintiff’s freedom from contributory negligence.

Much of the uncertainty and confusion surrounding the use of the term nuisance, which in itself means no more than harm, injury, inconvenience, or annoyance (see Webster’s Third New International Dictionary, p. 571; American Heritage Dictionary, p. 900), arises from a series of historical accidents covering the invasion of different kinds of interests and referring to various kinds of conduct on the part of defendants (Prosser, Torts (4th ed.), pp. 571-572). The word surfaced as early as the twelfth century in the assize of nuisance, which provided redress where the injury was not a disseisin but rather an indirect damage to the land or an interference with its use and enjoyment. Three centuries later the remedy was replaced by the common-law action on the case for nuisance, ***172 invoked only for damages upon the invasion of interests in the use and enjoyment **971 of land, as well as of easements and profits. If abatement by judicial process was desired, resort to equity was required. Along with the civil remedy protecting rights in land, there developed a separate principle that an infringement of the right of the

crown, or of *568 the general public, was a crime and, in time, this class of offenses was so enlarged as to include any “act not warranted by law, or omission to discharge a legal duty, which inconveniences the public in the exercise of rights common to all Her Majesty’s subjects” (Stephen, General View of Criminal Law of England (1890), p. 105). At first, interference with the rights of the public was confined to the criminal realm but in time an individual who suffered special damages from a public nuisance was accorded a right of action. (See Restatement, Torts, notes preceding s 822, pp. 217-218; Prosser, Torts (4th ed.), pp. 572-573.)

A private nuisance threatens one person or a relatively few (McFarlane v. City of Niagara Falls, 247 N.Y. 340, 344, 160 N.E. 391, 392), an essential feature being an interference with the use or enjoyment of land (Blessington v. McCrory Stores Corp., 198 Misc. 291, 299, 95 N.Y.S.2d 414, 421, affd. 279 App.Div. 807, 110 N.Y.S.2d 456, affd. 305 N.Y. 140, 111 N.E.2d 421). It is actionable by the individual person or persons whose rights have been disturbed (Restatement, Torts, notes preceding s 822, p. 217). A public, or as sometimes termed a common, nuisance is an offense against the State and is subject to abatement or prosecution on application of the proper governmental agency (Restatement, Torts, notes preceding s 822, p. 217; see Penal Law , s 240.45). It consists of conduct or omissions which offend, interfere with or cause damage to the public in the exercise of rights common to all (New York Trap Rock Corp. v. Town of Clarkston, 299 N.Y. 77, 80, 85 N.E.2d 873, 875), in a manner such as to offend public morals, interfere with use by the public of a public place or endanger or injure the property, health, safety or comfort of a considerable number of persons (Melker v. City of New York, 190 N.Y. 481, 488, 83 N.E. 565, 567; Restatement, Torts, notes preceding s 822, p. 217).

As observed by Professor Prosser, public and private nuisances “have almost nothing in common, except that each causes inconvenience to someone, and it would have been fortunate if they had been called from the beginning by different names” (Prosser, Torts (4th ed.), p. 573). Not only does confusion arise from sameness in denomination and from the lack of it in applicability, but also from the fact that, although an individual cannot institute an action for public nuisance as such, he may maintain an action when he suffers special damage from a public nuisance (Restatement, Torts, notes preceding s 822, p. 217; Wakeman v. Wilbur, 147 N.Y. 657, 663-664, 42 N.E. 341, 342).

*569 This developmental tracing indicates the erroneous concept under which appellant labors. It also points out that

nuisance, as a general term, describes the consequences of conduct, the inconvenience to others, rather than the type of conduct involved (2 N.Y.P.J.I. 653). It is a field of tort liability rather than a single type of tortious conduct (Prosser, Torts (4th ed.), p. 573).

Despite early private nuisance cases, which apparently assumed that the defendant was strictly liable, today it is recognized that one is subject to liability for a private nuisance if his conduct is a legal cause of the invasion of the interest in the private use and enjoyment of land and such invasion is (1) intentional and unreasonable, (2) negligent or reckless, or (3) actionable under the rules governing liability for abnormally dangerous conditions or activities (Restatement, Torts 2d (Tent Draft No. 16), s 822; Prosser, Torts (4th ed.), p. 574; 2 N.Y.P.J.I. 563-654; see *Spano v. Perini Corp.*, 25 N.Y.2d 11, 15, 302 N.Y.S.2d 527, 529, 250 N.E.2d 31, 33; ***173 *Kingsland v. Erie Co. Agric. Soc.*, 298 N.Y. 409, 426-427, 84 N.E.2d 38, 46-47; *Wright v. Masonite Corp.*, D.C., 237 F.Supp. 129, 138, aff'd, 4 Cir., 368 F.2d 661, cert. den. 386 U.S. 934, 87 S.Ct. 957, 17 L.Ed.2d 806).

In urging that the charge in respect to negligence constituted error, plaintiff's **972 brief opens its discussion with the assertion that "(t)he complaint contained no allegations of negligence and its theory was that of nuisance." This statement is significant in that not only does it miss the fundamental difference between types of conduct which may result in nuisance and the invasion of interests in land, which is the nuisance, but it also overlooks the firmly established principle that negligence is merely one type of conduct which may give rise to a nuisance. A nuisance, either public or private, based on negligence and whether characterized as either negligence or nuisance, is but a single wrong (*Morello v. Brookfield Constr. Co.*, 4 N.Y.2d 83, 90, 172 N.Y.S.2d 577, 581, 149 N.E.2d 202, 204), and "whenever a nuisance has its origin in negligence", negligence must be proven and a plaintiff "may not avert the consequences of his (or her) own contributory negligence by affixing to the negligence of the wrongdoer the label of a nuisance" (*McFarlane v. City of Niagara Falls*, 247 N.Y. 340, 344-345, 160 N.E. 391, 392, supra; *Khouri v. County of Saratoga*, 267 N.Y. 384, 389, 196 N.E. 299; *Lyman v. Village of Potsdam*, 228 N.Y. 398, 401-402, 405, 127 N.E. 312; *Herman v. City of Buffalo*, 214 N.Y. 316, 320-321, 108 N.E. 451, 452-453; 2 *Harper & James, Torts*, pp. 1223-1224; 2 *Shearman & Redfield, Negligence* (rev. ed.), p. 919; see *Nuisance-Damages-Defenses*, Ann., 73 A.L.R.2d 1378, 1387; but see *570 CPLR 1411-1413). Although during trial an issue as to causation developed, whether the deleterious substances reaching the customers' vehicles in plaintiff's custody had their origin at defendant's Hudson Avenue property or elsewhere, plaintiff introduced the testimony of different

witnesses in support of its contention that defendant operated its plant in a negligent manner. While plaintiff offered expert proof to the effect that it was the general custom or usage in the power plant industry, during the period in question, to use collectors or precipitators, or both, on oil-fired boilers and also to use magnesium as a fuel oil additive to reduce the formation of acid bearing particulates, defendant submitted testimony from similar sources that mechanical and electrostatic precipitators are not commonly utilized on oil-fired burners and that defendant actually was using manganese as an additive.

Besides liability for nuisance arising out of negligence and apart from consideration of a nuisance resulting from abnormally dangerous or ultrahazardous conduct or conditions, the latter of which obviously is not applicable here (see Restatement, Torts 2d, s 822 (Tent Draft No. 16); Restatement, Torts, s 822; *Spano v. Perini Corp.*, 25 N.Y.2d 11, 302 N.Y.S.2d 527, 250 N.E.2d 31, supra; 1 *Harper & James, Torts*, p. 68; Prosser, Torts (4th ed.), p. 575), one may be liable for a private nuisance where the wrongful invasion of the use and enjoyment of another's land is intentional and unreasonable. It is distinguished from trespass which involves the invasion of a person's interest in the exclusive possession of land (Restatement, Torts, notes preceding s 822, pp. 224-225; Prosser, Torts (4th ed.), pp. 594-596). The elements of such a private nuisance, as charged in effect by the Trial Justice, are: (1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act (Restatement, Torts, s 822; *Nussbaum v. Lacopo*, 27 N.Y.2d 311, 315, 317 N.Y.S.2d 347, 350, 265 N.E.2d 762, 764; *McCarty v. Natural Carbonic Gas Co.*, 189 N.Y. 40, 49-50, 81 N.E. 549, 551; *Cogswell v. New York, New Haven & Hartford R. R. Co.*, 103 N.Y. 10, 13-15, 8 N.E. 537, 538; *Campbell v. Seaman*, 63 N.Y. 568, 576-577; Prosser, Torts (4th ed.), p. 593; 1 *Harper & James, Torts*, pp. 67-68; 2 N.Y.P.J.I., Comment, p. 660). Thus, plaintiff's exception that "defendant's ***174 intent * * * is not * * * an essential element of the cause of action of nuisance" and its criticism of the charge, which was to the effect that as to the private nuisance plaintiff was required to prove that defendant's conduct was intentional, are not well *571 taken. "An invasion of another's interest in the use and enjoyment of land is intentional when the actor (a) acts for the purpose of causing it; or (b) **973 knows that it is resulting or is substantially certain to result from his conduct" (Restatement, Torts, s 825; *McKenna v. Allied Chem. & Dye Corp.*, 8 A.D.2d 463, 467, 188 N.Y.S.2d 919, 923; see *Richardson, Evidence* (10 ed.), s 90).

Negligence and nuisance were explained to the jury at

considerable length and its attention was explicitly directed to the two categories of nuisance, that based on negligence and that dependent upon intentional conduct. The causes accrued, if at all, prior to the applicable date of the new CPLR article 14-A (CPLR 1411-1413), and the trial court properly charged that contributory negligence may be a defense where the nuisance is based on negligent conduct (*McFarlane v. City of Niagara Falls*, 247 N.Y. 340, 344-345, 160 N.E. 391, 392, *supra*). As to nuisance involving a willful or intentional invasion of plaintiff's rights, the jury was instructed that contributory negligence was not a defense and, in this respect, plaintiff was not prejudiced and has no right to complain (see *Prosser, Torts* (4th ed.), s 91, pp. 608-612; 2 *Harper & James, Torts*, s 22.8, pp. 1219-1227; *Nuisance-Damages-Defenses*, Ann., 73 A.L.R.2d 1378, 1390-1395; 2 N.Y. P.J.I. 664).

Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 309 N.Y.S.2d 312, 257 N.E.2d 870, revg. 30 A.D.2d 480, 294 N.Y.S.2d 452 and 55 Misc.2d 1023, 287 N.Y.S.2d 112, relied on by plaintiff, does not dictate a contrary result. There, Supreme Court found that defendant maintained a nuisance, same was affirmed by the Appellate Division, and the Court of Appeals concerned itself with the relief to be granted. Although Trial Term did specifically mention the type of nuisance it found, it is obvious that it was not a nuisance in which the substance of the wrong was negligence since it was held that "the evidence in this case establishes that Atlantic took every available and possible precaution to protect the plaintiffs from dust" (55 Misc.2d, at p. 1024, 287 N.Y.S.2d at p. 113). Rather, it would appear that the nuisance found was based on an intentional and unreasonable invasion, as it was stated that "(t)he discharge of large quantities of dust upon each of the properties and excessive vibration from blasting deprived each party of the reasonable use of his property and thereby prevented his enjoyment of life and liberty therein" (55 Misc.2d, at pp. 1024-1025, 287 N.Y.S.2d at p. 114). Contrary to plaintiff's assertion, *Boomer* does not negate the necessity of proving negligence in some nuisance actions involving harmful emissions, since *572 negligence is one of the types of conduct on which a nuisance may depend.

Although there are some Judges in the majority who are of the opinion that the charge did not furnish a model of discussion on some subjects, all of that group agree that reversal on the basis of the charge would not be warranted.

The order of the Appellate Division should be affirmed, with costs.

FUCHSBERG, Judge (dissenting).

I believe, as did Justices Markewich and Kupferman, who dissented at the Appellate Division, that the charge in this case, by repeatedly presenting an admixture of nuisance and negligence in a manner and to an extent that could have misled the jury, should bring a reversal. All the more is that so because of the Trial Judge's insistent refrain that the injury to the plaintiff's property was required to be intentionally inflicted. Accordingly, I must dissent.

In doing so, I should note that, while in the main I am in agreement with the majority of our court in its discussion of the substantive law of nuisance, I believe the ***175 readiness with which it uses the term "negligence" in the context of this action for nuisance is counterproductive to the eradication of the confusion which has so long plagued that subject. Words such as "intent", "negligence" and "absolute liability" refer not to the result of the conduct of a defendant who intrudes unreasonably on the use and enjoyment of another's property, but rather to the method of bringing it about. Too often, as here, it serves to divert from focusing on the basic legal issue.

****974** Nuisance traditionally requires that, after a balancing of the risk-utility considerations, the gravity of harm to a plaintiff be found to outweigh the social usefulness of a defendant's activity (*Prosser, Torts* (4th ed.), p. 581). For no matter whether an act is intentional or unintentional, there should be no liability unless the social balance of the activity leads to the conclusion that it is unreasonable (cf. *Meyer v. Gehl Co.*, 36 N.Y.2d 760, 764, 368 N.Y.S.2d 834, 836, 329 N.E.2d 666, 668 (dissenting opn.)).

Interestingly, sections 826 and 829A of the Restatement of Torts 2d (Tent Draft Nos. 17, 18) have now given recognition to developments in the law of torts by moving past the traditional rule to favor recovery for nuisance even when a defendant's conduct is not unreasonable. To be exact, section *573 826 (Tent Draft No. 18, pp. 3-4) reads: "An intentional invasion of another's interest in the use and enjoyment of land is unreasonable under the rule stated in section 822, if (a) the gravity of the harm outweighs the utility of the actor's conduct, or (b) the harm caused by the conduct is substantial and the financial burden of compensating for this and other harms does not render infeasible the continuation of the conduct". (See, also, *Wade, Environmental Protection, Common Law of Nuisance*, 8 Forum 165, 171.)

Indeed, a fair reading of *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 309 N.Y.S.2d 312, 257 N.E.2d 870, would indicate that the position articulated by the Restatement's

Tentative Draft is consistent with the decision of our court in that case. The plaintiffs in *Boomer* were landowners who were substantially damaged by air pollution caused by the defendant's cement plant. However, since the court found that the adverse economic effects of a permanent injunction which would close the plant would far outweigh the loss plaintiffs would suffer if the nuisance continued, it limited the relief it granted to an award of monetary damages as compensation to the defendants for the "servitude" which had been imposed on their lands (26 N.Y.2d, at p. 228, 309 N.Y.S.2d at p. 319, 257 N.E.2d at p. 874). Taken into account was the fact that an injunction would have put 300 employees out of work and caused forfeiture of a \$45,000,000 investment, while plaintiffs' permanent damages were only \$185,000 (26 N.Y.2d, at p. 225, 309 N.Y.S.2d at p. 316, 257 N.E.2d at p. 872) and that the burden of compensating for the harm did "not render infeasible the continuation of the conduct" (Restatement, Torts 2d, s 826 (Tent Draft No. 18), pp. 3-4; see, also, Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules and Fines as Land Use Controls*, 40 U.Chi.L.Rev. 681, 720).

On the basis of these principles, it follows that, on reversal the plaintiff in this case should be permitted to sustain its action for damages on proof that the harm is substantial and that the financial burden of compensating for the harm does not render "infeasible" the continuation of the defendant's business activity.

BREITEL, C. J., and JASEN, GABRIELLI, JONES and WACHTLER, JJ., concur with COOKE, J.

FUCHSBERG, J., dissents and votes to reverse in a separate opinion.

Order affirmed.

All Citations

41 N.Y.2d 564, 362 N.E.2d 968, 394 N.Y.S.2d 169, 7 Env'tl. L. Rep. 20,604

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73 N.Y.2d 748
Court of Appeals of New York.

Jane DOE et al., Respondents,
v.
David AXELROD, as Commissioner of Health of
the State of New York, Appellant.

Nov. 22, 1988.

Synopsis

Appeal was taken from order of the Appellate Division of the Supreme Court in the First Judicial Department, 136 A.D.2d 410, 527 N.Y.S.2d 385, which modified and affirmed order of the Supreme Court, New York County, Miller, J., granting motion for preliminary injunction enjoining enforcement of regulation requiring that certain frequently prescribed tranquilizing medicines be subjected to strict prescription control reserved for drugs of the greatest abuse under the Controlled Substances Act, and certifying question. The Court of Appeals held that preliminary injunction should not have been issued.

Modified, as so modified, affirmed, and certified question answered in the negative.

Attorneys and Law Firms

***750 **1272 ***44** Robert Abrams, Atty. Gen. (Darren O'Connor, O. Peter Sherwood and Andrea Green, New York City, of counsel), for appellant.

Sheldon D. Camhy and George G. Nelson, New York City, for respondents.

Leslie Salzman, Brooklyn, Marilyn A. Kneeland and Herbert Semmel, New York City, for Public Health Ass'n of New York City and another, amici curiae.

OPINION OF THE COURT

MEMORANDUM.

The order of the Appellate Division, 136 A.D.2d 410, 527 N.Y.S.2d 385, should be modified, with costs, by reversing

so much of that order as affirmed the Supreme Court order granting plaintiffs a preliminary injunction; the certified question should be answered in the negative.

*****45** The decision to grant or deny provisional relief, which requires the court to weigh a variety of factors, is a matter ordinarily committed to the sound discretion of the lower courts. Our power to review such decisions is thus limited to determining whether the lower courts' discretionary powers were exceeded or, as a matter of law, abused (*James v. Board of Educ.*, 42 N.Y.2d 357, 363–364, 397 N.Y.S.2d 934, 366 N.E.2d 1291). In this case, there was an abuse of discretion, and, as a consequence, reversal is required.

A preliminary injunction may be granted under CPLR article 63 when the party seeking such relief demonstrates: (1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in the moving party's favor (*Grant Co. v. Srogi*, 52 N.Y.2d 496, 517, 438 N.Y.S.2d 761, 420 N.E.2d 953). Here, plaintiffs can succeed on the merits of their claim only if they show either that in promulgating the challenged regulations (10 NYCRR 80.67) respondent ****1273** Commissioner acted outside of the authority constitutionally delegated to him under the Public Health Law (*compare, Boreali v. Axelrod*, 71 N.Y.2d 1, 523 N.Y.S.2d 464, 517 N.E.2d 1350, *with Matter of Levine v. Whalen*, 39 N.Y.2d 510, 384 N.Y.S.2d 721, 349 N.E.2d 820; and *Chiropractic Assn. v. Hilleboe*, 12 N.Y.2d 109, 237 N.Y.S.2d 289, 187 N.E.2d 756) or that the regulation was “ ‘so lacking in reason for its promulgation that it is essentially arbitrary’ ” (*Ostrer v. Schenck*, 41 N.Y.2d 782, 786, 396 N.Y.S.2d 335, 364 N.E.2d 1107). On this record, plaintiffs have not demonstrated that they can make ***751** such a showing.* Thus, the first prong of the test for preliminary injunctive relief—likelihood of success on the merits—was not satisfied, and, as a matter of law, a preliminary injunction should not have been issued.

SIMONS, KAYE, ALEXANDER, TITONE, HANCOCK and BELLACOSA, JJ., concur. WACHTLER, C.J., taking no part.

Order modified, with costs to appellant, in accordance with the memorandum herein and, as so modified, affirmed. Certified question answered in the negative.

All Citations

Doe v. Axelrod, 73 N.Y.2d 748 (1988)

532 N.E.2d 1272, 536 N.Y.S.2d 44

73 N.Y.2d 748, 532 N.E.2d 1272, 536 N.Y.S.2d 44

Footnotes

- * At this early stage in the litigation, the record consists only of plaintiffs' complaint and the papers submitted in connection with their motion for a preliminary injunction. Respondent Commissioner has not yet served an answer or made a motion to dismiss under CPLR 3211 or 3212.

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110 S.Ct. 1595
Supreme Court of the United States

EMPLOYMENT DIVISION, DEPARTMENT OF
HUMAN RESOURCES OF OREGON, et al.,
Petitioners

v.

Alfred L. SMITH et al.

No. 88-1213.

|
Argued Nov. 6, 1989.

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Decided April 17, 1990.

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Rehearing Denied June 4, 1990.

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See 496 U.S. 913, 110 S.Ct. 2605.

Synopsis

Claimants sought review of determination that their religious use of peyote, which resulted in their dismissal from employment, was "misconduct" disqualifying them from receipt of Oregon unemployment compensation benefits. In one case, the Oregon Court of Appeals, 75 Or.App. 764, 709 P.2d 246, reversed and remanded. The Oregon Supreme Court, 301 Or. 209, 721 P.2d 445, affirmed as modified. In the second case, the Oregon Court of Appeals, 75 Or.App. 735, 707 P.2d 1274, reversed. The Oregon Supreme Court, 301 Or. 221, 721 P.2d 451, affirmed as modified and remanded. Petition for writ of certiorari was granted. The Supreme Court, Justice Stevens, 485 U.S. 660, 108 S.Ct. 1444, 99 L.Ed.2d 753, vacated judgment and remanded for determination whether sacramental peyote use was proscribed by state's controlled substance law. On remand, the Oregon Supreme Court, 307 Or. 68, 763 P.2d 146, held that sacramental peyote use violated state drug laws, but concluded that prohibition was nonetheless invalid under free exercise clause. The Supreme Court, Scalia, J., held that: (1) free exercise clause did not prohibit application of Oregon drug laws to ceremonial ingestion of peyote, and (2) thus state could, consistent with free exercise clause, deny claimants unemployment compensation for work-related misconduct based on use of drug.

Reversed.

Justice O'Connor filed opinion concurring in judgment, in which opinion Justices Brennan, Marshall and Blackmun joined as to Parts I and II only.

Justice Blackmun filed dissenting opinion, in which Justices Brennan and Marshall join.

Opinion on remand, 310 Or. 376, 799 P.2d 148.

****1596 Syllabus***

***872** Respondents Smith and Black were fired by a private drug rehabilitation organization because they ingested peyote, a hallucinogenic drug, for sacramental purposes at a ceremony of their Native American Church. Their applications for unemployment compensation were denied by the State of Oregon under a state law disqualifying employees discharged for work-related "misconduct." Holding that the denials violated respondents' First Amendment free exercise rights, the State Court of Appeals reversed. The State Supreme Court affirmed, but this Court vacated the judgment and remanded for a determination whether sacramental peyote use is proscribed by the State's controlled substance law, which makes it a felony to knowingly or intentionally possess the drug. Pending that determination, the Court refused to decide whether such use is protected by the Constitution. On remand, the State Supreme Court held that sacramental peyote use violated, and was not excepted from, the state-law prohibition, but concluded that that prohibition was invalid under the Free Exercise Clause.

Held: The Free Exercise Clause permits the State to prohibit sacramental peyote use and thus to deny unemployment benefits to persons discharged for such use. Pp. 1598-1606.

(a) Although a State would be "prohibiting the free exercise [of religion]" in violation of the Clause if it sought to ban the performance of (or abstention from) physical acts solely because of their religious motivation, the Clause does not relieve an individual of the obligation to comply with a law that incidentally forbids (or requires) the performance of an act that his religious belief requires (or forbids) if the law is not specifically directed to religious practice and is otherwise constitutional as applied to those who engage in the specified act for nonreligious reasons. See, e.g., *Reynolds v. United States*, 98 U.S. 145, 166-167, 25 L.Ed. 244. The only decisions in which this Court has held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action are distinguished ****1597** on the ground that they involved not the Free Exercise Clause alone, but that Clause in conjunction with other constitutional protections. ***873** See, e.g., *Cantwell v. Connecticut*, 310 U.S. 296, 304-307, 60

S.Ct. 900, 903-905, 84 L.Ed. 1213; *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15. Pp. 1598-1602.

(b) Respondents' claim for a religious exemption from the Oregon law cannot be evaluated under the balancing test set forth in the line of cases following *Sherbert v. Verner*, 374 U.S. 398, 402-403, 83 S.Ct. 1790, 1792-1794, 10 L.Ed.2d 965, whereby governmental actions that substantially burden a religious practice must be justified by a "compelling governmental interest." That test was developed in a context-unemployment compensation eligibility rules-that lent itself to individualized governmental assessment of the reasons for the relevant conduct. The test is inapplicable to an across-the-board criminal prohibition on a particular form of conduct. A holding to the contrary would create an extraordinary right to ignore generally applicable laws that are not supported by "compelling governmental interest" on the basis of religious belief. Nor could such a right be limited to situations in which the conduct prohibited is "central" to the individual's religion, since that would enmesh judges in an impermissible inquiry into the centrality of particular beliefs or practices to a faith. Cf. *Hernandez v. Commissioner*, 490 U.S. 680, 699, 109 S.Ct. 2136, 2148-2149, 104 L.Ed.2d 766. Thus, although it is constitutionally permissible to exempt sacramental peyote use from the operation of drug laws, it is not constitutionally required. Pp. 1602-1606.

307 Or. 68, 763 P.2d 146, reversed.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and WHITE, STEVENS, and KENNEDY, JJ., joined. O'CONNOR, J., filed an opinion concurring in the judgment, in Parts I and II of which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined without concurring in the judgment, *post*, p. 1606. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 1615.

Attorneys and Law Firms

Dave Frohnmayer, Attorney General of Oregon, argued the cause for petitioners. With him on the briefs were *James E. Mountain, Jr.*, Deputy Attorney General, *Virginia L. Linder*, Solicitor General, and *Michael D. Reynolds*, Assistant Solicitor General.

Craig J. Dorsay argued the cause and filed briefs for respondents.*

* Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Steven R. Shapiro* and *John A. Powell*; for the American Jewish

Congress by *Amy Adelson*, *Lois C. Waldman*, and *Marc D. Stern*; for the Association on American Indian Affairs et al. by *Steven C. Moore* and *Jack Trope*; and for the Council on Religious Freedom by *Lee Boothby* and *Robert W. Nixon*.

Opinion

*874 Justice SCALIA delivered the opinion of the Court.

This case requires us to decide whether the Free Exercise Clause of the First Amendment permits the State of Oregon to include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug, and thus permits the State to deny unemployment benefits to persons dismissed from their jobs because of such religiously inspired use.

I

Oregon law prohibits the knowing or intentional possession of a "controlled substance" unless the substance has been prescribed by a medical practitioner. Ore.Rev.Stat. § 475.992(4) (1987). The law defines "controlled substance" as a drug classified in Schedules I through V of the Federal Controlled Substances Act, 21 U.S.C. §§ 811-812, as modified by the State Board of Pharmacy. Ore.Rev.Stat. § 475.005(6) (1987). Persons who violate this provision by possessing a controlled substance listed on Schedule I are "guilty of a Class B felony." § 475.992(4)(a). As compiled by the State Board of Pharmacy under its statutory authority, see, § 475.035, Schedule I contains the drug peyote, a hallucinogen derived from the plant *Lophophora williamsii* Lemaire. Ore.Admin.Rule 855-80-021(3)(s) (1988).

Respondents Alfred Smith and Galen Black (hereinafter respondents) were fired from their jobs with a private drug rehabilitation organization because they ingested peyote for sacramental purposes at a ceremony of the Native American Church, of which **1598 both are members. When respondents applied to petitioner Employment Division (hereinafter petitioner) for unemployment compensation, they were determined to be ineligible for benefits because they had been discharged for work-related "misconduct." The Oregon Court of Appeals reversed that determination, holding that the denial of benefits violated respondents' free exercise rights under the First

Amendment.

*875 On appeal to the Oregon Supreme Court, petitioner argued that the denial of benefits was permissible because respondents' consumption of peyote was a crime under Oregon law. The Oregon Supreme Court reasoned, however, that the criminality of respondents' peyote use was irrelevant to resolution of their constitutional claim—since the purpose of the “misconduct” provision under which respondents had been disqualified was not to enforce the State’s criminal laws but to preserve the financial integrity of the compensation fund, and since that purpose was inadequate to justify the burden that disqualification imposed on respondents’ religious practice. Citing our decisions in *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), and *Thomas v. Review Bd., Indiana Employment Security Div.*, 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981), the court concluded that respondents were entitled to payment of unemployment benefits. *Smith v. Employment Div., Dept. of Human Resources*, 301 Or. 209, 217-219, 721 P.2d 445, 449-450 (1986). We granted certiorari. 480 U.S. 916, 107 S.Ct. 1368, 94 L.Ed.2d 684 (1987).

Before this Court in 1987, petitioner continued to maintain that the illegality of respondents’ peyote consumption was relevant to their constitutional claim. We agreed, concluding that “if a State has prohibited through its criminal laws certain kinds of religiously motivated conduct without violating the First Amendment, it certainly follows that it may impose the lesser burden of denying unemployment compensation benefits to persons who engage in that conduct.” *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 485 U.S. 660, 670, 108 S.Ct. 1444, 1450, 99 L.Ed.2d 753 (1988) (*Smith I*). We noted, however, that the Oregon Supreme Court had not decided whether respondents’ sacramental use of peyote was in fact proscribed by Oregon’s controlled substance law, and that this issue was a matter of dispute between the parties. Being “uncertain about the legality of the religious use of peyote in Oregon,” we determined that it would not be “appropriate for us to decide whether the practice is protected by the Federal Constitution.” *Id.*, at 673, 108 S.Ct., at 1452. Accordingly, we *876 vacated the judgment of the Oregon Supreme Court and remanded for further proceedings. *Id.*, at 674, 108 S.Ct., at 1452.

On remand, the Oregon Supreme Court held that respondents’ religiously inspired use of peyote fell within the prohibition of the Oregon statute, which “makes no exception for the sacramental use” of the drug. 307 Or. 68, 72-73, 763 P.2d 146, 148 (1988). It then considered whether that prohibition was valid under the Free Exercise Clause, and concluded that it was not. The court therefore

reaffirmed its previous ruling that the State could not deny unemployment benefits to respondents for having engaged in that practice.

We again granted certiorari. 489 U.S. 1077, 109 S.Ct. 1526, 103 L.Ed.2d 832 (1989).

II

Respondents’ claim for relief rests on our decisions in *Sherbert v. Verner*, *supra*, *Thomas v. Review Bd. of Indiana Employment Security Div.*, *supra*, and *Hobbie v. Unemployment Appeals Comm’n of Florida*, 480 U.S. 136, 107 S.Ct. 1046, 94 L.Ed.2d 190 (1987), in which we held that a State could not condition the availability of unemployment insurance on an individual’s willingness to forgo conduct required by his religion. As we observed in *Smith I*, however, the conduct at issue in those cases was not prohibited by law. We held that distinction to be critical, for “if Oregon does prohibit the religious **1599 use of peyote, and if that prohibition is consistent with the Federal Constitution, there is no federal right to engage in that conduct in Oregon,” and “the State is free to withhold unemployment compensation from respondents for engaging in work-related misconduct, despite its religious motivation.” 485 U.S., at 672, 108 S.Ct., at 1451. Now that the Oregon Supreme Court has confirmed that Oregon does prohibit the religious use of peyote, we proceed to consider whether that prohibition is permissible under the Free Exercise Clause.

A

The Free Exercise Clause of the First Amendment, which has been made applicable to the States by incorporation into *877 the Fourteenth Amendment, see *Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213 (1940), provides that “Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof*...” U.S. Const., Amdt. 1 (emphasis added.) The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all “governmental regulation of religious *beliefs* as such.” *Sherbert v. Verner*, *supra*, 374 U.S., at 402, 83 S.Ct., at 1793. The government may not

compel affirmation of religious belief, see *Torcaso v. Watkins*, 367 U.S. 488, 81 S.Ct. 1680, 6 L.Ed.2d 982 (1961), punish the expression of religious doctrines it believes to be false, *United States v. Ballard*, 322 U.S. 78, 86-88, 64 S.Ct. 882, 886-87, 88 L.Ed. 1148 (1944), impose special disabilities on the basis of religious views or religious status, see *McDaniel v. Paty*, 435 U.S. 618, 98 S.Ct. 1322, 55 L.Ed.2d 593 (1978); *Fowler v. Rhode Island*, 345 U.S. 67, 69, 73 S.Ct. 526, 527, 97 L.Ed. 828 (1953); cf. *Larson v. Valente*, 456 U.S. 228, 245, 102 S.Ct. 1673, 1683-84, 72 L.Ed.2d 33 (1982), or lend its power to one or the other side in controversies over religious authority or dogma, see *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 445-452, 89 S.Ct. 601, 604-608, 21 L.Ed.2d 658 (1969); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 95-119, 73 S.Ct. 143, 143-56, 97 L.Ed. 120 (1952); *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708-725, 96 S.Ct. 2372, 2380-2388, 49 L.Ed.2d 151 (1976).

But the “exercise of religion” often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation. It would be true, we think (though no case of ours has involved the point), that a State would be “prohibiting the free exercise [of religion]” if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display. It would doubtless be unconstitutional, for example, to ban the casting of “statues that are to be used *878 for worship purposes,” or to prohibit bowing down before a golden calf.

Respondents in the present case, however, seek to carry the meaning of “prohibiting the free exercise [of religion]” one large step further. They contend that their religious motivation for using peyote places them beyond the reach of a criminal law that is not specifically directed at their religious practice, and that is concededly constitutional as applied to those who use the drug for other reasons. They assert, in other words, that “prohibiting the free exercise [of religion]” includes requiring any individual to observe a generally applicable law that requires (or forbids) the performance of an act that his religious belief forbids (or requires). As a textual matter, we do not think the words must be given that meaning. It is no more necessary to regard the collection of a general tax, for example, as “prohibiting the free exercise [of religion]” by those citizens who believe support of organized government to be sinful, than it is to regard the same tax as “abridging the freedom ... of the press” of **1600 those publishing companies that must pay the tax as a condition of staying

in business. It is a permissible reading of the text, in the one case as in the other, to say that if prohibiting the exercise of religion (or burdening the activity of printing) is not the object of the tax but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended. Compare *Citizen Publishing Co. v. United States*, 394 U.S. 131, 139, 89 S.Ct. 927, 931-32, 22 L.Ed.2d 148 (1969) (upholding application of antitrust laws to press), with *Grosjean v. American Press Co.*, 297 U.S. 233, 250-251, 56 S.Ct. 444, 449, 80 L.Ed. 660 (1936) (striking down license tax applied only to newspapers with weekly circulation above a specified level); see generally *Minneapolis Star & Tribune Co. v. Minnesota Comm’r of Revenue*, 460 U.S. 575, 581, 103 S.Ct. 1365, 1369-70, 75 L.Ed.2d 295 (1983).

Our decisions reveal that the latter reading is the correct one. We have never held that an individual’s religious beliefs *879 excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition. As described succinctly by Justice Frankfurter in *Minersville School Dist. Bd. of Ed. v. Gobitis*, 310 U.S. 586, 594-595, 60 S.Ct. 1010, 1012-1013, 84 L.Ed. 1375 (1940): “Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities (footnote omitted).” We first had occasion to assert that principle in *Reynolds v. United States*, 98 U.S. 145, 25 L.Ed. 244 (1878), where we rejected the claim that criminal laws against polygamy could not be constitutionally applied to those whose religion commanded the practice. “Laws,” we said, “are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.... Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.” *Id.*, at 166-167.

Subsequent decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a “valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).” *United States v. Lee*, 455 U.S. 252, 263, n. 3, 102 S.Ct. 1051, 1058, n. 3, 71 L.Ed.2d 127 (1982) (STEVENS, J., concurring in judgment); see *Minersville*

School Dist. Bd. of Ed. v. Gobitis, *supra*, 310 U.S., at 595, 60 S.Ct., at 1013 (collecting cases). In *Prince v. Massachusetts*, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944), we held that a mother could be prosecuted under the child labor laws *880 for using her children to dispense literature in the streets, her religious motivation notwithstanding. We found no constitutional infirmity in “excluding [these children] from doing there what no other children may do.” *Id.*, at 171, 64 S.Ct., at 444. In *Braunfeld v. Brown*, 366 U.S. 599, 81 S.Ct. 1144, 6 L.Ed.2d 563 (1961) (plurality opinion), we upheld Sunday-closing laws against the claim that they burdened the religious practices of persons whose religions compelled them to refrain from work on other days. In *Gillette v. United States*, 401 U.S. 437, 461, 91 S.Ct. 828, 842, 28 L.Ed.2d 168 (1971), we sustained the military Selective Service System against the claim that it violated free exercise by conscripting persons who opposed a particular war on religious grounds.

****1601** Our most recent decision involving a neutral, generally applicable regulatory law that compelled activity forbidden by an individual’s religion was *United States v. Lee*, 455 U.S., at 258-261, 102 S.Ct., at 1055-1057. There, an Amish employer, on behalf of himself and his employees, sought exemption from collection and payment of Social Security taxes on the ground that the Amish faith prohibited participation in governmental support programs. We rejected the claim that an exemption was constitutionally required. There would be no way, we observed, to distinguish the Amish believer’s objection to Social Security taxes from the religious objections that others might have to the collection or use of other taxes. “If, for example, a religious adherent believes war is a sin, and if a certain percentage of the federal budget can be identified as devoted to war-related activities, such individuals would have a similarly valid claim to be exempt from paying that percentage of the income tax. The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief.” *Id.*, at 260, 102 S.Ct., at 1056-57. Cf. *Hernandez v. Commissioner*, 490 U.S. 680, 109 S.Ct. 2136, 104 L.Ed.2d 766 (1989) (rejecting free exercise challenge to payment of income taxes alleged to make religious activities more difficult).

***881** The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, see *Cantwell v. Connecticut*, 310 U.S., at 304-307, 60 S.Ct., at 903-905 (invalidating a licensing system for religious and

charitable solicitations under which the administrator had discretion to deny a license to any cause he deemed nonreligious); *Murdock v. Pennsylvania*, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943) (invalidating a flat tax on solicitation as applied to the dissemination of religious ideas); *Follett v. McCormick*, 321 U.S. 573, 64 S.Ct. 717, 88 L.Ed. 938 (1944) (same), or the right of parents, acknowledged in *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), to direct the education of their children, see *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) (invalidating compulsory school-attendance laws as applied to Amish parents who refused on religious grounds to send their children to school).¹ ***882** Some of our cases prohibiting compelled expression, decided exclusively upon free speech grounds, have also involved freedom of religion, cf. *Wooley v. Maynard*, 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977) (invalidating compelled display of a license plate slogan that offended individual religious beliefs); *West Virginia Bd. of Education v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) (invalidating ****1602** compulsory flag salute statute challenged by religious objectors). And it is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns. Cf. *Roberts v. United States Jaycees*, 468 U.S. 609, 622, 104 S.Ct. 3244, 3251-52, 82 L.Ed.2d 462 (1984) (“An individual’s freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State [if] a correlative freedom to engage in group effort toward those ends were not also guaranteed”).

The present case does not present such a hybrid situation, but a free exercise claim unconnected with any communicative activity or parental right. Respondents urge us to hold, quite simply, that when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation. We have never held that, and decline to do so now. There being no contention that Oregon’s drug law represents an attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of one’s children in those beliefs, the rule to which we have adhered ever since *Reynolds* plainly controls. “Our cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government.” *Gillette v. United States*, *supra*, 401 U.S., at 461, 91 S.Ct., at 842.

B

Respondents argue that even though exemption from generally applicable criminal laws need not automatically be extended to religiously motivated actors, at least the claim for a ***883** religious exemption must be evaluated under the balancing test set forth in *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963). Under the *Sherbert* test, governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest. See *id.*, at 402-403, 83 S.Ct., at 1792-1794; see also *Hernandez v. Commissioner*, 490 U.S., at 699, 109 S.Ct., at 2148. Applying that test we have, on three occasions, invalidated state unemployment compensation rules that conditioned the availability of benefits upon an applicant's willingness to work under conditions forbidden by his religion. See *Sherbert v. Verner*, *supra*; *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981); *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 107 S.Ct. 1046, 94 L.Ed.2d 190 (1987). We have never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation. Although we have sometimes purported to apply the *Sherbert* test in contexts other than that, we have always found the test satisfied, see *United States v. Lee*, 455 U.S. 252, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982); *Gillette v. United States*, 401 U.S. 437, 91 S.Ct. 828, 28 L.Ed.2d 168 (1971). In recent years we have abstained from applying the *Sherbert* test (outside the unemployment compensation field) at all. In *Bowen v. Roy*, 476 U.S. 693, 106 S.Ct. 2147, 90 L.Ed.2d 735 (1986), we declined to apply *Sherbert* analysis to a federal statutory scheme that required benefit applicants and recipients to provide their Social Security numbers. The plaintiffs in that case asserted that it would violate their religious beliefs to obtain and provide a Social Security number for their daughter. We held the statute's application to the plaintiffs valid regardless of whether it was necessary to effectuate a compelling interest. See 476 U.S., at 699-701, 106 S.Ct., at 2151-53. In *Lyng v. Northwest Indian Cemetery Protective Assn.*, 485 U.S. 439, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988), we declined to apply *Sherbert* analysis to the Government's logging and road construction activities on lands used for religious purposes by several Native American Tribes, even though it was undisputed that the activities ****1603** "could have devastating effects on traditional Indian religious practices," 485 U.S., at 451, 108 S.Ct., at 1326. ***884** In *Goldman v. Weinberger*, 475 U.S. 503, 106 S.Ct. 1310, 89 L.Ed.2d 478 (1986), we rejected application of the *Sherbert* test to military dress regulations that forbade the wearing of yarmulkes. In *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 107 S.Ct. 2400, 96 L.Ed.2d 282 (1987), we sustained, without mentioning the *Sherbert* test, a prison's refusal to

excuse inmates from work requirements to attend worship services.

Even if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law. The *Sherbert* test, it must be recalled, was developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct. As a plurality of the Court noted in *Roy*, a distinctive feature of unemployment compensation programs is that their eligibility criteria invite consideration of the particular circumstances behind an applicant's unemployment: "The statutory conditions [in *Sherbert* and *Thomas*] provided that a person was not eligible for unemployment compensation benefits if, 'without good cause,' he had quit work or refused available work. The 'good cause' standard created a mechanism for individualized exemptions." *Bowen v. Roy*, *supra*, 476 U.S., at 708, 106 S.Ct., at 2156 (opinion of Burger, C.J., joined by Powell and REHNQUIST, JJ.). See also *Sherbert*, *supra*, 374 U.S., at 401, n. 4, 83 S.Ct., at 1792, n. 4 (reading state unemployment compensation law as allowing benefits for unemployment caused by at least some "personal reasons"). As the plurality pointed out in *Roy*, our decisions in the unemployment cases stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of "religious hardship" without compelling reason. *Bowen v. Roy*, *supra*, 476 U.S., at 708, 106 S.Ct., at 2156-57.

Whether or not the decisions are that limited, they at least have nothing to do with an across-the-board criminal prohibition on a particular form of conduct. Although, as noted earlier, we have sometimes used the *Sherbert* test to analyze free exercise challenges to such laws, see *United States v. *885 Lee*, *supra*, 455 U.S., at 257-260, 102 S.Ct., at 1055-1057; *Gillette v. United States*, *supra*, 401 U.S., at 462, 91 S.Ct., at 842-43, we have never applied the test to invalidate one. We conclude today that the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the test inapplicable to such challenges. The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." *Lyng*, *supra*, 485 U.S., at 451, 108 S.Ct., at 1326. To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is "compelling"—permitting him, by virtue of his beliefs, "to become a law unto himself," *Reynolds v. United States*, 98 U.S., at 167—contradicts both constitutional tradition and common sense.²

****1604** The “compelling government interest” requirement seems benign, because it is familiar from other fields. But using it as the standard that must be met before the government may accord different treatment on the basis of race, see, e.g., ***886** *Palmore v. Sidoti*, 466 U.S. 429, 432, 104 S.Ct. 1879, 1881-82, 80 L.Ed.2d 421 (1984), or before the government may regulate the content of speech, see, e.g., *Sable Communications of California v. FCC*, 492 U.S. 115, 126, 109 S.Ct. 2829, 2836, 106 L.Ed.2d 93 (1989), is not remotely comparable to using it for the purpose asserted here. What it produces in those other fields—equality of treatment and an unrestricted flow of contending speech—are constitutional norms; what it would produce here—a private right to ignore generally applicable laws—is a constitutional anomaly.³

Nor is it possible to limit the impact of respondents’ proposal by requiring a “compelling state interest” only when the conduct prohibited is “central” to the individual’s religion. Cf. *Lyng v. Northwest Indian Cemetery Protective Assn.*, 485 U.S., at 474-476, 108 S.Ct., at 1338-1339 (BRENNAN, J., dissenting). It is no ***887** more appropriate for judges to determine the “centrality” of religious beliefs before applying a “compelling interest” test in the free exercise field, than it would be for them to determine the “importance” of ideas before applying the “compelling interest” test in the free speech field. What principle of law or logic can be brought to bear to contradict a believer’s assertion that a particular act is “central” to his personal faith? Judging the centrality of different religious practices is akin to the unacceptable “business of evaluating the relative merits of differing religious claims.” *United States v. Lee*, 455 U.S., at 263 n. 2, 102 S.Ct., at 1058 n. 2 (STEVENS, J., concurring). As we reaffirmed only last Term, “[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants’ interpretations of those creeds.” *Hernandez v. Commissioner*, 490 U.S., at 699, 109 S.Ct., at 2148. Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim. See, e.g., *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S., at 716, 101 S.Ct., at 1431; *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S., at 450, 89 S.Ct., at 606-07; *Jones v. Wolf*, 443 U.S. 595, 602-606, 99 S.Ct. 3020, 3024-3027, 61 L.Ed.2d 775 (1979); *United States v. Ballard*, 322 U.S. 78, 85-87, 64 S.Ct. 882, 885-87, 88 L.Ed. 1148 (1944).⁴

***888** If the “compelling interest” test is to be applied at all, then, it must be applied across the board, to all actions thought to be religiously commanded. Moreover, if

“compelling interest” really means what it says (and watering it down here would subvert its rigor in the other fields where it is applied), many laws will not meet the test. Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society’s diversity of religious beliefs, and its determination to coerce or suppress none of them. Precisely because “we are a cosmopolitan nation made up of people of almost every conceivable religious preference,” *Braunfeld v. Brown*, 366 U.S., at 606, 81 S.Ct., at 1147, and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order. The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind—ranging from ***889** compulsory military service, see, e.g., *Gillette v. United States*, 401 U.S. 437, 91 S.Ct. 828, 28 L.Ed.2d 168 (1971), to the payment of taxes, see, e.g., *United States v. Lee*, *supra*; to health and safety regulation such as manslaughter and child neglect laws, see, e.g., *Funkhouser v. State*, 763 P.2d 695 (Okla.Crim.App.1988), compulsory vaccination laws, see, e.g., *Cude v. State*, 237 Ark. 927, 377 S.W.2d 816 (1964), drug laws, see, e.g., *Olsen v. Drug Enforcement Administration*, 279 U.S.App.D.C. 1, 878 F.2d 1458 (1989), and traffic laws, see *Cox v. New Hampshire*, 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049 (1941); to social welfare legislation such as minimum wage laws, see *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 105 S.Ct. 1953, 85 L.Ed.2d 278 (1985), child labor laws, see *Prince v. Massachusetts*, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944), animal cruelty laws, see, e.g., *Church of the Lukumi Babalu Aye Inc. v. City of Hialeah*, 723 F.Supp. 1467 (SD Fla.1989), cf. *State v. Massey*, 229 N.C. 734, 51 S.E.2d 179, appeal dismissed, 336 U.S. 942, 69 S.Ct. 813, 93 L.Ed. 1099 (1949), environmental protection laws, ****1606** see *United States v. Little*, 638 F.Supp. 337 (Mont.1986), and laws providing for equality of opportunity for the races, see, e.g., *Bob Jones University v. United States*, 461 U.S. 574, 603-604, 103 S.Ct. 2017, 2034-2035, 76 L.Ed.2d 157 (1983). The First Amendment’s protection of religious liberty does not require this.⁵

***890** Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to

be solicitous of that value in its legislation as well. It is therefore not surprising that a number of States have made an exception to their drug laws for sacramental peyote use. See, e.g., Ariz.Rev.Stat. Ann. §§ 13-3402(B)(1)-(3) (1989); Colo.Rev.Stat. § 12-22-317(3) (1985); N.M.Stat. Ann. § 30-31-6(D) (Supp.1989). But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts. It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.

* * *

Because respondents' ingestion of peyote was prohibited under Oregon law, and because that prohibition is constitutional, Oregon may, consistent with the Free Exercise Clause, deny respondents unemployment compensation when their dismissal results from use of the drug. The decision of the Oregon Supreme Court is accordingly reversed.

It is so ordered.

***891** Justice O'CONNOR, with whom Justice BRENNAN, Justice MARSHALL, and Justice BLACKMUN join as to Parts I and II, concurring in the judgment.*

Although I agree with the result the Court reaches in this case, I cannot join its opinion. In my view, today's holding dramatically departs from well-settled First Amendment jurisprudence, appears unnecessary to resolve the question presented, and is incompatible with our Nation's fundamental commitment to individual religious liberty.

I

At the outset, I note that I agree with the Court's implicit determination that the constitutional ****1607** question upon which we granted review-whether the Free Exercise Clause protects a person's religiously motivated use of peyote

from the reach of a State's general criminal law prohibition-is properly presented in this case. As the Court recounts, respondents Alfred Smith and Galen Black (hereinafter respondents) were denied unemployment compensation benefits because their sacramental use of peyote constituted work-related "misconduct," not because they violated Oregon's general criminal prohibition against possession of peyote. We held, however, in *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 485 U.S. 660, 108 S.Ct. 1444, 99 L.Ed.2d 753 (1988) (*Smith I*), that whether a State may, consistent with federal law, deny unemployment compensation benefits to persons for their religious use of peyote depends on whether the State, as a matter of state law, has criminalized the underlying conduct. See *id.*, at 670-672, 108 S.Ct., at 1450-51. The Oregon Supreme Court, on remand from this Court, concluded that "the Oregon statute against possession of controlled substances, which include peyote, makes no exception for the sacramental use of peyote." 307 Or. 68, 72-73, 763 P.2d 146, 148 (1988) (footnote omitted).

***892** Respondents contend that, because the Oregon Supreme Court declined to decide whether the Oregon Constitution prohibits criminal prosecution for the religious use of peyote, see *id.*, at 73, n. 3, 763 P.2d, at 148, n. 3, any ruling on the federal constitutional question would be premature. Respondents are of course correct that the Oregon Supreme Court may eventually decide that the Oregon Constitution requires the State to provide an exemption from its general criminal prohibition for the religious use of peyote. Such a decision would then reopen the question whether a State may nevertheless deny unemployment compensation benefits to claimants who are discharged for engaging in such conduct. As the case comes to us today, however, the Oregon Supreme Court has plainly ruled that Oregon's prohibition against possession of controlled substances does not contain an exemption for the religious use of peyote. In light of our decision in *Smith I*, which makes this finding a "necessary predicate to a correct evaluation of respondents' federal claim," 485 U.S., at 672, 108 S.Ct., at 1451, the question presented and addressed is properly before the Court.

II

The Court today extracts from our long history of free exercise precedents the single categorical rule that "if prohibiting the exercise of religion ... is ... merely the incidental effect of a generally applicable and otherwise

valid provision, the First Amendment has not been offended.” *Ante*, at 1600 (citations omitted). Indeed, the Court holds that where the law is a generally applicable criminal prohibition, our usual free exercise jurisprudence does not even apply. *Ante*, at 1603. To reach this sweeping result, however, the Court must not only give a strained reading of the First Amendment but must also disregard our consistent application of free exercise doctrine to cases involving generally applicable regulations that burden religious conduct.

*893 A

The Free Exercise Clause of the First Amendment commands that “Congress shall make no law ... prohibiting the free exercise [of religion].” In *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940), we held that this prohibition applies to the States by incorporation into the Fourteenth Amendment and that it categorically forbids government regulation of religious beliefs. *Id.*, at 303, 60 S.Ct., at 903. As the Court recognizes, however, the “free exercise” of religion often, if not invariably, requires the performance of (or abstention from) certain acts. *Ante*, at 1599; cf. 3 A New English Dictionary on Historical Principles 401-402 (J. Murray ed. 1897) (defining “exercise” to include “[t]he practice and performance of rites and ceremonies, worship, **1608 etc.; the right or permission to celebrate the observances (of a religion)” and religious observances such as acts of public and private worship, preaching, and prophesying). “[B]elief and action cannot be neatly confined in logic-tight compartments.” *Wisconsin v. Yoder*, 406 U.S. 205, 220, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972). Because the First Amendment does not distinguish between religious belief and religious conduct, conduct motivated by sincere religious belief, like the belief itself, must be at least presumptively protected by the Free Exercise Clause.

The Court today, however, interprets the Clause to permit the government to prohibit, without justification, conduct mandated by an individual’s religious beliefs, so long as that prohibition is generally applicable. *Ante*, at 1599. But a law that prohibits certain conduct-conduct that happens to be an act of worship for someone-manifestly does prohibit that person’s free exercise of his religion. A person who is barred from engaging in religiously motivated conduct is barred from freely exercising his religion. Moreover, that person is barred from freely exercising his religion regardless of whether the law prohibits the conduct

only when engaged in for religious reasons, only by members of that religion, or by all persons. It is difficult to deny that a law that prohibits *894 religiously motivated conduct, even if the law is generally applicable, does not at least implicate First Amendment concerns.

The Court responds that generally applicable laws are “one large step” removed from laws aimed at specific religious practices. *Ibid.* The First Amendment, however, does not distinguish between laws that are generally applicable and laws that target particular religious practices. Indeed, few States would be so naive as to enact a law directly prohibiting or burdening a religious practice as such. Our free exercise cases have all concerned generally applicable laws that had the effect of significantly burdening a religious practice. If the First Amendment is to have any vitality, it ought not be construed to cover only the extreme and hypothetical situation in which a State directly targets a religious practice. As we have noted in a slightly different context, “ ‘[s]uch a test has no basis in precedent and relegates a serious First Amendment value to the barest level of minimum scrutiny that the Equal Protection Clause already provides.’ ” *Hobbie v. Unemployment Appeals Comm’n of Florida*, 480 U.S. 136, 141-142, 107 S.Ct. 1046, 1049, 94 L.Ed.2d 190 (1987) (quoting *Bowen v. Roy*, 476 U.S. 693, 727, 106 S.Ct. 2147, 2166-67, 90 L.Ed.2d 735 (1986) (O’CONNOR, J., concurring in part and dissenting in part)).

To say that a person’s right to free exercise has been burdened, of course, does not mean that he has an absolute right to engage in the conduct. Under our established First Amendment jurisprudence, we have recognized that the freedom to act, unlike the freedom to believe, cannot be absolute. See, e.g., *Cantwell*, *supra*, 310 U.S., at 304, 60 S.Ct., at 903-04; *Reynolds v. United States*, 98 U.S. 145, 161-167, 25 L.Ed. 244 (1878). Instead, we have respected both the First Amendment’s express textual mandate and the governmental interest in regulation of conduct by requiring the government to justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest. See *895 *Hernandez v. Commissioner*, 490 U.S. 680, 699, 109 S.Ct. 2136, 2148, 104 L.Ed.2d 766 (1989); *Hobbie*, *supra*, 480 U.S., at 141, 107 S.Ct., at 1049; *United States v. Lee*, 455 U.S. 252, 257-258 (1982); *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 718, 101 S.Ct. 1425, 1432, 67 L.Ed.2d 624 (1981); *McDaniel v. Paty*, 435 U.S. 618, 626-629, 98 S.Ct. 1322, 1327-1329, 55 L.Ed.2d 593 (1978) (plurality opinion); *Yoder*, *supra*, 406 U.S., at 215, 92 S.Ct., at 1533; *Gillette v. United States*, 401 U.S. 437, 462, 91 S.Ct. 828, 842, 28 L.Ed.2d 168 (1971); *Sherbert v. Verner*, 374 U.S. 398, 403, 83 S.Ct. 1790, 1793-94, 10 L.Ed.2d 965 (1963); see also

****1609** *Bowen v. Roy*, *supra*, 476 U.S., at 732, 106 S.Ct., at 2169 (opinion concurring in part and dissenting in part); *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624, 639, 63 S.Ct. 1178, 1186, 87 L.Ed. 1628 (1943). The compelling interest test effectuates the First Amendment's command that religious liberty is an independent liberty, that it occupies a preferred position, and that the Court will not permit encroachments upon this liberty, whether direct or indirect, unless required by clear and compelling governmental interests "of the highest order," *Yoder*, *supra*, 406 U.S., at 215, 92 S.Ct., at 1533. "Only an especially important governmental interest pursued by narrowly tailored means can justify exacting a sacrifice of First Amendment freedoms as the price for an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Roy*, *supra*, 476 U.S., at 728, 106 S.Ct., at 2167 (opinion concurring in part and dissenting in part).

The Court attempts to support its narrow reading of the Clause by claiming that "[w]e have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Ante*, at 1600. But as the Court later notes, as it must, in cases such as *Cantwell* and *Yoder* we have in fact interpreted the Free Exercise Clause to forbid application of a generally applicable prohibition to religiously motivated conduct. See *Cantwell*, 310 U.S., at 304-307, 60 S.Ct., at 903-905; *Yoder*, 406 U.S., at 214-234, 92 S.Ct., at 1532-1542. Indeed, in *Yoder* we expressly rejected the interpretation the Court now adopts:

"[O]ur decisions have rejected the idea that religiously grounded conduct is always outside the protection of the Free Exercise Clause. It is true that activities of individuals, even when religiously based, are often subject ***896** to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, or the Federal Government in the exercise of its delegated powers. But to agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, *even under regulations of general applicability*....

"... A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for government neutrality if it unduly burdens the free exercise of religion." *Id.*, at 219-220, 92 S.Ct., at 1535-36 (emphasis added; citations omitted).

The Court endeavors to escape from our decisions in *Cantwell* and *Yoder* by labeling them "hybrid" decisions, *ante*, at 1607, but there is no denying that both cases

expressly relied on the Free Exercise Clause, see *Cantwell*, 310 U.S., at 303-307, 60 S.Ct., at 903-905; *Yoder*, *supra*, 406 U.S., at 219-229, 92 S.Ct., at 1535-1540, and that we have consistently regarded those cases as part of the mainstream of our free exercise jurisprudence. Moreover, in each of the other cases cited by the Court to support its categorical rule, *ante*, at 1600-1601, we rejected the particular constitutional claims before us only after carefully weighing the competing interests. See *Prince v. Massachusetts*, 321 U.S. 158, 168-170, 64 S.Ct. 438, 443-444, 88 L.Ed. 645 (1944) (state interest in regulating children's activities justifies denial of religious exemption from child labor laws); *Braunfeld v. Brown*, 366 U.S. 599, 608-609, 81 S.Ct. 1144, 1148-1149, 6 L.Ed.2d 563 (1961) (plurality opinion) (state interest in uniform day of rest justifies denial of religious exemption from Sunday closing law); *Gillette*, *supra*, 401 U.S., at 462, 91 S.Ct., at 842-43 (state interest in military affairs justifies denial of religious exemption from conscription laws); *Lee*, *supra*, 455 U.S., at 258-259, 102 S.Ct., at 1055-1056 (state interest in comprehensive Social Security system justifies denial of religious exemption from mandatory participation requirement). That we rejected the free exercise ***897** claims in those cases hardly ****1610** calls into question the applicability of First Amendment doctrine in the first place. Indeed, it is surely unusual to judge the vitality of a constitutional doctrine by looking to the win-loss record of the plaintiffs who happen to come before us.

B

Respondents, of course, do not contend that their conduct is automatically immune from all governmental regulation simply because it is motivated by their sincere religious beliefs. The Court's rejection of that argument, *ante*, at 1602, might therefore be regarded as merely harmless dictum. Rather, respondents invoke our traditional compelling interest test to argue that the Free Exercise Clause requires the State to grant them a limited exemption from its general criminal prohibition against the possession of peyote. The Court today, however, denies them even the opportunity to make that argument, concluding that "the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the [compelling interest] test inapplicable to" challenges to general criminal prohibitions. *Ante*, at 1603.

In my view, however, the essence of a free exercise claim is relief from a burden imposed by government on religious

practices or beliefs, whether the burden is imposed directly through laws that prohibit or compel specific religious practices, or indirectly through laws that, in effect, make abandonment of one's own religion or conformity to the religious beliefs of others the price of an equal place in the civil community. As we explained in *Thomas*:

"Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists." 450 U.S., at 717-718, 101 S.Ct., at 1432.

***898** See also *Frazee v. Illinois Dept. of Employment Security*, 489 U.S. 829, 832, 109 S.Ct. 1514, 1516-1517, 103 L.Ed.2d 914 (1989); *Hobbie*, 480 U.S., at 141, 107 S.Ct., at 1049. A State that makes criminal an individual's religiously motivated conduct burdens that individual's free exercise of religion in the severest manner possible, for it "results in the choice to the individual of either abandoning his religious principle or facing criminal prosecution." *Braunfeld*, *supra*, 366 U.S., at 605, 81 S.Ct., at 1147. I would have thought it beyond argument that such laws implicate free exercise concerns.

Indeed, we have never distinguished between cases in which a State conditions receipt of a benefit on conduct prohibited by religious beliefs and cases in which a State affirmatively prohibits such conduct. The *Sherbert* compelling interest test applies in both kinds of cases. See, e.g., *Lee*, 455 U.S., at 257-260, 102 S.Ct., at 1055-1057 (applying *Sherbert* to uphold Social Security tax liability); *Gillette*, 401 U.S., at 462, 91 S.Ct., at 842-43 (applying *Sherbert* to uphold military conscription requirement); *Yoder*, 406 U.S., at 215-234, 92 S.Ct., at 1533-1538 (applying *Sherbert* to strike down criminal convictions for violation of compulsory school attendance law). As I noted in *Bowen v. Roy*:

"The fact that the underlying dispute involves an award of benefits rather than an exaction of penalties does not grant the Government license to apply a different version of the Constitution....

"... The fact that appellees seek exemption from a precondition that the Government attaches to an award of benefits does not, therefore, generate a meaningful distinction between this case and one where appellees seek an exemption from the Government's imposition of penalties upon them." 476 U.S., at 731-732, 106 S.Ct., at 2168-2169 (opinion concurring in part and dissenting in part).

****1611** See also *Hobbie*, *supra*, 480 U.S., at 141-142, 107 S.Ct., at 1049-1050; *Sherbert*, 374 U.S., at 404, 83 S.Ct., at 1794. I would reaffirm that principle today: A neutral criminal law prohibiting conduct that a State may legitimately regulate is, if anything, *more* burdensome than a neutral civil ***899** statute placing legitimate conditions on the award of a state benefit.

Legislatures, of course, have always been "left free to reach actions which were in violation of social duties or subversive of good order." *Reynolds*, 98 U.S., at 164; see also *Yoder*, *supra*, at 219-220, 92 S.Ct., at 1535-1536; *Braunfeld*, 366 U.S., at 603-604, 81 S.Ct., at 1145-1146. Yet because of the close relationship between conduct and religious belief, "[i]n every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." *Cantwell*, 310 U.S., at 304, 60 S.Ct., at 903. Once it has been shown that a government regulation or criminal prohibition burdens the free exercise of religion, we have consistently asked the government to demonstrate that unbending application of its regulation to the religious objector "is essential to accomplish an overriding governmental interest," *Lee*, *supra*, 455 U.S., at 257-258, 102 S.Ct., at 1055, or represents "the least restrictive means of achieving some compelling state interest," *Thomas*, *supra*, 450 U.S., at 718, 101 S.Ct., at 1432. See, e.g., *Braunfeld*, *supra*, 366 U.S. at 607, 81 S.Ct., at 1148; *Sherbert*, *supra*, 374 U.S., at 406, 83 S.Ct., at 1795; *Yoder*, *supra*, 406 U.S., at 214-215, 92 S.Ct., at 1532-1533; *Roy*, 476 U.S., at 728-732, 106 S.Ct., at 2167-2169 (opinion concurring in part and dissenting in part). To me, the sounder approach—the approach more consistent with our role as judges to decide each case on its individual merits—is to apply this test in each case to determine whether the burden on the specific plaintiffs before us is constitutionally significant and whether the particular criminal interest asserted by the State before us is compelling. Even if, as an empirical matter, a government's criminal laws might usually serve a compelling interest in health, safety, or public order, the First Amendment at least requires a case-by-case determination of the question, sensitive to the facts of each particular claim. Cf. *McDaniel*, 435 U.S., at 628, n. 8, 98 S.Ct., at 1328, n. 8 (plurality opinion) (noting application of *Sherbert* to general criminal prohibitions and the "delicate balancing required by our decisions in" *Sherbert* and *Yoder*). Given the range of conduct that a State might legitimately make ***900** criminal, we cannot assume, merely because a law carries criminal sanctions and is generally applicable, that the First Amendment *never* requires the State to grant a limited exemption for religiously motivated conduct.

Moreover, we have not "rejected" or "declined to apply"

the compelling interest test in our recent cases. *Ante*, at 1602-1603. Recent cases have instead affirmed that test as a fundamental part of our First Amendment doctrine. See, e.g., *Hernandez*, 490 U.S., at 699, 109 S.Ct., at 2148-2149; *Hobbie*, *supra*, 480 U.S., at 141-142, 107 S.Ct., at 1049-1050 (rejecting Chief Justice Burger's suggestion in *Roy*, *supra*, 476 U.S., at 707-708, 106 S.Ct., at 2156-2157, that free exercise claims be assessed under a less rigorous "reasonable means" standard). The cases cited by the Court signal no retreat from our consistent adherence to the compelling interest test. In both *Bowen v. Roy*, *supra*, and *Lyng v. Northwest Indian Cemetery Protective Assn.*, 485 U.S. 439, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988), for example, we expressly distinguished *Sherbert* on the ground that the First Amendment does not "require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development.... The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Roy*, *supra*, 476 U.S., at 699, 106 S.Ct., at 2152; see *Lyng*, *supra*, 485 U.S., at 449, 108 S.Ct., at 1325. This distinction makes sense because "the Free Exercise Clause is written in ****1612** terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government." *Sherbert*, *supra*, 374 U.S., at 412, 83 S.Ct., at 1798 (Douglas, J., concurring). Because the case *sub judice*, like the other cases in which we have applied *Sherbert*, plainly falls into the former category, I would apply those established precedents to the facts of this case.

Similarly, the other cases cited by the Court for the proposition that we have rejected application of the *Sherbert* test outside the unemployment compensation field, *ante*, at 1603, are distinguishable because they arose in the narrow, specialized contexts in which we have not traditionally required ***901** the government to justify a burden on religious conduct by articulating a compelling interest. See *Goldman v. Weinberger*, 475 U.S. 503, 507, 106 S.Ct. 1310, 1313, 89 L.Ed.2d 478 (1986) ("Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society"); *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349, 107 S.Ct. 2400, 2404, 96 L.Ed.2d 282 (1987) ("[P]rison regulations alleged to infringe constitutional rights are judged under a 'reasonableness' test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights") (citation omitted). That we did not apply the compelling interest test in these cases says nothing about whether the test should continue to apply in paradigm free exercise cases such as the one presented here.

The Court today gives no convincing reason to depart from settled First Amendment jurisprudence. There is nothing talismanic about neutral laws of general applicability or general criminal prohibitions, for laws neutral toward religion can coerce a person to violate his religious conscience or intrude upon his religious duties just as effectively as laws aimed at religion. Although the Court suggests that the compelling interest test, as applied to generally applicable laws, would result in a "constitutional anomaly," *ante*, at 1604, the First Amendment unequivocally makes freedom of religion, like freedom from race discrimination and freedom of speech, a "constitutional nor [m]," not an "anomaly." *Ibid*. Nor would application of our established free exercise doctrine to this case necessarily be incompatible with our equal protection cases. Cf. *Rogers v. Lodge*, 458 U.S. 613, 618, 102 S.Ct. 3272, 3276, 73 L.Ed.2d 1012 (1982) (race-neutral law that " 'bears more heavily on one race than another' " may violate equal protection) (citation omitted); *Castaneda v. Partida*, 430 U.S. 482, 492-495, 97 S.Ct. 1272, 1278-1281, 51 L.Ed.2d 498 (1977) (grand jury selection). We have in any event recognized that the Free Exercise Clause protects values distinct from those protected by the Equal Protection Clause. See *Hobbie*, 480 U.S., at 141-142, 107 S.Ct., at 1049. As the language of the ***902** Clause itself makes clear, an individual's free exercise of religion is a preferred constitutional activity. See, e.g., McConnell, Accommodation of Religion, 1985 S.Ct.Rev. 1, 9 ("[T]he text of the First Amendment itself 'singles out' religion for special protections"); P. Kauper, Religion and the Constitution 17 (1964). A law that makes criminal such an activity therefore triggers constitutional concern-and heightened judicial scrutiny-even if it does not target the particular religious conduct at issue. Our free speech cases similarly recognize that neutral regulations that affect free speech values are subject to a balancing, rather than categorical, approach. See, e.g., *United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672 (1968); *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-47, 106 S.Ct. 925, 928-929, 89 L.Ed.2d 29 (1986); cf. *Anderson v. Celebrezze*, 460 U.S. 780, 792-794, 103 S.Ct. 1564, 1571-1573, 75 L.Ed.2d 547 (1983) (generally applicable laws may impinge on free association concerns). The Court's parade of horrors, *ante*, at 1605-1606, not only fails as a reason for discarding the compelling interest ****1613** test, it instead demonstrates just the opposite: that courts have been quite capable of applying our free exercise jurisprudence to strike sensible balances between religious liberty and competing state interests.

Finally, the Court today suggests that the disfavoring of minority religions is an "unavoidable consequence" under

our system of government and that accommodation of such religions must be left to the political process. *Ante*, at 1606. In my view, however, the First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility. The history of our free exercise doctrine amply demonstrates the harsh impact majoritarian rule has had on unpopular or emerging religious groups such as the Jehovah's Witnesses and the Amish. Indeed, the words of Justice Jackson in *West Virginia State Bd. of Ed. v. Barnette* (overruling *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 60 S.Ct. 1010, 84 L.Ed. 1375 (1940)) are apt:

*903 "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." 319 U.S., at 638, 63 S.Ct., at 1185.

See also *United States v. Ballard*, 322 U.S. 78, 87, 64 S.Ct. 882, 886-87, 88 L.Ed. 1148 (1944) ("The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views"). The compelling interest test reflects the First Amendment's mandate of preserving religious liberty to the fullest extent possible in a pluralistic society. For the Court to deem this command a "luxury," *ante*, at 1605, is to denigrate "[t]he very purpose of a Bill of Rights."

III

The Court's holding today not only misreads settled First Amendment precedent; it appears to be unnecessary to this case. I would reach the same result applying our established free exercise jurisprudence.

A

There is no dispute that Oregon's criminal prohibition of peyote places a severe burden on the ability of respondents to freely exercise their religion. Peyote is a sacrament of the Native American Church and is regarded as vital to respondents' ability to practice their religion. See O. Stewart, *Peyote Religion: A History* 327-336 (1987) (describing modern status of peyotism); E. Anderson, *Peyote: The Divine Cactus* 41-65 (1980) (describing peyote ceremonies); Teachings from *904 the American Earth: Indian Religion and Philosophy 96-104 (D. Tedlock & B. Tedlock eds. 1975) (same); see also *People v. Woody*, 61 Cal.2d 716, 721-722, 40 Cal.Rptr. 69, 73-74, 394 P.2d 813, 817-818 (1964). As we noted in *Smith I*, the Oregon Supreme Court concluded that "the Native American Church is a recognized religion, that peyote is a sacrament of that church, and that respondent's beliefs were sincerely held." 485 U.S., at 667, 108 S.Ct., at 1449. Under Oregon law, as construed by that State's highest court, members of the Native American Church must choose between carrying out the ritual embodying their religious beliefs and avoidance of criminal prosecution. That choice is, in my view, more than sufficient to trigger First Amendment scrutiny.

There is also no dispute that Oregon has a significant interest in enforcing laws that **1614 control the possession and use of controlled substances by its citizens. See, e.g., *Sherbert*, 374 U.S., at 403, 83 S.Ct., at 1793-94 (religiously motivated conduct may be regulated where such conduct "pose[s] some substantial threat to public safety, peace or order"); *Yoder*, 406 U.S., at 220, 92 S.Ct., at 1535 ("[A]ctivities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare"). As we recently noted, drug abuse is "one of the greatest problems affecting the health and welfare of our population" and thus "one of the most serious problems confronting our society today." *Treasury Employees v. Von Raab*, 489 U.S. 656, 668, 674, 109 S.Ct. 1384, 1395, 103 L.Ed.2d 685 (1989). Indeed, under federal law (incorporated by Oregon law in relevant part, see Ore.Rev.Stat. § 475.005(6) (1987)), peyote is specifically regulated as a Schedule I controlled substance, which means that Congress has found that it has a high potential for abuse, that there is no currently accepted medical use, and that there is a lack of accepted safety for use of the drug under medical supervision. See 21 U.S.C. § 812(b)(1). See generally R. Julien, *A Primer of Drug Action* 149 (3d ed. 1981). In light of our recent decisions holding that the governmental *905 interests in the collection of income tax, *Hernandez*, 490 U.S., at 699-700, 109 S.Ct., at 2148-2149, a comprehensive Social Security system, see *Lee*, 455 U.S., at 258-259, 102 S.Ct., at 1055-1056, and military conscription, see *Gillette*, 401 U.S., at 460, 91 S.Ct., at 841,

are compelling, respondents do not seriously dispute that Oregon has a compelling interest in prohibiting the possession of peyote by its citizens.

B

Thus, the critical question in this case is whether exempting respondents from the State's general criminal prohibition "will unduly interfere with fulfillment of the governmental interest." *Lee, supra*, 455 U.S. at 259, 102 S.Ct., at 1056; see also *Roy*, 476 U.S., at 727, 106 S.Ct., at 2166 ("[T]he Government must accommodate a legitimate free exercise claim unless pursuing an especially important interest by narrowly tailored means"); *Yoder, supra*, 406 U.S., at 221, 92 S.Ct., at 1536; *Braunfeld*, 366 U.S., at 605-607, 81 S.Ct., at 1146-1148. Although the question is close, I would conclude that uniform application of Oregon's criminal prohibition is "essential to accomplish," *Lee, supra*, at 455 U.S., at 257, 102 S.Ct., at 1055, its overriding interest in preventing the physical harm caused by the use of a Schedule I controlled substance. Oregon's criminal prohibition represents that State's judgment that the possession and use of controlled substances, even by only one person, is inherently harmful and dangerous. Because the health effects caused by the use of controlled substances exist regardless of the motivation of the user, the use of such substances, even for religious purposes, violates the very purpose of the laws that prohibit them. Cf. *State v. Massey*, 229 N.C. 734, 51 S.E.2d 179 (denying religious exemption to municipal ordinance prohibiting handling of poisonous reptiles), appeal dism'd *sub nom. Bunn v. North Carolina*, 336 U.S. 942, 69 S.Ct. 813, 93 L.Ed. 1099 (1949). Moreover, in view of the societal interest in preventing trafficking in controlled substances, uniform application of the criminal prohibition at issue is essential to the effectiveness of Oregon's stated interest in preventing any possession of peyote. Cf. *Jacobson v. Massachusetts*, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643 (1905) (denying exemption from small pox vaccination requirement).

For these reasons, I believe that granting a selective exemption in this case would seriously impair Oregon's compelling interest in prohibiting possession of peyote by its citizens. Under such circumstances, the Free Exercise Clause does not require the State to accommodate respondents' religiously motivated conduct. See, e.g., *Thomas*, 450 U.S., at 719, 101 S.Ct., at 1432-33. Unlike in *Yoder*, where we noted that "[t]he record strongly indicates

that accommodating the ****1615** religious objections of the Amish by forgoing one, or at most two, additional years of compulsory education will not impair the physical or mental health of the child, or result in an inability to be self-supporting or to discharge the duties and responsibilities of citizenship, or in any other way materially detract from the welfare of society," 406 U.S., at 234, 92 S.Ct., at 1542; see also *id.*, at 238-240, 92 S.Ct., at 1544-1545 (WHITE, J., concurring), a religious exemption in this case would be incompatible with the State's interest in controlling use and possession of illegal drugs.

Respondents contend that any incompatibility is belied by the fact that the Federal Government and several States provide exemptions for the religious use of peyote, see 21 CFR § 1307.31 (1989); 307 Or., at 73, n. 2, 763 P.2d, at 148, n. 2 (citing 11 state statutes that expressly exempt sacramental peyote use from criminal proscription). But other governments may surely choose to grant an exemption without Oregon, with its specific asserted interest in uniform application of its drug laws, being *required* to do so by the First Amendment. Respondents also note that the sacramental use of peyote is central to the tenets of the Native American Church, but I agree with the Court, *ante*, at 1604, that because "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith," quoting *Hernandez, supra*, at 699, 109 S.Ct., at 2148, our determination of the constitutionality of Oregon's general criminal prohibition cannot, and should not, turn on the centrality of the particular ***907** religious practice at issue. This does not mean, of course, that courts may not make factual findings as to whether a claimant holds a sincerely held religious belief that conflicts with, and thus is burdened by, the challenged law. The distinction between questions of centrality and questions of sincerity and burden is admittedly fine, but it is one that is an established part of our free exercise doctrine, see *Ballard*, 322 U.S., at 85-88, 64 S.Ct., at 885-87, and one that courts are capable of making. See *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 303-305, 105 S.Ct. 1953, 1962-1963, 85 L.Ed.2d 278 (1985).

I would therefore adhere to our established free exercise jurisprudence and hold that the State in this case has a compelling interest in regulating peyote use by its citizens and that accommodating respondents' religiously motivated conduct "will unduly interfere with fulfillment of the governmental interest." *Lee, supra*, 455 U.S., at 259, 102 S.Ct., at 1056. Accordingly, I concur in the judgment of the Court.

Justice BLACKMUN, with whom Justice BRENNAN and Justice MARSHALL join, dissenting.

This Court over the years painstakingly has developed a consistent and exacting standard to test the constitutionality of a state statute that burdens the free exercise of religion. Such a statute may stand only if the law in general, and the State's refusal to allow a religious exemption in particular, are justified by a compelling interest that cannot be served by less restrictive means.¹

****1616 *908** Until today, I thought this was a settled and inviolate principle of this Court's First Amendment jurisprudence. The majority, however, perfunctorily dismisses it as a "constitutional anomaly." *Ante*, at 1604. As carefully detailed in Justice O'CONNOR's concurring opinion, *ante*, p. 1606, the majority is able to arrive at this view only by mischaracterizing this Court's precedents. The Court discards leading free exercise cases such as *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940), and *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), as "hybrid." *Ante*, at 1602. The Court views traditional free exercise analysis as somehow inapplicable to criminal prohibitions (as opposed to conditions on the receipt of benefits), and to state laws of general applicability (as opposed, presumably, to laws that expressly single out religious practices). *Ante*, at 1603-1604. The Court cites cases in which, due to various exceptional circumstances, we found strict scrutiny inapposite, to hint that the Court has repudiated that standard altogether. *Ante*, at 1602-1603. In short, it effectuates a wholesale overturning of settled law concerning the Religion Clauses of our Constitution. One hopes that the Court is aware of the consequences, and that its result is not a product of overreaction to the serious problems the country's drug crisis has generated.

This distorted view of our precedents leads the majority to conclude that strict scrutiny of a state law burdening the free exercise of religion is a "luxury" that a well-ordered society ***909** cannot afford, *ante*, at 1605, and that the repression of minority religions is an "unavoidable consequence of democratic government." *Ante*, at 1606. I do not believe the Founders thought their dearly bought freedom from religious persecution a "luxury," but an essential element of liberty-and they could not have thought religious intolerance "unavoidable," for they drafted the Religion Clauses precisely in order to avoid that intolerance.

For these reasons, I agree with Justice O'CONNOR's analysis of the applicable free exercise doctrine, and I join parts I and II of her opinion.² As she points out, "the critical question in this case is whether exempting respondents

from the State's general criminal prohibition 'will unduly interfere with fulfillment of the governmental interest.' " *Ante*, at 1614, quoting *United States v. Lee*, 455 U.S. 252, 259, 102 S.Ct. 1051, 1056, 71 L.Ed.2d 127 (1982). I do disagree, however, with her specific answer to that question.

I

In weighing the clear interest of respondents Smith and Black (hereinafter respondents) in the free exercise of their religion ****1617** against Oregon's asserted interest in enforcing its drug laws, it is important to articulate in precise terms the state interest involved. It is not the State's broad interest ***910** in fighting the critical "war on drugs" that must be weighed against respondents' claim, but the State's narrow interest in refusing to make an exception for the religious, ceremonial use of peyote. See *Bowen v. Roy*, 476 U.S. 693, 728, 106 S.Ct. 2147, 2167, 90 L.Ed.2d 735 (1986) (O'CONNOR, J., concurring in part and dissenting in part) ("This Court has consistently asked the Government to demonstrate that unbending application of its regulation to the religious objector 'is essential to accomplish an overriding governmental interest,' " quoting *Lee*, 455 U.S., at 257-258, 102 S.Ct., at 1055); *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 719, 101 S.Ct. 1425, 1432, 67 L.Ed.2d 624 (1981) ("focus of the inquiry" concerning State's asserted interest must be "properly narrowed"); *Yoder*, 406 U.S., at 221, 92 S.Ct., at 1536 ("Where fundamental claims of religious freedom are at stake," the Court will not accept a State's "sweeping claim" that its interest in compulsory education is compelling; despite the validity of this interest "in the generality of cases, we must searchingly examine the interests that the State seeks to promote ... and the impediment to those objectives that would flow from recognizing the claimed Amish exemption"). Failure to reduce the competing interests to the same plane of generality tends to distort the weighing process in the State's favor. See Clark, Guidelines for the Free Exercise Clause, 83 Harv.L.Rev. 327, 330-331 (1969) ("The purpose of almost any law can be traced back to one or another of the fundamental concerns of government: public health and safety, public peace and order, defense, revenue. To measure an individual interest directly against one of these rarified values inevitably makes the individual interest appear the less significant"); Pound, A Survey of Social Interests, 57 Harv.L.Rev. 1, 2 (1943) ("When it comes to weighing or valuing claims or demands with

respect to other claims or demands, we must be careful to compare them on the same plane ... [or else] we may decide the question in advance in our very way of putting it”).

The State’s interest in enforcing its prohibition, in order to be sufficiently compelling to outweigh a free exercise claim, *911 cannot be merely abstract or symbolic. The State cannot plausibly assert that unbending application of a criminal prohibition is essential to fulfill any compelling interest, if it does not, in fact, attempt to enforce that prohibition. In this case, the State actually has not evinced any concrete interest in enforcing its drug laws against religious users of peyote. Oregon has never sought to prosecute respondents, and does not claim that it has made significant enforcement efforts against other religious users of peyote.³ The State’s asserted interest thus amounts only to the symbolic preservation of an unenforced prohibition. But a government interest in “symbolism, even symbolism for so worthy a cause as the abolition of unlawful drugs,” *Treasury Employees v. Von Raab*, 489 U.S. 656, 687, 109 S.Ct. 1384, 1402, 103 L.Ed.2d 685 (1989) (SCALIA, J., dissenting), cannot suffice to abrogate the constitutional rights of individuals.

Similarly, this Court’s prior decisions have not allowed a government to rely on mere speculation about potential harms, but have demanded evidentiary support for a refusal to allow a religious exception. See *Thomas*, 450 U.S., at 719, 101 S.Ct., at 1432 (rejecting State’s reasons for refusing religious exemption, for lack of “evidence in the record”); *Yoder*, 406 U.S., at 224-229, 92 S.Ct., at 1537-38 (rejecting State’s argument concerning the dangers of a religious exemption as speculative, and unsupported by the record); *Sherbert v. Verner*, 374 U.S. 398, 407, 83 S.Ct. 1790, 1795, 10 L.Ed.2d 965 (1963) **1618 (“[T]here is no proof whatever to warrant such fears ... as those which the [State] now advance[s]”). In this case, the State’s justification for refusing to recognize an exception to its criminal laws for religious peyote use is entirely speculative.

The State proclaims an interest in protecting the health and safety of its citizens from the dangers of unlawful drugs. It offers, however, no evidence that the religious use of peyote *912 has ever harmed anyone.⁴ The factual findings of other courts cast doubt on the State’s assumption that religious use of peyote is harmful. See *State v. Whittingham*, 19 Ariz.App. 27, 30, 504 P.2d 950, 953 (1973) (“[T]he State failed to prove that the quantities of peyote used in the sacraments of the Native American Church are sufficiently harmful to the health and welfare of the participants so as to permit a legitimate intrusion under the State’s police power”); *People v. Woody*, 61 Cal.2d 716, 722-723, 40 Cal.Rptr. 69, 74, 394 P.2d 813,

818 (1964) (“[A]s the Attorney General ... admits, ... the opinion of scientists and other experts is ‘that peyote ... works no permanent deleterious injury to the Indian’ ”).

The fact that peyote is classified as a Schedule I controlled substance does not, by itself, show that any and all uses of peyote, in any circumstance, are inherently harmful and dangerous. The Federal Government, which created the classifications of unlawful drugs from which Oregon’s drug laws are derived, apparently does not find peyote so dangerous as to preclude an exemption for religious use.⁵ Moreover, *913 other Schedule I drugs have lawful uses. See *Olsen v. Drug Enforcement Admin.*, 279 U.S.App.D.C. 1, 6, n. 4, 878 F.2d 1458, 1463, n. 4 (medical and research uses of marijuana).

The carefully circumscribed ritual context in which respondents used peyote is far removed from the irresponsible and unrestricted recreational use of unlawful drugs.⁶ The Native American Church’s internal restrictions on, and supervision of, its members’ use of peyote substantially obviate the State’s health and safety concerns. See *Olsen*, *id.*, at 10, 878 F.2d, at 1467 (“ ‘The Administrator [of the Drug Enforcement Administration **1619 (DEA)] finds that ... the Native American Church’s use of peyote is isolated to specific ceremonial occasions,’ ” and so “ ‘an accommodation can be made for a religious organization which uses peyote in circumscribed ceremonies’ ” (quoting DEA Final Order)); *id.*, at 7, 878 F.2d, at 1464 (“[F]or members of the Native American Church, use of peyote outside the ritual is sacrilegious”); *Woody*, 61 Cal.2d, at 721, 394 P.2d, at 817 (“[T]o use peyote for nonreligious purposes is sacrilegious”); R. Julien, *A Primer of Drug Action* 148 (3d ed. 1981) (“[P]eyote is seldom abused by members of the Native American *914 Church”); Slotkin, *The Peyote Way*, in *Teachings from the American Earth* 96, 104 (D. Tedlock & B. Tedlock eds. 1975) (“[T]he Native American Church ... refuses to permit the presence of curiosity seekers at its rites, and vigorously opposes the sale or use of Peyote for non-sacramental purposes”); Bergman, *Navajo Peyote Use: Its Apparent Safety*, 128 Am.J. Psychiatry 695 (1971) (Bergman).⁷

Moreover, just as in *Yoder*, the values and interests of those seeking a religious exemption in this case are congruent, to a great degree, with those the State seeks to promote through its drug laws. See *Yoder*, 406 U.S., at 224, 228-229, 92 S.Ct., at 1540 (since the Amish accept formal schooling up to 8th grade, and then provide “ideal” vocational education, State’s interest in enforcing its law against the Amish is “less substantial than ... for children generally”); *id.*, at 238, 92 S.Ct., at 1544 (WHITE, J., concurring). Not only does the church’s doctrine forbid

nonreligious use of peyote; it also generally advocates self-reliance, familial responsibility, and abstinence from alcohol. See Brief for Association on American Indian Affairs et al. as *Amici Curiae* 33-34 (the church's "ethical code" has four parts: brotherly love, care of family, self-reliance, and avoidance of alcohol (quoting from the church membership card)); *Olsen*, 279 U.S.App.D.C., at 7, 878 F.2d, at 1464 (the Native American Church, "for all purposes other than the special, stylized ceremony, reinforced the state's prohibition"); *915 *Woody*, 61 Cal.2d, at 721-722, n. 3, 394 P.2d, at 818, n. 3 ("[M]ost anthropological authorities hold Peyotism to be a positive, rather than negative, force in the lives of its adherents ... the church forbids the use of alcohol ..."). There is considerable evidence that the spiritual and social support provided by the church has been effective in combating the tragic effects of alcoholism on the Native American population. Two noted experts on peyotism, Dr. Omer C. Stewart and Dr. Robert Bergman, testified by affidavit to this effect on behalf of respondent Smith before the Employment Appeal Board. Smith Tr., Exh. 7; see also E. Anderson, *Peyote: The Divine Cactus* 165-166 (1980) (research by Dr. Bergman suggests "that the religious use of peyote seemed to be directed in an ego-strengthening direction with an emphasis on interpersonal relationships where each individual is assured of his own significance as well as the support of the group"; many people have " 'come through difficult crises with the help of this religion.... It provides real help in seeing themselves not as people whose place and way in the world is gone, but as people whose way can be strong enough to change and meet new challenges' " (quoting Bergman 698)); Pascarosa & Futterman, *Ethnopsychedelic Therapy for Alcoholics: Observations in the Peyote Ritual of the Native American Church*, 8 J. of Psychedelic Drugs, No. 3, p. 215 (1976) (religious peyote use has been helpful in overcoming alcoholism); Albaugh & Anderson, *Peyote in the Treatment of Alcoholism among American Indians*, 131 Am.J. Psychiatry 1247, 1249 (1974) ("[T]he **1620 philosophy, teachings, and format of the [Native American Church] can be of great benefit to the Indian alcoholic"); see generally O. Stewart, *Peyote Religion* 75 *et seq.* (1987) (noting frequent observations, across many tribes and periods in history, of correlation between peyotist religion and abstinence from alcohol). Far from promoting the lawless and irresponsible use of drugs, Native American Church members' spiritual *916 code exemplifies values that Oregon's drug laws are presumably intended to foster.

The State also seeks to support its refusal to make an exception for religious use of peyote by invoking its interest in abolishing drug trafficking. There is, however, practically no illegal traffic in peyote. See *Olsen*, 279 U.S.App.D.C., at 6, 7, 878 F.2d, at 1463, 1467 (quoting

DEA Final Order to the effect that total amount of peyote seized and analyzed by federal authorities between 1980 and 1987 was 19.4 pounds; in contrast, total amount of marijuana seized during that period was over 15 million pounds). Also, the availability of peyote for religious use, even if Oregon were to allow an exemption from its criminal laws, would still be strictly controlled by federal regulations, see 21 U.S.C. §§ 821-823 (registration requirements for distribution of controlled substances); 21 CFR § 1307.31 (1989) (distribution of peyote to Native American Church subject to registration requirements), and by the State of Texas, the only State in which peyote grows in significant quantities. See Texas Health & Safety Code Ann. § 481.111 (1990 pamphlet); Texas Admin.Code, Tit. 37, pt. 1, ch. 13, Controlled Substances Regulations, §§ 13.35-13.41 (1989); *Woody*, 61 Cal.2d, at 720, 394 P.2d, at 816 (peyote is "found in the Rio Grande Valley of Texas and northern Mexico"). Peyote simply is not a popular drug; its distribution for use in religious rituals has nothing to do with the vast and violent traffic in illegal narcotics that plagues this country.

Finally, the State argues that granting an exception for religious peyote use would erode its interest in the uniform, fair, and certain enforcement of its drug laws. The State fears that, if it grants an exemption for religious peyote use, a flood of other claims to religious exemptions will follow. It would then be placed in a dilemma, it says, between allowing a patchwork of exemptions that would hinder its law enforcement efforts, and risking a violation of the Establishment Clause by arbitrarily limiting its religious exemptions. This *917 argument, however, could be made in almost any free exercise case. See *Lupu*, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 Harv.L.Rev. 933, 947 (1989) ("Behind every free exercise claim is a spectral march; grant this one, a voice whispers to each judge, and you will be confronted with an endless chain of exemption demands from religious deviants of every stripe"). This Court, however, consistently has rejected similar arguments in past free exercise cases, and it should do so here as well. See *Frazee v. Illinois Dept. of Employment Security*, 489 U.S. 829, 835, 109 S.Ct. 1514, 1518, 103 L.Ed.2d 914 (1989) (rejecting State's speculation concerning cumulative effect of many similar claims); *Thomas*, 450 U.S., at 719, 101 S.Ct., at 1432 (same); *Sherbert*, 374 U.S., at 407, 83 S.Ct., at 1795.

The State's apprehension of a flood of other religious claims is purely speculative. Almost half the States, and the Federal Government, have maintained an exemption for religious peyote use for many years, and apparently have not found themselves overwhelmed by claims to other religious exemptions.* Allowing an exemption for religious **1621 peyote use *918 would not necessarily oblige the

State to grant a similar exemption to other religious groups. The unusual circumstances that make the religious use of peyote compatible with the State's interests in health and safety and in preventing drug trafficking would not apply to other religious claims. Some religions, for example, might not restrict drug use to a limited ceremonial context, as does the Native American Church. See, e.g., *Olsen*, 279 U.S.App.D.C., at 7, 878 F.2d, at 1464 ("[T]he Ethiopian Zion Coptic Church ... teaches that marijuana is properly smoked 'continually all day'"). Some religious claims, see n. 8, *supra*, involve drugs such as marijuana and heroin, in which there is significant illegal traffic, with its attendant greed and violence, so that it would be difficult to grant a religious exemption without seriously compromising law enforcement efforts.⁹ That the State might grant an exemption for religious peyote use, but deny other religious claims arising in different circumstances, would not violate the Establishment Clause. Though the State must treat all religions equally, and not favor one over another, this obligation is fulfilled by the uniform application of the "compelling interest" test to all free exercise claims, not by reaching uniform results as to all claims. A showing that religious peyote use does not unduly interfere with the State's interests is "one that probably few other religious groups or sects could make," *Yoder*, 406 U.S., at 236, 92 S.Ct., at 1543; this does not mean that an exemption limited to peyote use is tantamount to an establishment of religion. See *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144-145, 107 S.Ct. 1046, 1051, 94 L.Ed.2d 190 (1987) ("[T]he government may (and *919 sometimes must) accommodate religious practices and ... may do so without violating the Establishment Clause"); *Yoder*, 406 U.S., at 220-221, 92 S.Ct., at 1536 ("Court must not ignore the danger that an exception from a general [law] ... may run afoul of the Establishment Clause, but that danger cannot be allowed to prevent any exception no matter how vital it may be to the protection of values promoted by the right of free exercise"); *id.*, at 234, n. 22, 92 S.Ct., at 1542, n. 22.

II

Finally, although I agree with Justice O'CONNOR that courts should refrain from delving into questions whether, as a matter of religious doctrine, a particular practice is "central" to the religion, *ante*, at 1614, I do not think this means that the courts must turn a blind eye to the severe impact of a State's restrictions on the adherents of a minority religion. Cf. *Yoder*, 406 U.S., at 219, 92 S.Ct., at

1535 (since "education is inseparable from and a part of the basic tenets of their religion ... [, just as] baptism, *1622 the confessional, or a sabbath may be for others," enforcement of State's compulsory education law would "gravely endanger if not destroy the free exercise of respondents' religious beliefs").

Respondents believe, and their sincerity has *never* been at issue, that the peyote plant embodies their deity, and eating it is an act of worship and communion. Without peyote, they could not enact the essential ritual of their religion. See Brief for Association on American Indian Affairs et al. as *Amici Curiae* 5-6 ("To the members, peyote is consecrated with powers to heal body, mind and spirit. It is a teacher; it teaches the way to spiritual life through living in harmony and balance with the forces of the Creation. The rituals are an integral part of the life process. They embody a form of worship in which the sacrament Peyote is the means for communicating with the Great Spirit"). See also O. Stewart, *Peyote Religion* 327-330 (1987) (description of peyote ritual); *920 T. Hillerman, *People of Darkness* 153 (1980) (description of Navajo peyote ritual).

If Oregon can constitutionally prosecute them for this act of worship, they, like the Amish, may be "forced to migrate to some other and more tolerant region." *Yoder*, 406 U.S., at 218, 92 S.Ct., at 1534-1535. This potentially devastating impact must be viewed in light of the federal policy-reached in reaction to many years of religious persecution and intolerance-of protecting the religious freedom of Native Americans. See American Indian Religious Freedom Act, 92 Stat. 469, 42 U.S.C. § 1996 (1982 ed.) ("[I]t shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions ..., including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites").¹⁰ Congress recognized that certain substances, such as peyote, "have religious significance because they are sacred, they have power, they heal, they are necessary to the exercise of *921 the rites of the religion, they are necessary to the cultural integrity of the tribe, and, therefore, religious survival." H.R.Rep. No. 95-1308, p. 2 (1978), U.S.Code Cong. & Admin.News 1978, pp. 1262, 1263.

The American Indian Religious Freedom Act, in itself, may not create rights enforceable against government action restricting religious freedom, but this Court must scrupulously apply its free exercise analysis to the religious claims of Native Americans, however unorthodox they may be. Otherwise, both the First Amendment and the stated policy of Congress will offer to Native Americans

merely an unfulfilled and hollow promise.

interest in denying benefits for religiously motivated “misconduct,” see *ante*, at 1598, is indistinguishable from the state interests this Court has rejected in *Frazee*, *Hobbie*, *Thomas*, and *Sherbert*. The State of Oregon cannot, consistently with the Free Exercise Clause, deny respondents unemployment benefits.

III

I dissent.

For these reasons, I conclude that Oregon’s interest in enforcing its drug laws against religious use of peyote is not sufficiently compelling to outweigh respondents’ right to the free exercise of their religion. Since the State could not constitutionally enforce its criminal prohibition against respondents, **1623 the interests underlying the State’s drug laws cannot justify its denial of unemployment benefits. Absent such justification, the State’s regulatory

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Footnotes

- * The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 237, 50 L.Ed. 499.
- 1 Both lines of cases have specifically adverted to the non-free-exercise principle involved. *Cantwell*, for example, observed that “[t]he fundamental law declares the interest of the United States that the free exercise of religion be not prohibited and that freedom to communicate information and opinion be not abridged.” 310 U.S., at 307, 60 S.Ct., at 905. *Murdock* said: “We do not mean to say that religious groups and the press are free from all financial burdens of government.... We have here something quite different, for example, from a tax on the income of one who engages in religious activities or a tax on property used or employed in connection with those activities. It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon.... Those who can deprive religious groups of their colporteurs can take from them a part of the vital power of the press which has survived from the Reformation.” 319 U.S., at 112, 63 S.Ct., at 874. *Yoder* said that “the Court’s holding in *Pierce* stands as a charter of the rights of parents to direct the religious upbringing of their children. And, when the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a ‘reasonable relation to some purpose within the competency of the State’ is required to sustain the validity of the State’s requirement under the First Amendment.” 406 U.S., at 233, 92 S.Ct., at 1542.
- 2 Justice O’CONNOR seeks to distinguish *Lyng v. Northwest Indian Cemetery Protective Assn.*, 485 U.S. 439, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988), and *Bowen v. Roy*, 476 U.S. 693, 106 S.Ct. 2147, 90 L.Ed.2d 735 (1986), on the ground that those cases involved the government’s conduct of “its own internal affairs,” which is different because, as Justice Douglas said in *Sherbert*, “ ‘the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.’ ” *Post*, at 1611-1612 (O’CONNOR, J., concurring in judgment), quoting *Sherbert v. Verner*, 374 U.S. 398, 412, 83 S.Ct. 1790, 1798, 10 L.Ed.2d 965 (1963) (Douglas, J., concurring). But since Justice Douglas voted with the majority in *Sherbert*, that quote obviously envisioned that what “the government cannot do to the individual” includes not just the prohibition of an individual’s freedom of action through criminal laws but also the running of its programs (in *Sherbert*, state unemployment compensation) in such fashion as to harm the individual’s religious interests. Moreover, it is hard to see any reason in principle or practicality why the government should have to tailor its health and safety laws to conform to the diversity of religious belief, but should not have to tailor its management of public lands, *Lyng*, *supra*, or its administration of welfare programs, *Roy*, *supra*.
- 3 Justice O’CONNOR suggests that “[t]here is nothing talismanic about neutral laws of general applicability,” and that all laws burdening religious practices should be subject to compelling-interest scrutiny because “the First Amendment unequivocally makes freedom of religion, like freedom from race discrimination and freedom of speech, a ‘constitutional nor[m],’ not an ‘anomaly.’ ” *Post*, at 1612 (opinion concurring in judgment). But this comparison with other fields supports, rather than undermines, the conclusion we draw today. Just as we subject to the most exacting scrutiny laws that make classifications based on race, see *Palmore v. Sidoti*, 466 U.S. 429, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984), or on the content of speech, see *Sable Communications of California v. FCC*, 492 U.S. 115, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989), so too we strictly scrutinize governmental classifications based on religion, see *McDaniel v. Paty*, 435 U.S. 618, 98 S.Ct. 1322, 55 L.Ed.2d 593 (1978); see also *Torcaso v. Watkins*, 367 U.S. 488, 81 S.Ct. 1680, 6 L.Ed.2d 982 (1961). But we have held that race-neutral laws that have the *effect* of disproportionately disadvantaging

a particular racial group do not thereby become subject to compelling-interest analysis under the Equal Protection Clause, see *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976) (police employment examination); and we have held that generally applicable laws unconcerned with regulating speech that have the effect of interfering with speech do not thereby become subject to compelling-interest analysis under the First Amendment, see *Citizen Publishing Co. v. United States*, 394 U.S. 131, 139, 89 S.Ct. 927, 22 L.Ed.2d 148 (1969) (antitrust laws). Our conclusion that generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest is the only approach compatible with these precedents.

- 4 While arguing that we should apply the compelling interest test in this case, Justice O'CONNOR nonetheless agrees that "our determination of the constitutionality of Oregon's general criminal prohibition cannot, and should not, turn on the centrality of the particular religious practice at issue," *post*, at 1615 (opinion concurring in judgment). This means, presumably, that compelling interest scrutiny must be applied to generally applicable laws that regulate or prohibit *any* religiously motivated activity, no matter how unimportant to the claimant's religion. Earlier in her opinion, however, Justice O'CONNOR appears to contradict this, saying that the proper approach is "to determine whether the burden on the specific plaintiffs before us is constitutionally significant and whether the particular criminal interest asserted by the State before us is compelling." *Post*, at 1611. "Constitutionally significant burden" would seem to be "centrality" under another name. In any case, dispensing with a "centrality" inquiry is utterly unworkable. It would require, for example, the same degree of "compelling state interest" to impede the practice of throwing rice at church weddings as to impede the practice of getting married in church. There is no way out of the difficulty that, if general laws are to be subjected to a "religious practice" exception, *both* the importance of the law at issue *and* the centrality of the practice at issue must reasonably be considered.

Nor is this difficulty avoided by Justice BLACKMUN's assertion that "although ... courts should refrain from delving into questions whether, as a matter of religious doctrine, a particular practice is 'central' to the religion, ... I do not think this means that the courts must turn a blind eye to the severe impact of a State's restrictions on the adherents of a minority religion." *Post*, at 1621 (dissenting opinion). As Justice BLACKMUN's opinion proceeds to make clear, inquiry into "severe impact" is no different from inquiry into centrality. He has merely substituted for the question "How important is X to the religious adherent?" the question "How great will be the harm to the religious adherent if X is taken away?" There is no material difference.

- 5 Justice O'CONNOR contends that the "parade of horrors" in the text only "demonstrates ... that courts have been quite capable of ... strik[ing] sensible balances between religious liberty and competing state interests." *Post*, at 1612-1613 (opinion concurring in judgment). But the cases we cite have struck "sensible balances" only because they have all applied the general laws, despite the claims for religious exemption. In any event, Justice O'CONNOR mistakes the purpose of our parade: it is not to suggest that courts would necessarily permit harmful exemptions from these laws (though they might), but to suggest that courts would constantly be in the business of determining whether the "severe impact" of various laws on religious practice (to use Justice BLACKMUN's terminology *post*, at 1621) or the "constitutiona[l] significan[ce]" of the "burden on the specific plaintiffs" (to use Justice O'CONNOR's terminology *post*, at 1611) suffices to permit us to confer an exemption. It is a parade of horrors because it is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice.

- * Although Justice BRENNAN, Justice MARSHALL, and Justice BLACKMUN join Parts I and II of this opinion, they do not concur in the judgment.

- 1 See *Hernandez v. Commissioner*, 490 U.S. 680, 699, 109 S.Ct. 2136, 2149, 104 L.Ed.2d 766 (1989) ("The free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden"); *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 141, 107 S.Ct. 1046, 1049, 94 L.Ed.2d 190 (1987) (state laws burdening religions "must be subjected to strict scrutiny and could be justified only by proof by the State of a compelling interest"); *Bowen v. Roy*, 476 U.S. 693, 732, 106 S.Ct. 2147, 2169, 90 L.Ed.2d 735 (1986) (O'CONNOR, J., concurring in part and dissenting in part) ("Our precedents have long required the Government to show that a compelling state interest is served by its refusal to grant a religious exemption"); *United States v. Lee*, 455 U.S. 252, 257-258, 102 S.Ct. 1051, 1055, 71 L.Ed.2d 127 (1982) ("The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest"); *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 718, 101 S.Ct. 1425, 1432, 67 L.Ed.2d 624 (1981) ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest"); *Wisconsin v. Yoder*, 406 U.S. 205, 215, 92 S.Ct. 1526, 1533, 32 L.Ed.2d 15 (1972) ("[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion"); *Sherbert v. Verner*, 374 U.S. 398, 406, 83 S.Ct. 1790, 1795, 10 L.Ed.2d 965 (1963) (question is "whether some compelling state interest ... justifies the substantial infringement of appellant's First Amendment right").

- 2 I reluctantly agree that, in light of this Court's decision in *Employment Division, Dept. of Human Resources of Ore. v. Smith*, 485 U.S. 660, 108 S.Ct. 1444, 99 L.Ed.2d 753 (1988), the question on which certiorari was granted is properly presented in this case. I have grave doubts, however, as to the wisdom or propriety of deciding the constitutionality of a criminal prohibition which the State has not sought to enforce, which the State did not rely on in defending its denial of unemployment benefits before the state courts, and which the Oregon courts could, on remand, either invalidate on state constitutional grounds, or conclude that it remains irrelevant to Oregon's interest in administering its unemployment benefits program.

It is surprising, to say the least, that this Court which so often prides itself about principles of judicial restraint and reduction of federal control over matters of state law would stretch its jurisdiction to the limit in order to reach, in this abstract setting, the constitutionality of Oregon's criminal prohibition of peyote use.

- 3 The only reported case in which the State of Oregon has sought to prosecute a person for religious peyote use is *State v. Soto*, 21 Ore.App. 794, 537 P.2d 142 (1975), cert. denied, 424 U.S. 955, 96 S.Ct. 1431, 47 L.Ed.2d 361 (1976).
- 4 This dearth of evidence is not surprising, since the State never asserted this health and safety interest before the Oregon courts; thus, there was no opportunity for factfinding concerning the alleged dangers of peyote use. What has now become the State's principal argument for its view that the criminal prohibition is enforceable against religious use of peyote rests on no evidentiary foundation at all.
- 5 See 21 CFR § 1307.31 (1989) ("The listing of peyote as a controlled substance in Schedule I does not apply to the nondrug use of peyote in bona fide religious ceremonies of the Native American Church, and members of the Native American Church so using peyote are exempt from registration. Any person who manufactures peyote for or distributes peyote to the Native American Church, however, is required to obtain registration annually and to comply with all other requirements of law"); see *Olsen v. Drug Enforcement Admin.*, 279 U.S.App.D.C. 1, 6-7, 878 F.2d 1458, 1463-1464 (1989) (explaining DEA's rationale for the exception).
Moreover, 23 States, including many that have significant Native American populations, have statutory or judicially crafted exemptions in their drug laws for religious use of peyote. See 307 Ore. 68, 73, n. 2, 763 P.2d 146, 148, n. 2 (1988) (case below). Although this does not prove that Oregon must have such an exception too, it is significant that these States, and the Federal Government, all find their (presumably compelling) interests in controlling the use of dangerous drugs compatible with an exemption for religious use of peyote. Cf. *Boos v. Barry*, 485 U.S. 312, 329, 108 S.Ct. 1157, 1168, 99 L.Ed.2d 333 (1988) (finding that an ordinance restricting picketing near a foreign embassy was not the least restrictive means of serving the asserted government interest; existence of an analogous, but more narrowly drawn, federal statute showed that "a less restrictive alternative is readily available").
- 6 In this respect, respondents' use of peyote seems closely analogous to the sacramental use of wine by the Roman Catholic Church. During Prohibition, the Federal Government exempted such use of wine from its general ban on possession and use of alcohol. See National Prohibition Act, Title II, § 3, 41 Stat. 308. However compelling the Government's then general interest in prohibiting the use of alcohol may have been, it could not plausibly have asserted an interest sufficiently compelling to outweigh Catholics' right to take communion.
- 7 The use of peyote is, to some degree, self-limiting. The peyote plant is extremely bitter, and eating it is an unpleasant experience, which would tend to discourage casual or recreational use. See *State v. Whittingham*, 19 Ariz.App. 27, 30, 504 P.2d 950, 953 (1973) (" '[P]eyote can cause vomiting by reason of its bitter taste' "); E. Anderson, *Peyote: The Divine Cactus* 161 (1980) ("[T]he eating of peyote usually is a difficult ordeal in that nausea and other unpleasant physical manifestations occur regularly. Repeated use is likely, therefore, only if one is a serious researcher or is devoutly involved in taking peyote as part of a religious ceremony"); Slotkin, *The Peyote Way*, in *Teachings from the American Earth* 96, 98 (D. Tedlock & B. Tedlock eds. 1975) ("[M]any find it bitter, inducing indigestion or nausea").
- 8 Over the years, various sects have raised free exercise claims regarding drug use. In no reported case, except those involving claims of religious peyote use, has the claimant prevailed. See, e.g., *Olsen v. Iowa*, 808 F.2d 652 (CA8 1986) (marijuana use by Ethiopian Zion Coptic Church); *United States v. Rush*, 738 F.2d 497 (CA1 1984) (same), cert. denied, 470 U.S. 1004, 105 S.Ct. 1355, 84 L.Ed.2d 378 (1985); *United States v. Middleton*, 690 F.2d 820 (CA11 1982) (same), cert. denied, 460 U.S. 1051, 103 S.Ct. 1497, 75 L.Ed.2d 929 (1983) (same); *United States v. Hudson*, 431 F.2d 468 (CA5 1970) (marijuana and heroin use by Moslems), cert. denied, 400 U.S. 1011, 91 S.Ct. 575, 577, 27 L.Ed.2d 624 (1971); *Leary v. United States*, 383 F.2d 851 (CA5 1967) (marijuana use by Hindu), rev'd on other grounds, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969); *Commonwealth v. Nissenbaum*, 404 Mass. 575, 536 N.E.2d 592 (1989) (marijuana use by Ethiopian Zion Coptic Church); *State v. Blake*, 5 Haw.App. 411, 695 P.2d 336 (1985) (marijuana use in practice of Hindu Tantrism); *Whyte v. United States*, 471 A.2d 1018 (D.C.App.1984) (marijuana use by Rastafarian); *State v. Rocheleau*, 142 Vt. 61, 451 A.2d 1144 (1982) (marijuana use by Tantric Buddhist); *State v. Brashear*, 92 N.M. 622, 593 P.2d 63 (1979) (marijuana use by nondenominational Christian); *State v. Randall*, 540 S.W.2d 156 (Mo.App.1976) (marijuana, LSD, and hashish use by Aquarian Brotherhood Church). See generally Annotation, *Free Exercise of Religion as Defense to Prosecution for Narcotic or Psychedelic Drug Offense*, 35 A.L.R.3d 939 (1971 and Supp.1989).
- 9 Thus, this case is distinguishable from *United States v. Lee*, 455 U.S. 252, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982), in which the Court concluded that there was "no principled way" to distinguish other exemption claims, and the "tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief." *Id.*, at 260, 102 S.Ct., at 1056.
- 10 See Federal Agencies Task Force, Report to Congress on American Indian Religious Freedom Act of 1978, pp. 1-8 (Aug. 1979) (history of religious persecution); Barsh, *The Illusion of Religious Freedom for Indigenous Americans*, 65 Ore.L.Rev. 363, 369-374

(1986).

Indeed, Oregon's attitude toward respondents' religious peyote use harkens back to the repressive federal policies pursued a century ago:

"In the government's view, traditional practices were not only morally degrading, but unhealthy. 'Indians are fond of gatherings of every description,' a 1913 public health study complained, advocating the restriction of dances and 'sings' to stem contagious diseases. In 1921, Commissioner of Indian Affairs Charles Burke reminded his staff to punish any Indian engaged in 'any dance which involves ... the reckless giving away of property ... frequent or prolonged periods of celebration ... in fact, any disorderly or plainly excessive performance that promotes superstitious cruelty, licentiousness, idleness, danger to health, and shiftless indifference to family welfare.' Two years later, he forbid Indians under the age of 50 from participating in any dances of any kind, and directed federal employees 'to educate public opinion' against them." *Id.*, at 370-371 (footnotes omitted).

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2019 WL 4050472

Supreme Court, Albany County, New York.

F.F. ON BEHALF OF her minor children, Y.F., E.F. Y.F.; M. & T. M. on behalf of their minor children, C.M. and B.M.; E.W., on behalf of his minor son, D.W.; Rabbi M., in behalf of his minor children I.F.M., M.M. & C.M.; M.H. on behalf of W.G.; C.O., on behalf of her minor children, C.O., M.O., Z.O. and Y.O.; Y. & M. on behalf of their minor children M.G., P.G., M.G., S.G., F.G. and C.G.; J.M. on behalf of his minor children C.D.M. & M.Y.M.; J.E., on behalf of his minor children, P.E., M.E., S.E., D.E., F.E. and E.E.; C.B. & D.B., on behalf of their minor children, M.M.B. and R.A.B.; T.F., on behalf of her minor children, E.F., H.F. and D.F.; L.C., on behalf of her minor child, M.C.; R.K., on behalf of her minor child, M.K.; R.S. & D.S. on behalf of their minor children, E.S. and S.S.; J.M. on behalf of her minor children, S.M. & A.M.; F.H., on behalf of her minor children, A.H., H.H. and A.H.; M.E. on behalf of his minor children, M.E. & P.E.; D.B., on behalf of her minor children, W.B., L.B. & L.B.; R.B., on behalf of her minor child, J.B.; L.R., on behalf of her minor child, E.R.; G.F., on behalf of his minor children, C.F. & A.F.; D.A., on behalf of her minor children, A.A. & A.A.; T.R., on behalf of her minor children, S.R. and F.M.; B.N., on behalf of her minor children, A.N., J.N. & M.N.; M.K., on behalf of her minor child, A.K.; L.B., on behalf of her minor children, B.B., A.B. & S.B.; A.V.M., on behalf of her minor children, B.M. and G.M.; N.L., on behalf of her minor children, H.L. and G.L.; L.G., on behalf of her minor children, M.C. and C.C.; L.L., on behalf of her minor child, B.L.; C.A., on behalf of her minor children, A.A., Y.M.A., Y.A. and M.A.; K.W., on behalf of her minor child, K.W.; B.K., on behalf of her minor children, N.K., S.K., R.K. and L.K.; W.E. and C.E., on behalf of their minor Child, A.E.; R.J. & A.J., on behalf of their minor Child, A.J.; S.Y. and Y.B., on behalf of their minor children, I.B. and J.B.; T.H., on behalf of her minor child, J.H.; K.T., on behalf of her minor children, A.J.T. & A.J.T.; L.M., on behalf of her minor child, M.M., D.Y.B., on behalf of her minor child, S.B.; A.M., on behalf of her minor child, G.M.; F.M., on behalf of his three minor children, A.M.M., D.M.M. and K.M.M.; H.M., on behalf of her minor child, R.M.; M.T. & R.T., on behalf of their minor child R.T.; E.H., on behalf of her minor children M.M.S.N. and L.Y.N., Rabbi M.B. on behalf of his minor child, S.B. and S.L. &

J.F. on behalf of their minor child C.L., A-M.P., on behalf of her minor child, M.P.; R.L., on behalf of her minor children, G.L., A.L. and M.L.; N.B., on behalf of her minor child, M.A.L.; B.C., on behalf of her minor child, E.H. and J.S. and W.C., on behalf of their minor children, M.C. and N.C., S.L., on behalf of his three minor children, A.L., A.L. and A.L., L. M., on behalf of her two minor children, M.M. and M.M., N.H., on behalf of his three minor children, J.H., S.H. and A.H., on their own behalves and on behalf of thousands of similarly-situated parents and children in the State of New York, Plaintiffs,

v.

STATE of New York; Andrew Cuomo, Governor;
Letitia James, Attorney General, Defendants.

4108-19

Decided on August 23, 2019

Synopsis

Background: Parents, on behalf of their minor children, brought putative class action challenging legislature's repeal of religious exemption to school vaccination requirements. Trial court denied parent's motion for temporary restraining order. Parents moved for preliminary injunction enjoining enforcement of repeal.

Holdings: The Supreme Court, Albany County, Denise A. Hartman, J., held that:

balance of the equities did not favor preliminary injunction in light of increased risk of disease that injunction would cause;

legislative repeal of religious exemption was not motivated by legislature's disapproval of religious beliefs, as might warrant application of strict scrutiny;

parents and students were unlikely to succeed on their claim that repeal of religious exemption violated Free Exercise Clause; and

adults in schools who were unaffected by repeal were not similarly situated to minor students, for purposes of claim that repeal violated Equal Protection Clause.

Motion denied.

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Opinion

Denise A. Hartman, J.

***1** Plaintiffs commenced this action on or about July 10, 2019, to challenge the constitutionality and legality of legislation, enacted June 13, 2019, which repealed New York’s Public Health Law provision allowing religious exemptions from mandatory vaccinations for children who attend most public and private schools in the State of New York. The named plaintiffs are parents of diverse religious beliefs who had obtained a religious exemption or who had qualified for a religious exemption from mandatory vaccinations. Seeking to litigate the case as a class action, plaintiffs claim that New York’s repeal of the religious exemption was based on religious discrimination and violates their rights to free exercise of religion under the First Amendment of the United States Constitution and Article 1, § 3 of the New York Constitution. They also claim that the repeal violates the Equal Protection Clause of the United States Constitution and forces plaintiffs to engage in compelled speech or violate New York’s compulsory education laws.

On July 12, 2019, Supreme Court (Mackey, J.) denied plaintiffs’ request for a temporary restraining order. Plaintiffs now seek a preliminary injunction enjoining enforcement of the legislative repeal of the religious exemption. Because plaintiffs have not demonstrated a likelihood of success on the merits, the Court denies the

request for a preliminary injunction; the legislative repeal of the religious exemption remains in effect.

Background

New York’s Public Health Law mandates that every parent or guardian of a child “shall have administered to such child an adequate dose or doses of an immunizing agent against poliomyelitis, mumps, measles, diphtheria, rubella, varicella, Haemophilus influenzae type b (Hib), pertussis, tetanus, pneumococcal disease, and hepatitis B,” which meet federal and state standards and specifications (Public Health § 2164 [2] [a]). The statute provides generally that a child may not be admitted or attend a “school” in this State without a certificate from a health care provider or other proof that the child has received the mandated vaccines (Public Health § 2164 [5], [7]). For purposes of the mandatory vaccination statute, “school” is defined broadly to mean “any public, private or parochial child caring center, day nursery, day care agency, nursery school, kindergarten, elementary, intermediate or secondary school” (Public Health Law § 2164 [1] [a]). Before June 13, 2019, New York’s Public Health Law provided for two types of exemptions: a medical exemption, where a physician certifies that immunization “may be detrimental to a child’s health” (Public Health Law § 2164 [8]); and a non-medical, religious exemption, where parents or guardians “hold genuine and sincere religious beliefs which are contrary” to the required vaccinations (Public Health Law § 2164 [9]).

On June 13, 2019, the Legislature repealed the provision authorizing non-medical, religious exemptions (L 2019, ch 35, § 1). The Introducer’s Memorandum in Support of Senate Bill 2994A explained the public health concerns underlying the legislation:

***2** The United States is currently experiencing the worst outbreak of measles since 1994, a disease that, in a major health victory, officials declared eliminated from the United States in 2000. 880 cases of measles have been confirmed nationwide so far in 2019.

Outbreaks in New York have been the primary driver of this epidemic. As of May 20, 2019, there have been at least 810 confirmed cases of measles in New York State since October 2018. The outbreaks have largely been concentrated in communities in Brooklyn and Rockland County with precipitously low immunization rates, some as low as 70 percent.

The Introducer’s Memorandum cited California’s recent

experience when it repealed all non-medical exemptions to that State's vaccination requirements after an outbreak of measles at Disneyland in 2014. After the repeal, vaccination rates improved particularly in schools with the lowest rates of compliance, and overall vaccination rates "improved demonstrably," up nearly five percentage points to just over 95% from 2014-2015 to 2017-2018. While acknowledging that "freedom of religion is a founding tenet of this nation," the Introducer's Memorandum noted "longstanding precedent establishing that one's right to free religious expression does not include the right to endanger the health of the community, one's children, or the children of others."

Similarly, the Memorandum in Support of A2371A, the parallel Assembly bill, described the legislation's public health objective:

According to the Centers for Disease Control, sustaining a high vaccination rate among school children is vital to the prevention of disease outbreaks, including the reestablishment of diseases that have been largely eradicated in the United States, such as measles. According to State data from 2013-2014, there are at least 285 schools in New York with an immunization rate below 85%, including 170 schools below 70%, far below the CDC's goal of at least a 95% vaccination rate to maintain herd immunity.

After floor debates in both the Senate and the Assembly, the respective legislative bodies voted to repeal the religious exemption in subdivision 9 of Public Health Law. On June 13, 2019, Governor Cuomo signed the repeal into law. He explained in a press release, "While I understand and respect freedom of religion, our first job is to protect the public health and by signing this measure into law, we will help prevent further transmissions and stop this [measles] outbreak right in its tracks."

Under the current statute and Department of Health guidance, children entering or attending school this fall who do not have required immunizations (or valid medical exemptions) must receive their first dose of mandated vaccinations, or overdue follow-up doses, within 14 days after their first day of school. Within 30 days after the first

day of school, parents or guardians of such children must show that they have scheduled appointments for their children's next required doses in accordance with the Advisory Committee on Immunization Practice schedule (see Public Health Law § 2164 [7] [a]).

Procedural History

Plaintiffs commenced this nominal class action on or about July 10, 2019 claiming that the repeal of the religious exemption violates their constitutional rights. On or about the same date, plaintiffs sought a temporary restraining order and preliminary injunction enjoining enforcement of the repeal. By Decision and Order dated July 12, 2019, another justice of this Court (Mackey, J.) denied the application for a temporary restraining order, finding that plaintiffs had not shown a likelihood of success on the merits. The motion for a preliminary injunction has now been fully submitted and the Court has heard oral argument of the motion.

***3** The complaint alleges that plaintiffs and the class they represent hold genuine and sincere religious beliefs against vaccinating their children. Some plaintiffs are affiliated with various organized religions. Others are not affiliated with any organized religion. Their children, unvaccinated under a religious exemption, have heretofore attended public or private schools or nursery programs. Others were expected to attend such schools and nursery programs. But, now that the religious exemption is repealed, they will not be able to attend unvaccinated.

The complaint further alleges that the Legislature acted with religious animus when enacting the repeal, notwithstanding the official statements in the memoranda supporting the legislation. The complaint alleges that "[r]ather than being motivated by any serious concern for public health and despite the rhetoric of the Governor, in the public debate and discourse which preceded the passage of this repeal legislation, numerous leading proponents of the legislation expressed active hostility toward religious exemption and ridiculed and scorned those who held such exemptions." They cite as examples the statement of the Senate majority leader that "We've chosen science over rhetoric," and other legislators who referred to those who claim religious exemptions as selfish and mistaken in their views of the science regarding such vaccines. They also cite the statement of a bill sponsor that, "[w]hether you are Christian, Jewish or Scientologist, none of these religions have texts or dogma that denounce vaccines. Let's stop pretending like they do"; and of another legislator calling many people's professed

religious rationale for the exemption “garbage.” And they cite numerous statements by legislators who have expressed their views that the religious exemption has become in effect a personal belief exemption influenced largely by disagreement with the prevailing scientific and medical views underlying mandatory vaccination.

Plaintiffs point out that neither legislative body held public hearings before enacting the repeal legislation and that, to the extent that the legislation was responsive to recent measles outbreaks, the legislature did not establish a factual basis for repealing the religious exemption when other measures are available to protect the public health. Plaintiffs posit that the government’s response to the 2018-2019 measles outbreak in Rockland County demonstrates that less restrictive means are available to protect the public health, if and when outbreaks occur.

Plaintiffs’ counsel submitted 330 affidavits from plaintiffs and other parents around the State describing the nature of their religious opposition to vaccinations, the hardships imposed on them and their children if enforcement of the legislative repeal is not enjoined, and the hostility they have experienced from legislators and their communities resulting from the assertion of a religious exemption from vaccination. Many parents expressed heartfelt concern that if the repeal is not enjoined they will be faced with the choice of pulling their children out of the schools they attend or plan to attend and provide home-schooling — requiring them to give up their own careers or employment to educate their children at home and causing their children to lose the opportunities for formal instruction and interaction with their peers. Or, they claim, they will be forced to move their families to another state that still recognizes religious or personal belief exemptions from vaccination requirements.

*4 In addition, plaintiffs’ counsel submitted affidavits from more than a dozen parents explaining the source of their religious objections to mandated vaccinations to demonstrate the bona fides of such objections. Some parents ground their beliefs in the Jewish, Christian, and Muslim texts. Others attributed their objections to the teachings of Buddhism and Hinduism.

The State defendants have opposed the motion for a preliminary injunction. They argue that the repeal of the religious exemption was prompted by the measles outbreaks in New York and across the Nation in 2018 and 2019. They cite statistics from the sponsors’ memoranda regarding recent measles outbreaks, 25 years after the disease was thought to have been eradicated in this country: 880 cases of measles confirmed nationwide in the first five of six months of 2019, with outbreaks in New York being

the primary driver of this epidemic with 810 confirmed cases between October 2018 and May 2019. They also cite data from 2013-2014 showing that there are at least 285 schools in New York with an immunization rate below 85%, including 170 schools below 70%, far below the CDC’s goal of at least a 95% vaccination rate to maintain community immunity.

The State defendants’ opposition includes an affidavit from Dr. Debra Blog, Director of Epidemiology in the New York State Health Department. She explains that measles, an airborne viral disease, is one of the most contagious diseases known, with 90% of susceptible people developing the disease following exposure. She states that the disease is characterized by a high fever, followed by cough, coryza, and/or conjunctivitis and, two to four days later, a red rash that lasts five to six days. The disease is contagious from four days before through four days after the rash appears. The disease can cause serious complications, particularly for those under five years of age and adults over 20 years of age. About one child in 1,000 will develop encephalitis, which can result in seizures, hearing loss, or permanent disability. About one in 20 children will develop pneumonia. She avers that, for every 1,000 cases of measles, one or two children will die despite medical care. Measles can also cause premature birth, low birth weight, and miscarriage.

Dr. Blog describes the extent of the recent measles outbreak in New York, the first in 25 years since the disease was thought to have been eliminated in the United States. She notes that there were 379 confirmed cases in New York outside of New York City — 283 in Rockland County, 55 in Orange County, 18 in Westchester County, 14 in Sullivan County, seven in Monroe County, one in Suffolk County, and one in Greene County. Most of the Rockland County cases were school-aged students.

Dr. Blog reports that the number of children entering schools with a valid religious exemption rose from 14,059 in 2010-2011 to 26,627 in 2017-2018. Meanwhile, the number of children entering schools declined from 3,437,226 in 2010-2011 to 3,348,544 in 2017-2018. And the number of children entering schools with medical exemptions rose only slightly from 3,365 in 2010-2011 to 4,571 in 2017-2018. Rockland County, where the outbreak was most severe, has the second lowest measles vaccination rate in the State and experienced a steep decline in vaccination rates in recent years. In 2010-2011, the measles vaccination rate was reported at 97.9%, with 531 religious exemptions; by 2017-2018, it was 94%, with 1,453 religious exemptions. In the localized area of the Orange County outbreak, 2018 data showed that children ages one to three have only a 59.4% vaccination rate, and

children ages four to eighteen have only a 53.8% vaccination rate.

*5 Dr. Blog explained the concept of “herd immunity,” also called “community immunity,” which historically has been considered achieved when 95% of the population has been immunized. She stated that one dose of the measles vaccine is about 93% effective in preventing the disease if exposed; two doses are about 97% effective in preventing the disease. Although 3% of those vaccinated are still at risk of getting the disease, the symptoms will be milder, and they are less likely to spread the disease. She reports that the vaccine is extremely safe and side effects are rare, citing two independent studies concluding that vaccines do not cause autism. She explained that, prior to widespread inoculation, thousands of children in the United States each year died or were left with life-long disabilities. Vaccines have resulted in the worldwide eradication of smallpox and near worldwide eradication of poliomyelitis. Rubella and diphtheria have become rare in the United States as a result of routine vaccination. More recently, measles and chicken pox vaccines have resulted in those diseases becoming more rare. Before vaccinations, these diseases historically occurred at high rates particularly in pre-school and school-aged children because of their highly contagious transmission modes. Dr. Blog added that, given people’s increased mobility in and out of areas where vaccination rates are relatively low, more outbreaks of measles and other diseases are likely to occur in New York and the United States as vaccination rates decline.

Analysis

A preliminary injunction is considered a drastic remedy and “should be issued cautiously” (*Rural Community Coalition, Inc. v. Village of Bloomingburg*, 118 A.D.3d 1092, 1094-1095, 987 N.Y.S.2d 654 [3d Dept. 2014] [internal quotation marks and citations omitted]; see *Uniformed Firefighters Assn. of Greater NY v. City of New York*, 79 N.Y.2d 236, 241, 581 N.Y.S.2d 734, 590 N.E.2d 719 [1992]; *Troy Sand & Gravel Co., Inc. v. Town of Nassau*, 101 A.D.3d 1505, 1509, 957 N.Y.S.2d 444 [3d Dept. 2012]). The party seeking preliminary injunctive relief “must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of the equities in its favor” (*Nobu Next Door, LLC v. Fine Arts Hous., Inc.*, 4 N.Y.3d 839, 840, 800 N.Y.S.2d 48, 833 N.E.2d 191 [2005]; accord *Rural Community Coalition, Inc. v. Village of Bloomingburg*, 118 A.D.3d at 1095, 987 N.Y.S.2d 654; see CPLR 6301; *Doe v. Axelrod*, 73 N.Y.2d 748, 750, 536 N.Y.S.2d 44, 532 N.E.2d 1272 [1988]). “The ruling on a motion for a

preliminary injunction ... does not establish the law of the case nor is it an adjudication on the ultimate merits of the underlying action” (*Rural Community Coalition, Inc. v. Village of Bloomingburg*, 118 A.D.3d at 1095, 987 N.Y.S.2d 654; see *Town of Concord v. Duwe*, 4 N.Y.3d 870, 875, 799 N.Y.S.2d 167, 832 N.E.2d 23 [2005]).

Here, plaintiffs have established the potential for irreparable harm. If the preliminary injunction is denied, pending resolution of this case, they will be required to make one of three choices: (1) violate their religious beliefs by having their children vaccinated; (2) home school their children, impacting parents’ careers and disrupting children’s educational and social structure; or (3) move their families to another state that permits a religious or personal belief exemption from vaccination mandates. Having read the hundreds of affidavits from plaintiffs and potential plaintiffs about the difficult choices and consequences to their lives if the repeal is enforced, the Court acknowledges the magnitude of disruption and potential harm they would suffer.

On the other hand, if the legislative repeal of the religious exemption is enjoined, people who are unvaccinated, because they are too young or for medical reasons or because they otherwise did not receive childhood inoculations,¹ are placed at increased risk of contracting diseases which, as history shows, can result in life-long disabilities or death. Mandatory vaccination programs permitting only minimal exemptions unquestionably would reduce their exposure and risk of severe illness, allowing them to more freely attend schools and participate in community activities. In communities where there have been recent outbreaks of measles, people at increased risk because they have not been vaccinated for medical reasons were compelled to remain home, jeopardizing their ability to attend schools and participate in the community. As noted, according to Dr. Blog, vaccine-preventable illnesses can be contagious for days before definitive symptoms present and quarantine measures are undertaken.

*6 Thus, the Court is hard-pressed to conclude that plaintiffs have shown that the balance of equities tips decidedly in their favor. Just as the Court cannot overstate the potential harm to plaintiffs if the injunction is denied, the Court cannot overstate the potential harm to unvaccinated individuals if the injunction is granted. Regardless of whether plaintiffs have demonstrated that the balance of equities tips in their favor, the Court views plaintiffs’ likelihood of success on the merits to be determinative of this motion, as discussed below.

Plaintiffs' Claim that the Repeal Violates Their Right to Free Exercise of Religion

For at least a century, the courts have repeatedly upheld the states' compulsory vaccination laws. In *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 25-27, 38, 25 S.Ct. 358, 49 L.Ed. 643 [1905], the Supreme Court held that mandatory vaccination laws are within the states' police power and rejected plaintiff's claim that a law requiring children to be vaccinated as a condition to attending public or private schools violated the guarantee of individual liberty under the United States Constitution (see also *Zucht v. King*, 260 U.S. 174, 176, 43 S.Ct. 24, 67 L.Ed. 194 [1922]). In *Matter of Viemeister*, 179 N.Y. 235, 72 N.E. 97 [1904], the New York Court of Appeals likewise upheld compulsory vaccination of school children. It upheld the mandate notwithstanding New York's constitutional duty to provide a system of free public schools, and notwithstanding the absence of a recent outbreak, based on historical and international experience (*id.* at 240-241, 72 N.E. 97).

While these cases did not expressly address claims that compulsory vaccination laws violate the Free Exercise Clause,² the Supreme Court in *Prince v. Massachusetts*, 321 U.S. 158, 166-167, 64 S.Ct. 438, 88 L.Ed. 645 [1944] stated in dicta that a parent "cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death." Relying on *Jacobson* and the "persuasive" dicta in *Prince*, the Second Circuit recently held that "mandatory vaccination as a condition for school does not violate the Free Exercise Clause" (*Phillips v. City of New York*, 775 F.3d 538, 543 [2d Cir. 2015], *cert denied* — U.S. —, 136 S. Ct. 104, 193 L.Ed.2d 37 [2015]). The Second Circuit, in rejecting a claim that the temporary exclusion of plaintiffs' children who had religious exemptions under New York's former law from schools during a chicken pox outbreak, observed:

"New York could constitutionally require that all children be vaccinated in order to attend public school. New York goes beyond what the Constitution requires by allowing exemption for parents with genuine and sincere religious beliefs. Because the State could bar [plaintiffs'] children from school altogether, *a fortiori*, the State's more limited exclusion during an outbreak of vaccine-preventable disease is clearly constitutional" (*id.*).

The Second Circuit's decision is not altogether on all fours with this challenge to New York's recent repeal of the religious exemption, but the quoted language is highly

persuasive dicta supporting the constitutionality of the challenged legislation here.

*7 There are now five states that do not allow religious exemptions to compulsory vaccination of children who attend schools. Beside New York, California, Maine, West Virginia, and Mississippi provide for no religious or other non-medical exemptions from compulsory vaccination laws, and the Court is aware of no cases striking down those states' laws. The Fourth Circuit has squarely rejected a Free Exercise Clause challenge to West Virginia's law mandating vaccination as a condition for admission to school (see *Workman v. Mingo County Bd. of Educ.*, 419 Fed. Appx. 348, 354 [4th Cir. 2011], *cert denied* 565 U.S. 1036, 132 S. Ct. 590, 181 L.Ed.2d 424 [2011]). Likewise, both the federal and state courts in California have rejected Free Exercise Clause challenges to that state's recent repeal of its personal belief exemption, which encompassed religious objections (see e.g. *Whitlow v. California*, 203 F. Supp. 3d 1079, 1085-1087 [S.D. Cal. 2016] [denying preliminary injunction]; *Love v. State Dept of Educ.*, 29 Cal. App. 5th 980, 996, 240 Cal.Rptr.3d 861 [3d App. Dist. 2018] [dismissing constitutional challenges]; *Brown v. Smith*, 24 Cal. App. 5th 1135, 1144-1145, 235 Cal.Rptr.3d 218 [2d App. Dist. 2018] [dismissing constitutional challenges]; see also *McCarthy v. Boozman*, 212 F. Supp. 2d 945, 948 [W.D. Ark. 2002], *appeal dismissed* 359 F.3d 1029 [2004] ["The constitutional right to freely practice one's religion does not provide an exemption for parents seeking to avoid compulsory immunization for their school-aged children."])

Generally, a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice (see *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 879, 110 S.Ct. 1595, 108 L.Ed.2d 876 [1990]). New York's Court of Appeals expounded on this rule in *Catholic Charities of Diocese of Albany v. Serio*, stating "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)" (7 N.Y.3d at 521, 825 N.Y.S.2d 653, 859 N.E.2d 459 [internal quotation marks and citations omitted]; see *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. at 879, 110 S.Ct. 1595; *United States v. Lee*, 455 U.S. 252, 263 n. 3, 102 S.Ct. 1051, 71 L.Ed.2d 127 [1982, Stevens, J., concurring]). "A neutral law, the Supreme Court has explained, is one that does not 'target[] religious beliefs as such' or have as its 'object ... to infringe upon or restrict practices because of their religious motivation'" (*Catholic Charities of Diocese of Albany v. Serio*, 7 N.Y.3d at 521,

825 N.Y.S.2d 653, 859 N.E.2d 459, quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533, 113 S.Ct. 2217, 124 L.Ed.2d 472[1993]).

Plaintiffs argue, however, that the general rule permitting the government to enact neutral laws under its police powers, notwithstanding incidental effects on religious practices, does not apply here. They argue for strict scrutiny on three separate grounds.

First, they contend that the June 2019 legislation repealing the exemption is not a neutral law; rather the repeal of a religious exemption, by definition, is a law that targets those with religious beliefs. They argue that because the repeal is a “targeted,” non-neutral law, which substantially burdens their free exercise rights, the Court must apply strict scrutiny. The Court is not convinced at this preliminary injunction phase that plaintiffs’ view on this question is likely to prevail. In this Court’s view, the more persuasive way of looking at the question is from the perspective of Public Health Law § 2164 as a whole. There is no question that the compulsory vaccination statute, as it exists with or without the religious exemption, is a neutral law of general applicability. The fact that the legislature first allowed for a religious exemption and later repealed that exemption does not in and of itself turn the law into one that targets religious beliefs (*cf. Catholic Charities of Diocese of Albany v. Serio*, 7 N.Y.3d at 522-533, 825 N.Y.S.2d 653, 859 N.E.2d 459 [stating fact that challenged law provided some religious exemptions did not mean it was not overall a neutral statute of general applicability]).

*8 Second, plaintiffs argue that strict scrutiny is required under the “so-called ‘hybrid rights’ ” exception to *Smith*’s general rule. As the Court of Appeals explained, the “notion of ‘hybrid rights’ ” is derived from dictum in which the *Smith* Court distinguished certain of its previous cases by saying:

“The only decisions in which we have held that the First Amendment bars application of neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, or the rights of parents ... to direct the education of their children” (*Catholic Charities of Diocese of Albany v. Serio*, 7 N.Y.3d at 523, 825 N.Y.S.2d 653, 859 N.E.2d 459 [internal quotation marks and citation omitted]; see *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. at 881, 110 S.Ct. 1595, 108 L.Ed.2d 876).

The discussion of “hybrid rights” is dicta in both *Smith* and *Catholic Charities*, and this area of the law is not well

developed. However, some courts have criticized and eschewed the doctrine of “hybrid rights” in favor of rational basis review in similar contexts (*see Phillips v. City of New York*, 775 F.3d 538, 543 [2d Cir. 2015], *cert denied* — U.S. —, 136 S. Ct. 104, 193 L.Ed.2d 37 [2015]; *Whitlow v. California*, 203 F. Supp. 3d 1079, 1086 n. 4 [S.D. Cal. 2016]). But assuming, without deciding, the viability of the “hybrid rights” theory, plaintiffs’ constitutional interests do appear to be two-fold — the right to free exercise of religion and the right of parents to make educational and medical decisions for their children (*see Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 [1972]). Plaintiffs present at least a colorable argument that elevated scrutiny may be required under a “hybrid rights” theory.

Third, plaintiffs argue in favor of strict scrutiny in reliance on *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, — U.S. —, 138 S. Ct. 1719, 201 L.Ed.2d 35 [2018], where the Supreme Court observed that “the government, if it is to respect the Constitution’s guarantee of free exercise, cannot impose regulations that are hostile to religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices” (*id.* at 1731-1732). “[T]he First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general” (*Church of Lukumi Babalu Aye v. Hialeah*, 508 U.S. at 532, 113 S.Ct. 2217). “At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons” (*id.*). “If the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral ... and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest” (*id.* at 533, 113 S.Ct. 2217 [citation omitted]). “Factors relevant to the assessment of governmental neutrality include ‘the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body’ ” (*Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, 138 S. Ct. at 1731, quoting *Church of Lukumi Babalu Aye v. Hialeah*, 508 U.S. at 540, 113 S.Ct. 2217).

*9 But “[i]nquiries into [legislative] motives or purposes are a hazardous matter” (*United States v. O’Brien*, 391 U.S. 367, 383, 88 S.Ct. 1673, 20 L.Ed.2d 672 [1968], *reh denied* 393 U.S. 900, 89 S.Ct. 63, 21 L.Ed.2d 188 [1968]), and “it is the motivation of the entire legislature, not the motivation of a handful of voluble members that is relevant”

(*South Carolina Edu. Ass'n v. Campbell*, 883 F.2d 1251, 1262 [4th Cir. 1989], *cert denied* 493 U.S. 1077, 110 S.Ct. 1129, 107 L.Ed.2d 1035 [1990] [citation omitted]; *see Citizens Union of City of NY v. Att'y Gen. of NY*, 269 F. Supp. 3d 124, 146-147 [S.D.N.Y. 2017]; *Murphy v. Empire of Am., FSA*, 746 F.2d 931, 935 [2d Cir. 1984]; *Matter of Kelly*, 841 F.2d 908, 912 n. 3 [9th Cir. 1988]). “[I]solated remarks are entitled to little or no weight, particularly when they are unclear or conflict with one another, as distinguished from a legislative committee’s formal report on its enactment” (*Murphy v. Empire of America, FSA*, 746 F.2d 931, 935 [2d Cir. 1984]). “Instead, the best indication of legislative intent is the law itself” (*Citizens Union of City of NY v. Att’y Gen. of NY*, 269 F. Supp. 3d at 147 [internal quotation marks and citation omitted]).

The Court is not convinced that strict scrutiny is likely required under the *Masterpiece Cakeshop* theory. Here, the legislative memoranda in support of the bills that were enacted, and the Governor’s approval statement, expressly state that the objective of the repeal is the protection of the public health from vaccine-preventable diseases. Also, they acknowledge respect for religious beliefs, but express the view that public health concerns must prevail.

The repeal was enacted on the heels of the most serious outbreak of measles in New York in 25 years, which was concentrated in areas of low vaccination rates. Although plaintiffs argue that the legislators’ animus is illustrated by the timing of the repeal — which was presented and enacted months after the apex of the measles outbreak — legislative priorities may have made it impractical to address this issue in January when it was addressing the State budget, with the proposed repeal rising as a priority in June to give affected families and schools time for decision making and planning before the start of the new school year.

Moreover, this is not a case where the government singled out those with religious beliefs and imposed an affirmative burden on them in the first instance. Rather, the challenged legislation removed a religious exemption, where others having secular, scientific or philosophical beliefs had been provided none. Nor does the fact that the legislature retained the medical exemption, while at the same time repealing the religious exemption, suggest religious animus. The ultimate purpose of the legislation is the protection of public health. The elimination of the medical exemption would be contrary to the ultimate purpose of the statute (*see Brock v. Boozman*, 2002 WL 1972086, *7-8, 2002 US Dist LEXIS 15479, *21-24 [E.D. Ark. 2002], *appeal dismissed* 359 F.3d 1029 [8th Cir. 2004]). For this reason, *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 [3d Cir. 1999], upon which

plaintiffs’ rely, is distinguishable (*see Brock v. Boozman*, 2002 WL 1972086, *7-8, 2002 US Dist LEXIS 15479, *21-24 [E.D. Ark. 2002]). Given the congruence of the purposes of the medical exemption with Public Health Law § 2164, continuing the medical exemption in the absence of the religious exemption raises no suspicion of religious animus (*see id.* [rejecting argument that a medical exemption to compulsory immunization reflects “a value judgment in favor of secular motivations but not religious motivations”]).

***10** Finally, many, although perhaps not all, of the legislative comments that plaintiffs argue demonstrate hostility to religious beliefs are susceptible to more than one meaning. Many of these comments may merely reflect frustration with parents who have asserted the religious exemption not on bona fide religious grounds, but because they disagree with scientific and medical consensus that vaccines are safe and effective. Skepticism over the genuineness of some claimed religious exemptions does not necessarily equate to hostility toward legitimate religious beliefs. And other legislators’ comments may merely express the view that the public health of all children, and the public generally, supersedes even bona fide religious interests.

For purposes of this motion, there is no dispute that plaintiffs hold genuine and sincere religious beliefs that are contrary to vaccination practices. The Court appreciates the affidavits plaintiffs and other nominal class members have provided to explain the basis of their religious beliefs. But, while many do hold genuine and sincere religious beliefs, it cannot be denied that there are individuals who have attempted to assert religious exemptions when they, in actuality, disagree with the prevailing scientific and medical consensus that vaccines are safe for their children and are a highly effective way to protect public health (*see e.g. Phillips v. City of New York*, 775 F.3d at 541; *Mason v. General Brown Cent. School Dist.*, 851 F.2d 47, 51 [2d Cir. 1988]; *NM v. Hebrew Acad. Long Beach*, 155 F. Supp. 3d 247, 258 [E.D.N.Y. 2016]; *Caviezel v. Great Neck Pub. Sch.*, 701 F. Supp. 2d 414 [E.D.N.Y. 2010], *aff’d* 500 Fed. Appx. 16 [2d Cir. 2012], *cert denied* 569 U.S. 947, 133 S.Ct. 1997, 185 L.Ed.2d 866 [2013]; *Farina v. Board of Educ. of City of New York*, 116 F. Supp. 2d 503, 508 [S.D.N.Y. 2000]).

Moreover, as a constitutional matter, the phrase “religious belief” must be construed broadly to encompass not just the tenets of organized religions, but also views of sub-groups or individuals derived from organized religions, and religious views that are wholly individual, unconnected to any organized religion (*see Mason v. General Brown Cent. School Dist.*, 851 F.2d at 50; *Matter of Sherr v. Northport-*

East Northport Union Free School Dist., 672 F. Supp. 81, 97-98 [E.D.N.Y. 1987]). And the Second Circuit has admonished that the State must tread delicately in this realm (see *Jolly v. Coughlin*, 76 F.3d 468, 476 [2d Cir. 1996] [“it is a delicate task to evaluate religious sincerity without questioning religious verity”]; *Ford v. McGinnis*, 352 F.3d 582, 588 [2d Cir. 2003]). Thus, the legislators’ statements may reflect their view that continued recognition of a broadly-construed religious exemption poses difficulties for enforcement and is incompatible with the overriding goal of protecting the public health. In sum, plaintiffs have not convinced the Court that they are likely to prevail in their argument that strict scrutiny is required because the legislation was driven by religious animus.

In any event, even if the Court were to apply strict scrutiny, plaintiffs nevertheless have failed to demonstrate that they are likely to succeed on their Free Exercise Clause claim. The courts addressing this question have concluded that compulsory vaccination laws without religious exemptions are constitutional, regardless of whether rational basis or strict scrutiny applies (see e.g., *Workman v. Mingo County Bd. of Educ.*, 419 Fed. Appx. 348, 354 [4th Cir. 2011], *cert denied* 565 U.S. 1036, 132 S. Ct. 590, 181 L.Ed.2d 424 [2011]; *Whitlow v. California*, 203 F. Supp. 3d 1079, 1085-1087 [S.D. Cal. 2016]; *Brown v. Smith*, 24 Cal. App. 5th 1135, 1144-1145, 235 Cal.Rptr.3d 218 [2d App. Dist. 2018]; *Love v. State Dep’t of Educ.*, 29 Cal. App. 5th 980, 996, 240 Cal.Rptr.3d 861 [3d App. Dist. 2018]).

Protecting public health, and children’s health in particular, through attainment of threshold inoculation levels for community immunity from communicable diseases is unquestionably a compelling state interest (see *Workman v. Mingo County Bd. of Educ.*, 419 Fed. Appx. at 353).³ The courts have routinely held that the states need not wait for vaccination rates to fall below the community immunity threshold or for outbreaks to occur before mandatory inoculations are required for children to attend school. They have upheld proactive compulsory vaccination requirements for school-aged children even where there has been no recent outbreak, in order to maintain community immunity to prevent future outbreaks (see *Zucht v. King*, 260 U.S. 174, 176, 43 S.Ct. 24, 67 L.Ed. 194 [1922]; *Workman v. Mingo County Bd. of Educ.*, 419 Fed. Appx. at 353-354; *McCarthy v. Boozman*, 212 F. Supp. 2d 945, 948 [W.D. Ark. 2002], *appeal dismissed* 359 F.3d 1029 [2004]; *Matter of Sherr v. Northport-East Northport Union Free School Dist.*, 672 F. Supp. at 88; *Davis v. State*, 294 Md. 370, 379 n. 8 [Md. 1982]). And the courts have upheld such requirements based on historical experience without the need for legislative fact-finding hearings (see *Matter of Viemeister*, 179 N.Y. 235, 240-241, 72 N.E. 97 [1904]; *Noyes v. Erie & Wyoming Farmers Co-op. Corp.*,

281 N.Y. 187, 194-195, 22 N.E.2d 334 [1939]). Here, lawmakers had access to CDC reports and publications from medical associations about the risks posed by vaccine preventable diseases and the effectiveness and safety of vaccines; knowledge of the recent outbreaks in New York which predominately occurred in communities with low vaccination rates; and data showing that those asserting religious exemptions have nearly doubled in recent years, despite declining student enrollment.

*11 Plaintiffs’ argument that there are less restrictive means to protect the public health, such as the temporary exclusion from schools as was done during the outbreak in Rockland County, is also likely to be unavailing. While such measures may mitigate dangers to unvaccinated individuals, they do not prevent or eliminate them. As Dr. Blog averred, diseases may be contagious for days before definitive symptoms appear, placing exposed, unvaccinated persons at risk of serious illness or death. Reactive measures to outbreaks, like quarantines and keeping unvaccinated individuals home, simply are not as effective at protecting public health as proactive measures aimed at attaining and maintaining threshold community immunity to contagious diseases before outbreaks occur.

In conclusion, given the long line of cases upholding the exercise of the State’s police power to require children to be vaccinated before they may attend public and private schools, the Court does not, at this early stage of the litigation, see a path for plaintiffs to succeed on the merits. The Court is therefore constrained to deny plaintiffs’ request for a preliminary injunction, and to allow the legislative policy choice to repeal the religious exemption to remain in effect.

Plaintiffs’ Equal Protection and Compelled Speech Claims

Plaintiffs only briefly developed their claims that the repeal of the religious exemption violates the Equal Protection Clause and requires them to engage in compelled speech or violate the State’s compulsory education laws. They have failed to demonstrate a likelihood of success on those claims.

In their complaint, plaintiffs allege that the repeal violates the Equal Protection Clause “because it eliminates the religious exemption for children while allowing students enrolled in higher education as well as employees of schools, both private and public, either to maintain their religious exemptions or to continue their employment without vaccinations.” In their memoranda of law in

support of preliminary relief, plaintiffs contend that they are being treated differently than the adults in the schools, both staff and students who have turned 18 years old. The adult class that plaintiffs point to are not similarly situated to plaintiffs. Public Health Law § 2164 requires that “[e]very parent in parental relation to a child in this state shall have administered to such child” the vaccines listed in the statute; and that no school shall admit a child between the ages of two months and 18 years without proof of vaccination or a medical exemption. New York’s legislature has chosen to target school-aged children, both for their immediate protection while they are in close, daily proximity to each other and as the primary means to achieve community immunity from vaccine-preventable diseases. Plaintiffs have not shown that this approach is irrational. That there may be other statutory or regulatory regimes that target adults who come into contact with vulnerable populations does not detract from the rationality of the legislative policy choice to enhance community immunity in this way.

Plaintiffs also argue that they are being treated differently than those students who have no exemptions from compulsory vaccination whatsoever but are still allowed to attend schools, citing news reports. This claim was not raised in the complaint and is not well-developed in the submissions on this preliminary injunction motion. Even if this claim of differential treatment were properly before the Court, plaintiffs have not demonstrated a likelihood of success on any claim that the repeal violates their equal protection rights because the mandatory vaccination requirements are not being adequately enforced by school

officials.

Finally, plaintiffs’ submissions address their compelled speech claims only in the most abbreviated manner. To the best the Court can discern, plaintiffs claim that the repeal of the religious exemption compels speech because they will be forced to home school their children. The record at this stage does not disclose potential mechanisms for home schooling children or otherwise develop this argument. Plaintiffs have come nowhere near establishing a likelihood of success on this claim.

***12** Accordingly, it is

Ordered that plaintiffs’ motion for a preliminary injunction is denied.

This constitutes the decision and order of the Court. The original decision and order is being transmitted to defendants’ counsel. All other papers are being transmitted to the County Clerk for filing. The signing of this decision and order does not constitute entry or filing under CPLR 2220 and counsel is not relieved from the applicable provisions of that rule respecting filing and service.

All Citations

--- N.Y.S.3d ----, 2019 WL 4050472, 2019 N.Y. Slip Op. 29261

Footnotes

- 1 Adults may not have been vaccinated for many reasons. Aside from medical reasons, some adults may not be vaccinated because certain vaccines may not have been medically available during their childhood. And in this age of increased mobility, some adults now living in New York may not be vaccinated because childhood vaccinations were not required or available in their states or countries of origin.
- 2 The Free Exercise Clause of the First Amendment applies to the States through the Fourteenth Amendment (see *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 [1940]). Plaintiffs also claim that the repeal violates Article 1, § 3 of the New York Constitution, but they have not pressed their State constitutional claim or differentiated it from their federal constitutional claims in arguments on this motion for a preliminary injunction (see *Catholic Charities of Diocese of Albany v. Serio*, 7 N.Y.3d 510, 825 N.Y.S.2d 653, 859 N.E.2d 459 [2006], *rearg denied* 9 N.Y.3d 866, 831 N.Y.S.2d 767, 863 N.E.2d 1019 [2007], *cert denied* 552 U.S. 816, 128 S. Ct. 97, 169 L.Ed.2d 22 [2007] [discussing review under New York Constitution]).
- 3 For purposes of this preliminary injunction motion, the Court has not differentiated among the various vaccines in analyzing plaintiffs’ free exercise claims. Plaintiffs briefly note that tetanus is not a communicable disease in the way that polio, smallpox, diphtheria, and whooping cough are but, perhaps because the tetanus vaccine is bundled with other vaccines, they have not pressed the argument.

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31 N.Y.3d 601
Court of Appeals of New York.

Magdalena GARCIA, Individually and on Behalf of
Her Minor Child, P.S., et al., Respondents,

v.

NEW YORK CITY DEPARTMENT OF HEALTH
AND MENTAL HYGIENE, et al., Appellants.

No. 64
|
June 28, 2018

Synopsis

Background: Parents of children enrolled in child care programs brought action against city department of health and mental hygiene, commissioner of department, and city board of health, challenging board's amendments to city health code mandating that children who attended city-regulated child care or school-based programs receive annual influenza vaccinations. The Supreme Court, New York County, Manuel J. Mendez, J., granted parents' motion to permanently enjoin defendants from implementing and enforcing amendments and defendants appealed. The Supreme Court, Appellate Division, Richter, J., 144 A.D.3d 59, affirmed. Defendants appealed.

Holdings: The Court of Appeals, Stein, J., held that:

rule was not result of choice between competing public policies;

rule was written without benefit of legislative guidance pursuant to board's significant delegated power;

legislative inaction did not support finding that rule violated separation of powers doctrine;

city board of health used special expertise to develop rule;

rule did not conflict with state law; and

state did not preempt field of mandatory school vaccinations.

Reversed.

Attorneys and Law Firms

****1190 ***830** Zachary W. Carter, Corporation Counsel, New York City (Richard Dearing, Benjamin Welikson and Devin Slack of counsel), for appellants.

Siri & Glimstad LLP, New York City (Aaron Siri and Mason Barney of counsel), for respondents.

OPINION OF THE COURT

STEIN, J.

***604** On this appeal, respondents the New York City Department of Health and Mental Hygiene (the Department), the New York City Board of Health (the Board), and Dr. Mary Travis Bassett, as Commissioner of the Department, argue that Supreme Court and the Appellate Division erred by enjoining enforcement of the Board's amendments to the New York City Health Code mandating that children between the ages of 6 months and 59 ***605** months who attend city-regulated child care or school-based programs receive annual influenza vaccinations. We agree. The Board's promulgation of the flu vaccine rules falls squarely within the powers specifically delegated to the Department in New York City Administrative Code of the City of New York § 17-109, and the Board's actions did not violate the separation of powers doctrine. Further, the flu vaccine rules are not preempted by state law.

I. Background

New York City and New York State share regulatory authority over child care ****1191 ***831** facilities and programs located in the city. Through the New York City Health Code, the Department and Board' regulate health and safety standards for school-based programs for children ages three through five years, as well as public and private group day care services for children under the age of six (see N.Y. City Health Code [24 RCNY] arts 43, 47), while the State maintains oversight of smaller family and group family day care programs, as well as school-age child care (see Social Services Law § 390[1][c]–[f]; [13]).

As a matter of state law, Public Health Law § 2164 requires every child between the age of two months and 18 years to receive vaccines against certain enumerated diseases—namely, “poliomyelitis, mumps, measles, diphtheria, rubella, varicella, Haemophilus influenzae type b(Hib), pertussis, tetanus, pneumococcal disease, and hepatitis B” (Public Health Law § 2164[2][a]). Absent proof of these immunizations, the Public Health Law prohibits officials in charge of “any public, private or parochial child caring center, day nursery, day care agency, nursery school, kindergarten, elementary, intermediate or secondary school” within the state from allowing any unvaccinated child to attend for more than 14 days (*id.* § 2164[1][a]; [7][a]). However, a statutory exception permits admission of an unvaccinated child if a physician certifies that “immunization may *606 be detrimental to [the] child’s health” or if the child’s parent or guardian objects based on “genuine and sincere religious beliefs” (*id.* § 2164[8], [9]).²

Prior to the amendments at issue here, New York City Health Code §§ 43.17 and 47.25 required that children attending child care programs under the Department’s jurisdiction “be immunized ... in accordance with ... Public Health Law § 2164, or successor law, and ... have such additional immunizations as the Department may require” (former N.Y. City Health Code [24 RCNY] §§ 43.17[a][2]; 47.25[a][2]). In December 2013, following a public hearing and comment period, the Board amended Health Code §§ 43.17 and 47.25, as relevant here, to provide that all children between the ages of 6 months and 59 months who attend child care or school-based programs under the Department’s jurisdiction must also receive annual influenza vaccinations (*see* N.Y. City Health Code [24 RCNY] §§ 43.17[a][2][B][i]; 47.25[a][2][B][i]). As with the other required vaccinations, a child may be exempt from the flu vaccine requirement upon a physician’s certification or on the basis of “genuine and sincere religious beliefs” held by the child’s parent or guardian (N.Y. City Health Code [24 RCNY] §§ 43.17[a][2][B][i]; 47.25[a][2][B][i]). The Board’s amendments authorized officials in charge of child care and school programs to deny admission to any child who fails to provide proof of influenza vaccination and established an appeals process for those denied admission on that **1192 ***832 ground (*see id.* §§ 43.17[a][2][B][ii]; 47.25[a][2][B][ii]). Under the new flu vaccine rules, a child care provider or school “that fails to maintain documentation showing that each child in attendance has either received each vaccination required by this subdivision or is exempt from such a requirement ... will be subject to fines” for each unvaccinated child permitted entry (*id.* § 43.17[a][2][C]; *see id.* § 47.25[a][2][C]).

Petitioners—parents of children enrolled in child care programs subject to the flu vaccine rules who object to their children receiving the vaccination—commenced this hybrid CPLR article 78 proceeding and declaratory judgment action to enjoin respondents from enforcing the flu vaccine rules or, alternatively, to have the court declare such rules invalid. Petitioners maintained that the Board’s adoption of those rules *607 exceeded its regulatory authority and violated the separation of powers doctrine. Petitioners also argued that the flu vaccine rules were preempted by the Public Health Law and that only the state legislature may mandate vaccinations for school children. Respondents cross-moved to dismiss the petition.

Supreme Court granted petitioners’ motion, denied respondents’ cross motion, and permanently enjoined respondents from enforcing the flu vaccine rules (2015 N.Y. Slip Op. 32601[U], 2015 WL 9215585 [Sup. Ct., N.Y. County 2015]). The court held that the “New York State Legislature retains the statutory authority to mandate vaccinations not already expressed within the Public Health Law,” and that “[r]espondents[’] actions in enacting the [flu vaccine rules] are not contemplated in the statute and are outside of the law” (*id.* at *7).

On respondents’ appeal, the Appellate Division affirmed, but employed different reasoning, concluding that “[t]he motion court improperly found that the Board of Health’s adoption of the challenged [flu vaccine rules] was preempted by state law” (144 A.D.3d 59, 65, 38 N.Y.S.3d 880 [1st Dept. 2016]). According to the Appellate Division, “[t]here is no field preemption here because the State has not assumed full regulatory responsibility over the entire field of disease control and vaccination” and, further, “[t]he absence of the flu vaccination from the mandated list does not present a conflict because [Public Health Law § 2164] contains no language prohibiting localities from requiring additional vaccinations not mandated by the State” (144 A.D.3d at 65, 67, 38 N.Y.S.3d 880).

Nevertheless, the Appellate Division held that the flu vaccine rules were invalid as enacted, under the analysis set forth in *Boreali v. Axelrod*, 71 N.Y.2d 1, 523 N.Y.S.2d 464, 517 N.E.2d 1350 (1987) and its progeny, because the “particular scheme adopted by the Board ... exceeded the scope of its regulatory authority” (144 A.D.3d at 62, 38 N.Y.S.3d 880). The Court clarified, however, that it was not holding that the Board lacked the authority to mandate vaccination of young children, given that section 17–109 of the Administrative Code of the City of New York empowers the Department to “take measures, and supply agents and offer inducements and facilities for general and gratuitous vaccination” (Administrative Code of the City of New York § 17–109[a], [b]; *see* 144 A.D.3d at 71–72,

38 N.Y.S.3d 880). Rather, the Appellate Division emphasized, its “only holding” was that “the particular scheme” adopted by the Board “involved improper policy decisions, and thus did not constitute appropriate rulemaking” (144 A.D.3d at 72, 38 N.Y.S.3d 880).

*608 We granted respondents leave to appeal (28 N.Y.3d 913, 2017 WL 524746 [2017]), and now reverse.

****1193 ***833 II. Separation of Powers**

Respondents argue that the Appellate Division erred in concluding that the Board violated the separation of powers doctrine by adopting the flu vaccine rules. More specifically, respondents contend that the legislature has delegated to the Board, through Administrative Code § 17–109, the necessary authority to promulgate rules relating to vaccinations, including those challenged here. Respondents further assert that the Appellate Division inappropriately applied the Boreali factors (71 N.Y.2d at 11–14, 523 N.Y.S.2d 464, 517 N.E.2d 1350) to second-guess the manner in which the Board exercised its regulatory authority, instead of merely determining whether the Board possessed the requisite authority to promulgate the rules in the first instance. In response, petitioners argue that the Appellate Division correctly held that the Board exceeded its regulatory authority and impermissibly crossed the threshold into legislative policymaking.

“ ‘The concept of the separation of powers is the bedrock of the system of government adopted by this State in establishing three coordinate and coequal branches of government, each charged with performing particular functions’ ” (Matter of NYC C.L.A.S.H., Inc. v. New York State Off. of Parks, Recreation & Historic Preserv., 27 N.Y.3d 174, 178, 32 N.Y.S.3d 1, 51 N.E.3d 512 [2016], quoting Matter of Soares v. Carter, 25 N.Y.3d 1011, 1013, 10 N.Y.S.3d 175, 32 N.E.3d 390 [2015]). This principle, “implied by the separate grants of power to each of the coordinate branches of government, requires that the Legislature make the critical policy decisions, while the executive branch’s responsibility is to implement those policies” (Bourquin v. Cuomo, 85 N.Y.2d 781, 784, 628 N.Y.S.2d 618, 652 N.E.2d 171 [1995] [internal quotation marks and citations omitted]; see N.Y. Const., art. III, § 1; art. IV, § 1).

Separation of powers challenges often involve the question of whether a regulatory body has exceeded the scope of its

delegated powers and encroached upon the legislative domain of policymaking (see Greater N.Y. Taxi Assn. v. New York City Taxi & Limousine Commn., 25 N.Y.3d 600, 608, 15 N.Y.S.3d 725, 36 N.E.3d 632 [2015]). However, the distinction between unauthorized policymaking and permissible regulating is not always an easy one to define. The powers of the legislative and executive branches “cannot be neatly divided into isolated pockets” (Bourquin, 85 N.Y.2d at 784, 628 N.Y.S.2d 618, 652 N.E.2d 171). A regulatory agency “is clothed with those powers expressly conferred by its authorizing statute, as well as those *609 required by necessary implication” (Matter of Acevedo v. New York State Dept. of Motor Vehs., 29 N.Y.3d 202, 221, 54 N.Y.S.3d 614, 77 N.E.3d 331 [2017]; see Matter of General Elec. Capital Corp. v. New York State Div. of Tax Appeals, Tax Appeals Trib., 2 N.Y.3d 249, 254, 778 N.Y.S.2d 412, 810 N.E.2d 864 [2004]). Generally, “an agency can adopt regulations that go beyond the text of [its enabling] legislation, provided they are not inconsistent with the statutory language or its underlying purposes” (Matter of General Elec. Capital Corp., 2 N.Y.3d at 254, 778 N.Y.S.2d 412, 810 N.E.2d 864). The guiding legislation “need not be detailed or precise as to the agency’s role” and, as an overarching principle, “common sense must be applied when reviewing a separation of powers challenge” (Greater N.Y. Taxi Assn., 25 N.Y.3d at 609, 15 N.Y.S.3d 725, 36 N.E.3d 632).

In Boreali and subsequent cases, we have clarified the “difficult-to-define line between administrative rule-making and legislative policy-making” by articulating *1194 ***834 ing four “coalescing circumstances” relevant to rendering such a determination (71 N.Y.2d at 11, 523 N.Y.S.2d 464, 517 N.E.2d 1350; see Matter of Acevedo, 29 N.Y.3d at 222, 54 N.Y.S.3d 614, 77 N.E.3d 331; Greater N.Y. Taxi Assn., 25 N.Y.3d at 610, 15 N.Y.S.3d 725, 36 N.E.3d 632; Matter of New York Statewide Coalition of Hispanic Chambers of Commerce v. New York City Dept. of Health and Mental Hygiene, 23 N.Y.3d 681, 696, 992 N.Y.S.2d 480, 16 N.E.3d 538 [2014]). These circumstances are: whether (1) the regulatory agency “ ‘balanc[ed] costs and benefits according to preexisting guidelines,’ or instead made ‘value judgments entail[ing] difficult and complex choices between broad policy goals to resolve social problems’ ” (Matter of Acevedo, 29 N.Y.3d at 222–223, 54 N.Y.S.3d 614, 77 N.E.3d 331, quoting Greater N.Y. Taxi Assn., 25 N.Y.3d at 610, 15 N.Y.S.3d 725, 36 N.E.3d 632); (2) the agency “merely filled in details of a broad policy or if it ‘wrote on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance’ ” (Matter of NYC C.L.A.S.H., 27 N.Y.3d at 182, 32 N.Y.S.3d 1, 51 N.E.3d 512, quoting Greater N.Y. Taxi Assn., 25 N.Y.3d at 611, 15 N.Y.S.3d 725, 36 N.E.3d 632); (3) the legislature had

unsuccessfully attempted to enact laws pertaining to the issue (see Boreali, 71 N.Y.2d at 13, 523 N.Y.S.2d 464, 517 N.E.2d 1350); and (4) the agency used special technical expertise in the applicable field (see id. at 13–14, 523 N.Y.S.2d 464, 517 N.E.2d 1350).

We have emphasized that these circumstances or factors are not “discrete, necessary conditions that define improper policymaking by an agency” or “criteria that should be rigidly applied in every case in which an agency is accused of crossing the line into legislative territory” (Matter of New York Statewide Coalition, 23 N.Y.3d at 696, 992 N.Y.S.2d 480, 16 N.E.3d 538; see Matter of NYC C.L.A.S.H., 27 N.Y.3d at 180, 32 N.Y.S.3d 1, 51 N.E.3d 512). “Rather, the factors are related considerations, designed to ascertain whether an agency has transgressed the bounds of permissible rulemaking” (*610 Matter of Acevedo, 29 N.Y.3d at 222, 54 N.Y.S.3d 614, 77 N.E.3d 331; see Greater N.Y. Taxi Assn., 25 N.Y.3d at 612, 15 N.Y.S.3d 725, 36 N.E.3d 632). Ultimately, “[a]ny Boreali analysis should center on the theme that ‘it is the province of the people’s elected representatives, rather than appointed administrators, to resolve difficult social problems by making choices among competing ends’ ” (Matter of New York Statewide Coalition, 23 N.Y.3d at 697, 992 N.Y.S.2d 480, 16 N.E.3d 538, quoting Boreali, 71 N.Y.2d at 13, 523 N.Y.S.2d 464, 517 N.E.2d 1350).

Turning to the case before us, the New York City Charter empowers the Department with “jurisdiction to regulate all matters affecting health in the city of New York and to perform all those functions and operations performed by the city that relate to the health of the people of the city” (N.Y. City Charter § 556), as well as to “supervise the reporting and control of communicable and chronic diseases and conditions hazardous to life and health” (id. § 556[c][2]). In addition, the City Charter authorizes the Board to “add to and alter, amend or repeal any part of the health code, ... [to] publish additional provisions for security of life and health in the city and [to] confer additional powers on the [D]epartment not inconsistent with the constitution, laws of this state or this charter” (id. § 558[b]). The Board “may embrace in the health code all matters and subjects to which the power and authority of the [D]epartment extends” (id. § 558[c]), and may enforce the Health Code through, among other things, “fines, penalties, [and] forfeitures” (id. § 558[b]). Although these are broad delegations of **1195 ***835 power, we have held that they nevertheless “reflect[] only a regulatory mandate, not legislative authority” (Matter of New York Statewide Coalition, 23 N.Y.3d at 694, 992 N.Y.S.2d 480, 16 N.E.3d 538). Accordingly, “the Board’s authority, like that of any other administrative agency, is restricted to promulgating ‘rules necessary to carry out the powers and

duties delegated to it by or pursuant to federal, state or local law’ ” (id. at 695, 992 N.Y.S.2d 480, 16 N.E.3d 538, quoting N.Y. City Charter § 1043[a]). “A rule has the force of law, but it is not a law; rather, it ‘implements or applies law or policy’ ” (Matter of New York Statewide Coalition, 23 N.Y.3d at 695, 992 N.Y.S.2d 480, 16 N.E.3d 538, quoting N.Y. City Charter § 1041[5][i]), and the Board must act within the strictures of its legislatively-delegated powers.

In that regard, as particularly relevant here, Administrative Code § 17–109 delegates to the Department—and, by extension, the Board (see N.Y. City Charter § 558[c])—the power “to collect and preserve pure vaccine lymph or virus, produce diphtheria antitoxin and other vaccines and antitoxins, and add necessary additional provisions to the health code in order *611 to most effectively prevent the spread of communicable diseases” (Administrative Code § 17–109[a]). Section 17–109 further authorizes the Board to “take measures, and supply agents and offer inducements and facilities for general and gratuitous vaccination, disinfection, and for the use of diphtheria antitoxin and other vaccines and antitoxins” (id. § 17–109[b]). Plainly, this is a legislative delegation of authority to adopt vaccination measures. Nonetheless, petitioners maintain that the flu vaccine rules exceed the scope of the Board’s authority under Boreali.

(A)

Analyzing the first Boreali factor, we must consider whether the flu vaccine rules are the result of the Board making difficult and complex value judgments, choosing between competing policy goals. Petitioners assert that the Board’s improper policymaking is evidenced by the so-called “exceptions” inherent in its chosen scheme insofar as the flu vaccine rules apply only to those child care providers regulated by the City and providers are permitted to admit unvaccinated children, albeit subject to significant financial penalties. In that regard, petitioners liken the flu vaccine rules to the rules at issue in Matter of New York Statewide Coalition, 23 N.Y.3d at 690, 992 N.Y.S.2d 480, 16 N.E.3d 538 capping the portion size of sugary drinks. This analogy is inapt.

In Matter of New York Statewide Coalition, the Board weighed the public health goal sought to be achieved by its regulation limiting the size of sugary drinks sold by certain food service establishments against various special interests, including “the economic consequences

associated with restricting profits by beverage companies and vendors, tax implications for small business owners, and personal autonomy with respect to the choices of New York City residents concerning what they consume” (*id.* at 698, 992 N.Y.S.2d 480, 16 N.E.3d 538). While we held that the agency’s weighing of these economic considerations supported the view that it had transgressed into policymaking, we clarified that, generally, “the promulgation of regulations necessarily involves an analysis of societal costs and benefits,” and that “Boreali should not be interpreted to prohibit an agency from attempting to balance costs and benefits” (Matter of New York Statewide Coalition, 23 N.Y.3d at 697–698, 992 N.Y.S.2d 480, 16 N.E.3d 538). However, under the facts presented there, we concluded that “the [p]ortion [c]ap [r]ule embodied a compromise that attempted to promote a *612 healthy diet without signific **1196 ***836 antly affecting the beverage industry,” which constituted a balancing of competing special interests that fell within the legislative domain (*id.* at 698, 992 N.Y.S.2d 480, 16 N.E.3d 538). We, therefore, held that the first factor weighed against the Board.

Here, by comparison, the Board did not choose between the competing public policies of advancing public health and avoiding economic disruption of specific industries (*compare id.* at 698–699, 992 N.Y.S.2d 480, 16 N.E.3d 538). Rather, the legislature chose the “end” of public health and the “means” to promote that end by empowering the Board to “add necessary additional provisions to the health code in order to most effectively prevent the spread of communicable diseases,” as well as to “take measures, and supply agents and offer inducements and facilities for general and gratuitous vaccination” (Administrative Code § 17–109[a], [b]). In adopting the flu vaccine rules, the Board determined, in accordance with the legislature’s mandates, which vaccines should be required for children attending certain day care programs, as a matter of public health.

Undisputedly, there is a very direct connection between the flu vaccine rules and the preservation of health and safety (*compare Matter of New York Statewide Coalition*, 23 N.Y.3d at 699, 992 N.Y.S.2d 480, 16 N.E.3d 538; *see generally Matter of Viemeister*, 179 N.Y. 235, 72 N.E. 97 [1904]). To be sure, the flu vaccine rules necessarily impinge upon personal choice to some degree. This will almost always be true with health-related regulations. Notably, however, unlike in Matter of New York Statewide Coalition, the rules challenged here do not relate merely to a personal choice about an individual’s own health but, rather, seek to ensure increased public safety and health for the citizenry by reducing the prevalence and spread of a contagious infectious disease within a particularly

vulnerable population.

That the Board determined the exact means of achieving and advancing the larger end chosen by the legislature—by imposing fines to ensure that the cost of admitting unvaccinated, nonexempt children to day care programs is too significant for a provider to risk noncompliance—is a necessary part of the Board’s exercise of its regulatory authority; it does not give rise to a violation of the separation of powers doctrine. Nor does application of the flu vaccine rules to only those day care programs primarily regulated by the City—not those primarily subject to state oversight—warrant a contrary conclusion. There is no indication that the Board limited the scope of the *613 rules based on financial considerations of special or business interests (*see Matter of NYC C.L.A.S.H.*, 27 N.Y.3d at 181 n. 5, 32 N.Y.S.3d 1, 51 N.E.3d 512 [scope of regulation did not indicate policymaking where it merely regulated areas under the agency’s jurisdiction]; *compare Boreali*, 71 N.Y.2d at 11–12, 523 N.Y.S.2d 464, 517 N.E.2d 1350 [invalidating “a regulatory scheme laden with exceptions based solely upon economic and social concerns” (emphasis added)]). Moreover, “the limited scope of the [flu vaccine rules] would not in itself demonstrate that [they] amounted to policymaking” (Matter of New York Statewide Coalition, 23 N.Y.3d at 698 n. 3, 992 N.Y.S.2d 480, 16 N.E.3d 538). Accordingly, our analysis of the first Boreali factor militates in favor of upholding the flu vaccine rules.

(B)

With regard to the second Boreali factor, as noted above, the legislature has delegated significant power to the Board to promulgate regulations in the field of public health. Indeed, as already ob **1197 ***837 served, the Board has jurisdiction to regulate “all matters affecting health in the city of New York” (N.Y. City Charter § 556), including matters relating to “communicable and chronic diseases and conditions hazardous to life and health” (*id.* § 556[c][2]). Further, Administrative Code § 17–109 specifically delegates to the Board the power to regulate vaccinations and adopt vaccination measures to reduce the spread of infectious disease. This provision traces back to an 1866 act of the state legislature creating a predecessor to the existing Department and Board, which empowered that predecessor agency to “take measures and supply agents, and afford inducements and facilities for general and gratuitous vaccination and disinfection ... as in its opinion the protection of the public health may require” (L

1866, ch 74, §§ 16, 20). Over the course of many decades, the State has repeatedly reaffirmed the authority of the Department (in its various forms) to regulate vaccinations (see L 1874, ch 635, § 1; L 1897, ch 378, § 1225 [established New York City Charter and Board of Health, and bestowed upon Board the power to “take measures, and supply agents and offer inducements and facilities for general and gratuitous vaccination”]; L 1901, ch 466, § 1225; L 1937, ch 929, § 556–6.0 [enacted the New York City Administrative Code with vaccination provision]).

In accordance with these statutory delegations, the Board has mandated smallpox vaccinations of minors since 1866 (see former Metro. Bd. Of Health Code of Health Ordinances *614 § 29 [1866]), and has required other vaccines for children enrolled in city-regulated day care centers since at least as early as 1948, when it directed that children be immunized against diphtheria prior to admission (see former NYC Sanitary Code § 198, Reg 6 [1948]). These requirements were expanded over the years to add a number of other mandatory vaccinations, including poliomyelitis, tetanus, and pertussis (former Health Code § 47.07 [1959]). Critically, this preceded the state legislature’s own foray into mandatory vaccinations for children enrolled in day care programs. Prior to 1966, when the legislature enacted Public Health Law § 2164 (see L 1966, ch 994), smallpox was the only vaccine mandated by the legislature on a state level. The first iteration of section 2164, itself, mandated only that children receive poliomyelitis vaccines (see L 1966, ch 994). Nonetheless, in the legislative history underlying section 2164, the legislature expressly recognized that the New York City Health Code already required children admitted to a day care program regulated by the City to be vaccinated against poliomyelitis, diphtheria, pertussis, and tetanus (see Assembly Mem in Support, Bill Jacket, L 1966, ch 994, at 8).³ Similarly, later amendments to section 2164 reflect the state legislature’s awareness that the Board continued to mandate vaccinations beyond the confines of section 2164 (see e.g. Sponsor’s Mem, Bill Jacket, L 1989, ch 538 at 8).

In light of the state legislature’s aforementioned delegations to the Board of the power to regulate vaccines, together with the Board’s long history of mandating immunizations for children attending city-regulated child care programs beyond those required by the legislature, there can be no serious claim that, in enacting the flu vaccine rules, the Board “wrote on a clean slate, creating its own comprehensive set of rules without benefit of legisla **1198 ***838 tive guidance” (Matter of NYC C.L.A.S.H., 27 N.Y.3d at 182, 32 N.Y.S.3d 1, 51 N.E.3d 512, quoting Greater N.Y. Taxi Assn., 25 N.Y.3d at 611, 15 N.Y.S.3d 725, 36 N.E.3d 632; see Rent Stabilization

Assn. of N.Y. City v. Higgins, 83 N.Y.2d 156, 170, 608 N.Y.S.2d 930, 630 N.E.2d 626 [1993], cert denied 512 U.S. 1213, 114 S.Ct. 2693, 129 L.Ed.2d 823 [1994]). “Where an agency has promulgated regulations in a particular area for an extended time without any interference from the legislative body, we can infer, to some degree, that the legislature approves of the agency’s interpretation or action” (Greater N.Y. Taxi Assn., 25 N.Y.3d at 612, 15 N.Y.S.3d 725, 36 N.E.3d 632).

*615 Nor can it be said that there was a complete absence of any “legislative articulation of health policy goals” (Matter of New York Statewide Coalition, 23 N.Y.3d at 700, 992 N.Y.S.2d 480, 16 N.E.3d 538) concerning the relevant subject matter. To the contrary, the state legislature has accepted that vaccinations are a viable method of curbing the spread of disease (see Public Health Law §§ 2164, 2165), enacted legislation to promote the administration of influenza vaccinations in youth populations (see id. § 613[1][b]), and delegated to the Board the authority to take measures to vaccinate gratuitously (see Administrative Code § 17–109[a], [b]). Under these circumstances, the second Boreali factor strongly supports the Board’s position.

(C)

As for the third Boreali factor, the question of legislative inaction, the parties do not identify any attempt by the New York City Council to legislate whether the influenza vaccine should be mandatory for children attending child care programs regulated by the Department. It is true that the state legislature has generally adopted an incremental approach to imposing vaccination requirements for children and has enacted legislation that encourages, but does not require, that children receive the influenza vaccination (see L 2010, ch 36, § 1; Public Health Law § 613[1]). However, this is hardly the equivalent of “repeated failures by the [l]egislature to [reach] an agreement” on the subject matter “in the face of substantial public debate and vigorous lobbying by a variety of interested factions” (Boreali, 71 N.Y.2d at 13, 523 N.Y.S.2d 464, 517 N.E.2d 1350). In any event, as we have previously recognized, “[l]egislative inaction, because of its inherent ambiguity, affords the most dubious foundation for drawing positive inferences” (Matter of NYC C.L.A.S.H., 27 N.Y.3d at 184, 32 N.Y.S.3d 1, 51 N.E.3d 512, quoting Matter of Oswald N., 87 N.Y.2d 98, 103 n. 1, 637 N.Y.S.2d 949, 661 N.E.2d 679 [1995]). Accordingly, we conclude that the third factor does not weigh against the

Board.

(D)

Likewise, the fourth Boreali factor, which looks to “whether the agency used special expertise or competence in the field to develop the challenged regulations” (Greater N.Y. Taxi Assn., 25 N.Y.3d at 612, 15 N.Y.S.3d 725, 36 N.E.3d 632, citing Boreali, 71 N.Y.2d at 13–14, 523 N.Y.S.2d 464, 517 N.E.2d 1350), does not counsel us to invalidate the flu vaccine rules. In debating the virtues of the proposed rules, the Board compiled data and research regarding the prevalence and severity of influenza in *616 the infant population, the effectiveness and safety of the vaccine, and the benefits to the greater population of mandating the vaccination of young children. The Board explained that the flu vaccine rules are supported by research indicating that children have “the highest attack rates of influenza,” “serve as a major source of transmission within **1199 ***839 communities,” and, further, that “[v]accinating children produces ‘herd immunity’ in the general population.” The Board also relied on the recommendation of the Federal Advisory Committee on Immunization Practice that everyone over the age of six months receive an annual influenza vaccination, and considered similar vaccination requirements in other states for children attending child care or preschool facilities. Unquestionably, the Board’s health expertise was essential to its determination of whether to require the influenza vaccination. Further, while the Board’s selection of financial penalties for noncompliance was less reliant on its technical competence in the health field, it is consistent with the Board’s regulatory authority to choose among various enforcement methods to best achieve compliance (see N.Y. City Charter § 558[b], [c]). Therefore, the final Boreali factor does not militate against the Board (see Matter of NYC C.L.A.S.H., 27 N.Y.3d at 185, 32 N.Y.S.3d 1, 51 N.E.3d 512; Greater N.Y. Taxi Assn., 25 N.Y.3d at 612, 15 N.Y.S.3d 725, 36 N.E.3d 632).

(E)

The legislature’s specific delegation to the Board of authority over vaccinations and our analysis of the Boreali factors—two of which weigh heavily in the agency’s favor

and two of which do not weigh against it—compel the conclusion that the Board’s adoption of the flu vaccine rules fits squarely within its regulatory authority and does not constitute impermissible policymaking. Accordingly, we reject petitioners’ separation of powers challenge. In so holding, we emphasize that the Boreali analysis is not aimed at determining whether a regulatory agency adopted the most desirable method or type of regulation. Stated otherwise, the factors enumerated in Boreali are not designed to second-guess agency regulations that properly fall within the agency’s purview. Rather, the Boreali analysis is intended only to aid courts in determining whether an agency has usurped the legislature’s power by regulating in an area in which it has not been delegated rule-making authority. To be sure, this may entail some consideration of the manner in which the agency has chosen to regulate. However, if the *617 Boreali factors indicate that the agency has been empowered to regulate the matter in question, the separation of powers analysis goes no farther in reviewing the agency’s methods.

III. Preemption

Alternatively, petitioners argue that the flu vaccine rules are invalid because they conflict with the Public Health Law. Petitioners also claim that—despite its delegation of authority to the Board to regulate vaccinations—the state legislature has preempted the narrower field of mandatory school vaccinations by enacting a comprehensive statutory scheme. Respondents contend, in opposition, that their power to adopt vaccination requirements is both consistent with, and derived from, state law and, therefore, the flu vaccine rules are not preempted.

“The preemption doctrine represents a fundamental limitation on home rule powers” and “embodies ‘the untrammelled primacy of the [l]egislature to act ... with respect to matters of State concern’ ” (Albany Area Bldrs. Assn. v. Town of Guilderland, 74 N.Y.2d 372, 377, 547 N.Y.S.2d 627, 546 N.E.2d 920 [1989], quoting Wambat Realty Corp. v. State of New York, 41 N.Y.2d 490, 497, 393 N.Y.S.2d 949, 362 N.E.2d 581 [1977]). “A local law will be preempted either where there is a direct conflict with a state statute (conflict preemption) or where the legislature has indicated its intent to occupy the particular field (field preemption)” (**1200 ***840 Eric M. Berman, P.C. v. City of New York, 25 N.Y.3d 684, 690, 16 N.Y.S.3d 25, 37 N.E.3d 82 [2015]; see DJL Rest. Corp. v. City of New York, 96 N.Y.2d 91, 95, 725 N.Y.S.2d 622, 749 N.E.2d 186 [2001]).

“We have held that a local law is inconsistent [with state law] ‘where local laws prohibit what would be permissible under [s]tate law, or impose prerequisite additional restrictions on rights under [s]tate law, so as to inhibit the operation of the State’s general laws’ ” (Eric M. Berman, P.C., 25 N.Y.3d at 690, 16 N.Y.S.3d 25, 37 N.E.3d 82, quoting Zakrzewska v. New School, 14 N.Y.3d 469, 480, 902 N.Y.S.2d 838, 928 N.E.2d 1035 [2010]). However, we have also cautioned that reading conflict preemption principles too broadly risks rendering the power of local governments illusory (see New York State Club Assn. v. City of New York, 69 N.Y.2d 211, 221, 513 N.Y.S.2d 349, 505 N.E.2d 915 [1987], aff’d 487 U.S. 1, 108 S.Ct. 2225, 101 L.Ed.2d 1 [1988]). Thus, the “fact that both the [s]tate and local laws seek to regulate the same subject matter does not in and of itself give rise to an express conflict” (Jancyn Mfg. Corp. v. County of Suffolk, 71 N.Y.2d 91, 97, 524 N.Y.S.2d 8, 518 N.E.2d 903 [1987]; see People v. Judiz, 38 N.Y.2d 529, 531, 381 N.Y.S.2d 467, 344 N.E.2d 399 [1976]), and conflict preemption is generally found only “when the State specifically permits the conduct prohibited at the local level” or there is some other indication that deviation *618 from state law is prohibited (New York State Club Assn., 69 N.Y.2d at 222, 513 N.Y.S.2d 349, 505 N.E.2d 915).

As for field preemption, “[t]he [s]tate [l]egislature may expressly articulate its intent to occupy a field, but it need not. It may also do so by implication” (DJL Rest. Corp., 96 N.Y.2d at 95, 725 N.Y.S.2d 622, 749 N.E.2d 186). “Intent to preempt the field may ‘be implied from the nature of the subject matter being regulated and the purpose and scope of the [s]tate legislative scheme, including the need for [s]tate-wide uniformity in a given area’ ” (People v. Diack, 24 N.Y.3d 674, 679, 3 N.Y.S.3d 296, 26 N.E.3d 1151 [2015], quoting Albany Area Bldrs. Assn., 74 N.Y.2d at 377, 547 N.Y.S.2d 627, 546 N.E.2d 920). “When the State has created a comprehensive and detailed regulatory scheme with regard to the subject matter that the local law attempts to regulate, the local interest must yield to that of the State in regulating that field” (Diack, 24 N.Y.3d at 677, 3 N.Y.S.3d 296, 26 N.E.3d 1151).

In support of their preemption claim, petitioners rely on Public Health Law §§ 206, 613, 2164, and 2165. Section 206 sets forth the general powers and duties of the Commissioner of the New York State Department of Health (N.Y.SDOH), including the power to “establish and operate such adult and child immunization programs as are necessary to prevent or minimize the spread of disease and to protect the public health” (Public Health Law § 206[1][1]). That section further authorizes NYSDOH to “promulgate such regulations as are necessary for the

implementation” of this mandate; however, the statute provides, in the same paragraph, that “[n]othing in this paragraph shall authorize mandatory immunization of adults or children, except as provided in sections [2164] and [2165]” (id. [emphasis added]).

Likewise, Public Health Law § 613(1)(a) requires NYSDOH to “develop and supervise the execution of a program of immunization, surveillance and testing, to raise to the highest reasonable level the immunity of the children of the state against communicable diseases including ... influenza” and several other enumerated diseases. Concerning influenza, in particular, Public Health Law § 613(1)(b) mandates that the NYSDOH Commissioner “administer a **1201 ***841 program of influenza education to the families of children ages six months to eighteen years of age who attend licensed and registered day care programs” and schools within the state. According to the statute, NYSDOH should encourage and assist municipalities to “maintain local programs of immunization to raise the immunity of the children and adults of each municipality to the *619 highest reasonable level, in accordance with an application for state aid submitted by the municipality and approved by the commissioner” (id. § 613[1][a]). Pursuant to section 613(1)(c), NYSDOH is directed to invite and encourage participation in the educational programs by medical societies and organizations, parents, teachers, child care resource centers, other groups, and other state agencies. However, the statute again provides that “[n]othing in this subdivision shall authorize mandatory immunization of adults or children, except as provided in” Public Health Law §§ 2164 and 2165 (Public Health Law § 613[1][c] [emphasis added]). As previously discussed, Public Health Law §§ 2164 and 2165 set forth mandatory vaccinations that are preconditions to enrollment in school and in institutions of higher education. Those statutes include exemptions, incorporate an appeal process, and explain the procedures to be followed when a student is unable to afford the necessary vaccinations. Taking each of the aforementioned statutes into consideration, the Appellate Division correctly determined that the flu vaccine rules are not preempted by state law.

(A)

Addressing conflict preemption first, nothing in Public Health Law § 2164 suggests that the list of vaccinations set forth therein is an exclusive one that may not be expanded by local municipalities to which the authority to regulate

vaccinations has been delegated. Indeed, as noted above, the state legislature has long recognized the Board as a pioneer of mandatory immunizations of children and, to some degree, it modeled Public Health Law § 2164 on the New York City Health Code (see Assembly Mem in Support, Bill Jacket, L 1966, ch 994 at 8; see also Sponsor’s Mem, Bill Jacket, L 1989, ch 538 at 8). In fact, NYSDOH expressed its recognition of the Board’s independent authority as recently as 2015 (see Notice of Proposed Rule Making, NY Reg, Mar. 18, 2015 at 18 [observing that proposed amendments to state regulations concerning school immunization requirements “do not address additional immunizations that may be required for school admission by the New York City Health Code”]). Thus, the flu vaccine rules do not conflict with either section 2164 or section 2165.

Contrary to petitioners’ assertions, the flu vaccine rules also do not conflict with Public Health Law §§ 206 and 613. Those provisions are directed to the powers and duties of the Commissioner *620 of NYSDOH, not of the Board. Notably, the language relied on by petitioners—that nothing in the particular “subdivision” (Public Health Law § 613[1][c]) or “paragraph” “shall authorize mandatory immunization of adults or children, except as provided in sections [2164] and [2165]” of the Public Health Law—was added to those statutes in 2004, and the legislative history reveals no intent to restrict the Board’s authority to regulate vaccinations (Public Health Law § 206[1][1]; see id., § 613[1][c]). Rather, the legislature intended to grant NYSDOH authority to oversee voluntary adult immunization programs, while ensuring that its grant of authority would not be construed as extending to the adoption of mandatory adult immunizations (see Letter from Richard N. Gottfried, **1202 ***842 Chair, Assembly Comm on Health, to Richard Platkin, Counsel to Governor, July 16, 2004, Bill Jacket, L 2004, ch 207 at 5, 2004 NY Legis Ann at 179). Indeed, by their plain language, these provisions simply make clear that the particular statutory subdivisions at issue do not authorize NYSDOH to adopt additional mandatory immunizations, but nothing therein prohibits the adoption of mandatory immunizations if otherwise authorized by law.

(B)

Turning to the question of field preemption, although the State has enacted a relatively comprehensive statutory scheme for school vaccinations, the relevant statutes reflect the state legislature’s recognition that municipalities play a

significant role in vaccination programs. It is not unusual for the State to set the floor for public health regulations while permitting localities to adopt stricter measures (see e.g. Public Health Law § 228[3]).

“[T]he mere fact that the Legislature has enacted specific legislation in a particular field does not necessarily lead to the conclusion that broader agency regulation of the same field is foreclosed. The key question in all cases is what did the Legislature intend?” (Matter of Consolidated Edison Co. of N.Y. v. Department of Env’tl. Conservation, 71 N.Y.2d 186, 193, 524 N.Y.S.2d 409, 519 N.E.2d 320 [1988]). Significantly, although Administrative Code § 17–109 is now codified as New York City legislation, it was originally enacted by the state legislature and “reflect[s] the policy of the State that” the Board has the authority to regulate vaccinations in New York City, including mandatory vaccinations of children enrolled in city-regulated child care programs (*621 Matter of Patrolmen’s Benevolent Assn. of City of N.Y., Inc. v. New York State Pub. Empl. Relations Bd., 6 N.Y.3d 563, 574, 815 N.Y.S.2d 1, 848 N.E.2d 448 [2006]). Indeed, it would be difficult to reconcile the state legislature’s repeated explicit recognition of the Board’s independent vaccination requirements when amending Public Health Law § 2164, with an intent to implicitly repeal the Board’s authority (see Sponsor’s Mem, Bill Jacket, L 1989, ch 538 at 8; Bill Jacket, L 1966, ch 994; cf. Matter of Natural Resources Defense Council v. New York City Dept. of Sanitation, 83 N.Y.2d 215, 222, 608 N.Y.S.2d 957, 630 N.E.2d 653 [1994] [repeal by implication will only be resorted to in the clearest of cases]; Matter of Consolidated Edison Co. of N.Y., 71 N.Y.2d at 195, 524 N.Y.S.2d 409, 519 N.E.2d 320 [“(r)epel or modification of legislation by implication is not favored in the law”]). When codifying the Administrative Code in 1937, in fact, the state legislature specifically provided that no law enacted thereafter should be construed to implicitly repeal any provision of the Code, and the Code still so states (see former Administrative Code § 982–6.0 as enacted by L 1937, ch 929, § 1; Administrative Code § 1–110). Accordingly, we cannot conclude that the State has preempted the field of mandatory school vaccinations so as to invalidate the Board’s flu vaccine rules.

IV. Conclusion

For all of these reasons, we hold that the Board permissibly adopted the flu vaccine rules pursuant to its legislatively-delegated and long-exercised authority to regulate

vaccinations. We also hold that neither field, nor conflict, preemption abrogates the rules. Therefore, the order of the Appellate Division should be reversed, with costs, the petition insofar as it sought to enjoin enforcement of the amendments to the New York City Health Code denied, and judgment granted declaring in re ****1203 ***843** spondents' favor in accordance with this opinion.⁴

Order reversed, with costs, petition insofar as it sought to enjoin enforcement of the amendments to the New York City Health Code denied, and judgment granted declaring in respondents' favor in accordance with the opinion herein.

All Citations

31 N.Y.3d 601, 106 N.E.3d 1187, 81 N.Y.S.3d 827, 2018 N.Y. Slip Op. 04778

Chief Judge DiFiore and Judges Rivera, Fahey, Garcia, Wilson and Feinman concur.

Footnotes

- ¹ The Board of Health—which is within the Department of Health and Mental Hygiene—is chaired by the Commissioner of the Department and is comprised of 10 other members appointed by the mayor, five of whom must be medical doctors, and the remaining five of whom must have at least a master's degree in a science-related field, in addition to 10 years of relevant experience (see N.Y. City Charter § 553[a]). Significantly, the New York City Charter authorizes the Board to “add to and alter, amend or repeal any part of the health code” concerning “all matters and subjects to which” the Department's authority extends and to “publish additional provisions for security of life and health in the city” (id. § 558[b], [c]).
- ² Public Health Law § 2165 sets forth similar immunization requirements, and statutory exceptions, for college students.
- ³ Vaccinations for pertussis and tetanus were not mandated by state law until 2004 (see L 2004, ch 207).
- ⁴ Because petitioners sought a declaration of the parties' rights, a declaration in respondents' favor rather than a dismissal of the petition is appropriate (see 200 Genesee St v. City of Utica, 6 N.Y.3d 761, 811 N.Y.S.2d 288, 844 N.E.2d 742 [2006]; Lanza v. Wagner, 11 N.Y.2d 317, 229 N.Y.S.2d 380, 183 N.E.2d 670 [1962]).

25 S.Ct. 358
Supreme Court of the United States.

HENNING JACOBSON, *Plff. in Err.*,
v.
COMMONWEALTH OF MASSACHUSETTS.

No. 70.
|
Argued December 6, 1904.
|
Decided February 20, 1905.

Synopsis

IN ERROR to the Superior Court of the State of Massachusetts for the County of Middlesex to review a judgment entered on a verdict of guilty in a prosecution under the compulsory vaccination law of that State, after defendant's exceptions were overruled by the Massachusetts Supreme Judicial Court. *Affirmed*.

See same case below, 183 Mass. 242, 66 N. E. 719.

The facts are stated in the opinion.

Attorneys and Law Firms

****358** *Messrs. George Fred Williams and James A. Halloran* for plaintiff in error.

Messrs. Frederick H. Nash and Herbert Parker for defendant in error.

Opinion

Mr. Justice **Harlan** delivered the opinion of the court:

***12** This case involves the validity, under the Constitution of the United States, of certain provisions in the statutes of Massachusetts relating to vaccination.

The Revised Laws of that commonwealth, chap. 75, § 137, provide that 'the board of health of a city or town, if, in its opinion, it is necessary for the public health or safety, shall require and enforce the vaccination and revaccination of all the inhabitants thereof, and shall provide them with the means of free vaccination. Whoever, being over twenty-one years of age and not under guardianship, refuses or neglects to comply with such requirement shall forfeit \$5.'

An exception is made in favor of 'children who present a certificate, signed by a ****359** registered physician, that they are unfit subjects for vaccination.' § 139.

Proceeding under the above statutes, the board of health of the city of Cambridge, Massachusetts, on the 27th day of February, 1902, adopted the following regulation: 'Whereas, smallpox has been prevalent to some extent in the city of Cambridge, and still continues to increase; and whereas, it is necessary for the speedy extermination of the disease that all persons not protected by vaccination should be vaccinated; and whereas, in the opinion of the board, the public health and safety require the vaccination or revaccination of all the inhabitants of Cambridge; be it ordered, that ***13** all the inhabitants habitants of the city who have not been successfully vaccinated since March 1st, 1897, be vaccinated or revaccinated.'

Subsequently, the board adopted an additional regulation empowering a named physician to enforce the vaccination of persons as directed by the board at its special meeting of February 27th.

The above regulations being in force, the plaintiff in error, Jacobson, was proceeded against by a criminal complaint in one of the inferior courts of Massachusetts. The complaint charged that on the 17th day of July, 1902, the board of health of Cambridge, being of the opinion that it was necessary for the public health and safety, required the vaccination and revaccination of all the inhabitants thereof who had not been successfully vaccinated since the 1st day of March, 1897, and provided them with the means of free vaccination; and that the defendant, being over twenty-one years of age and not under guardianship, refused and neglected to comply with such requirement.

The defendant, having been arraigned, pleaded not guilty. The government put in evidence the above regulations adopted by the board of health, and made proof tending to show that its chairman informed the defendant that, by refusing to be vaccinated, he would incur the penalty provided by the statute, and would be prosecuted therefor; that he offered to vaccinate the defendant without expense to him; and that the offer was declined, and defendant refused to be vaccinated.

The prosecution having introduced no other evidence, the defendant made numerous offers of proof. But the trial court ruled that each and all of the facts offered to be proved by the defendant were immaterial, and excluded all proof of them.

The defendant, standing upon his offers of proof, and

introducing no evidence, asked numerous instructions to the jury, among which were the following:

That § 137 of chapter 75 of the Revised Laws of Massachusetts was in derogation of the rights secured to the defendant by the preamble to the Constitution of the United *14 States, and tended to subvert and defeat the purposes of the Constitution as declared in its preamble;

That the section referred to was in derogation of the rights secured to the defendant by the 14th Amendment of the Constitution of the United States, and especially of the clauses of that amendment providing that no state shall make or enforce any law abridging the privileges or immunities of citizens of the United States, nor 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; and

That said section was opposed to the spirit of the Constitution.

Each of defendant's prayers for instructions was rejected, and he duly excepted. The defendant requested the court, but the court refused, to instruct the jury to return a verdict of not guilty. And the court instructed the jury, in substance, that, if they believed the evidence introduced by the commonwealth, and were satisfied beyond a reasonable doubt that the defendant was guilty of the offense charged in the complaint, they would be warranted in finding a verdict of guilty. A verdict of guilty was thereupon returned.

The case was then continued for the opinion of the supreme judicial court of Massachusetts. Santa Fé Pacific Railroad Company, the exceptions, sustained the action of the trial court, and thereafter, pursuant to the verdict of the jury, he was sentenced by the court to pay a fine of \$5. And the court ordered that he stand committed until the fine was paid.

*22 We pass without extended discussion the suggestion that the particular section of the statute of Massachusetts now in question (§ 137, chap. 75) is in derogation of rights secured by the preamble of the Constitution of the United States. Although that preamble indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power conferred on the government of the United States, or on any of its departments. Such powers embrace only those expressly granted in the body of the Constitution, and such as may be implied from those so granted. Although, therefore, one of the declared objects of the Constitution was to secure the blessings of liberty to all under the sovereign jurisdiction and authority of the United

States, no power can be exerted to that end by the United States, unless, apart from the preamble, it be found in some express delegation of power, or in some power **360 to be properly implied therefrom. 1 Story, Const. § 462.

We also pass without discussion the suggestion that the above section of the statute is opposed to the spirit of the Constitution. Undoubtedly, as observed by Chief Justice Marshall, speaking for the court in *Sturges v. Crowninshield*, 4 Wheat. 122, 202, 4 L. ed. 529, 550, 'the spirit of an instrument, especially of a constitution, is to be respected not less than its letter; yet the spirit is to be collected chiefly from its words.' We have no need in this case to go beyond the plain, obvious meaning of the words in those provisions of the Constitution which, it is contended, must control our decision.

What, according to the judgment of the state court, are the *23 scope and effect of the statute? What results were intended to be accomplished by it? These questions must be answered.

The supreme judicial court of Massachusetts said in the present case: 'Let us consider the offer of evidence which was made by the defendant Jacobson. The ninth of the propositions which he offered to prove, as to what vaccination consists of, is nothing more than a fact of common knowledge, upon which the statute is founded, and proof of it was unnecessary and immaterial. The thirteenth and fourteenth involved matters depending upon his personal opinion, which could not be taken as correct, or given effect, merely because he made it a ground of refusal to comply with the requirement. Moreover, his views could not affect the validity of the statute, nor entitle him to be excepted from its provisions. *Com. v. Connolly*, 163 Mass. 539, 40 N. E. 862; *Com. v. Has*, 122 Mass. 40; *Reynolds v. United States*, 98 U. S. 145, 25 L. ed. 244; *Reg. v. Downes*, 13 Cox, C. C. 111. The other eleven propositions all relate to alleged injurious or dangerous effects of vaccination. The defendant 'offered to prove and show be competent evidence' these so-called facts. Each of them, in its nature, is such that it cannot be stated as a truth, otherwise than as a matter of opinion. The only 'competent evidence' that could be presented to the court to prove these propositions was the testimony of experts, giving their opinions. It would not have been competent to introduce the medical history of individual cases. Assuming that medical experts could have been found who would have testified in support of these propositions, and that it had become the duty of the judge, in accordance with the law as stated in *Com. v. Anthes*, 5 Gray, 185, to instruct the jury as to whether or not the statute is constitutional, he would have been obliged to consider the evidence in connection with facts of common knowledge, which the court will always regard in passing upon the

constitutionality of a statute. He would have considered this testimony of experts in connection with the facts that for nearly a century most of the members of the medical profession *24 have regarded vaccination, repeated after intervals, as a preventive of smallpox; that, while they have recognized the possibility of injury to an individual from carelessness in the performance of it, or even in a conceivable case without carelessness, they generally have considered the risk of such an injury too small to be seriously weighed as against the benefits coming from the discreet and proper use of the preventive; and that not only the medical profession and the people generally have for a long time entertained these opinions, but legislatures and courts have acted upon them with general unanimity. If the defendant had been permitted to introduce such expert testimony as he had in support of these several propositions, it could not have changed the result. It would not have justified the court in holding that the legislature had transcended its power in enacting this statute on their judgment of what the welfare of the people demands.' *Com. v. Jacobson*, 183 Mass. 242, 66 N. E. 719.

While the mere rejection of defendant's offers of proof does not strictly present a Federal question, we may properly regard the exclusion of evidence upon the ground of its incompetency or immateriality under the statute as showing what, in the opinion of the state court, are the scope and meaning of the statute. Taking the above observations of the state court as indicating the scope of the statute,—and such is our duty. *Leffingwell v. Warren*, 2 Black, 599, 603, 17 L. ed. 261, 262; *Morley v. Lake Shore & M. S. R. Co.* 146 U. S. 162, 167, 36 L. ed. 925, 928, 13 Sup. Ct. Rep. 54; *Tullis v. Lake Erie & W. R. Co.* 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136; *W. W. Cargill Co. v. Minnesota*, 180 U. S. 452, 466, 45 L. ed. 619, 625, 21 Sup. Ct. Rep. 423,—we assume, for the purposes of the present inquiry, that its provisions require, at least as a general rule, that adults not under the guardianship and remaining within the limits of the city of Cambridge must submit to the regulation adopted by the board of health. Is the statute, so construed, therefore, inconsistent with the liberty which the Constitution of the United States secures to every person against deprivation by the state?

The authority of the state to enact this statute is to be *25 referred to what is commonly called the police power,—a power which the state did not surrender when becoming a member of the Union under the Constitution. Although this court has refrained from any attempt to define the limits of that power, yet it has distinctly recognized the authority of a state to enact quarantine laws and 'health laws of every description;' indeed, all laws that relate to matters completely within its territory and which do not by their necessary operation affect the people of other states. According to settled principles, the police

power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety. *Gibbons v. Ogden*, 9 Wheat. 1, 203, 6 L. ed. 23, 71; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 470, 24 L. ed. 527, 530; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 661, 29 L. ed. 516, 520, 6 Sup. Ct. Rep. 252; *Lawson v. Stecle*, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499. It is equally true that the state may invest local bodies called into existence for purposes of local administration with authority in some appropriate way to safeguard the public health and the public safety. The mode or manner in which those results are to be accomplished is within the discretion of the state, subject, of course, so far as Federal power is concerned, only to the condition that no rule prescribed by a state, nor any regulation adopted by a local governmental agency acting under the sanction of state legislation, shall contravene the Constitution of the United States, nor infringe any right granted or secured by that instrument. A local enactment or regulation, even if based on the acknowledged police powers of a state, must always yield in case of conflict with the exercise by the general government of any power it possesses under the Constitution, or with any right which that instrument gives or secures. *Gibbons v. Ogden*, 9 Wheat. 1, 210, 6 L. ed. 23, 73; *Sinnot v. Davenport*, 22 How. 227, 243, 16 L. ed. 243, 247; *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 626, 42 L. ed. 878, 882, 18 Sup. Ct. Rep. 488.

We come, then, to inquire whether any right given or secured by the Constitution is invaded by the statute as *26 interpreted by the state court. The defendant insists that his liberty is invaded when the state subjects him to fine or imprisonment for neglecting or refusing to submit to vaccination; that a compulsory vaccination law is unreasonable, arbitrary, and oppressive, and, therefore, hostile to the inherent right of every freeman to care for his own body and health in such way as to him seems best; and that the execution of such a law against one who objects to vaccination, no matter for what reason, is nothing short of an assault upon his person. But the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the

injury that may be done to others. This court has more than once recognized it as a fundamental principle that 'persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state; of the perfect right of the legislature to do which no question ever was, or upon acknowledged general principles ever can be, made, so far as natural persons are concerned.' *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 471, 24 L. ed. 527, 530; *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 628, 629, 42 L. ed. 878–883, 18 Sup. Ct. Rep. 488; *Thorpe v. Rutland & B. R. Co.* 27 Vt. 148, 62 Am. Dec. 625. In *Crowley v. Christensen*, 137 U. S. 86, 89, 34 L. ed. 620, 621, 11 Sup. Ct. Rep. 13, we said: 'The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community. Even liberty *27 itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is, then, liberty regulated by law.' In the Constitution of Massachusetts adopted in 1780 it was laid down as a fundamental principle of the social compact that the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for 'the common good,' and that government is instituted 'for the common good, for the protection, safety, prosperity, and happiness of the people, and not for the profit, honor, or private interests of any one man, family, or class of men.' The good and welfare of the commonwealth, of which the legislature is primarily the judge, is the basis on which the police power rests in Massachusetts. *Com. v. Alger*, 7 Cush. 84.

Applying these principles to the present case, it is to be observed that the legislature **362 of Massachusetts required the inhabitants of a city or town to be vaccinated only when, in the opinion of the board of health, that was necessary for the public health or the public safety. The authority to determine for all what ought to be done in such an emergency must have been lodged somewhere or in some body; and surely it was appropriate for the legislature to refer that question, in the first instance, to a board of health composed of persons residing in the locality affected, and appointed, presumably, because of their fitness to determine such questions. To invest such a body with authority over such matters was not an unusual, nor an unreasonable or arbitrary, requirement. Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members. It is to be observed that when the regulation in question was adopted smallpox, according to the recitals in the regulation adopted by the board of health, was prevalent to some

extent in the city of Cambridge, and the disease was increasing. If such was *28 the situation,—and nothing is asserted or appears in the record to the contrary,—if we are to attach any value whatever to the knowledge which, it is safe to affirm, in common to all civilized peoples touching smallpox and the methods most usually employed to eradicate that disease, it cannot be adjudged that the present regulation of the board of health was not necessary in order to protect the public health and secure the public safety. Smallpox being prevalent and increasing at Cambridge, the court would usurp the functions of another branch of government if it adjudged, as matter of law, that the mode adopted under the sanction of the state, to protect the people at large was arbitrary, and not justified by the necessities of the case. We say necessities of the case, because it might be that an acknowledged power of a local community to protect itself against an epidemic threatening the safety of all might be exercised in particular circumstances and in reference to particular persons in such an arbitrary, unreasonable manner, or might go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere for the protection of such persons. *Wisconsin, M. & P. R. Co. v. Jacobson*, 179 U. S. 287, 301, 45 L. ed. 194, 201, 21 Sup. Ct. Rep. 115; 1 Dill. Mun. Corp. 4th ed. §§ 319–325, and authorities in notes; Freurid, Police Power, §§ 63 *et seq.* In *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 471–473, 24 L. ed. 527, 530, 531, this court recognized the right of a state to pass sanitary laws, laws for the protection of life, liberty, health, or property within its limits, laws to prevent persons and animals suffering under contagious or infectious diseases, or convicts, from coming within its borders. But, as the laws there involved went beyond the necessity of the case, and, under the guise of exerting a police power, invaded the domain of Federal authority, and violated rights secured by the Constitution, this court deemed it to be its duty to hold such laws invalid. If the mode adopted by the commonwealth of Massachusetts for the protection of its local communities against smallpox proved to be distressing, inconvenient, or objectionable to some,—if nothing more could be reasonably *29 affirmed of the statute in question,—the answer is that it was the duty of the constituted authorities primarily to keep in view the welfare, comfort, and safety of the many, and not permit the interests of the many to be subordinated to the wishes or convenience of the few. There is, of course, a sphere within which the individual may assert the supremacy of his own will, and rightfully dispute the authority of any human government,—especially of any free government existing under a written constitution, to interfere with the exercise of that will. But it is equally true that in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the

pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand. An American citizen arriving at an American port on a vessel in which, during the voyage, there had been cases of yellow fever or Asiatic cholera, he, although apparently free from disease himself, may yet, in some circumstances, be held in quarantine against his will on board of such vessel or in a quarantine station, until it be ascertained by inspection, conducted with due diligence, that the danger of the spread of the disease among the community at large has disappeared. The liberty secured by the 14th Amendment, this court has said, consists, in part, in the right of a person 'to live and work where he will' (*Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427); and yet he may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, or even his religious or political convictions, to take his place in the ranks of the army of his country, and risk the chance of being shot down in its defense. It is not, therefore, true that the power of the public to guard itself against imminent danger depends in every case involving the control of one's body upon his willingness ****363** to submit to reasonable regulations established by the constituted authorities, under the ***30** sanction of the state, for the purpose of protecting the public collectively against such danger.

It is said, however, that the statute, as interpreted by the state court, although making an exception in favor of children certified by a registered physician to be unfit subjects for vaccination, makes no exception in case of adults in like condition. But this cannot be deemed a denial of the equal protection of the laws to adults; for the statute is applicable equally to all in like condition, and there are obviously reasons why regulations may be appropriate for adults which could not be safely applied to persons of tender years.

Looking at the propositions embodied in the defendant's rejected offers of proof, it is clear that they are more formidable by their number than by their inherent value. Those offers in the main seem to have had no purpose except to state the general theory of those of the medical profession who attach little or no value to vaccination as a means of preventing the spread of smallpox, or who think that vaccination causes other diseases of the body. What everybody knows the court must know, and therefore the state court judicially knew, as this court knows, that an opposite theory accords with the common belief, and is maintained by high medical authority. We must assume that, when the statute in question was passed, the legislature of Massachusetts was not unaware of these opposing theories, and was compelled, of necessity, to choose between them. It was not compelled to commit a matter involving the public health and safety to the final

decision of a court or jury. It is no part of the function of a court or a jury to determine which one of two modes was likely to be the most effective for the protection of the public against disease. That was for the legislative department to determine in the light of all the information it had or could obtain. It could not properly abdicate its function to guard the public health and safety. The state legislature proceeded upon the theory which recognized vaccination as at least an effective, if not the best-known, way in which to meet and suppress the ***31** evils of a smallpox epidemic that imperiled an entire population. Upon what sound principles as to the relations existing between the different departments of government can the court review this action of the legislature? If there is any such power in the judiciary to review legislative action in respect of a matter affecting the general welfare, it can only be when that which the legislature has done comes within the rule that, if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution. *Mugler v. Kansas*, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273; *Minnesota v. Barber*, 136 U. S. 313, 320, 34 L. ed. 455, 458, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Atkin v. Kansas*, 191 U. S. 207, 223, 48 L. ed. 148, 158, 24 Sup. Ct. Rep. 124.

Whatever may be thought of the expediency of this statute, it cannot be affirmed to be, beyond question, in palpable conflict with the Constitution. Nor, in view of the methods employed to stamp out the disease of smallpox, can anyone confidently assert that the means prescribed by the state to that end has no real or substantial relation to the protection of the public health and the public safety. Such an assertion would not be consistent with the experience of this and other countries whose authorities have dealt with the disease of smallpox.* And the principle of vaccination ****364** as a means to ***32** prevent the spread of smallpox has been enforced in many states by statutes making the vaccination of children a condition of their right to enter or remain in public schools. *Blue v. Beach*, 155 Ind. 121, 50 L. R. A. 64, 80 Am. St. Rep. 195, 56 N. E. 89; ***33** *Morris v. Columbus*, 102 Ga. 792, 42 L. R. A. 175, 66 Am. St. Rep. 243, 30 S. E. 850; *State v. Hay*, 126 N. C. 999, 49 L. R. A. 588, 78 Am. St. Rep. 691, 35 S. E. 459; *Abeel v. Clark*, 84 Cal. 226, 24 Pac. 383; *Bissell v. Davison*, 65 Conn. 183, 29 L. R. A. 251, 32 Atl. 348; *Hazen v. Strong*, 2 Vt. 427; *Duffield v. Williamsport School District*, 162 Pa. 476, 25 L. R. A. 152, 29 Atl. 742.

***34** The latest case upon the subject of which we are aware is *Viemester v. White*, decided very recently by the court of appeals of New York. That case involved the validity of a

statute excluding from the public schools all children who had not been vaccinated. One contention was that the statute and the regulation adopted in exercise **365 of its provisions was inconsistent with the rights, privileges, and liberties of the citizen. The contention was overruled, the court saying, among other things: 'Smallpox is known of all to be a dangerous and contagious disease. If vaccination strongly tends to prevent the transmission or spread of this disease, it logically follows that children may be refused admission to the public schools until they have been vaccinated. The appellant claims that vaccination does not tend to prevent smallpox, but tends to bring about other diseases, and that it does much harm, with no good. It must be conceded that some laymen, both learned and unlearned, and some physicians of great skill and repute, do not believe that vaccination is a preventive of smallpox. The common belief, however, is that it has a decided tendency to prevent the spread of this fearful disease, and to render it less dangerous to those who contract it. While not accepted by all, it is accepted by the mass of the people, as well as by most members of the medical profession. It has been general in our state, and in most civilized nations for generations. It is *35 generally accepted in theory, and generally applied in practice, both by the voluntary action of the people, and in obedience to the command of law. Nearly every state in the Union has statutes to encourage, or directly or indirectly to require, vaccination; and this is true of most nations of Europe. . . . A common belief, like common knowledge, does not require evidence to establish its existence, but may be acted upon without proof by the legislature and the courts. . . . The fact that the belief is not universal is not controlling, for there is scarcely any belief that is accepted by everyone. The possibility that the belief may be wrong, and that science may yet show it to be wrong, is not conclusive; for the legislature has the right to pass laws which, according to the common belief of the people, are adapted to prevent the spread of contagious diseases. In a free country, where the government is by the people, through their chosen representatives, practical legislation admits of no other standard of action, for what the people believe is for the common welfare must be accepted as tending to promote the common welfare, whether it does in fact or not. Any other basis would conflict with the spirit of the Constitution, and would sanction measures opposed to a Republican form of government. While we do not decide, and cannot decide, that vaccination is a preventive of smallpox, we take judicial notice of the fact that this is the common belief of the people of the state, and, with this fact as a foundation, we hold that the statute in question is a health law, enacted in a reasonable and proper exercise of the police power.' 179 N. Y. 235, 72 N. E. 97.

Since, then, vaccination, as a means of protecting a community against smallpox, finds strong support in the

experience of this and other countries, no court, much less a jury, is justified in disregarding the action of the legislature simply because in its or their opinion that particular method was—perhaps, or possibly—not the best either for children or adults.

Did the offers of proof made by the defendant present a case which entitled him, while remaining in Cambridge, to *36 claim exemption from the operation of the statute and of the regulation adopted by the board of health? We have already said that his rejected offers, in the main, only set forth the theory of those who had no faith in vaccination as a means of preventing the spread of smallpox, or who thought that vaccination, without benefiting the public, put in peril the health of the person vaccinated. But there were some offers which it is contended embodied distinct facts that might properly have been considered. Let us see how this is.

The defendant offered to prove that vaccination 'quite often' caused serious and permanent injury to the health of the person vaccinated; that the operation 'occasionally' resulted in death; that it was 'impossible' to tell 'in any particular case' what the results of vaccination would be, or whether it would injure the health or result in death; that 'quite often' one's blood is in a certain condition of impurity when it is not prudent or safe to vaccinate him; that there is no practical test by which to determine 'with any degree of certainty' whether one's blood is in such condition of impurity as to render vaccination necessarily unsafe or dangerous; that vaccine matter is 'quite often' impure and dangerous to be used, but whether impure or not cannot be ascertained by any known practical test; that the defendant refused to submit to vaccination for the reason that he had, 'when a child,' been caused great and extreme suffering for a long period by a disease produced by vaccination; and that he had witnessed a similar result of vaccination, not only in the case of his son, but in the cases of others.

These offers, in effect, invited the court and jury to go over the whole ground gone over by the legislature when it enacted the statute in question. The legislature assumed that some children, by reason of their condition at the time, might not be fit subjects of vaccination; and it is suggested—and we will not say without reason—that such is the case with some adults. But the defendant did not offer to prove that, by **366 reason of his then condition, he was in fact not a fit subject of vaccination *37 at the time he was informed of the requirement of the regulation adopted by the board of health. It is entirely consistent with his offer of proof that, after reaching full age, he had become, so far as medical skill could discover, and when informed of the regulation of the board of health was, a fit subject of vaccination, and that the vaccine matter to be used in his

case was such as any medical practitioner of good standing would regard as proper to be used. The matured opinions of medical men everywhere, and the experience of mankind, as all must know, negative the suggestion that it is not possible in any case to determine whether vaccination is safe. Was defendant exempted from the operation of the statute simply because of his dread of the same evil results experienced by him when a child, and which he had observed in the cases of his son and other children? Could he reasonably claim such an exemption because 'quite often,' or 'occasionally,' injury had resulted from vaccination, or because it was impossible, in the opinion of some, by any practical test, to determine with absolute certainty whether a particular person could be safely vaccinated?

It seems to the court that an affirmative answer to these questions would practically strip the legislative department of its function to care for the public health and the public safety when endangered by epidemics of disease. Such an answer would mean that compulsory vaccination could not, in any conceivable case, be legally enforced in a community, even at the command of the legislature, however widespread the epidemic of smallpox, and however deep and universal was the belief of the community and of its medical advisers that a system of general vaccination was vital to the safety of all.

We are not prepared to hold that a minority, residing or remaining in any city or town where smallpox is prevalent, and enjoying the general protection afforded by an organized local government, may thus defy the will of its constituted authorities, acting in good faith for all, under the legislative sanction of the state. If such be the privilege of a minority, *38 then a like privilege would belong to each individual of the community, and the spectacle would be presented of the welfare and safety of an entire population being subordinated to the notions of a single individual who chooses to remain a part of that population. We are unwilling to hold it to be an element in the liberty secured by the Constitution of the United States that one person, or a minority of persons, residing in any community and enjoying the benefits of its local government, should have the power thus to dominate the majority when supported in their action by the authority of the state. While this court should guard with firmness every right appertaining to life, liberty, or property as secured to the individual by the supreme law of the land, it is of the last importance that it should not invade the domain of local authority except when it is plainly necessary to do so in order to enforce that law. The safety and the health of the people of Massachusetts are, in the first instance, for that commonwealth to guard and protect. They are matters that do not ordinarily concern the national government. So far as they can be reached by any government, they depend,

primarily, upon such action as the state, in its wisdom, may take; and we do not perceive that this legislation has invaded any right secured by the Federal Constitution.

Before closing this opinion we deem it appropriate, in order to prevent misapprehension as to our views, to observe—perhaps to repeat a thought already sufficiently expressed, namely—that the police power of a state, whether exercised directly by the legislature, or by a local body acting under its authority, may be exerted in such circumstances, or by regulations so arbitrary and oppressive in particular cases, as to justify the interference of the courts to prevent wrong and oppression. Extreme cases can be readily suggested. Ordinarily such cases are not safe guides in the administration of the law. It is easy, for instance, to suppose the case of an adult who is embraced by the mere words of the act, but yet to subject whom to vaccination in a particular condition of his health *39 or body would be cruel and inhuman in the last degree. We are not to be understood as holding that the statute was intended to be applied to such a case, or, if it was so intended, that the judiciary would not be competent to interfere and protect the health and life of the individual concerned. 'All laws,' this court has said, 'should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter.' *United States v. Kirby*, 7 Wall. 482, 19 L. ed. 278; *Lau Ow Bew v. United States*, 144 U. S. 47, 58, 36 L. ed. 340, 344, 12 Sup. Ct. Rep. 517. Until otherwise informed by the highest court of Massachusetts, we are not inclined to hold that the statute establishes the absolute rule that an adult must be vaccinated if it be apparent or can be shown with reasonable **367 certainty that he is not at the time a fit subject of vaccination, or that vaccination, by reason of his then condition, would seriously impair his health, or probably cause his death. No such case is here presented. It is the cause of an adult who, for aught that appears, was himself in perfect health and a fit subject of vaccination, and yet, while remaining in the community, refused to obey the statute and the regulation adopted in execution of its provisions for the protection of the public health and the public safety, confessedly endangered by the presence of a dangerous disease.

We now decide only that the statute covers the present case, and that nothing clearly appears that would justify this court in holding it to be unconstitutional and inoperative in its application to the plaintiff in error.

The judgment of the court below must be affirmed.

It is so ordered.

All Citations

197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643, 3 Am. Ann. Cas. 765

Mr. Justice **Brewer** and Mr. Justice **Peckham** dissent.

Footnotes

† 'State-supported facilities for vaccination began in England in 1808 with the National Vaccine Establishment. In 1840 vaccination fees were made payable out of the rates. The first compulsory act was passed in 1853, the guardians of the poor being intrusted with the carrying out of the law; in 1854 the public vaccinations under one year of age were 408,824 as against an average of 180,960 for several years before. In 1867 a new act was passed, rather to remove some technical difficulties than to enlarge the scope of the former act; and in 1871 the act was passed which compelled the boards of guardians to appoint vaccination officers. The guardians also appoint a public vaccinator, who must be duly qualified to practise medicine, and whose duty it is to vaccinate (for a fee of one shilling and sixpence) any child resident within his district brought to him for that purpose, to examine the same a week after, to give a certificate, and to certify to the vaccination officer the fact of vaccination or of insusceptibility. . . . Vaccination was made compulsory in Bavaria in 1807, and subsequently in the following countries: Denmark (1810), Sweden (1814), Württemberg, Hesse, and other German states (1818), Prussia (1835), Roumania (1874), Hungary (1876), and Servia (1881). It is compulsory by cantonal law in 10 out of the 22 Swiss cantons; an attempt to pass a Federal compulsory law was defeated by a plebiscite in 1881. In the following countries there is no compulsory law, but governmental facilities and compulsion on various classes more or less directly under governmental control, such as soldiers, state employees, apprentices, school pupils, etc.: France, Italy, Spain, Portugal, Belgium, Norway, Austria, Turkey. . . . Vaccination has been compulsory in South Australia since 1872, in Victoria since 1874, and in Western Australia since 1878. In Tasmania a compulsory act was passed in 1882. In New South Wales there is no compulsion, but free facilities for vaccination. Compulsion was adopted at Calcutta in 1880, and since then at 80 other towns of Bengal, at Madras in 1884, and at Bombay and elsewhere in the presidency a few years earlier. Revaccination was made compulsory in Denmark in 1871, and in Roumania in 1874; in Holland it was enacted for all school pupils in 1872. The various laws and administrative orders which had been for many years in force as to vaccination and revaccination in the several German states were consolidated in an imperial statute of 1874.' 24 Encyclopaedia Britannica (1894), *Vaccination*.

'In 1857 the British Parliament received answers from 552 physicians to questions which were asked them in reference to the utility of vaccination, and only two of these spoke against it. Nothing proves this utility more clearly than the statistics obtained. Especially instructive are those which Flinzer compiled respecting the epidemic in Chemnitz which prevailed in 1870-71. At this time in the town there were 64,255 inhabitants, of whom 53,891, or 83.87 per cent, were vaccinated, 5,712, or 8.89 per cent were unvaccinated, and 4,652, or 7.24 per cent, had had the smallpox before. Of those vaccinated 953, or 1.77 per cent, became affected with smallpox, and of the uninoculated 2,643, or 46.3 per cent, had the disease. In the vaccinated the mortality from the disease was 0.73 per cent, and in the unprotected it was 9.16 per cent. In general, the danger of infection is six times as great, and the mortality 68 times as great, in the unvaccinated, as in the vaccinated. Statistics derived from the civil population are in general not so instructive as those derived from armies, where vaccination is usually more carefully performed, and where statistics can be more accurately collected. During the Franco-German war (1870-71) there was in France a widespread epidemic of smallpox, but the German army lost during the campaign only 450 cases, or 58 men to the 100,000; in the French army, however, where vaccination was not carefully carried out, the number of deaths from smallpox was 23,400.' Johnson's Universal Cyclopaedia (1897), *Vaccination*.

'The degree of protection afforded by vaccination thus became a question of great interest. Its extreme value was easily demonstrated by statistical researches. In England, in the last half of the eighteenth century, out of every 1,000 deaths, 96 occurred from smallpox; in the first half of the present century, out of every 1,000 deaths, but 35 were caused by that disease. The amount of mortality in a country by smallpox seems to bear a fixed relation to the extent to which vaccination is carried out. In all England and Wales, for some years previous to 1853, the proportional mortality by smallpox was 21.9 to 1,000 deaths from all causes; in London it was but 16 to 1,000; in Ireland, where vaccination was much less general, it was 49 to 1,000, while in Connaught it was 60 to 1,000. On the other hand, in a number of European countries where vaccination was more or less compulsory, the proportionate number of deaths from smallpox about the same time varied from 2 per 1,000 of all causes in Bohemia, Lombardy, Venice, and Sweden, to 8.33 per 1,000 in Saxony. Although in many instances persons who had been vaccinated were attacked with smallpox in a more or less modified form, it was noticed that the persons so attacked had been commonly vaccinated many years previously. 16 American Cyclopaedia, *Vaccination* (1883).

'Dr Buchanan, the medical officer of the London Government Board, reported [1881] as the result of statistics that the smallpox death rate among adult persons vaccinated was 90 to a million; whereas among those unvaccinated it was 3,350 to a million; whereas among vaccinated children under five years of age, 42 1/2 per million; whereas among unvaccinated children of the same age it was 5,950 per million.' Hardway, *Essentials of Vaccination* (1882). The same author reports that, among other conclusions reached by the Académie de Médecine of France, was one that, 'without vaccination, hygienic measures (isolation, disinfection, etc.) are of themselves insufficient for preservation from smallpox.' *Ibid*.

The Belgian Academy of Medicine appointed a committee to make an exhaustive examination of the whole subject, and among the conclusions reported by them were: 1. 'Without vaccination, hygienic measures and means, whether public or private, are powerless in preserving mankind from smallpox. . . . 3. Vaccination is always an inoffensive operation when practised with proper care on

healthy subjects. . . . 4. It is highly desirable, in the interests of the health and lives of our countrymen, that vaccination should be rendered compulsory.’ Edwards, *Vaccination* (1882.)

The English Royal Commission, appointed with Lord Herschell, the Lord Chancellor of England, at its head, to inquire, among other things, as to the effect of vaccination in reducing the prevalence of, and mortality from, smallpox, reported, after several years of investigation: ‘We think that it diminishes the liability to be attacked by the disease; that it modifies the character of the disease and renders it less fatal,—of a milder and less severe type; that the protection it affords against attacks of the disease is greatest during the years immediately succeeding the operation of vaccination.’

11 N.Y.2d 317
Court of Appeals of New York.

Vito F. LANZA et al., Appellants,
v.
Robert F. WAGNER, as Mayor of the City of New
York, et al., Respondents.

May 17, 1962.

Synopsis

Suit for judgment declaring that statute terminating plaintiffs' terms as incumbent members of New York City Board of Education and providing for reorganized and reconstituted board was unconstitutional. The Supreme Court, Special Term, Kings County Benjamin Brenner, J., 30 Misc.2d 212, 220 N.Y.S.2d 477, rendered judgment upon dismissing the complaint, and the plaintiffs appealed. The Supreme Court, Appellate Division, Second Department, 15 A.D.2d 552, 222 N.Y.S.2d 1019, affirmed, and the plaintiffs appealed on constitutional grounds. The Court of Appeals, Fuld, J., held that the statute was not subject to constitutional attack as violation of home rule provision, as vesting power of nomination in private persons and organizations, so as to constitute impermissible delegation of legislative authority, or as a bill of attainder, but that the Supreme Court should not have dismissed the complaint merely because the plaintiffs were not entitled to the declaration sought by them.

Judgment modified.

Dye, Froessel and Van Voorhis, JJ., dissented in part.

Attorneys and Law Firms

***383 **672 *318 Samuel Shapiro, New York City, and Vito F. Lanza, in person, for appellants.

*319 Leo A. Larkin, Corp. Counsel (Sidney P. Nadel, Seymour B. Quel and Joseph M. Callahan, Jr., New York City, of counsel), for Robert F. Wagner, as Mayor of City of New York, respondent.

*320 Louis J. Lefkowitz, Atty. Gen. (Irving Galt and Sheldon Raab, New York City, of counsel), in his statutory capacity under section 71 of the Executive Law, Consol.Laws, c. 18.

Opinion

FULD, Judge.

Prior to the summer of 1961, the Education Law of this State provided that the Board of Education of the City of New York was to consist of nine members appointed by the Mayor (s 2553, subd. 2), Consol.Laws, c. 16. During the early part of August, the Mayor asked those then serving on the board to resign, and all except three tendered their resignations. On August 21, the Legislature, convened by the Governor, met in an Extraordinary Session for the purpose of dealing with conditions in the school system of New York City. Finding and declaring that 'The conditions existing in (such)n school system * * * have shaken public confidence, cause * * * grave concern and call for prompt corrective action' (s 1) in short, finding that 'this is a time of crisis for the New York city schools' (s 1) the Legislature passed the statute, now before us, under which the city's Board of Education was to be reorganized and reconstituted, the method of effecting appointments to the board materially altered (L.1961, ch. 971).

Pursuant to the legislation, the terms of those then comprising the Board of Education were to come to an end on September 20, 1961 (s 2) and appointment of new members of the board, as well as of their successors, were to be made by the Mayor from a list of nominees to be submitted to him by 'a selection board' consisting of the heads of three universities located in New York City and the presidents of eight other organizations representing educational, civic, business, labor and professional ***384 groups interested in city affairs including education (ss 3, 5, Education Law, s 2553, subd. 2).¹ In making its nominations, the selection board was directed to receive and consider **673 'recommendations from representative associations (and) * * * groups active or *323 interested in the field of education' and to select nominees who in its judgment are 'persons of outstanding experience, competence and qualification for service on the board of education' (s 3). For the purposes of the initial appointment of nine new board members, the selection panel was required to submit a list of at least 18 names by September 15, 1961 (s 3). If the Mayor should fail to make the appointments by September 20, the State Commissioner of Education was to make them from among the nominees submitted to the Mayor (s 3). If the selection board submitted less than 18 names to him, the Mayor was 'to fill from the names submitted that number of vacancies equal to one-half the number of names submitted disregarding resulting fractions and the mayor (was authorized to) fill any remaining vacancies * * * without regard to the provisions of this section' (s 3).²

Following enactment of the statute, the selection panel met, nominated 26 persons, eight more than the specified minimum, and submitted a list of such nominees to the Mayor. Several days later, the Mayor made his appointments to the board from that list. The plaintiffs, former members of the board who had not resigned and whose terms of office still had some time to run, brought this action for a judgment (1) declaring the new statute unconstitutional and (2) enjoining the Mayor from making appointments to the board to cull from their complaint 'in (their) place and stated'.³ The court at Special Term dismissed the complaint, the Appellate Division affirmed unanimously and the appeal is here as of right on constitutional grounds.

The plaintiffs' basic contention is that, insofar as chapter 971 of the Laws of 1961 terminates their terms of office and provides for a new method of appointing board members, it violates the home rule provisions of the State Constitution (art. IX, s 9) and, insofar as it vests the power ***385 of nomination in private persons and organizations, it not only interferes with *324 home rule but also constitutes some sort of impermissible delegation of legislative authority. They further urge that the statute is a bill of attainder, in violation of section 10 of article I of the United States Constitution.

We may quickly dispose of the attack upon the statute on the score of its having shortened the plaintiffs' terms of office. The office held by each of the plaintiffs was concededly created by the Legislature, not by the Constitution, and there is no constitutional inhibition against the mere shortening of the term of an existing statutory office by legislation aimed at the office rather than at its incumbent. (See *Conner v. Mayor of City of N. Y.*, 5 N.Y. 285, 295-296; *Long v. Mayor of City of N. Y.*, 81 N.Y. 425; *Dodge v. Board of Educ.*, 302 U.S. 74, 78-79, 58 S.Ct. 98, 82 L.Ed. 57; *Phelps v. Board of Educ.*, 300 U.S. 319, 323, 57 S.Ct. 483, 81 L.Ed. 674.) Public offices are created for the benefit of the public, and not granted for the benefit of the incumbent, and the office holder has no contractual, vested or property right in the office. (*Long v. Mayor of City of N. Y.*, 81 N.Y. 425, 427-428, supra.) Absent any express constitutional limitation, the Legislature has full and unquestionable power to abolish an office of its creation or to modify its term, or other incidents attending it, in the public interest, even though the effect may be to curtail an incumbent's unexpired term. (See *Conner v. Mayor of City of N. Y.*, 5 N.Y. 285, 295-296, supra; **674 *Long v. Mayor of City of N. Y.* 81 N.Y. 425, 427-428, supra; *Dodge v. Board of Educ.*, 302 U.S. 74, 78-79, 58 S.Ct. 98, supra.)

We may be equally brief in dealing with the plaintiffs' attack on the statute as a bill of attainder. Such a bill has been defined as a legislative act which applies either to

named or easily identifiable individuals in such a way as to inflict punishment or impose penalties upon them without a judicial trial. (See *Cummings v. State of Missouri*, 4 Wall. 277, 323, 71 U.S. 277, 323, 18 L.Ed. 356; *United States v. Lovett*, 328 U.S. 303, 315, 66 S.Ct. 1073, 90 L.Ed. 1252; *Garner v. Los Angeles Bd.*, 341 U.S. 716, 722, 71 S.Ct. 909, 95 L.Ed. 1317; *Communist Party v. Control Bd.*, 367 U.S. 1, 82 et seq., 81 S.Ct. 1357, 6 L.Ed.2d 625.) Stated even more succinctly, 'Punishment is a prerequisite'. (*Garner v. Los Angeles Bd.*, 341 U.S. 716, 722, 71 S.Ct. 909, supra.) There is not the slightest warrant in the present case for the charge that either the purpose or the effect of the statute was to punish or impeach the plaintiffs or any other incumbent member of the former board or to render them ineligible for consideration as potential appointees to the new Board. It is *325 clear that general legislation such as this, designed solely to provide a more effective and ***386 efficient body and aimed at the office of board members rather than at the incumbent office holders, has none of the objectionable attributes of a bill of attainder. (See *Garner v. Los Angeles Bd.*, 341 U.S. 716, 722, 71 S.Ct. 909, supra.)

This brings us to the challenge directed at the new appointive procedure prescribed by the statute. As we have already stated, the plaintiffs' principal reliance is on the home rule provisions of our State Constitution, contained in section 9 of Article IX. As far as pertinent, section 9 reads as follows:

'All city, town and village officers whose election or appointment is not provided for by this constitution shall be elected by the electors of such cities, towns and villages, or of some division thereof, or appointed by such authorities thereof, as the legislature shall designate for that purpose. All other officers whose election or appointment is not provided for by this constitution and all officers whose offices may hereafter be created by law shall be elected by the people or appointed, as the legislature may direct.'

The purpose of these provisions is to preserve the principle of home rule for cities, towns and villages 'by continuing the right of these divisions to select their local officers, with the general functions which have always belonged to the office.' (*People ex rel. Metropolitan St. Ry. Co. v. State Bd.*

of Tax Comrs., 174 N.Y. 417, 434, 67 N.E. 69, 63 L.R.A. 884; see, also, *People ex rel. Wood v. Draper*, 15 N.Y. 532, 539.) With the exception of essentially new offices, created after the adoption of the constitutional provisions, the Legislature is thus prohibited from providing for the selection of such local officers other than through local elections or through appointment by local authorities. (See *Matter of Brown-Lipe Gear Co. v. Ferris*, 275 N.Y. 418, 10 N.E.2d 466; *People ex rel. Town of Pelham v. Village of Pelham*, 215 N.Y. 374, 109 N.E. 513; *People v. Raymond*, 37 N.Y. 428; see, also, *Matter of McAneny v. Board of Estimate*, 232 N.Y. 377, 390-391, 134 N.E. 187, 191-192; *Matter of Morgan v. Furey*, 186 N.Y. 202, 206-207, 78 N.E. 869, 870.) Those restrictions do not, however, apply to nonlocal or newly created offices. (See *People ex rel. Wood v. Draper*, 15 N.Y. 532, 539, 186 N.Y. 202, 206-207, *326 78 N.E. 869, 446, 450; *Matter of Morgan v. Furey*, 186 N.Y. 202, 206-207, 78 N.E. 869, 870, *supra*.)

It is perfectly clear, as all the members of the court agree, that the plaintiffs' reliance on section 9 is misplaced, since members of New York City's Board of Education are not 'city officers' within the meaning of that section. On the contrary, **675 it has long been settled that the administration of public education is a State function to be kept separate and apart from all other local or municipal functions (N.Y.Const. art. XI, s 1; art. IX, s 13, subd. B). Although members of a Board of ***387 Education in a city perform tasks generally regarded as connected with local government, they are officers of an independent corporation separate and distinct from the city, created by the State for the purpose of carrying out a purely State function and are not city officers within the compass of the Constitution's home rule provisions. (See *Gunnison v. Board of Educ.*, 176 N.Y. 11, 23, 68 N.E. 106, 110; *Matter of Emerson v. Buck*, 230 N.Y. 380, 385, 130 N.E. 584, 585; *People ex rel. Wells & Newton Co. v. Craig*, 232 N.Y. 125, 135, 133 N.E. 419, 423; *Matter of Divisich v. Marshall*, 281 N.Y. 170, 173, 22 N.E.2d 327; *Nelson v. Board of Higher Educ. of City of N. Y.*, 263 App.Div. 144, 149, 31 N.Y.S.2d 825, 831, *affd.* 288 N.Y. 649, 42 N.E.2d 744; *People ex rel. Elkind v. Rosenblum*, 184 Misc. 916, 54 N.Y.S.2d 295, *affd.* 269 App.Div. 859, 56 N.Y.S.2d 526, *affd.* 295 N.Y. 929, 68 N.E.2d 34; *Matter of Board of Educ. of Bethlehem Union Free School Dist. v. Wilson*, 303 N.Y. 107, 113, 100 N.E.2d 159, 162.) 'If there be one public policy well-established in this State', this court declared in *Matter of Divisich v. Marshall* (281 N.Y. 170, 173, 22 N.E.2d 327, 328, *supra*), 'it is that public education shall be beyond control by municipalities and politics. The Board of Education of the City of New York is not a department of the city government, it is an independent corporate body * * *'.

The circumstance that the city exercises fiscal control over the Board of Education or that the Legislature has seen fit to vest the power of appointment and of removal of its members in the Mayor or that school personnel in certain instances have been made subject to the same controls and limitations as city employees cannot affect the status of the board as an agency of State Government. The statutory requirements that the Board of Education submit expense budget estimates to the Board of Estimate (Education Law, s 2576) and an annual report to the Mayor (New York City Charter, s 522) are merely *327 corollaries of the obligation imposed on New York City, as it is on other municipalities, to contribute to the support of education furnished within its territorial limits. (See *Matter of Divisich v. Marshall*, 281 N.Y. 170, 174, 22 N.E.2d 327, 329, *supra*.) And, in exercising his appointive and removal powers, the Mayor is acting by legislative direction as a State officer in support of the State system of education. (Cf. *Maximilian v. Mayor of City of N. Y.*, 62 N.Y. 160, 165-166.) It is because of his intimate knowledge of affairs in the city, because it regards the Mayor as qualified to act in these areas, that the Legislature has invested him with such powers. The Commissioner of Education, it should be observed, has similar powers of removal (Education Law, s 306). Nor does the fact that school personnel have been made subject to some of the prohibitions imposed on city employees (see *Matter of Daniman v. Board of Educ. of City of N. Y.*, 306 N.Y. 532, 539, 119 N.E.2d 373, 377) signify that school personnel have thereby been made municipal officers within the meaning of the Constitution. All ***388 it means is that the Legislature has determined that school personnel who are operating within the territorial limits of the city shall in certain respects be subject to the same restrictions as are placed upon city employees. As Justice Brenner aptly observed at Special Term, it is in large measure because of the 'very formidable powers (vested in the city), particularly that of control of the purse strings, (that) the boards as agencies of the State Government must remain independent of local governments.'

Since, then, education is a State, not a local, function and members of New York City's Board of Education are State, not local, officers, the home rule restrictions of section 9 are inapplicable and, under the explicit language of that section, such officers may be 'elected by the people or appointed, **676 as the legislature may direct.' (Emphasis supplied.)

Despite this apparently unrestricted grant of power to the Legislature to direct the mode of selection of nonlocal officers, whose election or appointment is not provided for by the Constitution, it is insisted that the method of appointment provided for by chapter 971 must be condemned as an unlawful delegation of legislative

authority in violation of section 1 of article III of the State Constitution. As we understand the argument, it is that the Legislature may not confer on private individuals or ***328** organizations a voice of any kind in the appointment of public officers, and that such a delegation constitutes an unconstitutional relinquishment of legislative authority.

We shall shortly consider the ample authority, both in this State and elsewhere, supporting the validity of legislation providing for an appointive procedure such as that prescribed by the present statute. But, before doing so, it is worth noting that this very technique of designating a representative panel of responsible and knowledgeable persons to assist the appointing power by submitting a list of eminently qualified nominees from among whom the appointments are to be made is by no means a novel one in New York. Since before the turn of the century, a similar procedure has been followed in the appointment of State boards of examiners and committees on grievances. The Education Law contains a number of sections providing for the appointment of members of such bodies by the State Board of Regents from among nominees designated by private professional societies. (See, e. g., Education Law, s 6607, derived from Public Health Law of 1893, s 161, as added by L.1896, ch. 297, s 2 (State Board of Dental Examiners); Education Law, s 6703, derived from Public Health Law of 1893, s 172, as added by L.1895, ch. 860, s 1 (State Board of Veterinary Medical Examiners); Education Law, s 6802, derived from Public Health Law of 1893, s 180 (State Board of Pharmacy); Education Law, s 6903, derived from Public Health Law of 1893, s 207, as added by L.1903, ch. 293, s 1 (State Board of Examiners of Nurses); Education Law, s 7004 (State Board of *****389** Podiatry Examiners); Education Law, s 6515 (Committee on Medical Grievances); Education Law, s 6515-a (Committee on Physiotherapy Grievances); Education Law, s 6904 (Advisory Council of Nurses).)

In our judgment, the Legislature's power to provide such a method of appointment is not open to doubt. In so many words, section 9 of article IX of our Constitution declares that all officers other than local officials whose election or appointment is not provided for by the Constitution (and all officers whose offices 'may hereafter be created' by law) 'shall be elected by the people or appointed, as the legislature may direct.' This is plain, forthright language and, as this court long ago held when called upon to consider the constitutionality of legislation ***329** which went much further than that now under review, it means precisely what it says. (See *Sturgis v. Spofford*, 45 N.Y. 446, *supra*; see, also, *Matter of Kane v. Gaynor*, 144 App.Div. 196, 197, 129 N.Y.S. 280, 281, *affd.* 202 N.Y. 615, 96 N.E. 1117; *State Bd. of Pharmacy v. Bellinger*, 138 App.Div. 12, 14-15, 122 N.Y.S. 651, 654; *Szold v. Outlet Embroidery Supply Co.*, 274 N.Y. 271, 279, 8 N.E.2d 858, 860.) The statute upheld in the *Sturgis* case, instead of

providing for a selection or nominating board, actually vested the very power of appointment in specified private organizations. More particularly, it established a board of five commissioners of pilots for the Port of New York and provided for the 'election' of 'three * * * by the members of the chamber of commerce, and the other two by the presidents and vice presidents of the marine insurance companies of the city of New York represented' in the city's board of underwriters.

In a carefully considered opinion by Chief Judge Church, the court sustained the validity of the statute and the method of appointment prescribed. Judge Church rejected ****677** the contention that 'the power of appointment can only be conferred (by the Legislature) upon somebody or officer representing or responsible to the people.' Discussing the home rule provisions of the Constitution of 1846 (art. X, s 2), which were practically identical with those contained in our present Constitution (art. IX, s 9), he pointed out that the limitations contained therein on the Legislature's power vis-a-vis the election or appointment of local officers were 'carefully omitted' in the very next clause dealing with the election or appointment of 'all other officers whose election or appointment is not provided for by (the) Constitution, and all officers whose offices may hereafter be created by law'. With respect to the latter classes of officials (which the court decided included commissioners of pilots as offices 'hereafter created'), he wrote (45 N.Y., at p. 450):

'The omission of any direction as to the appointment of such officers is significant of the intention of the framers and the people to leave the unrestricted power in the legislature. The *****390** inconsistency with the mode prescribed for appointing or electing the enumerated officers is one authorized by the express provision of the Constitution itself.'

***330** In other words, the Constitution itself grants to the Legislature the power to prescribe the method by which officers other than those provided for by the Constitution shall be selected or chosen.

The great weight of authority throughout the country supports this conclusion. (See, e. g., *Matter of Opinion of the Justices*, 252 Ala. 559, 42 So.2d 56; *Matter of Bulger*, 45 Cal. 553; *Ex parte Gerino*, 143 Cal. 412, 77 P. 166, 66 L.R.A. 249; *Overshiner v. State*, 156 Ind. 187, 59 N.E. 468,

51 L.R.A. 748; Marks v. Frantz, 179 Kan. 638, 298 P.2d 316; Elrod v. Willis, 305 Ky. 225, 203 S.W.2d 18; McCurdy v. Jessop, 126 Md. 318, 95 A. 37; Bradley v. Board of Zoning Adjustment, 255 Mass. 160, 150 N.E. 892; Driscoll v. Sakin, 121 N.J.L. 225, 1 A.2d 881, affd. 122 N.J.L. 414, 5 A.2d 699; State ex rel. Humker v. Hummel, 143 Ohio St. 604, 56 N.E.2d 167; Floyd v. Thornton, 220 S.C. 414, 68 S.E.2d 334; but see, contra, Lasher v. People, 183 Ill. 226, 55 N.E. 663; State ex inf. Hadley v. Washburn, 167 Mo. 680, 67 S.E. 592.) In some of these cases, the statute, similar to that in Sturgis, delegated the ultimate power of appointment to a private society or association,⁴ while, in others, the enactment, resembling the one now before us, provided for a selection panel of private persons or organizations to submit a list of nominees to the appointing power for ultimate appointment.⁵

In *Ex parte Gerino*, 143 Cal. 412, 77 P. 166, *supra*, for instance, the statute provided that private medical societies were to appoint the members of the State's Board of Medical Examiners. In answering the contention that the statute vested the power of appointment to public office in private organizations, the California Supreme Court called attention to a provision of its Constitution almost identical with section 9 of article IX of ours (p. 414, 77 P. p. 167) and then then went on to hold (pp. 414-415, 77 P. p. 167):

'This gives the Legislature power to declare the manner in which officers ****678** other than those provided by the Constitution shall be chosen. Such officers may be ***331** appointed by the Legislature itself, or the duty of appointment may be delegated and *****391** imposed upon some other person or body. *People v. Provines*, 34 Cal. 541; *In re Bulger*, 45 Cal. 559. There is no limitation to any particular person or class of persons upon whom alone the Legislature may impose this obligation.'

In *Bradley v. Board of Zoning Adjustment*, 255 Mass. 160, 150 N.E. 892, *supra*, the statute, in format similar to the one before us, created a zoning adjustment board (for Boston) composed of persons to be appointed by the mayor from candidates nominated by the chamber of commerce and other private organizations, including the Associated Industries of Massachusetts, the Boston Central Labor Union, the Boston Real Estate Exchange and the Boston Society of Architects. The Massachusetts high court upheld

the act against the challenge that 'the freedom of appointment naturally appurtenant to the power (in the mayor) to name a public officer (was) curtailed beyond constitutional bounds' (pp. 164-165, 150 N.E. p. 894). After observing that 'A statute designed to secure men of eminent sagacity for the performance of these duties is entitled to every presumption in its favor' (p. 166, 150 N.E. p. 895), the court declared (pp. 166-167, 150 N.E. p. 895):

'The executive officers and the members of these several societies may be thought to know the persons possessing the finest expert knowledge and widest practical experience touching the various departments of activity indicated by their names. The nominations are not required to be made from the membership of the several societies. A wide field is open to the nominating societies to find those best adapted by character, learning, experience and common sense to perform the specified duties. The qualifications of persons appointed from nominees thus presented to the appointing officer doubtless were supposed by the Legislature to be likely to be superior to an exceptional degree. The scheme of the statute is to provide by statutory sanction expert advice of unusual quality for the aid of the appointing power. Its design is to secure the administrative and executive ability of men of experience and vision in municipal planning to meet the exigencies of the ***332** present and the prospective needs of the future. Every presumption must be indulged * * * in favor of the view that the duty of making nominations imposed by the statute on the several societies will be performed with a genuinely zealous purpose to present to the consideration of the appointing officer the names of the best men obtainable for the service.'

There has been some diversity of opinion in other jurisdictions as to whether the Legislature may confer on private persons or organizations the actual power of appointing public officers, as distinguished from *****392**

merely authorizing them to make nominations. While the decisions in most of the cases would as this court held in *Sturgis* (45 N.Y. 446, *supra* permit the Legislature to adopt either of these methods of appointment (see cases, *supra*, p. 330 of 11 N.Y.2d 229 N.Y.S.2d 390, 183 N.E.2d 677), the courts of a few states have expressed the view that, while the Legislature may grant a voice in the appointive process to private persons or organizations through the submission of lists of nominees, the ultimate power of appointment may not be granted to them. (See *State ex rel. James v. Schorr*, 45 Del. 18, 27-28, 32-33, 65 A.2d 810; *Opinion of the Justices*, 337 Mass. 777, 784, 150 N.E.2d 693.) No purpose, however, is to be served by treating these variant views at any length, for decision in the present case does not require us to decide whether the Legislature could have validly conferred on the selection panel the power of ultimate appointment to membership on the new Board of Education. Under the statute before us, it is the ****679** Mayor (or, in certain contingencies, the Commissioner of Education) who has been given the responsibility of making the actual appointments to the board. The selection panel merely serves the purpose of providing 'by statutory sanction expert advice of unusual quality for the aid of the appointing power'. (*Bradley v. Board of Zoning Adjustment*, 255 Mass. 160, 167, 150 N.E. 892, 895, *supra*.)

The cases relied upon to support the plaintiffs' position are completely beside the point. We are not here confronted as we were in *Matter of Fink v. Cole*, 302 N.Y. 216, 97 N.E.2d 873 with a statute purporting to delegate an essentially legislative power, the issuance of licenses, to a private club or association or as we were in ***333** *Fox v. Mohawk & Hudson Riv. Humane Soc.*, 165 N.Y. 517, 523, 59 N.E. 353, 354, 51 L.R.A. 681 with an act violating the constitutional prohibition against the appropriation of public moneys 'in aid of any association, corporation or private undertaking' (N.Y.Const. of 1894, art. VIII, s 9, now art. VII, s 8).

Concededly, there is here no appropriation of public funds to any association or private undertaking and, it is just as clear, there is no delegation of legislative authority (N.Y.Const. art. III, s 1). It is sufficient to note that the exercise of the power of appointment to public office is not a function of such essentially legislative character as to fall afoul of the constitutional proscription. (See *Sturgis v. Spofford*, 45 N.Y. 446, 450, *supra*; *Szold v. Outlet Embroidery Supply Co.*, 274 N.Y. 271, 279, 8 N.E.2d 858, 860, *supra*; *Reed v. Dunbar*, 41 Or. 509, 514, 69 P. 451; *Floyd v. Thornton*, 220 S.C. 414, 420-421, 68 S.E.2d 334, *supra*; see, also, 42 Am.Jur., *Public Officers*, s 95; Ann. 79 L.Ed. 474, 573.) In the *Reed* case, for instance, where a statute delegated to another the power to appoint a public official, the court wrote: 'It is undoubtedly *****393** true that the legislature cannot delegate powers conferred upon it by the constitution, but the appointment to an office is not one

of such powers. The appointment to public office may, under certain circumstances, be made by the legislature, but it is not a duty imposed upon it by the constitution. The rule invoked refers to the lawmaking power' (41 Or., at p. 514, 69 P. at p. 453).

In point of fact, it is an exceedingly narrow and artificial view to emphasize, as the plaintiffs have, the 'private' character of the selection board. It was set up, not to grant any special privileges to the organizations which they head (cf. N.Y.Const. art. III, s 17) but rather to establish a new public or quasi-public body invested with specific duties and responsibilities, in the field of education, for the interest and benefit of the public at large. (Cf. *Matter of Opinion of the Justices*, 252 Ala. 559, 42 So.2d 56, *supra*; *Ex parte Gerino*, 143 Cal. 412, 415-416, 77 P. 166, *supra*; *Bradley v. Board of Zoning Adjustment*, 255 Mass. 160, 150 N.E. 892, *supra*.) In short, though, whether we regard the selection board as 'private' or 'public', we perceive no constitutional bar to the legislative designation of a nominating panel, made up of people representing a knowledgeable cross-section of city interests, either active or vitally interested in the educational life of the city, who could reasonably be expected to present to the Mayor, on an objective and nonpartisan basis, the names of individuals exceptionally qualified for service on the Board of Education.

***334** Accordingly, we concluded that the courts below correctly sustained the validity of the entire statute before us. It was error, however, to dismiss the complaint in this action for a declaratory judgment merely because the plaintiffs were not entitled to the declaration sought by them. (See, e. g., *Cahill v. Regan*, 5 N.Y.2d 292, 298, 184 N.Y.S.2d 348, 353, 157 N.E.2d 505, 509; *Rockland Light & Power Co. v. City of New York*, 289 N.Y. 45, 51, 43 N.E.2d 803, 806; *Civil Serv. Forum v. New York City Transit Auth.*, 4 A.D.2d 117, 129, 163 N.Y.S.2d 476, 488, *affd.* 4 N.Y.2d 866, 174 N.Y.S.2d 234, 150 N.E.2d 705.)

****680** The judgment appealed from should be modified, without costs, to the extent of directing judgment in favor of the defendants (1) declaring that chapter 971 of the Laws of 1961 is constitutional and (2) adjudging that it was proper for the defendant Mayor of the City of New York to appoint new members to the Board of Education in accordance with the provisions of the statute.

DYE, Judge (dissenting).

In this action for judgment declaring chapter 971 of the

Laws of 1961 (Extraordinary Session of August 21, 1961) unconstitutional and permanently enjoining the defendant Mayor of the City of New York from ***394 proceeding to reorganize the New York City Board of Education under the challenged legislation and replacing plaintiffs with new appointees, the plaintiffs, two former members of the board, appeal on constitutional grounds from a judgment, entered upon an order of the Appellate Division, Second Department, unanimously affirming, without opinion, a judgment of the Supreme Court, Kings County (Brenner, J.) which dismissed the complaint for insufficiency and also from an incidental order which denied plaintiffs' motion for a temporary injunction restraining the Mayor from acting in the premises and granted defendants' cross motion to dismiss the complaint for insufficiency. (The joinder of the Attorney-General apparently is for the reason that the constitutionality of a statute is challenged (Executive Law, s 71).)

During the hotly contested New York City mayoralty campaign in the Summer of 1961, certain actions in the school construction and maintenance program were disclosed, leading to sensational charges of corruption and malfeasance. Early in August, Mayor Wagner requested the resignation of all nine members of the New York City Board of Education, all of whom were then serving unexpired terms with varying dates of termination *335 (Education Law, s 2553, former subd. 2). Six of these members submitted their resignations but three, including plaintiffs Lanza and Rank whose terms were to expire in May of 1962 and 1964 respectively, refused to resign. Thereafter the Legislature, at an Extraordinary Session held August 21, 1961, passed, on a message of necessity, the challenged legislation (L.1961, ch. 971). That statute (amdg. Education Law, ss 2553, 2554), after reciting that conditions existing in the school system in New York City had shaken public confidence, caused the Legislature grave concern and called for prompt corrective action, proceeded to list four categories of irregularity, concluding that 'this is a time of crisis for the New York city schools * * * the terms of office of the persons then comprising the membership of the board of education of the city school district of the city of New York shall terminate' (L.1961, ch. 971, s 2).

The statute then made provision for a new and novel method of appointment of school board members. The Mayor's power of appointment was continued, but sharply curtailed as to whom he should appoint and forfeiture of the power of appointment if he failed to act within a specified time. The eligible list from which the Mayor was to make appointments was to be furnished by a selection board consisting of 11 members, who were to convene with the Chancellor of the Board of Regents, from the heads of certain named private business, educational, civic and

philanthropic organizations, to wit:
the president of Columbia University;

the chancellor of the City University of New York;

***395 the president of New York University;

the president of the Association of the Bar of the City of New York;

the president of the New York City Central Trades and Labor Council;

the president of Commerce and Industry Association of New York, Inc.;

the president of the Public Education Association;

the president of the United Parents Associations of New York City, Inc.;

the president of the League of Women Voters of the City of New York;

**681 the president of Citizens Union; and

the president of the Citizens Budget Commission, Inc.

*336 The members of the selection board thus designated but not named, no later than September 15, 1961, were to submit a list of 18 nominees to the Mayor for service on the Board of Education. No later than September 20, 1961, the Mayor was to appoint, from such list of 18 nominees only, nine persons to be members of the Board of Education. If he failed to do so within the time limit, then the appointments were to be made by the State Commissioner of Education. The statute also provides that the terms of the incumbents should expire and those of the new members begin on September 20 for staggered terms of 8 months to 7 years. Such a list of nominees was promulgated, none of whom were present or former members of the Board of Education. The Mayor made his selection within the allotted time and the nine so selected were duly sworn in as members of the Board of Education on September 19, 1961 at about 3:30 p. m. This time is mentioned because this action was commenced at about 5:00 p. m., September 18, and was returnable at Special Term on the morning of the 19th. Counsel waived all questions of practice and procedure in order to facilitate the presentment.

Appellants' first contention may be disposed of summarily. There is no invasion of home rule. Matters dealing with education and with Boards of Education are not within the

Home Rule Amendment (art. IX, s 13, subd. B) of the New York State Constitution (*People ex rel. Elkind v. Rosenblum*, 295 N.Y. 929, 68 N.E.2d 34, affg. 269 App.Div. 859, which affd. 184 Misc. 916, 54 N.Y.S.2d 295).

Recognizing, then, that the power to select members of the New York City Board of Education rests with the Legislature, we come now to appellants' second contention that there has been an unconstitutional delegation of that power to private individuals.

The statute under attack provides, in pertinent part: 'At least five days before the effective date of section two of this act, the selection board shall submit a list to the mayor of at least eighteen names of nominees who, in the judgment of the selection board, are persons of outstanding experience, competence and qualification for service on the board of education. ***396 On the effective date of section two of this act, the mayor shall appoint nine persons from among the nominees to be the members of the board of education of the city school district of the city of New York.' (Emphasis supplied.)

*337 Thus we find that the 11 private individuals who comprise the so-called 'selection board' may, in their untrammelled discretion, decide who shall, and who shall not, be considered by the local governmental authorities for appointment to the Board of Education. Under this arrangement the Mayor, instead of being able to choose for appointment to the school board any qualified citizen from among the more than eight million inhabitants comprising the school district, including these plaintiffs, is limited to the 18 eligibles nominated by the selection board. The board, under the circumstances, is thus not merely a civic advisory committee, but a quasi-executive committee with mandatory power to limit the appointive prerogative of a duly elected public official. However well intended the statutory scheme may be, its practical effect is to delegate a sensitive legislative function to a number of private persons whose identity may not be known for certain until the moment they convene for the purpose of making a selection of eligibles and, even then, their status is a nebulous one, since they are not sworn as public officers nor are they removable as such. The tendency to run government by committee is becoming a favorite device to circumvent the democratic process which our Constitution reposes in the Legislature. Such power may not be delegated to others. The promptings of expediency to deal with momentary political problems, however well **682 directed, furnish a poor excuse for tampering with fundamental principles of government and 'can never serve in lieu of constitutional power' (*Carter v. Carter Coal Co.*, 298 U.S. 238, 291, 56 S.Ct. 855, 864, 80 L.Ed. 1160).

Not long ago this court unanimously struck down a statute which purported to delegate to a private corporation, the Jockey Club, the 'power, at (its) discretion, to grant licenses to Owners, Trainers and Jockeys' (emphasis supplied). There we said: 'In our view the delegation by the Legislature of its licensing power to The Jockey Club, a private corporation, is such an abdication as to be patently an unconstitutional relinquishment of legislative power in violation of section 1 of article III of the Constitution of this State which provides: 'The legislative power of this State shall be vested in the Senate and Assembly.' (citing cases).' (*Matter of Fink v. Cole*, 302 N.Y. 216, 224-225, 97 N.E.2d 873, 875-876).

Similarly, in *Fox v. Mohawk & Hudson Riv. Humane Soc.*, 165 N.Y. 517, 59 N.E. 353, 51 L.R.A. 681, cited with approval in *Matter of Fink v. Cole* *338 (supra), it was said: 'I certainly should deny the right of the legislature to vest in private associations or corporations authority and power ***397 affecting the life, liberty, and property of the citizens' (id., p. 524, 59 N.E. p. 355).

Even if we were to adopt the argument of the Attorney-General that the selection board is itself a new governmental body, there is yet another objection to the statute. The members of the panel are themselves not individually selected by the Legislature or by an authorized State officer, such, for instance, as the Governor of the State, but their selection is left to the happenstance of who may be filling the chief executive office of the named private organization, the membership of which, so far as we know, may be composed of persons of certain types, classes and occupation, or perhaps even aliens; whom they may choose as their chief executive officer from time to time cannot be foretold he might not even be a citizen and whose identity cannot be known for certain until the very moment they meet to promulgate a list of names from whom the Mayor must select a Board of Education. Nor may anyone be sure how such persons are selected for the named executive office of the designated private voluntary organizations, since they have no connection with government, owe it no duty and are subject to no governmental supervision or control except as is common to any corporate and membership group. Even though we assume that the organizations named are composed of reputable law-abiding people who are motivated with the best of intentions, their chief executives, when meeting as a selection board, cannot be deemed a public body, absent an oath requirement or accountability for the action taken. The method of selection provided by the statute under review runs squarely afoul of the principle enunciated by this court in the *Fox* case: 'the corporations are private in the sense that they proceed from the voluntary action of the individual citizens alone (in many cases it is not necessary that the members of the corporation should be citizens),

that the agents or officers of the corporation are appointed such by the incorporators, and that, if such agents are invested by virtue of their agency alone with the power of public officers, it is in substance devolving the choice of public offices on a few of the citizens, and possibly persons not citizens, while under the Constitution, all public officers must be elected or ***339** appointed by other public authorities and thus trace their title to power and authority either immediately or mediately back to the people' (p. 525, 59 N.E. p. 355; emphasis supplied). There is little or no relation between the unofficial, unnamed, unidentified persons designated to make up the selection board and the administration of the school system of the City of New York. The selection board thus authorized is not at all like the various State examining boards for professional licenses where, to be qualified, a distinct and special expertise is essential for the ****683** proper conduct of the examination. Why *****398** these particular voluntary organizations were selected, rather than some of the hundreds of others equally reputable with which the City and State of New York abound, does not appear and may be of no great importance, but it is certain that the organizations so selected cannot and do not represent the People of the City of New York. The delegation of legislative power thus attempted is more than a mere transfer of authority. It is a delegation upon a delegation done for the purpose of curbing and limiting the appointive power of the Mayor of the City of New York. What is to prevent the use of a similar pattern in respect to every other city and State public officer possessing the power of appointment is difficult to perceive. I apprehend no good reason for encouraging such a practice for it is by such means that constitutions adopted by a free people are gradually undermined and finally overthrown.

I find no merit to appellants' contention that the statute is actually a bill of attainder. Its purpose was not to punish appellants. Nor were these unsalaried officials deprived of any property right, as was the case in *United States v. Lovett*, 328 U.S. 303, 315, 66 S.Ct. 1073, 90 L.Ed. 1252, relied on by appellants. The statute there involved provided that certain named individuals, suspected of subversive activities, were not to be paid their salaries. The *Lovett* case has since been sharply limited by the United States Supreme Court (see, e. g., *Garner v. Los Angeles Bd.*, 341 U.S. 716, 71 S.Ct. 909, 95 L.Ed. 1317).

Nor do I find any basis for disturbing provisions of the statute dealing with subjects other than the method of appointment. The unconstitutional provisions may properly be severed and the remainder of the statute sustained (see, e. g., *People v. Mancuso*, 255 N.Y. 463, 175 N.E. 177, 76 A.L.R. 514; *Schieffelin v. Goldsmith*, 253 N.Y. 243, 170 N.E. 905; see, generally, 2 *Sutherland, Statutory Construction* (3d ed.), ss 2401-2419).

***340** Since this is an action for a declaratory judgment, the complaint should, in any event, not have been dismissed (*Rockland Light & Power Co. v. City of New York*, 289 N.Y. 45, 43 N.E.2d 803).

The judgment appealed from should be modified by reinstating the complaint and awarding plaintiffs a judgment declaring that chapter 971 of the Laws of 1961 is invalid to the extent stated herein.

FROESSEL, Judge (dissenting).

I vote for modification, but upon the following grounds: I agree that there is no invasion of home rule (N.Y.Const., art. IX, s 9), and that the statute before us is not a bill of attainder (U.S.Const., art. I, s 10).

*****399** I also agree with Judge DYE that the statute before us is constitutional except insofar as it delegates power to unnamed private individuals. By that portion of the statute, the presidents of a voters' league, a labor council, an industry association, a united parents' association, and two civic associations (constituting a majority of the so-called selection board) would have the right to dictate to the Mayor a list of names from which he must choose members of the Board of Education. These unnamed presidents are selected by their own private organizations, changed from time to time, are not required to take an oath or to be citizens, as a member of the Board of Education must be (Education Law, s 2553, subd. 1), and their organizations, however worthy they may be in their own fields of endeavor, do not have any particular relationship to education as such, and do not have any connection with any branch of our Government. This amounts to an unconstitutional relinquishment of legislative power in violation of section 1 of article III of our State Constitution (*Matter of Fink v. Cole*, 302 N.Y. 216, 97 N.E.2d 873; *Fox v. Mohawk & Hudson Riv. Humane Soc.*, 165 N.Y. 517, 59 N.E. 353). I do not deem as controlling here the case of *Sturgis v. Spofford*, 45 N.Y. 446, decided over 90 years ago, and ****684** relating to the right of commissioners of pilots to recover certain penalties.

In my opinion, the illegal portion is severable. The test of severability when part of a statute is declared to be unconstitutional is 'whether the Legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part excised, or rejected altogether' (*People ex rel. Alpha Portland Cement Co. v. Knapp*, 230 N.Y. 48, 60, 129 N.E. 202). In my judgment, the Legislature here would have wished that ***341** the statute be enforced with the illegal part removed. In the first place, the new law, as well as former subdivision 2 of

section 2553 of the Education Law, grants to the Mayor the ultimate power to appoint the members of the Board of Education. As before (s 2553, subd. 2), recommendations from 'representative associations, civic, educational, business, labor and professional groups active or interested in the field of education' are to be considered (L.1961, ch. 971, s 3). Moreover, the present statute gives the Mayor the unqualified right to make appointments in two instances: first, had the selection board submitted less than 18 candidates, the Mayor would have had to choose half of the nominees submitted but could have filled remaining vacancies himself; second, when a member's term of office expires, or should a vacancy occur and the selection board fail to submit nominations to the Mayor within 15 days after the Mayor requested the board to convene, the Mayor may fill the vacancy himself (ch. 971, ss 3, 5).

***400 Notwithstanding the partial invalidity of the statute, the present membership of the board may be sustained. The Mayor is the person directly aggrieved. He has made his selections and is content to leave the membership as presently constituted. Indeed, in his position as respondent on this appeal, he vigorously argues for the retention of the present board. Under these circumstances, it may not be said that the present board is improperly constituted and must be replaced, but the Mayor continues to have the right to choose any person who he deems qualified for membership on the board.

Footnotes

- 1 The selection board consists of 'the president of Columbia University; the chancellor of the City University of New York; the president of New York University; the president of the Association of the Bar of the City of New York; the president of the New York City Central Trades and Labor Council; the president of Commerce and Industry Association of New York, Inc.; the president of the Public Education Association; the president of the United Parents Associations of New York City, Inc.; the president of the League of Women Voters of the City of New York; the president of Citizens Union; and the president of the Citizens Budget Commission, Inc.'
- 2 In addition, the statute contains provisions designed to strengthen the powers of the Board of Education and to assure closer supervision of the educational affairs of New York City's school system by the Regents and the Commissioner of Education during an 'emergency period', which was to continue until July 1, 1962 (s 7, Education Law, s 2554-a).
- 3 The Attorney-General was joined as a party defendant because of the attack on the constitutionality of a State statute (Executive Law, s 71).
- 4 See Matter of Opinion of the Justices, 252 Ala. 559, 42 So.2d 56, supra; Matter of Bulger, 45 Cal. 553, supra; Ex parte Gerino, 143 Cal. 412, 77 P. 166, supra; Overshiner v. State, 156 Ind. 187, 59 N.E. 468, supra; McCurdy v. Jessop, 126 Md. 318, 95 A. 37, supra; Driscoll v. Sakin, 121 N.J.L. 225, 1 A.2d 881, affd. 122 N.J.L. 414, 5 A.2d 699, supra; State ex rel. Humker v. Hummel, 143 Ohio St. 604, 56 N.E.2d 167, supra.
- 5 See Marks v. Frantz, 179 Kan. 638, 298 P.2d 316, supra; Elrod v. Willis, 305 Ky. 225, 203 S.W.2d 18, supra; Bradley v. Board of Zoning Adjustment, 255 Mass. 160, 150 N.E. 892, supra; Floyd v. Thornton, S.C. 414, 68 S.E.2d 334, supra; see, also, State ex rel. James v. Schorr, 45 Del. 18, 27-28, 32-33, 65 A.2d 810.

The complaint should, therefore, be reinstated; that portion of the statute which mandates the Mayor to choose from a list furnished by the selection board should be declared unconstitutional as an invalid delegation of legislative power; in all other respects the statute should be declared constitutional, and the appointments by the Mayor should be declared valid. The judgment should be modified accordingly, and without costs.

DESMOND, C. J., and BURKE and FOSTER, JJ., concur with FULD, J.

DYE, J., dissents in part in a separate opinion in which VAN VOORHIS, J., concurs. FROESSEL, J., dissents in part in a separate opinion.

Judgment modified, without costs, in accordance with the opinion herein.

All Citations

11 N.Y.2d 317, 183 N.E.2d 670, 229 N.Y.S.2d 380, 97 A.L.R.2d 344

Lanza v. Wagner, 11 N.Y.2d 317 (1962)

183 N.E.2d 670, 229 N.Y.S.2d 380, 97 A.L.R.2d 344

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83 S.Ct. 205
Supreme Court of the United States

Vito F. LANZA et al., petitioners,
v.
Robert F. WAGNER, Mayor of the City of New
York, et al.

No. 334.
|
November 13, 1962

Synopsis

Facts and opinion, 30 Misc.2d 212, 220 N.Y.S.2d 477; 15
A.D.2d 552, 222 N.Y.S.2d 1019; 11 N.Y.2d 317, 229
N.Y.S.2d 380, 183 N.E.2d 670.

Attorneys and Law Firms

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Opinion

Petition for writ of certiorari to the Court of Appeals of
New York.

Denied.

All Citations

371 U.S. 901, 83 S.Ct. 205, 9 L.Ed.2d 164

87 S.Ct. 1817
Supreme Court of the United States
Richard Perry LOVING et ux., Appellants,
v.
COMMONWEALTH OF VIRGINIA.

No. 395.

|
Argued April 10, 1967.

|
Decided June 12, 1967.

Synopsis

Proceeding on motion to vacate sentences for violating state ban on interracial marriages. The Circuit Court of Caroline County, Virginia, denied motion, and writ of error was granted. The Virginia Supreme Court of Appeals, 206 Va. 924, 147 S.E.2d 78, affirmed the convictions, and probable jurisdiction was noted. The United States Supreme Court, Mr. Chief Justice Warren, held that miscegenation statutes adopted by Virginia to prevent marriages between persons solely on basis of racial classification violate equal protection and due process clauses of Fourteenth Amendment.

Convictions reversed.

Attorneys and Law Firms

****1818 *1** Philip J. Hirschkop, pro hac vice, by special leave of Court, Bernard S. Cohen, Alexandria, Va., for appellants.

R. D. McIlwaine, III, Richmond, Va., for appellee.

William M. Marutani, Philadelphia, Pa., for Japanese American Citizens League, as amicus curiae, by special leave of Court.

Opinion

***2** Mr. Chief Justice WARREN delivered the opinion of the Court.

This case presents a constitutional question never addressed by this Court: whether a statutory scheme adopted by the State of Virginia to prevent marriages between persons solely on the basis of racial classifications

violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment.¹ For reasons ****1819** which seem to us to reflect the central meaning of those constitutional commands, we conclude that these statutes cannot stand consistently with the Fourteenth Amendment.

In June 1958, two residents of Virginia, Mildred Jeter, a Negro woman, and Richard Loving, a white man, were married in the District of Columbia pursuant to its laws. Shortly after their marriage, the Lovings returned to Virginia and established their marital abode in Caroline County. At the October Term, 1958, of the Circuit Court ***3** of Caroline County, a grand jury issued an indictment charging the Lovings with violating Virginia's ban on interracial marriages. On January 6, 1959, the Lovings pleaded guilty to the charge and were sentenced to one year in jail; however, the trial judge suspended the sentence for a period of 25 years on the condition that the Lovings leave the State and not return to Virginia together for 25 years. He stated in an opinion that:

‘Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.’

After their convictions, the Lovings took up residence in the District of Columbia. On November 6, 1963, they filed a motion in the state trial court to vacate the judgment and set aside the sentence on the ground that the statutes which they had violated were repugnant to the Fourteenth Amendment. The motion not having been decided by October 28, 1964, the Lovings instituted a class action in the United States District Court for the Eastern District of Virginia requesting that a three-judge court be convened to declare the Virginia antimiscegenation statutes unconstitutional and to enjoin state officials from enforcing their convictions. On January 22, 1965, the state trial judge denied the motion to vacate the sentences, and the Lovings perfected an appeal to the Supreme Court of Appeals of Virginia. On February 11, 1965, the three-judge District Court continued the case to allow the Lovings to present their constitutional claims to the highest state court.

The Supreme Court of Appeals upheld the constitutionality of the antimiscegenation statutes and, after ***4** modifying

the sentence, affirmed the convictions.² The Lovings appealed this decision, and we noted probable jurisdiction on December 12, 1966, 385 U.S. 986, 87 S.Ct. 595, 17 L.Ed.2d 448.

The two statutes under which appellants were convicted and sentenced are part of a comprehensive statutory scheme aimed at prohibiting and punishing interracial marriages. The Lovings were convicted of violating s 20—58 of the Virginia Code:

‘Leaving State to evade law.—If any white person and colored person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished as provided in s 20—59, and the marriage shall be governed by the same law as if it had been solemnized in this State. The fact of their cohabitation here as man and wife shall be evidence of their marriage.’

Section 20—59, which defines the penalty for miscegenation, provides:

‘Punishment for marriage.—If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary **1820 for not less than one nor more than five years.’

Other central provisions in the Virginia statutory scheme are s 20—57, which automatically voids all marriages between ‘a white person and a colored person’ without any judicial proceeding,³ and ss 20—54 and 1—14 which, *5 respectively, define ‘white persons’ and ‘colored persons and Indians’ for purposes of the statutory prohibitions.⁴ The Lovings have never disputed in the course of this litigation that Mrs. Loving is a ‘colored person’ or that Mr. Loving is a ‘white person’ within the meanings given those terms by the Virginia statutes.

*6 Virginia is now one of 16 States which prohibit and

punish marriages on the basis of racial classifications.⁵ Penalties **1821 for miscegenation arose as an incident to slavery and have been common in Virginia since the colonial period.⁶ The present statutory scheme dates from the adoption of the Racial Integrity Act of 1924, passed during the period of extreme nativism which followed the end of the First World War. The central features of this Act, and current Virginia law, are the absolute prohibition of a ‘white person’ marrying other than another ‘white person,’⁷ a prohibition against issuing marriage licenses until the issuing official is satisfied that *7 the applicants’ statements as to their race are correct,⁸ certificates of ‘racial composition’ to be kept by both local and state registrars,⁹ and the carrying forward of earlier prohibitions against racial intermarriage.¹⁰

I.

In upholding the constitutionality of these provisions in the decision below, the Supreme Court of Appeals of Virginia referred to its 1955 decision in *Naim v. Naim*, 197 Va. 80, 87 S.E.2d 749, as stating the reasons supporting the validity of these laws. In *Naim*, the state court concluded that the State’s legitimate purposes were ‘to preserve the racial integrity of its citizens,’ and to prevent ‘the corruption of blood,’ ‘a mongrel breed of citizens,’ and ‘the obliteration of racial pride,’ obviously an endorsement of the doctrine of White Supremacy. *Id.*, at 90, 87 S.E.2d, at 756. The court also reasoned that marriage has traditionally been subject to state regulation without federal intervention, and, consequently, the regulation of marriage should be left to exclusive state control by the Tenth Amendment.

While the state court is no doubt correct in asserting that marriage is a social relation subject to the State’s police power, *Maynard v. Hill*, 125 U.S. 190, 8 S.Ct. 723, 31 L.Ed. 654 (1888), the State does not contend in its argument before this Court that its powers to regulate marriage are unlimited notwithstanding the commands of the Fourteenth Amendment. Nor could it do so in light of *Meyer v. State of Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), and *Skinner v. State of Oklahoma*, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942). Instead, the State argues that the meaning of the Equal Protection Clause, as illuminated by the statements of the Framers, is only that state penal laws containing an interracial element *8 as part of the definition of the offense must apply equally to whites and Negroes in the sense that members of each race are punished to the same degree. Thus, the State contends that, because its miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage, these statutes, despite their reliance on racial classifications

do not constitute an invidious discrimination based upon race. The second argument advanced by the State assumes the validity of its equal application theory. The argument is that, if the Equal Protection Clause does not outlaw miscegenation statutes because of their reliance on racial classifications, the question of constitutionality would thus become whether there was any rational basis for a State to treat interracial marriages differently from other marriages. On this question, the State argues, the scientific evidence is substantially in doubt and, consequently, this Court should defer to the wisdom of the state legislature in adopting its policy of discouraging interracial marriages.

****1822** Because we reject the notion that the mere ‘equal application’ of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment’s proscription of all invidious racial discriminations, we do not accept the State’s contention that these statutes should be upheld if there is any possible basis for concluding that they serve a rational purpose. The mere fact of equal application does not mean that our analysis of these statutes should follow the approach we have taken in cases involving no racial discrimination where the Equal Protection Clause has been arrayed against a statute discriminating between the kinds of advertising which may be displayed on trucks in *New York City, Railway Express Agency, Inc. v. People of State of New York*, 336 U.S. 106, 69 S.Ct. 463, 93 L.Ed. 533 (1949), or an exemption in Ohio’s ad valorem tax for merchandise owned by a non-resident in a storage warehouse, ***9** *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 79 S.Ct. 437, 3 L.Ed.2d 480 (1959). In these cases, involving distinctions not drawn according to race, the Court has merely asked whether there is any rational foundation for the discriminations, and has deferred to the wisdom of the state legislatures. In the case at bar, however, we deal with statutes containing racial classifications, and the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race.

The State argues that statements in the Thirty-ninth Congress about the time of the passage of the Fourteenth Amendment indicate that the Framers did not intend the Amendment to make unconstitutional state miscegenation laws. Many of the statements alluded to by the State concern the debates over the Freedmen’s Bureau Bill, which President Johnson vetoed, and the Civil Rights Act of 1866, 14 Stat. 27, enacted over his veto. While these statements have some relevance to the intention of Congress in submitting the Fourteenth Amendment, it must be understood that the pertained to the passage of specific statutes and not to the broader, organic purpose of a

constitutional amendment. As for the various statements directly concerning the Fourteenth Amendment, we have said in connection with a related problem, that although these historical sources ‘cast some light’ they are not sufficient to resolve the problem; ‘(a)t best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among ‘all persons born or naturalized in the United States.’ Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect.’ *Brown v. Board of Education of Topeka*, 347 U.S. 483, 489, 74 S.Ct. 686, 689, 98 L.Ed. 873 (1954). See also ***10** *Strauder v. State of West Virginia*, 100 U.S. 303, 310, 25 L.Ed. 664 (1880). We have rejected the proposition that the debates in the Thirty-ninth Congress or in the state legislatures which ratified the Fourteenth Amendment supported the theory advanced by the State, that the requirement of equal protection of the laws is satisfied by penal laws defining offenses based on racial classifications so long as white and Negro participants in the offense were similarly punished. *McLaughlin v. State of Florida*, 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 222 (1964).

The State finds support for its ‘equal application’ theory in the decision of the Court in *Pace v. State of Alabama*, 106 U.S. 583, 1 S.Ct. 637, 27 L.Ed. 207 (1883). In that case, the Court upheld a conviction under an Alabama statute forbidding adultery or fornication between a white person and a Negro which imposed a greater penalty than that of a statute proscribing similar conduct by members of the same race. The Court reasoned ****1823** that the statute could not be said to discriminate against Negroes because the punishment for each participant in the offense was the same. However, as recently as the 1964 Term, in rejecting the reasoning of that case, we stated ‘*Pace* represents a limited view of the Equal Protection Clause which has not withstood analysis in the subsequent decisions of this Court.’ *McLaughlin v. Florida*, supra, 379 U.S. at 188, 85 S.Ct. at 286. As we there demonstrated, the Equal Protection Clause requires the consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination. The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States. *Slaughter-House Cases*, 16 Wall. 36, 71, 21 L.Ed. 394 (1873); *Strauder v. State of West Virginia*, 100 U.S. 303, 307—308, 25 L.Ed. 664 (1880); *Ex parte Virginia*, 100 U.S. 339, 344—345, 26 L.Ed. 676 (1880); *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948); *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961).

***11** There can be no question but that Virginia’s miscegenation statutes rest solely upon distinctions drawn

according to race. The statutes proscribe generally accepted conduct if engaged in by members of different races. Over the years, this Court has consistently repudiated '(d)istinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.' *Hirabayashi v. United States*, 320 U.S. 81, 100, 63 S.Ct. 1375, 1385, 87 L.Ed. 1774 (1943). At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the 'most rigid scrutiny,' *Korematsu v. United States*, 323 U.S. 214, 216, 65 S.Ct. 193, 194, 89 L.Ed. 194 (1944), and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate. Indeed, two members of this Court have already stated that they 'cannot conceive of a valid legislative purpose * * * which makes the color of a person's skin the test of whether his conduct is a criminal offense.' *McLaughlin v. Florida*, supra, 379 U.S. at 198, 85 S.Ct. at 292, (Stewart, J., joined by Douglas, J., concurring).

There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.¹¹ We have consistently denied *12 the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.

****1824 II.**

These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause

Footnotes

¹ Section 1 of the Fourteenth Amendment provides:
'All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; 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.'

² 206 Va. 924, 147 S.E.2d 78 (1966).

of the Fourteenth Amendment. The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.

Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival. *Skinner v. State of Oklahoma*, 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L.Ed. 1655 (1942). See also *Maynard v. Hill*, 125 U.S. 190, 8 S.Ct. 723, 31 L.Ed. 654 (1888). To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State.

These convictions must be reversed. It is so ordered.

Reversed.

***13** Mr. Justice STEWART, concurring.

I have previously expressed the belief that 'it is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor.' *McLaughlin v. State of Florida*, 379 U.S. 184, 198, 85 S.Ct. 283, 292, 13 L.Ed.2d 222 (concurring opinion). Because I adhere to that belief, I concur in the judgment of the Court.

All Citations

388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010

- 3 Section 20—57 of the Virginia Code provides:
'Marriages void without decree.—All marriages between a white person and a colored person shall be absolutely void without any decree of divorce or other legal process.' Va.Code Ann. s 20—57 (1960 Repl.Vol.).
- 4 Section 20—54 of the Virginia Code provides:
'Intermarriage prohibited; meaning of term 'white persons.'—It shall hereafter be unlawful for any white person in this State to marry any save a white person, or a person with no other admixture of blood than white and American Indian. For the purpose of this chapter, the term 'white person' shall apply only to such person as has no trace whatever of any blood other than Caucasian; but persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasic blood shall be deemed to be white persons. All laws heretofore passed and now in effect regarding the intermarriage of white and colored persons shall apply to marriages prohibited by this chapter.' Va.Code Ann. s 20—54 (1960 Repl.Vol.).
The exception for persons with less than one-sixteenth 'of the blood of the American Indian' is apparently accounted for, in the words of a tract issued by the Registrar of the State Bureau of Vital Statistics, by 'the desire of all to recognize as an integral and honored part of the white race the descendants of John Rolfe and Pocahontas * * *.' Plecker, *The New Family and Race Improvement*, 17 Va.Health Bull., Extra No. 12, at 25—26 (New Family Series No. 5, 1925), cited in Wadlington, *The Loving Case; Virginia's Anti-Miscegenation Statute in Historical Perspective*, 52 Va.L.Rev. 1189, 1202, n. 93 (1966).
Section 1—14 of the Virginia Code provides:
Colored persons and Indians defined.—Every person in whom there is ascertainable any Negro blood shall be deemed and taken to be a colored person, and every person not a colored person having one fourth or more of American Indian blood shall be deemed an American Indian; except that members of Indian tribes existing in this Commonwealth having one fourth or more of Indian blood and less than one sixteenth of Negro blood shall be deemed tribal Indians.' Va.Code Ann. s 1—14 (1960 Repl.Vol.).
- 5 After the initiation of this litigation, Maryland repealed its prohibitions against interracial marriage, Md.Laws 1967, c. 6, leaving Virginia and 15 other States with statutes outlawing interracial marriage: Alabama, Ala.Const., Art. 4, s 102, Ala.Code, Tit. 14, s 360 (1958); Arkansas, Ark.Stat. Ann. s 55—104 (1947); Delaware, Del.Code Ann., Tit. 13, s 101 (1953); Florida, Fla.Const., Art. 16, s 24, F.S.A., Fla.Stat. s 741.11 (1965) F.S.A.; Georgia, Ga.Code Ann. s 53—106 (1961); Kentucky, Ky.Rev.Stat. Ann. s 402.020 (Supp.1966); Louisiana, La.Rev.Stat. s 14:79 (1950); Mississippi, Miss.Const., Art. 14, s 263, Miss.Code Ann. s 459 (1956); Missouri, Mo.Rev.Stat. s 451.020 (Supp.1966), V.A.M.S.; North Carolina, N.C.Const., Art. XIV, s 8, N.C.Gen.Stat. s 14—181 (1953); Oklahoma, Okla.Stat., Tit. 43, s 12 (Supp.1965); South Carolina, S.C.Const., Art. 3, s 33, S.C.Code Ann. s 20—7 (1962); Tennessee, Tenn.Const., Art. 11, s 14, Tenn.Code Ann. s 36—402 (1955); Vernon's Ann.Texas, Tex.Pen.Code, Art. 492 (1952); West Virginia, W.Va.Code Ann. s 4697 (1961).
Over the past 15 years, 14 States have repealed laws outlawing interracial marriages: Arizona, California, Colorado, Idaho, Indiana, Maryland, Montana, Nebraska, Nevada, North Dakota, Oregon, South Dakota, Utah, and Wyoming.
The first state court to recognize that miscegenation statutes violate the Equal Protection Clause was the Supreme Court of California. *Perez v. Sharp*, 32 Cal.2d 711, 198 P.2d 17 (1948).
- 6 For a historical discussion of Virginia's miscegenation statutes, see Wadlington, *supra*, n. 4.
- 7 Va.Code Ann. s 20—54 (1960 Repl.Vol.).
- 8 Va.Code Ann. s 20—53 (1960 Repl.Vol.).
- 9 Va.Code Ann. s 20—50 (1960 Repl.Vol.).
- 10 Va.Code Ann. s 20—54 (1960 Repl.Vol.).
- 11 Appellants point out that the State's concern in these statutes, as expressed in the words of the 1924 Act's title, 'An Act to Preserve Racial Integrity,' extends only to the integrity of the white race. While Virginia prohibits whites from marrying any nonwhite (subject to the exception for the descendants of Pocahontas), Negroes, Orientals, and any other racial class may intermarry without statutory interference. Appellants contend that this distinction renders Virginia's miscegenation statutes arbitrary and unreasonable even assuming the constitutional validity of an official purpose to preserve 'racial integrity.' We need not reach this contention because we find the racial classifications in these statutes repugnant to the Fourteenth Amendment, even assuming an even-handed state purpose to protect the 'integrity' of all races.

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91 S.Ct. 1160
Supreme Court of the United States

Fred T. MACKEY, Petitioner,
v.
UNITED STATES.

No. 36.
|
Argued Oct. 21, 1970.
|
Decided April 5, 1971.

Synopsis

Petitioner, who had been convicted of evading payment of income taxes by willfully preparing and causing to be prepared false and fraudulent tax returns, moved to vacate sentence and set aside judgment of conviction. The United States District Court for the Northern District of Indiana denied motion, and appeal was taken. The Court of Appeals, 411 F.2d 504, affirmed, and certiorari was granted. The Supreme Court held that Supreme Court decisions that statutory requirement to register and file gambling tax returns, compelled self-incrimination and privilege was complete defense to prosecution for failure to register and pay related taxes so that registration and excise tax returns filed in response to statutory command were compelled statements within meaning of Fifth Amendment and accordingly were inadmissible as part of prosecution's case-in-chief did not apply retroactively to invalidate accused's prior conviction because his wagering excise tax returns were introduced against him at his trial.

Judgment affirmed.

Mr. Justice Brennan filed an opinion concurring in the judgment in which Mr. Justice Marshall joined.

Mr. Justice Douglas filed a dissenting opinion in which Mr. Justice Black joined.

Mr. Justice Harlan filed an opinion concurring in the judgment.

For concurring opinion of Mr. Justice Harlan see 91 S.Ct. 1171.

****1160** Syllabus*

***667** At petitioner's trial for income tax evasion, the

Government used monthly wagering tax forms petitioner had filed, as required by statute, to show that the gross amount of wagers he reported, less business expenses, exceeded the gambling profits reported on his income tax returns. Petitioner objected on the ground that the forms were prejudicial and irrelevant, but he was convicted in 1964 and the Court of Appeals affirmed. After this Court's 1968 decisions in *Marchetti v. United States*, 390 U.S. 39, 88 S.Ct. 697, 19 L.Ed.2d 889, and *Grosso v. United States*, 390 U.S. 62, 88 S.Ct. 709, 19 L.Ed.2d 906, petitioner applied for postconviction relief on the ground that the Fifth Amendment barred the prosecution's use of the wagering tax forms. The District Court denied the application. The Court of Appeals affirmed, holding that *Marchetti* and *Grosso* would not be applied retroactively to overturn the earlier income tax evasion ****1161** conviction based on the then-applicable constitutional principles. Held: The judgment is affirmed.

411 F.2d 504, affirmed.

Mr. Justice WHITE, joined by THE CHIEF JUSTICE, Mr. Justice STEWART, and Mr. Justice BLACKMUN, concluded that *Marchetti* and *Grosso* are not to be applied retroactively, since no threat to the reliability of the factfinding process was involved in the use of the wagering tax forms at petitioner's trial. *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 86 S.Ct. 459, 15 L.Ed.2d 453; *Johnson v. New Jersey*, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882; *Williams v. United States*, 401 U.S. 646, 91 S.Ct. 1148, 28 L.Ed.2d 388. Pp. 1150—1153.

Mr. Justice HARLAN concluded that in this case, here on collateral review, the judgment should be affirmed, since he cannot say that the pre-*Marchetti* rule that prevailed at the time of petitioner's conviction, viz., that the registration requirement and obligation to pay the gambling tax did not violate the Fifth Amendment, was so grossly erroneous as to work an unexcusable inequity against petitioner and that the then-existing justification for that result (that persons could avoid self-incrimination by ceasing to engage in illegal activities) is not without some force. P. 1184.

Mr. Justice BRENNAN, joined by Mr. Justice MARSHALL, concluded that the Fifth Amendment does not bar the use of information ***668** that, in furtherance of the general scheme of collecting taxes and enforcing the tax laws, required those in the business of accepting wagers to report their income, a situation readily distinguishable from that in *Marchetti* and *Grosso*, where the Amendment was held to bar forced disclosure of information that would have subjected the individual concerned to the 'real and appreciable' hazard of self-incrimination for violating

pervasive state or federal laws proscribing gambling. Pp. 1165—1171.

Attorneys and Law Firms

William M. Ward for petitioner.

Matthew J. Zinn for respondent.

Opinion

Mr. Justice WHITE announced he judgment of the Court and an opinion in which THE CHIEF JUSTICE, Mr. Justice STEWART, and Mr. Justice BLACKMUN join.

An indictment was returned in March 1963 charging petitioner Fred T. Mackey in five counts of evading payment of income taxes by willfully preparing and causing to be prepared false and fraudulent tax returns for the years 1956 through 1960, in violation of 26 U.S.C. s 7201. On January 21, 1964, a jury in the District Court for the Northern District of Indiana found Mackey guilty on all five counts.¹ The conviction was affirmed on appeal by the Court of Appeals for the *669 Seventh Circuit in the spring of 1965. 345 F.2d 499 (CA7), cert. denied, 382 U.S. 824, 86 S.Ct. 54, 15 L.Ed.2d 69 (1965).

At petitioner's trial, the Government used the networth method to prove evasion of income taxes.² As part of its case, it introduced 60 wagering excise tax returns—one for every month of each of the five years covered by the indictment—filed by petitioner pursuant to 26 U.S.C. s 4401. A summary exhibit prepared from these returns and petitioner's income tax returns were also introduced, and an Internal Revenue Service technical advisor testified that for the years in question the totals of the **1162 gross amount of wagers reported on the wagering tax returns, less the expenses of running petitioner's 'policy wheel' operation as reported on his annual income tax returns, exceeded the net profits from gambling reported on the petitioner's income tax returns. Defense counsel objected to the introduction of these exhibits, arguing that they were prejudicial, inflammatory, and irrelevant; the Government responded that the wagering tax returns and the summary exhibit were relevant because they showed a likely source of unreported income. The exhibits were admitted, and the Court of Appeals found, without specific discussion, no error in the ruling.³

On January 29, 1968, this Court held that the Fifth Amendment privilege against compulsory self-incrimination was a valid defense to a prosecution for failure to register as a gambler and to pay the related

occupational and gambling excise taxes under *670 26 U.S.C. ss 4401, 4411, 4412. *Marchetti v. United States*, 390 U.S. 39, 88 S.Ct. 697, 19 L.Ed.2d 889 (1968); *Grosso v. United States*, 390 U.S. 62, 88 S.Ct. 709, 19 L.Ed.2d 906 (1968). Petitioner, who had begun serving his sentence in December 1965, filed on February 12, 1968, a motion pursuant to 28 U.S.C. s 2255 to vacate his sentence and set aside the judgment of conviction on authority of *Marchetti* and *Grosso*. The motion was denied by the District Court for the Northern District of Indiana,⁴ and the Court of Appeals affirmed. 411 F.2d 504 (CA7 1969).

Although the Court of Appeals suggested that petitioner's argument that he had not waived the Fifth Amendment claim by his failure to raise it at trial was open to question, 411 F.2d, at 506—507, it specifically held that *Marchetti* and *Grosso* would not be applied retroactively to upset a pre-*Marchetti* conviction for *671 evading payment of income tax simply because the wagering excise tax returns filed pursuant to 26 U.S.C. s 4401 were introduced in evidence at trial. Employing the threefold analysis set forth in our retroactivity decisions, see, e.g., *Stovall v. Denno*, 388 U.S. 293, 297, 87 S.Ct. 1967, 1970, 18 L.Ed.2d 1199 (1967), the Court of Appeals found that law enforcement officials had relied on the old rule, that retroactive application of *Marchetti* and *Grosso* in cases such as petitioner's would have a substantial impact on the administration of justice, and that '(t)he unreliability of the fact-finding process which is the touchstone of retroactivity is simply not threatened by the impersonal command of the wagering tax laws.' 411 F.2d at 509. We granted certiorari. 396 U.S. 954, 90 S.Ct. 426, 24 L.Ed.2d 419.

****1163 I**

In *United States v. Kahriger*, 345 U.S. 22, 73 S.Ct. 510, 97 L.Ed. 754 (1953), a prosecution for failure to register and pay the gambling tax, this Court held that the registration requirement and the obligation to pay the gambling tax did not violate the Fifth Amendment. The Court construed the privilege as relating 'only to past acts, not to future acts that may or may not be committed. * * * Under the registration provisions of the wagering tax, appellee is not compelled to confess to acts already committed, he is merely informed by the statute that in order to engage in the business of wagering in the future he must fulfill certain conditions.' 345 U.S., at 32—33, 73 S.Ct., at 515. *Lewis v. United States*, 348 U.S. 419, 75 S.Ct. 415, 99 L.Ed. 475 (1955), reaffirmed this construction of the Fifth Amendment. Thirteen years later we could not agree with what was

deemed an ‘excessively narrow’ view of the scope of the privilege. 390 U.S., at 52, 88 S.Ct., at 704. The ‘force of the constitutional prohibition is (not) diminished merely because confession of a guilty purpose precedes the act which it is subsequently employed to *672 evidence.’ 390 U.S., at 54, 88 S.Ct., at 705. The gambling registration and tax requirements were held to present substantial risks of self-incrimination and therefore to be unenforceable; imposition of criminal penalties for noncompliance was an impermissible burden on the exercise of the privilege.

Until *Marchetti and Grosso*, then, the registration and gambling tax provisions had the express approval of this Court; the Fifth Amendment provided no defense to a criminal prosecution for failure to comply. But as of January 29, 1968, the privilege was expanded to excuse noncompliance. The statutory requirement to register and file gambling tax returns was held to compel self-incrimination and the privilege became a complete defense to a criminal prosecution for failure to register and pay the related taxes. It followed that the registration and excise tax returns filed in response to the statutory command were compelled statements within the meaning of the Fifth Amendment and accordingly were inadmissible in evidence as part of the prosecution’s case in chief. The question before us is whether the *Marchetti-Grosso* rule applies retroactively and invalidates Mackey’s conviction because his gambling excise tax returns were introduced against him at his trial for income tax evasion.

We have today reaffirmed the nonretroactivity of decisions overruling prior constructions of the Fourth Amendment. *Williams v. United States and Elkanich v. United States*, 401 U.S. 646, 91 S.Ct. 1148, 28 L.Ed.2d 388. The decision in those cases represents the approach to the question of when to accord retroactive sweep to a new constitutional rule taken by this Court in the line of cases from *Linkletter*⁵ in 1965 to *Desist*⁶ in 1969. Among those cases were two which determined that earlier decisions extending the *673 reach of the Fifth Amendment privilege against compelled self-incrimination would not be retroactively applied to invalidate prior convictions that in all respects conformed to the then-controlling law.

In *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 86 S.Ct. 459, 15 L.Ed.2d 453 (1966), the Court declined to apply the rule of *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965), to prisoners seeking collateral relief. *Griffin* had construed the Fifth Amendment to forbid comment on defendants’ failure to testify, thereby removing a burden from the exercise of the privilege against compulsory self-incrimination and further implementing its purpose. The basic purpose of the privilege, we said, was not related to ‘protecting the innocent from conviction,’ **1164 382 U.S., at 415, 86

S.Ct., at 464, the privilege ‘is not an adjunct to the ascertainment of truth,’ but is aimed at serving the complex of values on which it was historically rested. 382 U.S., at 416, 86 S.Ct., at 465. Given this purpose, clear reliance on the pre-*Griffin* rules, and the frustration of state interests which retroactivity would have entailed, we refused relief to a state prisoner seeking collateral relief although the prosecutor’s comment on his failure to take the stand at his trial would have infringed the new rule that was announced in *Griffin* and was being applied in contemporary trials.

Johnson v. New Jersey, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966), reaffirmed this view of the Fifth Amendment by declining to apply the *Miranda*’ rules to cases pending on direct review as well as to those involving applications for collateral relief. Stating that the ‘prime purpose of these rulings is to guarantee full effectuation of the privilege against self-incrimination, the mainstay of our adversary system of criminal justice,’ 384 U.S., at 729, 86 S.Ct., at 1779, the Court also recognized that the new rules to some extent did guard against the possibility of unreliable admissions given *674 during custodial interrogation. *Id.*, at 730, 86 S.Ct., at 1779. The question, however, was one of ‘probabilities.’ The hazard of untrustworthy results in past trials was not sufficient apparent to require retroactive application in view of the existing, well-defined remedies against the use of many involuntary confessions, the obvious fact that the new warnings had not been standard practice prior to *Miranda*, and the consequent disruption to the administration of the criminal law.

II

Guided by our decisions dealing with the retroactivity of new constitutional interpretations of the broad language of the Bill of Rights, we agree with the Court of Appeals that *Marchetti and Grosso* should not have any retroactive effect on Mackey’s conviction. Petitioner was convicted in strict accordance with then-applicable constitutional norms. Mackey would have a significant claim only if *Marchetti and Grosso* must be given full retroactive sweep. But in overruling *Kahriger and Lewis*, the Court’s purpose was to provide for a broader implementation of the Fifth Amendment privilege—a privilege that does not include at its core a concern for improving the reliability of the results reached at criminal trials. There is no indication in *Marchetti or Grosso* that one of the considerations which moved the Court to hold that the Congress could not constitutionally compel citizens to register as gamblers and file related tax returns was the probable unreliability of

such statements once given. Petitioner has not advanced any objective considerations suggesting such unreliability. The wagering tax returns introduced in evidence at his trial have none of the characteristics, and hence none of the potential unreliability, of coerced confessions produced by 'overt and obvious coercion.' Johnson, 384 U.S., at 730, 86 S.Ct., at 1779. Nor does Mackey suggest that his returns—made under *675 oath—were inaccurate in any respect.⁸ Thus, a gambling excise tax return, like physical evidence seized in violation of a new interpretation of the Fourth Amendment, is concededly relevant and probative even though obtained by the Government through means since defined by this Court as constitutionally objectionable. As in *Desist*, *Elkanich*, and *Williams*, the result here should be that a pre-Marchetti trial in which the Government employed such evidence is not set aside through retroactive application of the new constitutional principle.

The short of the matter is that Marchetti and Grosso raise not the slightest **1165 doubt about the accuracy of the verdict of guilt returned here. Under these circumstances, the principles represented by *Elkanich* and *Williams*, as well as by *Tehan* and *Johnson*, must control. For *Tehan* and *Johnson* indicate that even though decisions reinterpreting the Fifth Amendment may create marginal doubts as to the accuracy of the results of past trials, the purposes of those decisions are adequately served by prospective application. Accordingly, the judgment of the Court of Appeals is affirmed.

It is so ordered.

Judgment affirmed.

*702 Mr. Justice BRENNAN, with whom Mr. Justice MARSHALL joins, concurring in the judgment.

Three years ago we held that the federal wagering tax statutes, 26 U.S.C. s 4401 et seq., subjected those to whom they applied to such a real and substantial danger of self-incrimination that those statutes could 'not be employed to punish criminally those persons who have defended a failure to comply with their requirements with a proper assertion of the privilege against self-incrimination.' *Marchetti v. United States*, 390 U.S. 39, 42, 88 S.Ct. 697, 699, 19 L.Ed.2d 889 (1968); *Grosso v. United States*, 390 U.S. 62, 88 S.Ct. 709, 19 L.Ed.2d 906 (1968). This case presents the question what, if any, use the Government is entitled to make of wagering excise tax returns, filed pursuant to the statutory scheme, in a prosecution for income tax evasion. Since I believe the Fifth Amendment does not prevent the use of such returns to show a likely source of unreported income in a criminal prosecution for

income tax evasion, I concur in the judgment of the Court.¹

*703 I

The relevant facts may be briefly stated. As required by statute, petitioner from 1956 through 1960 filed monthly wagering excise tax returns showing his name, address, and the gross amount of wagers accepted by him during the month in question.² He was subsequently indicted for willfully attempting to evade payment of his income taxes for those years. 26 U.S.C. s 7201. At trial, the Government used the wagering tax returns to show that the gross amount of wagers reported, less the expenses of petitioner's business as reported on his annual income tax returns, was greater than the profits from gambling reported on those same annual returns. The Court of Appeals affirmed over petitioner's claim that the returns were inflammatory, prejudicial, and irrelevant. 345 F.2d 499 (CA7 1965). After our decisions in *Marchetti v. United States*, supra, and *Grosso v. United States*, supra, petitioner filed an application for postconviction relief on the ground that use of the wagering tax returns was barred by the Fifth Amendment. The application was denied by the District Court in an unreported opinion, and the denial was affirmed by the Court of Appeals. 411 F.2d 504 (CA7 1969).

II

At first glance, petitioner's argument appears compellingly simple. Since the information required of him under the federal wagering tax statutes presented a real and substantial danger of subjecting him to criminal prosecution for his gambling activities, the Government *704 lacked the power to compel the information absent a waiver of his Fifth Amendment privilege unless it provided the necessary immunity from prosecution. **1166 *Marchetti v. United States*, 390 U.S. 39, 88 S.Ct. 697, 19 L.Ed.2d 889 (1968); *Grosso v. United States*, 390 U.S. 62, 88 S.Ct. 709, 19 L.Ed.2d 906 (1968); *Heike v. United States*, 227 U.S. 131, 143—144, 33 S.Ct. 226, 228, 57 L.Ed. 450 (1913); *Counselman v. Hitchcock*, 142 U.S. 547, 584—586, 12 S.Ct. 195, 206, 35 L.Ed. 1110 (1892). Since petitioner filed the wagering tax returns under threat of criminal prosecution for failure to do so, 26 U.S.C. s 7203, and since he never knowingly waived his Fifth Amendment

privilege, see *Grosso v. United States*, supra, 390 U.S., at 70—71, 88 S.Ct., at 714—715, he is entitled to the immunity required by the Fifth Amendment. *Adams v. Maryland*, 347 U.S. 179, 181, 74 S.Ct. 442, 444, 98 L.Ed.2d 608 (1954). Therefore, petitioner argues, the Government was foreclosed from using the information provided by him on the wagering tax returns against him in a criminal prosecution for evasion of the income tax.

But in *Marchetti* and *Grosso*, we dealt with the question whether, in light of possible uses of testimonial evidence sought to be compelled over a claim of privilege, the Fifth Amendment allows the individual concerned to withhold the evidence without penalty. In the present case, however, we deal with the scope of immunity required when the privilege is claimed and the evidence is nevertheless compelled. This distinction, in my view critical, is overlooked by petitioner. Where testimony has been refused, adjudication of necessity must take place in something of a vacuum. Although an individual may not ‘draw a conjurer’s circle around the whole matter’ by refusing to provide any explanation why the information sought might be incriminating, *United States v. Sullivan*, 274 U.S. 259, 264, 47 S.Ct. 607, 608, 71 L.Ed. 1037 (1927), he need not provide the incriminating evidence in order to demonstrate that the privilege was validly invoked, *Hoffman v. United States*, 341 U.S. 479, 486, 71 S.Ct. 814, 818, 95 L.Ed. 1118 (1951). In such circumstance, sanctions may be applied for refusal *705 to testify only if it is “perfectly clear, from a careful consideration of all the circumstances in the case * * * that the answer(s) cannot possibly have (a) tendency’ to incriminate.’ *Id.*, at 488, 71 S.Ct., at 819, quoting *Temple v. Commonwealth*, 75 Va. 892, 898 (1881) (emphasis in original).

But where the individual has succumbed to compulsion and provided the information sought, finer analytical tools may be employed. ‘A factual record showing, for example, the substance of the individual’s compelled testimony, the way that testimony was subsequently used by the prosecutor, and the crime for which the individual was ultimately prosecuted, provides important considerations to anchor and inform the constitutional judgment.’ *Piccirillo v. New York*, 400 U.S. 548, 558, 91 S.Ct. 520, 526, 27 L.Ed.2d 596 (1971) (Brennan, J., dissenting). Thus, even when the privilege against self-incrimination permits an individual to refuse to answer questions asked by the Government, if false answers are given the individual may be prosecuted for making false statements. *United States v. Knox*, 396 U.S. 77, 80—83, 90 S.Ct. 363, 365—367, 24 L.Ed.2d 275 (1969).

The flaw in petitioner’s argument lies in its misunderstanding of *Marchetti* and *Grosso* as applied to a situation where testimonial evidence has been compelled over a claim of privilege. For we did not, in those cases,

cast any doubt upon the power of the United States to impose taxes on unlawful, as well as on lawful activities. 390 U.S., at 44, 88 S.Ct., at 700, see *United States v. Sullivan*, 274 U.S., at 263, 47 S.Ct., at 607. Nor did we suggest that the Fifth Amendment would make it impossible for Congress to construct an enforceable statutory scheme for reporting by individuals of their illicit gains. See 390 U.S., at 72, 88 S.Ct., at 716 (Brennan, J., concurring). Rather, we noted that ‘(t)he laws of every State, except Nevada, include broad prohibitions against gambling, wagering, and associated activities,’ and that even Nevada imposed *706 ‘criminal penalties upon lotteries and certain other wagering activities taxable under (the federal) statutes.’ *Id.*, at 44—46, 88 S.Ct., at 700, 701. **1167 We noted that federal statutes prohibit the use of the mails and of interstate commerce for many activities ancillary to wagering.³ *Id.*, at 44, 88 S.Ct., at 700. On that basis we concluded that ‘throughout the United States, wagering is ‘an area permeated with criminal statutes,’ and those engaged in wagering are a group ‘inherently suspect of criminal activities.’ *Albertson v. SACB*, 382 U.S. 70, 79, 86 S.Ct. 194, 199, 15 L.Ed.2d 165.’ *Marchetti*, 390 U.S., at 47, 88 S.Ct. at 702. Accordingly, registration and payment of the occupational tax, or the filing of a wagering excise tax return that the Government required as a prerequisite to payment of the excise tax,⁴ would subject the individual concerned to “real and appreciable,” and not merely ‘imaginary and unsubstantial,’ hazards of self-incrimination.’ *Id.*, at 48, 88 S.Ct., at 702; *Grosso*, 390 U.S., at 64—67, 88 S.Ct., at 711—713. Since we found the ‘required records’ doctrine of *Shapiro v. United States*, 335 U.S. 1, 68 S.Ct. 1375, 92 L.Ed. 1787 (1948), inapplicable to the statutory requirement that a gambler admit his present or future involvement in gambling activity, *Marchetti*, 391 U.S., at 55—57, 88 S.Ct., at 706—707, *Grosso*, 390 U.S., at 67—69, 88 S.Ct., at 713—714, we held that the privilege against self-incrimination was available to the petitioners as a defense to prosecution for failure to register for, report, or pay the federal wagering taxes.⁵

*707 Had the present case arisen in the context of a federal investigation designed simply to uncover evidence of criminal activity, we would need to go no further.⁶ In such a situation, petitioner would be entitled to ‘absolute immunity * * * from prosecution (under federal laws) for any transaction revealed in that testimony.’ *Piccirillo v. New York*, 400 U.S., at 562, 91 S.Ct., at 527 (Brennan, J., dissenting); *Counselman v. Hitchcock*, 142 U.S., at 584—586, 12 S.Ct., at 206. But although we recognized in *Marchetti* that ‘Congress intended information obtained as a consequence of registration and payment of the (gambling) occupational tax to be provided to interested prosecuting authorities,’ *Marchetti*, 390 U.S., at 58—59, 88 S.Ct., at 708, 19 L.Ed.2d 889,⁷ we nevertheless

concluded that the 'United States' principal interest is evidently the collection of revenue, and not the punishment of gamblers.' *Id.*, at 57, 88 S.Ct., at 707; see **1168 *United States v. Calamaro*, 354 U.S. 351, 358, 77 S.Ct. 1138, 1143, 1 L.Ed.2d 1394 (1957).

This dual purpose is significant here. For while the Government may not undertake the prosecution of crime by inquiring of individuals what criminal acts they have lately planned or committed, it may surround a taxing or regulatory scheme with reporting requirements designed *708 to insure compliance with the scheme. See *Marchetti*, 390 U.S., at 44, 60, 88 S.Ct., at 700, 708; *Grosso*, 390 U.S., at 72—74, 88 S.Ct., at 715—717 (concurring opinion). In the latter situation, the privilege may not be claimed if the danger of incrimination is only that the information required may show a violation of the taxing or regulatory scheme. Thus in *Shapiro v. United States*, 335 U.S. 1, 68 S.Ct. 1375, 92 L.Ed. 1787 (1948), we upheld a conviction based upon records of sales provided under compulsion of a regulation under the Emergency Price Control Act, 56 Stat. 23. The privilege had been claimed on the basis that the records would (as they did) provide evidence of a violation of the Act. We rejected the claim, reasoning that the Government has power to compel "suitable information of transactions which are the appropriate subjects of governmental regulation, and the enforcement of restrictions validly established." *Id.*, at 33, 68 S.Ct., at 1392.⁸ And in *United States v. Sullivan*, 274 U.S. 259, 47 S.Ct. 607, 71 L.Ed. 1037 (1927), we rejected a claim that the privilege against self-incrimination allowed an individual whose income was earned in crime to file no form of income tax return whatsoever. Although dubious, we noted the possibility that the privilege could be claimed to excuse reporting the amount of income earned because that alone would disclose the criminal activities that had produced the income. *Id.*, at 263—264, 47 S.Ct., at 607. But neither in *Sullivan* nor in any other of our cases is there the slightest suggestion that an individual may refuse to disclose the income he has earned solely because such disclosure will indicate a failure to pay the taxes imposed on that income.

Of Course, the Government may not insulate inquiries designed to produce incriminating information merely by *709 labeling the inquiry a necessary incident of a regulatory scheme. Where the essence of a statutory scheme is to forbid a given class of activities, it may not be enforced by requiring individuals to report their violations. See *Marchetti*, *supra*; *Haynes v. United States*, 390 U.S. 85, 88 S.Ct. 722, 19 L.Ed.2d 923 (1968); *Albertson v. SACB*, 382 U.S. 70, 86 S.Ct. 194, 15 L.Ed.2d 165 (1965). But where the statutory scheme is not designed to forbid certain acts, but only to require that they be done in a certain way, the Government may enforce its requirements by a

compulsory scheme of reporting, directed at all who engage in those activities, and not on its face designed simply to elicit incriminating information. *Shapiro v. United States*, *supra*; see *Albertson v. SACB*, *supra*, 382 U.S., at 77—80, 86 S.Ct., at 198—199.

Viewed in this light, then, *Marchetti* and *Grosso* are the outgrowth of two principles inapplicable to the problem at hand. The first is that when a given class of activities is, in the main, made criminal by either state or federal law, an individual may not be compelled to disclose whether he engages in activities within the class unless his disclosure is compensated by the requisite grant of immunity.⁹ *Marchetti*, *supra*; *Haynes v. United States*, *supra*; *Albertson v. SACB*, *supra*. The second is that such individuals may likewise not be compelled, absent sufficient immunity, to disclose the details of their activities within such a suspect class: for if the mere admission of engaging in any of a class of activities is sufficiently likely to lead to criminal prosecution that the privilege against self-incrimination may be invoked, *710 admission of the details of these activities is a fortiori likely to lead to incrimination. *Grosso*, *supra*.

Neither of these principles, however, controls the case at hand. The relevant class of activities 'permeated with criminal statutes,' *Albertson v. SACB*, 382 U.S., at 79, 86 S.Ct., at 199, is the class of activities related to gambling. But this case does not involve a prosecution for gambling or related activities. It involves a prosecution for income tax evasion, by use of information compelled pursuant to a scheme requiring all those who engage in the business of accepting wagers¹⁰ to report their income twice. For the reasons discussed above, the Government may validly enforce the tax laws by a scheme of required reports, directed at all persons engaging in certain types of activity, and requiring them to report the amount of their income so that the Government may insure that the requisite taxes have been paid. If such a reporting requirement raises a substantial danger of incrimination under state or federal statutes making criminal the activity that is being taxed, an individual may, of course, assert the privilege against self-incrimination and refuse to disclose the information sought. We so held in *Marchetti* and *Grosso*. And if the information has been compelled over a claim of privilege, application of those cases requires that the individual be protected against the use of that information in state prosecutions under the statutes making criminal the taxed activity, and to complete immunity from prosecution under federal statutes of like kind. *Piccirillo v. New York*, 400 U.S., at 561—574, 91 S.Ct., at 527—533 (Brennan, J., dissenting); *Adams v. Maryland*, 347 U.S., at 181, 74 S.Ct., at 444, 98 L.Ed. 608; *Counselman v. Hitchcock*, 142 U.S., at 584—586, 12 S.Ct., at 206; cf. *Murphy v. Waterfront Comm.*, 378 U.S. 52, 79, and n. 18, 84 S.Ct. 1594, 1609, 12 L.Ed.2d 678 (1964). He is, in short, entitled to the protection *711

required by the Fifth Amendment. But here the Government was entitled to demand the information that petitioner supplied—his gross income from wagering—in order to enforce the tax laws. Petitioner was entitled to claim the privilege only because of the possibility of prosecution under state or federal gambling laws. No such prosecution is involved here. ‘Once the reason for the privilege ceases, the privilege ceases.’ *Ullmann v. United States*, 350 U.S. 422, 439, 76 S.Ct. 497, 507, 100 L.Ed. 511 (1956). Since the United States was entitled to demand the information at issue here for the purpose to which it was eventually put, the danger that petitioner’s disclosures might also have been impermissibly used does not prevent their present, legitimate use even though the danger of impermissible use would justify refusal to provide the information at all.¹¹

****1170 III**

Finally, our decisions in both *Marchetti* and *Grosso* not to attempt to salvage the statutory scheme by imposing *712 use restrictions do not require that, once evidence has actually been compelled, we refuse to protect a valid governmental interest by restricting use of that evidence any more than is required by the Fifth Amendment. For although we recognized in *Marchetti* that ‘the imposition of use-restrictions would directly preclude effectuation of a significant element of Congress’ purposes in adopting the wagering taxes,’ 390 U.S., at 59, 88 S.Ct., at 708, the primary basis for our refusal to impose such restrictions was that ‘the imposition of such restrictions would necessarily oblige state prosecuting authorities to establish in each case that their evidence was untainted by any connection with information obtained as a consequence of the wagering taxes; the federal requirements would thus be protected, only at the cost of hampering, perhaps seriously, enforcement of state prohibitions against gambling.’ *Ibid.*¹² Since a balance between effective state enforcement of gambling laws and the interests of the federal treasury was one to be struck by Congress, and not this Court, we declined to impose the proposed restrictions. *Id.*, at 59—60, 88 S.Ct., at 708. And in *Grosso*, we merely noted that it would be ‘inappropriate to impose such restrictions upon one portion of a statutory system, when we have concluded that it would be improper, for reasons discussed in *Marchetti*, to do so upon ‘an integral part’ of the same system.’ 390 U.S., at 69, 88 S.Ct., at 714. Once again, however, different considerations apply when the question is not whether information may be compelled but rather to what uses compelled information may be put. Once the

return has *713 been filed, prosecution under state gambling laws can take place only if the State can demonstrate that its evidence is not tainted by information derived from the incriminatory aspects of the return. Since disclosure once made may never be completely undone, this burden must be borne by the State regardless of what additional restrictions are imposed upon use of the return. Accordingly, the considerations that led us to decline the imposition of use restrictions for the future in *Marchetti* and *Grosso* are not compelling in situations where the incriminating information has already been disclosed. Petitioner is therefore entitled to the immunity required by the Fifth Amendment, and to no more. Since I believe the Amendment is no bar to the use to which his wagering tax returns were put, I concur in the judgment of the Court.

Mr. Justice DOUGLAS, with whom Mr. Justice BLACK concurs, dissenting.

I had assumed that all criminal and civil decisions involving constitutional defenses which go in favor of the defendant were necessarily retroactive. That is to say, the Constitution has from Chief Justice Jay’s time been retroactive,* for there were no decisions on the points prior thereto. *Marchetti v. United States*, 390 U.S. 39, 88 S.Ct. 697, 19 L.Ed.2d 889 and **1171 *Grosso v. United States*, 390 U.S. 62, 88 S.Ct. 709, 19 L.Ed.2d 906, exonerated defendants who, when they failed to file returns, were not by reason of *United States v. Kahriger*, 345 U.S. 22, 73 S.Ct. 510, 97 L.Ed. 754, entitled to a constitutional immunity. Why *Marchetti* and *Grosso* are entitled to relief and *Mackey* is not, is a mystery. It is said that *Mackey*’s gambling return, ‘like physical evidence seized in violation of a new interpretation of the Fourth Amendment, is concededly relevant and probative even though obtained by *714 the Government through means since defined by this Court as constitutionally objectionable.’ The same could be said of *Marchetti* and *Grosso*. Yet their convictions were reversed.

I could understand today’s decision if *Marchetti* and *Grosso* had announced only a prospective rule applicable to all like defendants. But when the defendants in those cases are given the benefit of a new constitutional rule forged by the Court, it is not comprehensible, if justice rather than the fortuitous circumstances of the time of the trial is the standard, why all victims of the old unconstitutional rule should not be treated equally.

I can find nothing in the Constitution that authorizes some constitutional rules to be prospective and others to be

retroactive. The majority often says the test is whether a new rule affects the integrity of the factfinding process, *Desist v. United States*, 394 U.S. 244, 89 S.Ct. 1030, 22 L.Ed.2d 248. Yet even that test is not applied when the majority thinks that the impact of the new rule, if applied with due regard to the Equal Protection Clause, would be ‘devastating.’ *Tehan v. Shott*, 382 U.S. 406, 419, 86 S.Ct. 459, 467, 15 L.Ed.2d 453. The Constitution grants this Court no such legislative powers.

U.S. 618, 640, 85 S.Ct. 1731, 1743, 14 L.Ed.2d 601, and *Johnson v. New Jersey*, 384 U.S. 719, 736, 86 S.Ct. 1772, 1783, 16 L.Ed.2d 882, and I adhere to them. I would continue to construe all constitutional safeguards ‘strictly.’

All Citations

401 U.S. 667, 91 S.Ct. 1160, 28 L.Ed.2d 404, 27 A.F.T.R.2d 71-1006, 71-1 USTC P 9305, 1971-1 C.B. 409

My views have been expressed in *Linkletter v. Walker*, 381

Footnotes

- * The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.
- 1 Petitioner received a sentence of five years’ imprisonment and a fine of \$10,000 on each count, the prison terms to be served concurrently.
- 2 This method of prosecution is discussed and approved in *Holland v. United States*, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150 (1954); *Friedberg v. United States*, 348 U.S. 142, 75 S.Ct. 138, 99 L.Ed. 188 (1954); *Smith v. United States*, 348 U.S. 147, 75 S.Ct. 194, 99 L.Ed. 192 (1954); *United States v. Calderon*, 348 U.S. 160, 75 S.Ct. 186, 99 L.Ed. 202 (1954).
- 3 In rejecting petitioner’s application for relief under 28 U.S.C. s 2255, the District Judge so read the Court of Appeals’ earlier opinion. See App. 28.
- 4 The District Court advanced several reasons for denying petitioner’s application. See App. 27—38. Noting that with gambling excise tax returns ‘there is little danger of their unreliability other than their possible understatement of liability,’ *id.*, at 32, the District Judge held that *Marchetti* and *Grosso* should not be applied to petitioner’s case:
‘An examination of these and other cases reveals no instance where the (Supreme) Court has given retroactive application to an exclusionary rule or other Constitutional guarantee where the reliability of the fact-finding process had not been jeopardized. The briefs for (Mackey) have suggested none. In (petitioner) Mackey’s trial, the introduction of the wagering tax forms did not jeopardize the integrity of the trial except to the extent that they showed that he was engaged in illegal activities other than that charged. This possibility was raised by Mackey’s attorneys at the trial, and apparently on appeal, and both times the Courts held that there was no error.’ *Id.*, at 36.
We note in reference to the last point mentioned by the District Judge that at trial, the court’s charge to the jury included several strong admonitions to the effect that the question of whether any business run by petitioner was legal or illegal was irrelevant to the offense charged in the indictment—failure to report income for five years. See Brief for the United States 11.
- 5 *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965).
- 6 *Desist v. United States*, 394 U.S. 244, 89 S.Ct. 1030, 22 L.Ed.2d 248 (1969).
- 7 *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).
- 8 See n. 4, *supra*.
- 1 This view of the case makes it unnecessary for me to decide whether petitioner’s conviction should be examined without regard to the standards embodied in *Marchetti* and *Grosso*. The balance of this opinion is written on the assumption that *Marchetti* and *Grosso* are applicable.
- 2 See 26 U.S.C. s 6011(a); Treas.Reg. s 44.6011(a)—1(a), 26 CFR s 44.6011(a)—1(a).
- 3 See 18 U.S.C. s 1084 (interstate transmission of wagering information), ss 1301—1304 (conduct of lotteries by mails or broadcasting), s 1952 (interstate travel in aid of, *inter alia*, gambling), s 1953 (interstate transportation of wagering paraphernalia).

- 4 We were informed by the United States in *Grosso* that the wagering excise tax would not be accepted unless accompanied by the required return. 390 U.S., at 65, 88 S.Ct., at 712.
- 5 In addition, we declined in both *Marchetti* and *Grosso* the Government's invitation to salvage the statutory scheme by imposing use restrictions on the information required. *Marchetti*, 390 U.S., at 58—60, 88 S.Ct., at 707—708; *Grosso*, 390 U.S., at 69, 88 S.Ct., at 714. The relevance of this to the issue before us is discussed *infra*, at 1169—1170. For the moment it is sufficient to note that even the imposition of use restrictions could not have saved the convictions at issue in those cases, for the petitioners obviously had no way of knowing, when they failed to register and file the required forms, that use restrictions might be imposed. See *Murphy v. Waterfront Comm.*, 378 U.S. 52, 79—80, 84 S.Ct. 1594, 1609—1610, 12 L.Ed.2d 678 (1964); *Reina v. United States*, 364 U.S. 507, 514—515, 71 S.Ct. 260, 264—265, 5 L.Ed.2d 249 (1960).
- 6 See n. 1, *supra*.
- 7 In *Grosso*, we remarked that 'although there is no statutory instruction, as there is for the occupational tax, that state and local prosecuting officers be provided listings of those who have paid the excise tax, neither has Congress imposed explicit restrictions upon the use of information obtained as a consequence of payment of the tax,' and that the Revenue Service in fact disseminated such information to 'interested prosecuting authorities.' *Grosso*, 390 U.S., at 66, 88 S.Ct., at 712.
- 8 The regulation upheld in *Shapiro* required only the keeping of records, and not their reporting; the information there was compelled pursuant to an administrative subpoena. But as we noted in *Marchetti*, this situation is constitutionally indistinguishable from a simple reporting requirement. 390 U.S., at 56 n. 14, 88 S.Ct., at 706.
- 9 Since the statutory scheme in *Marchetti* and *Grosso* provided no immunity whatsoever, and since those cases arose in the context of an attempt by the Government to punish individuals for failure to disclose the information requested, we had no occasion there to determine the precise scope of the immunity that would be required to displace the privilege.
- 10 The few exceptions to this requirement are noted in *Marchetti*, 390 U.S., at 42, 88 S.Ct., at 699.
- 11 The filing of a wagering tax return (or registration as a prospective gambler) necessarily involves an admission that one has engaged in, or intends to engage in gambling. Since gambling and related activities are very likely to be criminal under state or federal law, the Government lacks power to compel such an admission absent the requisite grant of immunity. This was the question involved in *Marchetti* and *Grosso*. But what is relevant to the present case is not whether petitioner was involved in criminal activity, but whether he paid the taxes imposed on his income. I have indicated above why I believe that the Government may enforce an otherwise unobjectionable scheme designed to insure that individuals report the amount of their income in order to enforce the tax laws. It therefore follows that the registration and reporting requirements of the federal wagering tax statutes could properly be enforced under a statute granting those who complied with the requirements immunity from prosecution under federal statutes that outlaw gambling and related activities, and protection against the use of information contained in the returns in aid of prosecution under state or federal laws making such activities criminal.
- 12 That this was the primary basis for our refusal is evidenced by our recognition that the 'United States' principal interest is evidently the collection of revenue and not the punishment of gamblers.' 390 U.S., at 57, 88 S.Ct., at 707. Absent the necessity for balancing state and federal interests, we would surely not have crippled the primary purpose of the statutes because a secondary purpose was necessarily disabled.
- * See *Chisholm v. Georgia*, 2 Dall. 419, 1 L.Ed. 440.

73 Misc.2d 241
Supreme Court, Onondaga County, New York.

William MAIER, et al., Plaintiffs,
v.

Paul BESSER, Individually and in his capacity as
Principal of Fabius Central School, and Fabius-
Pompey Central School District, Defendants.

Dec. 29, 1972.

Synopsis

Motion for preliminary injunction. The Supreme Court, County of Onondaga, Donald H. Mead, J., held that where child of parent who is bona fide Christian Scientist may be enrolled and received into school under statutory exemption from requirements for certificates of immunization, person would qualify for the statutory exemption if he has genuine and sincere religious belief which he actively practices and follows and which is in reality substantially similar to the Christian Scientist faith.

Preliminary injunction granted.

Attorneys and Law Firms

****411 *242** Richard A. Ellison, Syracuse, for plaintiffs.

Robert N. Kenyon, Kenyon & Ames, Tully, for defendants.

DONALD H. MEAD, Judge.

DECISION

This court has before it a motion for a preliminary injunction in an action seeking a permanent injunction and a declaratory judgment.

****412** Plaintiff, William Maier, is the father of three children who are attending Fabius Central School. They were directed to leave school because they did not have certificates of immunization in compliance with s 2164 of the Public Health Law. A lawsuit was commenced in the United States District Court for the Northern District of

New York challenging the exemption provisions of that statute. A decision was rendered directing plaintiff to exhaust state remedies first. (*Maier v. Good*, D.C., 325 F.Supp. 1268.) The children are presently attending school pursuant to the terms of a temporary restraining order which prohibits their exclusion from school, pending a determination of this motion.

Plaintiff father submitted an affidavit in which he avers that because of the religious beliefs of himself and his children 'which are basically similar to those held by Christian Scientists', the children have not been inoculated or immunized. He also admits that they are not 'members' of the Christian Scientist Church. He maintains that it is an unconstitutional infringement upon his rights to force them to join an organized religious body in order to practice their religious beliefs without governmental interference.

Section 2164(8) of the Public Health Law provides:

'This section shall not apply to children whose parent, parents, or guardian are bona fide members of a recognized religious organization whose teachings are contrary to the practices herein required, and no certificate shall be required as a prerequisite to such children being admitted or received into school or attending school.'

***243** 'The medical practice of immunization and vaccination against diphtheria and smallpox has been recognized for many years, and the power of the state, through its legislative body, to make such immunization and vaccinations mandatory for pupils, without exemptions based on religious beliefs or convictions, is valid by constitutional standards as a reasonable exercise of police power. (*Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643; *Zucht v. King*, 260 U.S. 174, 43 S.Ct. 24, 67 L.Ed. 194; *Sadlock v. Board of Education of Borough of Carlstadt*, 137 N.J.L. 85, 58 A.2d 218; *Mountain Lakes Board of Education v. Maas*, 56 N.J.Super. 245, 152 A.2d 394, aff'd, 31 N.J. 537, 158 A.2d 330, certiorari denied, 363 U.S. 843, 80 S.Ct. 1613, 4 L.Ed.2d 1727; *Matter of Viemeister v. White*, 179 N.Y. 235, 72 N.E. 97, 70 L.R.A. 796; *People v. Ekerold*, 211 N.Y. 386, 105 N.E. 670, L.R.A.1915D, 223; *In re Whitmore*, Dom.Rel.Ct.N.Y., 47 N.Y.S.2d 143; *Pierce v. Board of Education of City of Fulton*, New York, 30 Misc.2d 1039, 219 N.Y.S.2d 519.)' (*Matter of Elwell*, 55

Misc.2d 252, at p. 255—256, 284 N.Y.S.2d 924, at p. 929.)

Nonetheless, the Legislature saw fit not to force immunization and vaccination upon persons where it was contrary to their sincerely followed religious beliefs. (See ***413** *McCartney v. Austin*, 31 A.D.2d 370, at p. 371, 298 N.Y.S.2d 26, at p. 27.) It was obviously not the intent of the Legislature to force individuals to join a religious organization in order to practice their religious tenets freely, but rather to prevent individuals from avoiding this health requirement enacted for the general welfare of society, merely because they oppose such medical procedures on the basis of personal moral scruples or by reason of unsupported personal fears. No doubt the language of s 2164(8) was drafted to safeguard against the claim of exemption by this latter category of persons. (*Matter of Elwell*, *Supra*; *McCartney v. Austin*, *Supra*.)

‘It has been said that for purposes of the constitutional guaranty of freedom of religion the term ‘religion’ has reference to one’s views of his relations to his Creator and to the obligations they impose of ‘reverence for His being in character, and of obedience to His will’; it is often confounded with the cultus or form of worship of a particular sect, but is distinguishable from the latter.’ (9 N.Y.Jur., Constitutional Law s 207, citing *Davis v. Beason*, 133 U.S. 333, 10 S.Ct. 299, 33 L.Ed. 637, among other cases.)

While the court was interpreting a more liberal statute in *Kolbeck v. Kramer*, 84 N.J.Super. 569, 202 A.2d 889, the principles discussed therein are equally applicable to this case.

‘There is no right in a state or an instrumentality thereof to determine that a cause is not a religious one. Such a censorship of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment and included in the liberty which is within the protection of ***244** the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940).’ (*Kolbeck v. Kramer*, 84 N.J.Super. 569, 574, 202 A.2d 889, 892, *supra*.)

Clearly, the child of a parent who is a bona fide Christian Scientist may be enrolled and received into school under the statutory exemption. To deny the exemption to a child whose parent conscientiously and honestly believes and practices the teachings and tenets of the Christian Science faith, notwithstanding lack of formal membership in the Church, would require a holding that the exemption provision of the statute is unconstitutional. This, the court is reluctant to do in the posture of the present application.

In *Matter of Community Synagogue v. Bates*, 1 N.Y.2d

445, 458, 154 N.Y.S.2d 15, 26, 136 N.E.2d 488, 496, Conway, Ch. J., writing for the court, stated ‘that a court may not permit a municipal ordinance to be so construed that it would appear in any manner to interfere with the ‘free exercise and enjoyment of religious profession and worship’’. (N.Y.Const., art. I, s 3.) The same logic, where possible, should apply to the court’s construction of a statute.

***414** A statute should be interpreted ‘so as to preserve its constitutionality * * *’ (*Spahn v. Julian Messner, Inc.*, 21 N.Y.2d 124, 127, 286 N.Y.S.2d 832, 834, 233 N.E.2d 840, 842; *Matter of Seitz v. Drogheo*, 21 N.Y.2d 181, 186, 287 N.Y.S.2d 29, 32, 234 N.E.2d 209, 211.) In *Defiance Milk Prods. Co. v. Du Mond*, 309 N.Y. 537, 540—541, 132 N.E.2d 829, 830, Judge Desmond, with reference to the constitutionality of a statute, noted that: ‘The applicable rules of law are well known. Every legislative enactment carries a strong presumption of constitutionality including a rebuttable presumption of the existence of necessary factual support for its provisions (*Borden’s Co. v. Baldwin*, 293 U.S. 194, 209, 210, 55 S.Ct. 187, 79 L.Ed. 281). If any state of facts, known or to be assumed, justify the law, the court’s power of inquiry ends (*United States v. Carolene Products Co.*, 304 U.S. 144, 154, 58 S.Ct. 778, 82 L.Ed. 1234). Questions as to wisdom, need or appropriateness are for the Legislature (*Olsen v. Nebraska*, 313 U.S. 236, 246, 61 S.Ct. 862, 85 L.Ed. 1305). Courts strike down statutes only as a last resort (*Matter of Ahern v. South Buffalo Ry. Co.*, 303 N.Y. 545, 555, 104 N.E.2d 898, *affd.* 344 U.S. 367, 73 S.Ct. 340, 97 L.Ed. 395) and only when unconstitutionality is shown beyond a reasonable doubt (*Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 79, 31 S.Ct. 337, 55 L.Ed. 369; *Matter of Fay*, 291 N.Y. 198, 206, 207, 52 N.E.2d 97.).’

There does not appear to be any rational basis or legitimate purpose in requiring a person to be registered member of an organized church as opposed to one who can prove that he genuinely practices and lives his religious tenets in order to qualify for this religious exemption. (*Shapiro v. Thompson*, 394 U.S. 618, 626, 89 S.Ct. 1322, 22 L.Ed.2d 600.) In fact, the latter could be more sincerely ***245** a proponent of a religious faith than the former. Mere church membership or attendance does not guarantee the everyday practice of such religious beliefs. Thus, if the Legislature desires to exempt for religious grounds a certain class of persons, it must do so on a logical and non-discriminatory basis. (*Welsh v. United States*, 398 U.S. 333, 90 S.Ct. 1792, 26 L.Ed.2d 308; *United States v. Seeger*, 380 U.S. 163, 85 S.Ct. 850, 13 L.Ed.2d 733; *United States v. Macintosh*, 283 U.S. 605, 51 S.Ct. 570, 75 L.Ed. 1302.)

The trial Justice, upon hearing the sworn testimony and observing the plaintiff, will be in a better position to evaluate the sincerity of plaintiff’s claimed religious

convictions.

Certainly, the interpretation of section 2164(8) urged by defendant is not within the spirit of the exemption. This court holds that if plaintiff can prove at the trial that he has a genuine and sincere religious belief which he actively practices and follows and which is in reality substantially similar to the Christian Scientist faith, as he alleges, he will qualify for the exemption under s 2164(8)

****415** Since under the statutory exemption there may presently be enrolled students who have not been vaccinated or immunized, there will be no great prejudice

to defendant if plaintiff's three children are permitted to remain in school until this case is tried. Conversely, however, if these children miss time from their classes until the final outcome of a trial, they may suffer serious consequences which could even result in having to repeat a grade. Therefore, the preliminary injunction is granted.

All Citations

73 Misc.2d 241, 341 N.Y.S.2d 411

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28 Bedell 481
Court of Appeals of New York.

MELKER
v.
CITY OF NEW YORK.

Jan. 21, 1908.

Synopsis

Appeal from Supreme Court, Appellate Division, First Department.

Action by Samuel Melker, by his guardian ad litem, against the city of New York. From a judgment of the Appellate Division in the First Department (103 N. Y. Supp. 1134) unanimously affirming a judgment entered on a verdict rendered in favor of defendant, plaintiff, by permission of the Appellate Division, appeals. Affirmed.

Attorneys and Law Firms

***565 *483** William M. K. Olcott and T. B. Chancellor, for appellant.

Francis K. Pendleton, Corp. Counsel (Theodore Connolly and Terence Farley, of counsel), for respondent.

Opinion

VANN, J.

This action was brought to recover damages for personal injuries alleged to have been sustained by the plaintiff through the fault of the defendant. The complaint contains two counts, one alleging negligence, which was not relied upon at the trial, and the other a nuisance, as the ground of recovery. The action involves the liability of the defendant for an explosion of fireworks ***566** on Madison avenue, adjoining Madison Square, on the evening of election day, in November, 1902, after the board of aldermen had adopted a resolution suspending ***484** the ordinances relating to the discharge of fireworks, 'so far as they may apply to the meetings and parades of political parties or associations during the campaign of 1902.' The case is a companion to one recently decided by us relating to the same accident. *Landau v. City of New York*, 180 N. Y. 48, 72 N. E. 631, 105 Am. St. Rep. 709. Upon the trial of that

action it was not disputed that 'the National Association of Democratic Clubs, a political organization, had a parade on the evening of November 4, 1902, and its officers arranged to have a display of fireworks on Madison avenue between Twenty-Third and Twenty-Fifth streets in connection therewith.' Upon the trial of this action the allegation as to a parade by a political organization was disputed, and evidence was given by both parties upon the proposition, so that it became a question of fact for the jury. In other respects the leading facts were the same in both cases. Madison avenue, at the point in question, 'is a wide street, bounded on the west by Madison Square, a park of seven acres, where, as well as in the adjoining the election returns and witness the parade. the election returns and witness the park and They stood closely crowded in the park and on both sides of Madison avenue. The fireworks, consisting of mortars, bombs, rockets, and the like, were arranged in six parallel rows in the middle and on the west side of the avenue, commencing about 12 feet from the curb. * * * They filled the middle of Madison avenue from Twenty-Fourth to Twenty-Fifth streets. The bombs were fired from mortars made of steel tubing, and were of a kind that had been frequently used before without serious results.' Between 9 and 10 o'clock in the evening some of the fireworks exploded from a cause not disclosed by the evidence, and the plaintiff was injured. The case was submitted to the jury under the instruction that, in order to render a verdict for the plaintiff, they 'must find that there was a meeting or a parade of a political party, or a political association, and that the fireworks were discharged in connection with this parade or meeting,' to which no exception ***485** was taken. The trial court further charged the jury that they should 'determine whether or not the fireworks that were then exposed in the city of New York constituted a nuisance,' and that if they were a nuisance the defendant was liable, to which an exception was taken. The plaintiff requested the court to charge that 'fireworks placed upon the surface of a great thoroughfare, in the midst of a large city, where a vast multitude of people is assembled, and exhibited and discharged there on an extensive scale, as was done in this instance, constitutes a nuisance as matter of law.' The court refused to so charge, and the plaintiff excepted. The plaintiff testified that he went to the place in question for the purpose of seeing 'the election returns, the balloon, and the fireworks'; but no instruction was given or requested as to the effect of his presence as a voluntary spectator of the display. The jury found a verdict for the defendant, and the Appellate Division, after unanimously affirming the judgment entered accordingly, permitted an appeal to this court, and certified that, in its opinion, 'a question of law is involved which ought to be reviewed by the Court of Appeals.'

The rule of unanimous affirmance requires us to assume, for the purpose of this appeal, that the exhibition of fireworks in question was not held in connection with a meeting or parade of a political party or association, and that there was no nuisance as matter of fact. The only question requiring the expression of consideration is whether upon the conceded facts a nuisance existed as matter of law. Twice, quite recently, we have considered the question whether a display of fireworks in a public street in the midst of a large city is a nuisance. *Speir v. City of Brooklyn*, 139 N. Y. 6, 34 N. E. 727, 21 L. R. A. 641, 36 Am. St. Rep. 664; *Landau v. City of New York*, 180 N. Y. 48, 72 N. E. 631, 105 Am. St. Rep. 709. In the earlier case the exhibition was held at the junction of two narrow streets in a compact part of the city of Brooklyn, and the damage was caused by fire resulting from the discharge of a rocket directly through a window of the plaintiff's *486 house. Chief Judge Andrews, speaking for the court, said: 'The finding of the trial judge that the use of the street for the discharge of fireworks constituted a public nuisance is amply justified in view of the circumstances. It has been decided in some cases that the discharge of fireworks in the streets of a city or village is a nuisance *per se*, and subjects persons engaged in the transaction to responsibility for any injury to person or property resulting therefrom. *Jenne v. Sutton*, 43 N. J. Law, 257, 39 Am. Rep. 578; *Conklin v. Thompson*, 29 Barb. 218. It may be doubted whether the doctrine in its full breadth can be maintained. The practice of making the display of fireworks a part of the entertainment furnished by municipalities on occasions of the celebration of holidays or the commemoration of important public events is almost universal in cities and villages, and we are not prepared to say that this may not be done, and that streets and public places may not be used for this purpose under the supervision of municipal authorities, due care being used both as to the place selected and in the management of the display, without subjection the municipality to the charge of sanctioning a nuisance and the responsibility of wrongdoers.' The final conclusion announced was that the circumstances were such as to authorize the trial court to hold the city liable for an 'unreasonable, unwarranted, and unlawful use of the **567 streets,' and that such use 'was properly found to constitute a nuisance.' The emphasis of the opinion rests on the location at the junction of two narrow streets and the imminent danger of fire, owing to the contracted space and the inflammable nature of the materials used. *Speir v. City of Brooklyn*, 139 N. Y. 6, 11, 34 N. E. 727, 21 L. R. A. 641, 36 Am. St. Rep. 664. The later case involved the display of fireworks now under consideration, where the space was ample, the danger from fire comparatively light, the management in charge of experts of high standing, the accident of unknown origin and of a kind not reasonably to be apprehended. Upon the first trial of that case the plaintiff

had a verdict, which was reversed by the Appellate Division. *Landau v. City of New York*, 90 App. Div. 50, 85 N. Y. Supp. 616. Upon the second trial there was a nonsuit *487 and the Appellate Division affirmed, but we reversed and granted a new trial upon the ground, distinctly announced, that 'a case was made for the jury.' In discussing the subject we said: 'There is a distinction, well recognized by law, between the discharge of fireworks upon private property and in a public highway. There is also a distinction in this regard between highways, depending on their location, the extent of the traffic upon them, and the danger involved in case of accident. Fireworks in certain streets may or may not be a nuisance, according to the circumstances, which usually present a question of fact. In the case now before us we have to do with a crowded street, near the center of the largest city on the continent, 'where any misadventure in managing the discharge would be likely to result in injury to persons or property.' Fireworks exhibited on an extensive scale in a great thoroughfare, in the midst of a large city, where a vast multitude of people is assembled, if not a nuisance as matter of law, may properly be found such as matter of fact. This was so adjudged in the *Speir Case*, which is controlling in principle.' We held that, 'while a municipal corporation is not liable for the failure to pass ordinances prohibiting the discharge of fireworks in the public streets, it is bound to exercise due care to keep its streets in safe condition, and is liable for permitting dangerous obstructions or nuisances therein.' *Landau v. City of New York*, 180 N. Y. 48, 72 N. E. 631, 105 Am. St. Rep. 709.

We intimated that the exhibition might be a nuisance as matter of law, but all we decided was that the nonsuit was improper, and that the case should have been sent to the jury. A similar intimation was given in another case, but the actual decision was that there was a question of fact as to the alleged negligence of the defendant. *Crowley v. Rochester Fireworks Co.*, 183 N. Y. 353, 76 N. E. 470, 3 L. R. A. (N. S.) 330.

It now becomes our duty to decide whether the exhibition which resulted in a frightful disaster was a nuisance as matter of law. For time out of mind the term 'nuisance' has been regarded as incapable of definition so as to fit all cases, because *488 the controlling facts are seldom alike, and each case stands on its own footing. We are not aided by the classification into public and private nuisances, because the difference between them does not depend on the nature of the thing done, but on the fact that one affects the public at large and the other a limited number only. The primary meaning of the word, suggested by its derivation, is that which injures, or, in the quaint phrase of ancient times, 'that which worketh hurt.' The injury may be to person or property, to health, comfort, safety, or morality. It may be a crime. Pen. Code, § 385. Courts of high

standing have held that a nuisance at law, or a nuisance per se, exists only when the act done is a nuisance at all times and under any circumstances, regardless of location or surroundings. *Hundley v. Harrison*, 123 Ala. 292, 26 South. 294; *Whitmore v. Orono Pulp & Paper Co.*, 91 Me. 297, 39 Atl. 1032 40 L. R. A. 377, 64 Am. St. Rep. 229; *Windfall Mfg. Co. v. Patterson*, 148 Ind. 414, 47 N. E. 2, 37 L. R. A. 381, 62 Am. St. Rep. 532. Other courts make fitness of locality the standard, and give controlling effect to surrounding circumstances, holding certain acts not permissible as matter of law under some circumstances, but permissible under others, and under others still not permissible if the jury find them nuisances as matter of fact. The weight of authority in this state and elsewhere is in accordance with the latter view, except when the act is malum in se, when the surrounding circumstances have no bearing upon the question.

We think that each case must depend on its own facts for classification as a nuisance at law, or in fact, or neither. Without attempting a general definition, we are of the opinion that, as applied to the facts of the case before us, if the natural tendency of the act complained of is to create danger and inflict injury upon person or property, it may properly be found a nuisance as matter of fact; but, if the act in its inherent nature is so hazardous as to make the danger extreme and serious injury so probable as to be almost a certainty, it should be held a nuisance as matter of law. While this definition lies on the border of the domain of fact, any definition of a nuisance at law must necessarily lie there, for it is a fact, *489 but so conclusive in legal effect as to be treated as a matter of law. Locality, surroundings, methods, the degree of danger, and the custom of the country are the important factors. The firing of a cannon loaded with grape shot, if in a city or village, would be a nuisance as matter of law, if in a remote place far from the habitations of man, it might be a nuisance as matter of fact, and if against the face of a precipice, no nuisance at all. What were the surroundings and the degree of danger reasonably to be apprehended from the **568 in the olight of what actually took place, but in the light of what actually took place, but in the light of what was likely to take place? It was not at the junction of two narrow streets, as in the *Speir Case*, but in a wide street bordering on a park seven acres in extent, with reasonable space for safe and effective management. The display was under the control of experts of established skill and experience. The fireworks were all made by a leading manufacturer of high repute. For more than 30 years he had given similar displays, with similar pieces, all over the world, without an accident of moment. Repeatedly, in Madison Square, in Union Square, and in City Hall Park, during the Spanish war, on election nights, at the opening of great public works, and on other occasions, he had given such exhibitions with no bad results. He had never known a

mortar to explode before, and it was the explosion of a mortar used for the purpose of firing bombs that caused the accident. All the mortars had been carefully tested on the day of the exhibition, and each responded to the tap of the hammer with that clear ring which indicates a sound condition. The explosion was owing to some cause so secret and unprecedented that it could not be explained. Army officers of great experience in testing explosives made many experiments with similar mortars soon after the accident, at the request of the district attorney, but they could not state the cause of the explosion, and they regarded the mortars as safe. The expert called by the plaintiff, an ex-army officer who had made many tests in *490 behalf of the government, likened the occurrence to the firing of a gun hundreds of times without danger, when at last 'you suddenly have a burst that cannot be explained.' He looked for the unexpected, and favored precautions to meet what possibly might happen. He thought that 'as an extra precaution' space should have been 'roped off for 100 feet,' and that the mortars should have been sunk below the surface of the ground so that a possible explosion would do no damage. The other experts were of a different ipinion, and some thought that burying in the ground would increase the danger. The occasion was one of public rejoicing by many people. For generations such exhibitions have been common throughout the country. Our great national holiday never passes without them in many places all over the land. National victories, the victories of political parties, and the success of organizations comprising a multitude of persons, for time out of mind have been celebrated by such displays. It is a common method by which large bodies of people express their satisfaction and joy over some event they deem important. Fireworks are widely used to express patriotism, triumph, and gladness, to celebrate public events, to entertain crowds of people, and for various purposes, too numerous to mention. Such uses are no innovation, but are in accordance with an ald and well-settled custom of the country, sanctioned by the practice of every community. The custom may not be wise; but it is almost universal, and indicates the average judgment of our citizens upon the subject.

An exhibition of fireworks is not malum in se, but is evil or innocent according to circumstances. Unless malum in se, like a disorderly house, for instance, a nuisance is a matter of degree. Thus we have held that the storage of gunpowder is not a nuisance per se, and that it 'depends upon the locality, the quantity, and the surrounding circumstances,' which are for the consideration of the jury. *Heeg v. Licht*, 80 N. Y. 579, 36 Am. Rep. 654. A nuisance does not rest upon the degree of care used, for that presents a question of negligence, but on *491 the degree of danger existing even with the best of care. Degree implies gradation, and gradation depends on circumstances. When

the degree of danger is obvious and so extreme as to invite calamity, a nuisance per se exists; but, when the danger is so secret in nature that the cause of an accident cannot be discovered, and according to all experience is neither imminent nor extreme, it is not a nuisance per se, although the jury may find it a nuisance in fact. When disinterested army officers, expert from years of official experiments, testify that the degree of danger was so slight that they regarded the mortars as safe, and the only difference of opinion related to the method of using them, it would be hazardous to hold the danger so inherent and the degree of danger so extreme as to make the act a nuisance of itself, independent of the attending circumstances. If the circumstances are to be considered, they must be weighed in order to get at the degree of danger, and the weight of evidence is for the judges of fact. The circumstances of this case do not call for the hard and fast rule of a nuisance as matter of law, but for the judgment of a jury whether the occurrence was a nuisance as matter of fact. The terrible but unprecedented result may suggest regulation or restraint by the Legislature; but it is safer for the courts, following the weight of authority throughout the country,

to leave such questions to a jury, even at the risk of inconsistent verdicts, rather than to lay down a rigid and inflexible rule, less calculated to do justice in a majority of cases.

The judgment appealed from should be affirmed, with costs.

CULLEN, C. J., and GRAY, WERNER, HISCOCK, and CHASE, JJ., concur. EDWARD T. BARTLETT, J., absent.

Judgment affirmed.

All Citations

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295 A.D.2d 431
Supreme Court, Appellate Division, Second
Department, New York.

In the Matter of MERSCORP, INC., et al.,
Appellants,
v.
Edward P. ROMAINE, etc., et al., Respondents.

June 10, 2002.

Synopsis

Operator of national electronic mortgage registration system sued county clerk, under Article 78, seeking to set aside decision to register mortgages submitted by operator under names of lenders rather than operator's name, as was done previously. The Supreme Court, Suffolk County, Catterson, J., denied motion for preliminary injunction, and operator appealed. The Supreme Court, Appellate Division held that operator was entitled to injunctive relief.

Reversed; injunction motion granted.

Goldstein, J., concurred in result and filed memorandum.

Attorneys and Law Firms

****563** Hiscock & Barclay, LLP, Buffalo, N.Y. (Charles C. Martorana of counsel), for appellants.

Cahn Wishod & Knauer, LLP, Melville, N.Y. (Richard C. Cahn and Brian T. Egan of counsel), for respondents.

Ann M. Kappler, Washington, DC, for Federal National Mortgage Association, and Howard Lindenberg, McLean, Va., for Federal Home Loan Mortgage Corporation, amicus curiae (one brief filed).

SONDRA MILLER, J.P., GABRIEL M. KRAUSMAN,
GLORIA GOLDSTEIN and BARRY A. COZIER, JJ.

Opinion

***431** In a hybrid proceeding pursuant to CPLR article 78 in the nature of mandamus, inter alia, to compel the Suffolk County Clerk to record and index instruments that name Mortgage Electronic Registration Systems, Inc., as the lender's nominee or the mortgagee of record, and an action for a judgment declaring that these instruments are acceptable for recording, the petitioners appeal, by

permission, from an order of the Supreme Court, Suffolk County (Catterson, J.), entered May 22, 2001, which denied their motion for a preliminary injunction.

ORDERED that the order is reversed, without costs or disbursements, and the motion for a preliminary injunction is granted pending the Supreme Court's determination of the hybrid proceeding and action on the merits.

The petitioners, Merscorp, Inc. (hereinafter Merscorp), and its subsidiary, Mortgage Electronic Registration Systems, Inc. (hereinafter MERS), operate a national electronic registration system (hereinafter the MERS System) for residential mortgages and related instruments (hereinafter MERS Instruments). In essence, lenders who subscribe to the MERS System (hereinafter MERS Members) designate MERS as their nominee or the "mortgagee of record" for the purpose of ***432** recording MERS Instruments in the county where the subject real property is located. The MERS Instruments are registered in a central database, which tracks all future transfers of the beneficial ownership interests and servicing rights among MERS Members. As of May 2001, the MERS System had recorded more than four million MERS Instruments in more than 3,000 counties in all 50 states, including more than 16,000 MERS Instruments in Suffolk County.

****564** On April 5, 2001, the Attorney-General issued Informal Opinion No.2001-2 in response to two questions posed by the Nassau County Clerk regarding the latter's obligation to record and index MERS Instruments. Although the Attorney-General concluded that the Nassau County Clerk had a statutory duty under Real Property Law § 291 to record MERS Instruments if they were duly acknowledged and accompanied by the proper fee, he advised the Nassau County Clerk to list the MERS Instruments in the County's alphabetical indexes under the names of the actual lenders. Based in part on the Attorney-General's Informal Opinion, the Suffolk County Clerk announced that as of May 1, 2001, he would no longer accept MERS Instruments which listed MERS as the mortgagee or nominee of record unless MERS was, in fact, the actual mortgagee.

Simultaneously with commencing this hybrid proceeding and action, Merscorp and MERS moved, inter alia, for a preliminary injunction to compel the Suffolk County Clerk to record MERS Instruments and list MERS as the mortgagee in the County's alphabetical mortgagee-mortgagor indexes for recorded conveyances. Although the Supreme Court, Suffolk County (Bivona, J.), granted the request of Merscorp and MERS for a temporary restraining order on May 2, 2001, the same court (Catterson, J.),

subsequently denied their request for a preliminary injunction on May 22, 2001.

It is well established that the decision to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court (*see Doe v. Axelrod*, 73 N.Y.2d 748, 750, 536 N.Y.S.2d 44, 532 N.E.2d 1272). In exercising that discretion, however, the Supreme Court must consider several factors, including whether the moving party has established (1) a likelihood of success on the merits, (2) irreparable harm if the injunction is denied, and (3) a balance of the equities in favor of the injunction (*see* CPLR 6301, 6312 [a]; *W.T. Grant Co. v. Srogi*, 52 N.Y.2d 496, 517, 438 N.Y.S.2d 761, 420 N.E.2d 953; *Clarion Assocs. v. D.J. Colby Co.*, 276 A.D.2d 461, 714 N.Y.S.2d 99). Upon our review of the record, we find that the Supreme Court failed to set forth specific findings with respect to the tripartite test for injunctive relief and *433 improvidently exercised its discretion in denying the motion for preliminary injunctive relief.

Merscorp and MERS demonstrated a reasonable probability of success on the merits of its claim for a writ of mandamus to compel the Suffolk County Clerk to record MERS Instruments (*see Klostermann v. Cuomo*, 61 N.Y.2d 525, 539, 475 N.Y.S.2d 247, 463 N.E.2d 588). Contrary to the contention of the Suffolk County Clerk, he has a statutory duty that is ministerial in nature to record a written conveyance if it is duly acknowledged and accompanied by the proper fee (*see* Real Property Law § 290[3], § 291; County Law § 525[1]). Accordingly, the Clerk does not have the authority to refuse to record a conveyance which satisfies the narrowly-drawn prerequisites set forth in the recording statute (*see People ex rel. Frost v. Woodbury*, 213 N.Y. 51, 106 N.E. 932; *People ex rel. Title Guar. & Trust Co. v. Grifenhagen*, 209 N.Y. 569, 103 N.E. 1131; *Matter of Westminster Heights Co. v. Delaney*, 107 App.Div. 577, 95 N.Y.S. 247, *affd.* 185 N.Y. 539, 77 N.E. 1198; *Putnam v. Stewart*, 97 N.Y. 411).

This court notes that the Suffolk County index is governed exclusively by Real Property Law § 316-a. Real Property Law § 316-a(1) provides that the Suffolk County Clerk shall record and index “[e]very instrument affecting real estate or chattels real, situated in the county of Suffolk * * * which shall have been recorded * * * 565 in the office of the [C]lerk of said county * * * pursuant to the provisions of this act” (emphasis supplied). Pursuant to Real Property Law § 316-a(2), the Suffolk County Clerk must maintain the indexes so they “contain the date of recording of each instrument, the names of the parties to each instrument and the liber and page of the record thereof and shall be substantially the forms of the schedules hereto annexed” (emphasis supplied; *see also* Real Property Law § 316-

a[5]).

Therefore, in light of Real Property Law § 316-a, Merscorp and MERS also demonstrated a reasonable probability of success on the merits of their claim to compel the Suffolk County Clerk to perform his ministerial duty to index MERS Instruments as the language of Real Property Law § 316-a is mandatory and not permissive (*see Klostermann v. Cuomo*, *supra* at 539, 475 N.Y.S.2d 247, 463 N.E.2d 588).

Moreover, to the extent that the Suffolk County Clerk has recorded approximately 16,000 MERS Instruments before May 1, 2001, MERS established irreparable harm to its business operation, the mortgage lending industry, and the general public, in the absence of a preliminary injunction compelling the Suffolk County Clerk to record and index MERS Instruments (*see Clarion Assocs. v. D.J. Colby Co.*, *supra*; *McLaughlin, Piven, *434 Vogel, Inc. v. W.J. Nolan & Co.*, 114 A.D.2d 165, 174, 498 N.Y.S.2d 146), particularly since Real Property Law § 316-a(8),(9), and (10) sets forth a mechanism for correcting any mistakes in the indexes.

Under these circumstances, a preliminary injunction should be granted to maintain the status quo while the legal issues are determined in a deliberate and judicious manner (*see Moody v. Filipowski*, 146 A.D.2d 675, 678, 537 N.Y.S.2d 185; *Incorporated Vil. of Babylon v. Anthony's Water Cafe*, 137 A.D.2d 791, 792, 525 N.Y.S.2d 341; *Tucker v. Toia*, 54 A.D.2d 322, 326, 388 N.Y.S.2d 475).

GOLDSTEIN, J., concurs in the result, with the following memorandum:

Although I do not necessarily agree with my colleagues that there is a likelihood of success on the merits, I nevertheless concur in granting a preliminary injunction, as the Supreme Court failed to take into consideration and address the other factors which must be taken into account, namely, irreparable harm to the movant absent the granting of a preliminary injunction, and a balancing of the equities (*see Melvin v. Union Coll.*, 195 A.D.2d 447, 448, 600 N.Y.S.2d 141). Where, as here, the case involves issues of first impression in the courts, it is appropriate to grant a preliminary injunction, “ ‘to hold the parties in status quo while the legal issues are determined in a deliberate and judicious manner’ ” (*Time Sq. Books v. City of Rochester*, 223 A.D.2d 270, 278, 645 N.Y.S.2d 951, quoting *Tucker v. Toia*, 54 A.D.2d 322, 326, 388 N.Y.S.2d 475; *State v. City of New York*, 275 A.D.2d 740, 713 N.Y.S.2d 360; *Sau Thi Ma v. Xuan T. Lien*, 198 A.D.2d 186, 604 N.Y.S.2d 84).

295 A.D.2d 431, 743 N.Y.S.2d 562, 2002 N.Y. Slip Op.
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McKinney's Consolidated Laws of New York Annotated

Municipal Home Rule Law (Refs & Annos)

Chapter 36-a. Of the Consolidated Laws

Article 2. General Powers of Local Governments to Adopt and Amend Local Laws; Restrictions (Refs & Annos)

McKinney's Municipal Home Rule Law § 10

§ 10. General powers of local governments to adopt and amend local laws

Effective: August 24, 2018

Currentness

1. In addition to powers granted in the constitution, the statute of local governments or in any other law,
 - (i) every local government shall have power to adopt and amend local laws not inconsistent with the provisions of the constitution or not inconsistent with any general law relating to its property, affairs or government and,
 - (ii) every local government, as provided in this chapter, shall have power to adopt and amend local laws not inconsistent with the provisions of the constitution or not inconsistent with any general law, relating to the following subjects, whether or not they relate to the property, affairs or government of such local government, except to the extent that the legislature shall restrict the adoption of such a local law relating to other than the property, affairs or government of such local government:
 - a. A county, city, town or village:
 - (1) The powers, duties, qualifications, number, mode of selection and removal, terms of office, compensation, hours of work, protection, welfare and safety of its officers and employees, except that cities and towns shall not have such power with respect to members of the legislative body of the county in their capacities as county officers. This provision shall include but not be limited to the creation or discontinuance of departments of its government and the prescription or modification of their powers and duties.
 - (2) In the case of a city, town or village, the membership and composition of its legislative body.
 - (3) The transaction of its business.

§ 10. General powers of local governments to adopt and..., NY MUN HOME RULE...

(4) The incurring of its obligations, except that local laws relating to financing by the issuance of evidences of indebtedness by such local government shall be consistent with laws enacted by the legislature.

(5) The presentation, ascertainment, disposition and discharge of claims against it.

(6) The acquisition, care, management and use of its highways, roads, streets, avenues and property.

(7) The acquisition of its transit facilities and the ownership and operation thereof.

(8) The levy and administration of local taxes authorized by the legislature and of assessments for local improvements, which in the case of county, town or village local laws relating to local non-property taxes shall be consistent with laws enacted by the legislature.

(9) The collection of local taxes authorized by the legislature and of assessments for local improvements, which in the case of county, town or village local laws shall be consistent with laws enacted by the legislature.

(9-a) The fixing, levy, collection and administration of local government rentals, charges, rates or fees, penalties and rates of interest thereon, liens on local property in connection therewith and charges thereon.

(10) The wages or salaries, the hours of work or labor, and the protection, welfare and safety of persons employed by any contractor or subcontractor performing work, labor or services for it.

(11) The protection and enhancement of its physical and visual environment.

(12) The government, protection, order, conduct, safety, health and well-being of persons or property therein. This provision shall include but not be limited to the power to adopt local laws providing for the regulation or licensing of occupations or businesses provided, however, that:

(a) The exercise of such power by a town shall relate only to the area thereof outside the village or villages therein.

(b) Except in a case where and to the extent that a county is specifically authorized to regulate or license an occupation or business, the exercise of such power by a county shall not relate to the area thereof in any city, village or area of any town outside the village or villages therein during such time as such city, village or town is regulating or licensing the occupation or business in question.

(13) The apportionment of its legislative body and, only in connection with such action taken pursuant to this subparagraph, the composition and membership of such body, the terms of office of members thereof, the units of local government or other areas from which representatives are to be chosen and the voting powers of individual members of such legislative body. Except for the equal apportionment requirements in subclause (i.) of clause (a.) and clause (c.) of this subparagraph, which shall apply generally to any local government, the power granted by this subparagraph shall be in addition to and not in substitution for any other power and the provisions of this subparagraph shall apply only to local governments which adopt a plan of apportionment thereunder.

(a.) A plan of apportionment adopted under this subparagraph shall comply with the following standards, which shall have priority in the order herein set forth, to the extent applicable:

(i.) The plan shall provide substantially equal weight for the population of that local government in the allocation of representation in the local legislative body.

(ii.) In such plan adopted by a county, no town except a town having more than one hundred and ten per cent of a full ratio for each representative, shall be divided in the formation of representation areas. Adjacent representation areas in the same town or city shall not contain a greater excess in population than five per cent of a full ratio for each representative.

(iii.) The plan shall provide substantially fair and effective representation for the people of the local government as organized in political parties.

(iv.) Representation areas shall be of convenient and contiguous territory in as compact form as practicable.

(b.) A plan of apportionment adopted by a county under this subparagraph may provide that mayors of cities or villages, supervisors of towns or members of the legislative bodies of cities, towns, or villages, who reside in the county shall be eligible to be elected as members of the county legislative body.

(c.) As used in this subparagraph the term “population” shall mean residents, citizens, or registered voters. For such purposes, no person shall be deemed to have gained or lost a residence, or to have become a resident of a local government, as defined in subdivision eight of section two of this chapter, by reason of being subject to the jurisdiction of the department of corrections and community supervision and present in a state correctional facility pursuant to such jurisdiction. A population base for such a plan of apportionment shall utilize the latest statistical information obtainable from an official enumeration done at the same time for all the residents, citizens, or registered voters of the local government. Such a plan may allocate, by extrapolation or any other rational method, such latest statistical information to representation areas or units of local government, provided that any plan containing such an allocation shall have annexed thereto as an appendix, a detailed explanation of the allocation.

(d.) Where a public hearing on a local law proposed to be adopted under this subparagraph is required, by subdivision five of

section twenty of this chapter, to be held only before an elective chief executive officer, the legislative body shall not adopt such proposed local law until after a public hearing shall have been held thereon before it, on notice as provided in such subdivision five, in which event no public hearing thereon before such chief executive officer shall be required.

(e.) A local law proposed to be adopted under this subparagraph shall be subject to referendum only in the manner provided by paragraph j of subdivision two of section twenty-four of this chapter, except that such local law shall be subject to a mandatory referendum in any county in which a provision of law requires a mandatory referendum if a local law proposes a change in the form or composition of the elective governing body of the county. The local law may be so structured as to permit separate submission of the principle elements (such as, multiple office holding as in clause (b) above, the use of multiple member or floterial districts in portions of the local government, and so forth) of the plan and also may provide alternatives in the event one or more of these separate submissions is rejected by the electorate.

(f.) Notwithstanding any inconsistent provisions of any general or special law, or any local law, ordinance, resolution or city or county charter heretofore or hereafter adopted, no local government may restructure its local legislative body (pursuant to provision of this chapter or any other provision of law) more than once in each decade commencing with the year nineteen hundred seventy; provided, however, that this prohibition shall not prevent the periodic adjustment of the weight of the votes of representatives on the basis of current census, voter, or other valid information where an existing plan distributes the votes of representatives on such a basis.

(14) The powers granted to it in the statute of local governments.

b. A county:

(1) The adoption, amendment or repeal of a county charter pursuant to article four of this chapter in addition to its powers under this article.

(2) The establishment of a county tax department headed by a director appointed by and serving at the pleasure of the board of supervisors, which director shall, subject to authorization of such board (a) employ necessary employees, (b) advise with and assist all assessors, collectors and receivers of taxes of the various tax districts within the county in the discharge of their duties, (c) assist in the preparation of equalization rates with the various tax districts within the county, (d) assist in the disposition and sale of real property acquired by the county as the result of enforcement of unpaid taxes, and (e) perform such other duties as shall be prescribed by such board.

(3) The assignment to and the performance by the chairman of the board of supervisors of specified administrative functions, powers and duties on behalf of such board, with provision for periodic reports to such board, and with further provision that such local law shall not divest such board of such functions, powers and duties.

(4) The creation of an office of administrative assistant to the chairman of the board of supervisors and assignment to and performance by such an assistant, under the general supervision of such chairman, of specified administrative functions, powers and duties on behalf of such board, with provision for periodic reports to such board, and with further provision that such local

law shall not divest such board of such functions, powers and duties.

(5) The compensation to be paid from county funds to public officers or employees who are not officers or employees of the county other than members of the judiciary.

(6) The method for the correction of assessment rolls and tax rolls as authorized by title three of article five of the real property tax law, subject to review by the courts as provided by law.

(7) The protection or preservation of game, game birds, fish or shell fish on county-owned lands.

(8) The control of floods or the conservation of soil.

(9) The reforestation of lands owned by the county.

(10) The eradication or prevention of bovine tuberculosis or other infectious or communicable diseases affecting animals or fowls.

(11) The regulation or prohibition of the dumping of garbage, rubbish, ashes or other waste material in or adjacent to creeks or streams in watershed areas improved under any flood control or soil erosion program.

c. A city:

(1) The revision of its charter or the adoption of a new charter by local law adopted by its legislative body pursuant to the provisions of this chapter and subject to the procedure prescribed by this chapter or by local law adopted pursuant to article four of this chapter.

(2) The preparation, making, confirmation and correction of assessments of real property and the review of such assessments subject to further review by the courts as provided by law.

(3) The authorization, making, confirmation and correction of benefit assessments for local improvements.

d. A town:

(1) The preparation, making, confirmation and correction of assessments of real property and the review of such assessments subject to further review by the courts as provided by law, consistent with laws enacted by the legislature.

(2) The authorization, making, confirmation and correction of benefit assessments for local improvements, consistent with laws enacted by the legislature.

(3) The amendment or supersession in its application to it, of any provision of the town law relating to the property, affairs or government of the town or to other matters in relation to which and to the extent to which it is authorized to adopt local laws by this section, notwithstanding that such provision is a general law, unless the legislature expressly shall have prohibited the adoption of such a local law. Unless authorized by other state statute this subparagraph shall not be deemed to authorize supersession of a state statute relating to (1) a special or improvement district or an improvement area, (2) creation or alteration of areas of taxation, (3) authorization or abolition of mandatory and permissive referendum or (4) town finances as provided in article eight of the town law; provided, however that nothing set forth herein shall preclude the transfer or assignment of functions, powers and duties from one town officer or employee to another town officer or employee, and provided, however, further that the powers of local legislation and appropriation shall be exercised by the local legislative body.

e. A village:

(1) The preparation, making, confirmation and correction of assessments of real property and the review of such assessments subject to further review by the courts as provided by law, consistent with laws enacted by the legislature.

(2) The authorization, making, confirmation and correction of benefit assessments for local improvements.

(3) The amendment or supersession in its application to it, of any provision of the village law relating to the property, affairs or government of the village or to other matters in relation to which and to the extent to which it is authorized to adopt local laws by this section, notwithstanding that such provision is a general law, unless the legislature expressly shall have prohibited the adoption of such a local law.

2. Every local government also shall have power to adopt and amend local laws where and to the extent that its legislative body has power to act by ordinance, resolution, rule or regulation.

3. a. A grant of a specific power by this section to one or more local governments shall not operate to restrict the meaning of a general grant of power by this section to the same or any other local government or to exclude other powers comprehended in such general grant.

§ 10. General powers of local governments to adopt and..., NY MUN HOME RULE...

b. The enumeration of powers in this section is not intended to imply that any of such powers is not included within the power of a local government to adopt and amend local laws in relation to its property, affairs and government.

4. In the exercise of its powers to adopt and amend local laws, the legislative body of a local government shall have power:

(a) To delegate to any officer or agency of such local government the power to adopt resolutions or to promulgate rules and regulations for carrying into effect or fully administering the provisions of any local law and to authorize issuance of an appearance ticket by a public servant who, by virtue of office, title or position is authorized or required to enforce any statute, local law, ordinance, rule or regulation relating to parking, licensing of occupations or businesses, fire prevention and safety, health and sanitation, and building, zoning and planning; provided however, that a peace officer may be authorized to issue an appearance ticket relating to enforcement of any statute, local law, ordinance, rule or regulation affecting the public health, safety and welfare.

(b) To provide for the enforcement of local laws by legal or equitable proceedings which are or may be provided or authorized by law, to prescribe that violations thereof shall constitute misdemeanors, offenses or infractions and to provide for the punishment of violations thereof by civil penalty, fine, forfeiture, community service, where the defendant has consented to the amount and conditions of such service, provided however, that the performance of any such services shall not result in the displacement of employed workers or in the impairment of existing services, nor shall the performance of any such services be required or permitted in any establishment involved in any labor strike or lockout, or imprisonment, or by two or more of such punishments, provided, however, that a local law adopted pursuant to subdivision two of this section shall provide only for such enforcement or punishment as could be prescribed if the action of the legislative body were taken by ordinance, resolution, rule or regulation, as the case may be.

(c) To enact as local law the provisions of any existing charter, general law or special law, theretofore enacted, conferring a right, power or authority, or imposing a duty or obligation, on such local government, whether or not the same relate to its property, affairs or government. Any such provision of law so re-enacted shall thereafter be subject to be superseded by local law only to the same extent and in the same manner as if the same had not been so re-enacted.

(d) In establishing the office of the head of a department of its government, to provide that such an office shall be in the unclassified service of the civil service and, in establishing the offices of one or more deputies to the head of a department of its government with power to act generally for and in place of their principals, to provide that the positions of such deputies shall be in the exempt class of the civil service.

5. Except in the case of a transfer of functions pursuant to the constitution or under an alternative form of county government, a local government shall not have power to adopt local laws which impair the powers of any other public corporation.

6. Whenever the constitutionality of any local law, ordinance, rule or regulation is brought into issue upon a trial or hearing of any civil cause of action or proceeding in any court, and the local government which enacted such local law, ordinance, rule, or regulation is not a party to such action or proceeding, notice shall be served upon such local government in accordance with section one thousand twelve of the civil practice law and rules.

§ 10. General powers of local governments to adopt and..., NY MUN HOME RULE...

Credits

(L.1963, c. 843. Amended L.1964, c. 78, §§ 3-5; L.1969, c. 834, § 2; L.1969, c. 835; L.1969, c. 1136, §§ 1, 2; L.1970, c. 53, §§ 1, 2; L.1974, c. 177, § 7; L.1976, c. 365, § 1; L.1976, c. 805, § 1; L.1978, c. 495, § 3; L.2003, c. 296, § 5, eff. Jan. 1, 2005; L.2010, c. 57, pt. XX, § 3, eff. Aug. 11, 2010; L.2011, c. 62, pt. C, subpt. B, § 119, eff. March 31, 2011; L.2018, c. 216, § 1, eff. Aug. 24, 2018.)

Notes of Decisions (906)

Footnotes

¹

So in original. Probably should read “principal”.

McKinney’s Municipal Home Rule Law § 10, NY MUN HOME RULE § 10

Current through L.2019, chapter 373. Some statute sections may be more current, see credits for details.

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900 F.3d 1357

United States Court of Appeals, Federal Circuit.

Laura OLIVER and Eddie Oliver, Jr., Parents and
Legal Representatives of E.O., III, Petitioners-
Appellants

v.

SECRETARY OF HEALTH AND HUMAN
SERVICES, Respondent-Appellee

2017-2540

|

Decided: August 17, 2018

Synopsis

Background: Parents brought action against Secretary of Health and Human Services seeking compensation under the National Childhood Vaccine Injury Act, and alleging that vaccinations received by child, including Diphtheria–Tetanus-acellular Pertussis (DTaP), Hepatitis B, inactivated Poliovirus, pneumococcal conjugate, and rotavirus vaccinations, caused child’s Dravet epilepsy syndrome. The Court of Federal Claims, Nora Beth Dorsey, Chief Special Master, 2017 WL 747846, dismissed petition, and Kaplan, J., 133 Fed.Cl. 341, denied parents’ motion for review. Parents appealed.

Holdings: The Court of Appeals, Wallach, Circuit Judge, held that:

chief special master’s conclusion that opinion of government’s expert was more persuasive and entitled to more weight than opinion of parents’ expert was not arbitrary or capricious, and

chief special master did not improperly apply estoppel to deny a fair hearing or bar parents’ theory of causation.

Affirmed.

Newman, Circuit Judge, filed dissenting opinion.

***1359** Appeal from the United States Court of Federal Claims in No. 1:10-vv-00394-EDK, Judge Elaine Kaplan.

Attorneys and Law Firms

Clifford John Shoemaker, Shoemaker and Associates,

Vienna, VA, argued for petitioners-appellants.

Daniel Anthony Principato, Torts Branch, Civil Division, United States Department of Justice, Washington, DC, argued for respondent-appellee. Also represented by Chad A. Readler, C. Salvatore D’Alessio, Catharine E. Reeves, Heather Lynn Pearlman.

Before Newman, Lourie, and Wallach, Circuit Judges.

Opinion

Dissenting opinion filed by Circuit Judge Newman.

Wallach, Circuit Judge

Appellants Laura Oliver and Eddie Oliver, Jr. (together, “the Olivers”), parents and legal representatives of E.O., III (“E.O.”), sued the Secretary of Health and Human Services (“the Government”) for compensation under the National Childhood Vaccine Injury Act of 1986 (“Vaccine Act”), Pub. L. No. 99-660, 100 Stat. 3755 (codified as amended at 42 U.S.C. §§ 300aa-2–300aa-33 (2012)). The Olivers allege that E.O. developed Dravet syndrome¹ as a result of certain vaccinations. The Chief Special Master of the U.S. Court of Federal Claims determined that, inter alia, the Olivers “failed to show by preponderant evidence that E.O.’s injuries were caused by his ... vaccinations,” such that the Olivers were not entitled to compensation. *Oliver v. Sec’y of Health & Human Servs. (Oliver I)*, No. 10-394V, 2017 WL 747846, at *2 (Fed. Cl. Feb. 1, 2017). ***1360** The Olivers filed a motion for review in the Court of Federal Claims, and the Court of Federal Claims denied it. *See Oliver v. Sec’y of Health & Human Servs. (Oliver II)*, 133 Fed.Cl. 341, 344 (2017); *see also* J.A. 52 (Judgment).

The Olivers appeal. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3) (2012). We affirm.

BACKGROUND²

On April 9, 2009, E.O. visited a pediatrician for his six-month visit and received vaccinations for Diphtheria-Tetanus-acellular Pertussis, Hepatitis B, Inactivated Poliovirus, Pneumococcal Conjugate, and Rotavirus. *Oliver I*, 2017 WL 747846, at *4. At approximately 11:30 PM that night, Mrs. Oliver “found E.O. seizing in his bed”

and called 9-1-1. *Id.* (citation omitted). When he arrived at the emergency room, E.O. presented with “a fever of 101.3 degrees, red eyes with discharge from his right eye, and a runny nose.” *Id.* (internal quotation marks and citation omitted). The emergency room physician diagnosed E.O. with a febrile seizure and discharged E.O. with instructions to see his pediatrician. *Id.* On April 10, 2009, E.O.’s pediatrician recorded E.O.’s temperature as 97.1 degrees and diagnosed E.O. with “complex febrile seizure and conjunctivitis in the right eye.” *Id.* (citation omitted).

“E.O. did not have any health issues or seizures for the next two months.” *Id.* However, E.O. had several seizures over the summer of 2009 and began to experience prolonged seizures in March 2010, with each seizure resulting in an emergency room visit. *Id.* at *5. In April 2010, E.O. was referred to a pediatric neurologist, who diagnosed E.O. with an SCN1A gene defect in June 2010. *Id.* at *5–6. In July 2010, E.O. began to exhibit developmental delay, and the pediatric neurologist performed general physical, neurological, and motor examinations, which demonstrated “intractable, symptomatic childhood absence and complex partial seizures of independent hemisphere origin secondary to SCN1A gene defect (borderline SMEI syndrome) and encephalopathy characterized by speech delay.” *Id.* at *6 (internal quotation marks and citation omitted).

DISCUSSION

I. Standard of Review and Legal Standard

“We review an appeal from the Court of Federal Claims in a Vaccine Act case de novo, applying the same standard of review [as the Court of Federal Claims] applied in reviewing the special master’s decision.” *Milik v. Sec’y of Health & Human Servs.*, 822 F.3d 1367, 1375 (Fed. Cir. 2016) (citation omitted). “Although we review legal determinations without deference, we review the special master’s factual findings under the arbitrary and capricious standard.” *Id.* at 1376 (citation omitted). This standard is “uniquely deferential” and “difficult for an appellant to satisfy with respect to any issue, but particularly with respect to an issue that turns on the weighing of evidence by the trier of fact.” *Id.* (internal quotation marks and citations omitted). “[A]s long as the special master’s conclusion is based on evidence in the record *1361 that is

not wholly implausible, we are compelled to uphold that finding as not being arbitrary or capricious.” *Id.* (internal quotation marks, brackets, and citation omitted).

Where, as here, a petitioner alleges an injury not found on the Vaccine Injury Table (“the Table”),³ they “must show that the vaccine was not only a but-for cause of the injury but also a substantial factor in bringing about the injury.” *Moberly*, 592 F.3d at 1321 (internal quotation marks and citation omitted). To demonstrate causation, the petitioner’s “burden is to show by preponderant evidence” each of the requirements set forth in *Althen v. Secretary of Health and Human Services* (“the *Althen* prongs”): “(1) a medical theory causally connecting the vaccination and the injury; (2) a logical sequence of cause and effect showing that the vaccination was the reason for the injury; and (3) a showing of a proximate temporal relationship between vaccination and injury.” 418 F.3d 1274, 1278 (Fed. Cir. 2005). “If [the petitioner] satisfies this burden, she is entitled to recover unless the [G]overnment shows, also by a preponderance of evidence, that the injury was in fact caused by factors unrelated to the vaccine.” *Id.* (internal quotation marks, brackets, and citation omitted).

II. The Court of Federal Claims Did Not Err in Sustaining the Chief Special Master’s Determination

The Chief Special Master determined that the Olivers failed to satisfy their burden as to each of the *Althen* prongs. *Oliver I*, 2017 WL 747846, at *11–21. The Olivers aver that the Chief Special Master erred in her evaluation of the *Althen* prongs by: (1) “misappl[ying] *Daubert* [*v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)] and thus appl[ying] an evidentiary standard not in accordance with law,” Appellants’ Br. 17 (capitalization modified); *see id.* at *17–33; and (2) “improperly using estoppel and a faulty scientific premise to deny both a full and fair hearing, in an abuse of her discretion, as well as a finding of causation,” *id.* at *34 (italics omitted); *see id.* at *34–43. We disagree with the Olivers.

First, although the Olivers claim that the Chief Special Master misapplied *Daubert*, their argument amounts to no more than a challenge to the weight afforded to their expert’s testimony and supporting evidence.⁴ *See id.* at *17–33. The Chief Special Master thoroughly evaluated both parties’ evidence as to each *Althen* prong and found the Government’s more persuasive. *See* *1362 *Oliver I*, 2017 WL 747846, at *11–21. For example, regarding the

first *Althen* prong, the Chief Special Master found that “none of the articles cited by [the Oliver’s expert] suggest that vaccines can cause ... or change the clinical course of Dravet syndrome, and several come to the opposite conclusion,” whereas the Government’s expert “provide[d] strong evidence [in the form of animal studies] that Dravet syndrome will develop in children with the SCN1A mutation, whether or not they receive vaccinations.” *Id.* at *16; *see id.* at *11–16 (reviewing the parties’ evidence as to the first *Althen* prong). In light of these findings, the Chief Special Master determined that the Oliver’s expert “did not provide a ‘sound and reliable’ medical theory to explain how the vaccinations at issue cause Dravet syndrome.” *Id.* at *16. The Chief Special Master made similar findings with respect to the second and third *Althen* prongs. *See id.* at *16–20 (reviewing the parties’ evidence as to the second *Althen* prong), *20 (finding, with respect to the second *Althen* prong, that the Oliver’s expert’s testimony was “not persuasive” in light of the Government’s expert’s testimony and E.O.’s medical records, such that the Oliver’s “failed to prove by a preponderance of the evidence a logical sequence of cause and effect showing that the vaccines E.O. received caused his Dravet syndrome”), *20–21 (reviewing the parties’ evidence as to the third *Althen* prong), *21 (finding, with respect to the third *Althen* prong, that, “[w]hile the proximity between vaccination and seizure onset might suggest a causal relationship between the two events, E.O. did not develop Dravet syndrome until ... more than a year after these vaccinations,” such that the Oliver’s evidence “[wa]s not sufficient to establish a causal link”).

The Oliver’s repeatedly fault the Chief Special Master for failing to afford greater weight to their expert’s testimony and supporting evidence. *See, e.g.,* Appellants’ Br. 25 (stating that “the [Chief] Special Master is highly dismissive of all of [their expert]’s testimony”), 26 (stating that the Oliver’s expert’s “theory and ... mechanisms were, in fact, *supported* by the literature even if his conclusions were not yet published”), 33 (stating that the Chief Special Master “essentially reject[ed]” their expert’s supporting evidence). We cannot review such challenges. *See Milik*, 822 F.3d at 1376 (“[W]e do not reweigh the factual evidence, assess whether the special master correctly evaluated the evidence, or examine the probative value of the evidence or the credibility of the witnesses—these are all matters within the purview of the fact finder.” (internal quotation marks and citation omitted)); *Lampe v. Sec’y of Health & Human Servs.*, 219 F.3d 1357, 1362 (Fed. Cir. 2000) (stating that “assessments of the credibility of the witnesses and the relative persuasiveness of the competing medical theories of the case” “are virtually unchallengeable on appeal”). Therefore, we hold that the Chief Special Master did not misapply *Daubert* in

weighing the parties’ experts’ testimony and supporting evidence and that the Chief Special Master’s factual findings were neither arbitrary nor capricious. *See de Bazan v. Sec’y of Health & Human Servs.*, 539 F.3d 1347, 1352 n.4 (Fed. Cir. 2008) (rejecting similar arguments on the grounds that “*Daubert* is inapposite here because the special master did not exclude any expert evidence under *Daubert*” and, instead, “admitted and weighed both parties’ evidence but simply decided that the [G]overnment’s evidence was more persuasive”); *Terran ex rel. Terran v. Sec’y of Health & Human Servs.*, 195 F.3d 1302, 1316 (Fed. Cir. 1999) (affirming a “[s]pecial [m]aster’s *1363 analysis ... using *Daubert*[] ... as a tool or framework for conducting the inquiry into the reliability of the evidence,” where the special master’s “application of the *Daubert* factors [was] reasonable,” because “[t]he [s]pecial [m]aster found that the *Daubert* inquiry raised serious questions about the [petitioner’s expert’s] testimony,” such that “the proffered theory of causation was not sufficiently reliable”).⁵

Second, the Chief Special Master did not apply estoppel to either deny a fair hearing or bar the Oliver’s theory of causation. The Oliver’s assert that the Chief Special Master “effectively estopped the [Oliver’s] from fully presenting [their] case,” Appellants’ Br. 39, by noting that, “[t]o date, there have been at least [fifteen] other ... cases which involved children with SCN1A mutations[] and compensation has been denied in all of these cases,” *Oliver I*, 2017 WL 747846, at *1 (footnote omitted); *see id.* at *1 n.3 (listing the prior cases); *see also Estoppel*, Black’s Law Dictionary (10th ed. 2014) (defining estoppel as, *inter alia*, “[a] bar that prevents the relitigation of issues”). However, one reference to other cases rejecting similar claims does not constitute the application of estoppel. *Cf. Waymo LLC v. Uber Techs., Inc.*, 870 F.3d 1350, 1361 (Fed. Cir. 2017) (“We will not find legal error based upon an isolated statement stripped from its context.” (internal quotation marks and citation omitted)). Indeed, the Chief Special Master made no reference to estoppel, *see generally Oliver I*, 2017 WL 747846, and the Oliver’s concede that they cannot identify where the Chief Special Master applied *1364 estoppel to bar their claims, *see* Oral Arg. at 2:04–41 (acknowledging that the Chief Special Master’s opinion did not apply equitable estoppel and failing to identify any authority for finding an improper application of equitable estoppel under those circumstances). As we explained above, the Chief Special Master thoroughly considered the parties’ evidence and found the Government’s more persuasive, *Oliver I*, 2017 WL 747846, at *11–27, and we may not reweigh that evidence on appeal, *see Milik*, 822 F.3d at 1376.⁶

CONCLUSION

We have considered the Olivers' remaining arguments and find them unpersuasive. Accordingly, the Judgment of the U.S. Court of Federal Claims is

AFFIRMED

Newman, Circuit Judge, dissenting.

Infant E.O. was described by his pediatrician, at his 6-month well-baby visit on April 9, 2009, as developing normally, temperature 97.4° F. He was given the third dose of the DTaP¹ vaccine. At about 11:30 that night he was found convulsing and with a fever. He was rushed by ambulance to the emergency room, where a temperature of 101.3° F was recorded. By August 2009 E.O. had six observed seizure episodes. By the following year seizures were occurring daily, and normal mental and physical development were affected.

E.O.'s parents obtained genetic analysis of both his and their DNA. E.O. was found to have a mutation of the SCN1A gene, which has become associated with "severe myoclonic epilepsy in infancy," also called "Dravet syndrome," as characterized by Dr. Dravet in 1978.² The Petitioners duly sought the benefits of the Vaccine Act, but the Special Master held that since E.O. has this genetic mutation, any vaccine relationship is irrelevant and the Vaccine Act does not apply. My colleagues now affirm this ruling.

I respectfully dissent, for this is a classic case of vaccine injury, within the purpose, policy, and text of the Vaccine Act. Advances in scientific understanding of why some infants experience vaccine-related seizures and their tragic consequences, support the statutory plan.

DISCUSSION

It was known that about one half of one percent of apparently normal infants experience a serious adverse

reaction to vaccine. *See* S. Hrg. 98-1060, at 21 (1984). *1365 Vaccine injury of healthy infants has long been believed to be affected by some aberration within the infant; advances in genetic science now are enabling exploration of such aspects.

The Special Master held that E.O.'s "destiny" is to be mentally and physically disabled because of his SCN1A gene mutation. The Special Master held that it is irrelevant that E.O. experienced a classic Vaccine Act injury, and irrelevant whether the vaccine triggered or contributed to his ensuing disability. The Special Master discarded the studies that show at least half of the persons found to have the SCN1A mutation never manifest Dravet syndrome. The Special Master deemed it irrelevant that 20–30% of persons afflicted with Dravet syndrome do not have the SCN1A mutation.

The reported studies found that vaccination within the first 6 months of infancy almost always produced seizures and led to Dravet syndrome for infants having the SCN1A mutation, while vaccination after 12 months never produced seizures and Dravet syndrome. The studies show that both vaccination and the mutation have a role in Dravet syndrome. Nonetheless, my colleagues hold that if a genetic relationship to the injury can be found, the triggering role of vaccination is irrelevant.

Science is at last providing answers to why some infants manifest a severe reaction to vaccination. However, these are the infants for whom the Vaccine Act was enacted. Instead, HHS and the courts now exclude these infants from the Vaccine Act—in contravention of the statute and the legislative purpose.³

THE EVOLVING SCIENCE OF VACCINE INJURY

HHS acknowledges that E.O.'s 6-month DTaP vaccination produced an immediate reaction of seizures and fever, squarely within the statutory vaccine injury.⁴ However, HHS insists that vaccine injury is irrelevant if the SCN1A mutation is present.

The Petitioners cite several scientific articles that report studies of the role of vaccination when the SCN1A mutation is present. These articles illustrate evolving understanding, drawing on the capabilities of DNA analysis. I have placed these publications in chronological order, for they illustrate the growth of this area of scientific

knowledge, as well as the continuing uncertainties.

1.

M. Nieto-Barrera et al., *Severe Myoclonic Epilepsy in Infancy. An Analytical Epidemiological Study*, 30 REV. NEUROL. 620–24 (2000).

The authors report their study of patients afflicted in infancy with Severe Myoclonic *1366 Epilepsy (SMEI, referred to as “Dravet’s syndrome” by the early 2000s). The article recites the history of vaccine-related convulsions, and traces the appearance and effects of infant myoclonic epilepsy. The authors state:

Our study emphasizes, however, the high frequency in which the first convulsion is related with the DTP vaccination (six times with the first dose, eight with the second and two with the third), [a] fact that we consider, with discrete reservations, something more than a coincidence. The relation between the vaccine DTP and the convulsions has been discussed extensively. It is considered by some as mere coincidence etárea, is estimated that the majority of the seizures that follow to the pertussis vaccination are associated with the fever

J.A. 1197 (internal citations omitted). The authors state that “[a] relative increase has been verified of the incidence of convulsions in the three first days that follow to the vaccination,” *id.*, and that “[w]ith independence of the differences among vaccines of the diverse manufacturers ... sufficient experimental data exist to imply to the endotoxin and to the germ pertussis in the neurological adverse reactions to the pertussis vaccination.” *Id.*

2.

Charlotte Dravet et al., *Severe myoclonic epilepsy in infancy (Dravet Syndrome)*, in *Epileptic Syndromes in Infancy, Childhood and Adolescence* 89–113 (J. Roger et al. eds., 4th ed. 2005).

The authors review the scientific literature and de-scribe “Dravet syndrome.” They note that some studies have concluded that “in a significant number of SME cases a genetic aetiology is likely” *Id.* at 90. The authors report that many studies confirm that the syndrome does not manifest exclusively in individuals with the SCN1A mutation. *Id.* at 108. The authors discuss their attempts to understand the biophysical properties of SCN1A gene mutations and find phenotype/genotype correlations, and state that the relationship between genotype and phenotype is “complex.” *Id.* at 91. The authors state that:

afebrile seizures usually occur in the context of a vaccination or of an infectious episode, or after a bath. Later on, they are associated with febrile seizures in 80 per cent of the patients. Nieto-Barrera *et al.* (2000) emphasized the coincidence between the first seizure and the DTP (diphtheria-tetanus-polio) vaccination.

Id. at 92.

3.

Samuel F. Berkovic et al., *De-novo mutations of the sodium channel gene SCN1A in alleged vaccine*

***encephalopathy: a retrospective study*, 5 LANCET NEUROL. 488–92 (2006).**

5.

The authors state that “[v]accination, particularly for pertussis, has been implicated as a direct cause of an encephalopathy with refractory seizures and intellectual impairment.” *Id.* at 488 (Summary). They trace the association with SCN1A mutations, and state that “[t]he mechanism by which SCN1A mutations cause SMEI is unknown.” *Id.* at 491. The authors state that some patients with the SCN1A mutation may develop the syndrome without a vaccine trigger, and also state:

In the presence of SCN1A mutations, vaccination can still be argued to be a trigger for the encephalopathy, perhaps via fever or an immune mechanism.

*1367 *Id.* The authors state that this study was not designed to address that question.

4.

***Anne M. McIntosh et al., Effects of vaccination on onset and outcome of Dravet syndrome: a retrospective study*, 9 LANCET NEUROL. 592–98 (2010).**

The authors, reviewing the scientific literature, state that about 70–80% of children with Dravet syndrome have the SCN1A gene mutation, and about 20–30% do not have the mutation. *Id.* at 592. They report that about one-third of children with Dravet syndrome exhibited onset in less than 3 days after vaccination. The authors state that “[v]accination might trigger earlier onset of Dravet syndrome in children who, because of an SCN1A mutation, are destined to develop the disease.” *Id.* at 592.

***Blanca Tro-Baumann et al., A retrospective study of the relation between vaccination and occurrence of seizures in Dravet syndrome*, 52(1) EPILEPSIA 175–78 (2011).**

The authors state that for infants with SCN1A mutations,

epileptic seizures in the setting of fever are a clinical hallmark. Fever is also commonly seen after vaccinations and provocation of epileptic seizures by vaccinations in patients with Dravet syndrome has been reported, but not systematically assessed.

Id. at 175 (Summary). They report that “[t]he majority of seizures occurred after DPT vaccinations and within 72 h after vaccination.” *Id.*

The authors state that seizures after vaccination are “a common feature in Dravet syndrome and emphasize the need for preventive measures for seizures triggered by vaccination or fever in these children.” *Id.* at 175.

6.

***Meral Özmen et al., Severe myoclonic epilepsy of infancy (Dravet syndrome): Clinical and genetic features of nine Turkish patients*, 14(3) ANNALS OF INDIAN ACADEMY OF NEUROLOGY 178 (2011).**

The authors studied patients having the SCN1A mutation, and discuss the complexities of the relation to vaccines. They summarize past studies, and state:

Sudden occurrence of seizures and developmental regression after the pertussis vaccine in previously healthy children may confound as that it may be related with vaccination. There are several reasons for seizures and developmental regression in infancy. Some of them were incorrectly identified as vaccine encephalopathies. However, later studies did not support the link between permanent brain damage and vaccines. On the other hand, similarities were observed between clinical progressions of SMEI and vaccine encephalopathy as more data was gained about special epilepsy syndromes like SMEI. Berkovic et al. detected SCN1A gene mutations in 11 out of 14 patients who were diagnosed with vaccine encephalopathy. It was reported that the cause of vaccine encephalopathy was not vaccination but rather the genetically determined age-specific epileptic encephalopathy. In our patients, convulsions started after whole cell pertussis vaccination. Similarly, recent data from a study by McIntosh et al. showed that 37 patients out of 40 in the co-hort had their first seizure after at least one DTP vaccination. They concluded that while the pertussis vaccine is a trigger for earlier onset of the disease, it does not affect its outcome.

J.A. 1310 (internal citations omitted). The authors conclude that:

Pertussis vaccination acts as a trigger for the onset of [SMEI]. Neuro-developmental delay and behavioral problems that appear after two years of age should be expected in all patients as long-term complications of the disease.

J.A. 1311.

7.

Nelia Zamponi et al., *Vaccination and Occurrence of Seizures in SCN1A Mutation-positive Patients: A Multicenter Italian Study*, PEDIATRIC NEUROLOGY xxx 1–5 (2013).

The authors acknowledge the controversy concerning the relation of vaccination to Dravet syndrome (“DS”), and consider whether vaccination should be withheld for infants with the SCN1A mutation. They state:

The relationship between vaccination and clinical evolution of SCN1A-mutated patients is still controversial. Moreover, the possible advantage to suspend vaccination route in these patients has not been addressed. Recently, some authors have argued that vaccination might trigger the onset of DS in patients carrying a genetic mutation because these patients are genetically inclined to developing the disease. However, according to these studies, vaccination does not seem to affect clinical outcome of DS and therefore it should not be withheld. In contrast, other authors have stated that vaccination, performed either before or after DS onset, might affect clinical outcome of these patients.

Id. at 2 (internal citations omitted). The authors are cautious about extrapolating vaccination recommendations from their results, although they state that “patients who experienced seizures close to vaccination had an earlier seizure onset and a higher frequency of status epilepticus during development.” *Id.* at 4.

8.

Valentina Cetica et al., *Clinical and Genetic Factors Predicting Dravet Syndrome in Infants with SCN1A Mutations*, 88(11) NEUROLOGY 1037 (2017).

This is a study of 200 persons having the SCN1A mutation, wherein 97 had Dravet syndrome, including borderline forms, and 103 did not have the syndrome. All 200 subjects were more than 24 months of age, which is when Dravet syndrome can usually be diagnosed; the sample had an average age of 18.58 years.

Of these subjects, the relation of seizure occurrence to Dravet syndrome was analyzed, with 182 patients having had seizures as their presenting symptom. The authors report that “age at first seizure and frameshift mutations were associated with Dravet Syndrome. The risk of [developing] Dravet Syndrome was 85% [if the first seizure occurred] in the 0- to 6-month group, 51% in the 6- to 12-month range, and 0% after the 12th month.” *Id.* at 1037. The authors report that: “None of the patients who experienced their first seizure after 12 months of age developed Dravet syndrome.” *Id.* at 1040. Thus, “an older age at seizure onset represents a protective factor against the risk of developing Dravet syndrome.” *Id.*

***1369 APPLICATION TO E.O.**

The government’s position is that “E.O.’s mutation is the sole cause of his Dravet syndrome and his resulting neurological condition.” J.A. 2. Although the science is still evolving, it is apparent that this simplistic statement is incorrect.

All of the reported studies show a role of vaccination in producing seizures in infants with the SCN1A mutation. The Petitioners agree that there is a relationship between

E.O.’s genetic mutation and his seizures and ensuing disabilities; they argue that “his DTaP vaccination in conjunction, with his SCN1A mutation ... likely caused his seizure disorder, encephalopathy, and developmental delays.” Reply Br. 1.

It is not known whether E.O. would have manifested Dravet syndrome without the vaccination. The only certainty is that E.O. experienced a dramatic reaction within a few hours of DTaP vaccination, that the seizures continued, and that there were developmental consequences. The Special Master so acknowledged, but leaped to the conclusion that “[a]lthough E.O.’s vaccinations may have caused a fever or otherwise triggered his first seizure, neither that initial seizure nor his vaccinations caused his Dravet syndrome or neurological complications.” *Oliver v. Sec’y of Health & Human Servs.*, No. 10-394V, 2017 WL 747846, at *2 (Fed. Cl. Feb. 1, 2017).

This conclusion does not withstand scrutiny. The scientific studies all show a reasonable likelihood that E.O.’s vaccination in his first 6 months triggered the adverse events he suffered. The seizures and fever on the evening of E.O.’s 6-month DTaP vaccination are recognized in the scientific literature as likely to have contributed to or triggered the Dravet syndrome in conjunction with the SCN1A mutation.

“Likelihood” is the standard of Vaccine Act recovery, for the Vaccine Act arose because certainty was not available. Until modern science discovered a genetic foundation for at least some vaccine injury, E.O.’s vaccine response would have been classified as a “Table Injury” and routinely entitled to the support of the Vaccine Act. Though science has begun to understand previously unexplained responses to vaccines, such understanding does not alter the Vaccine Act.

Until every infant is genetically analyzed before vaccination and all aberrant genes are identified, the Vaccine Act is the nation’s response to potential vaccine-induced consequences such as Dravet syndrome. HHS is required to administer the Vaccine Act in accord with its text and purpose. From my colleagues’ contrary ruling, I respectfully dissent.

All Citations

900 F.3d 1357

Footnotes

- 1 According to a 2010 study on the relation between vaccination and Dravet syndrome, “Dravet syndrome, formerly severe myoclonic epilepsy of infancy (SMEI), is characterized by prolonged febrile seizures starting at about the age of [six] months.” J.A. 1221. “Mutations in [the] SCN1A [gene] can be identified in the majority of patients, and epileptic seizures in the setting of fever are a clinical hallmark” of Dravet syndrome. J.A. 1221 (italics omitted).
- 2 The relevant facts and procedural history are largely undisputed and are set forth in the Chief Special Master’s and Court of Federal Claims’ decisions below. *See Oliver II*, 133 Fed.Cl. at 344–48; *Oliver I*, 2017 WL 747846, at *1–9. For convenience, we cite those opinions in outlining the undisputed facts relevant to this appeal.
- 3 The Table is published in 42 U.S.C. § 300aa-14. For injuries listed in the Table, i.e., “Table Injuries,” “causation is presumed when a designated condition follows the administration of a designated vaccine within a designated period of time.” *Moberly ex rel. Moberly v. Sec’y of Health & Human Servs.*, 592 F.3d 1315, 1321 (Fed. Cir. 2010). For “all other injuries alleged to be caused by a vaccine” that are not listed in the Table, i.e., “off-Table injuries,” “causation must be proved in each case.” *Id.* (citation omitted).
- 4 While the Chief Special Master referenced *Daubert* in the “Standards for Adjudication” section of her opinion, *see Oliver I*, 2017 WL 747846, at *10, she did not exclude either parties’ evidence and made no reference to *Daubert* when weighing the parties’ evidence to determine whether the Olivers had satisfied their burden of establishing each of the *Athen* prongs, *see id.* at *11–21. Nevertheless, the Government acknowledges that the Chief Special Master *implicitly* conducted a *Daubert* analysis in finding the Olivers’ expert’s testimony and supporting evidence unpersuasive. *See Oral Arg.* at 18:39–19:17, <http://oralarguments.cafc.uscourts.gov/default.aspx?fl=2017-2540.mp3>.
- 5 At oral argument, the Olivers asked the court to take judicial notice of an extra-record scientific article published in 2017 (“the 2017 Article”). *Oral Arg.* at 10:12–11:41; *see Reply Br. 20 & n.8* (discussing Valentina Cetica et al., *Clinical and Genetic Factors Predicting Dravet Syndrome in Infants with SCN1A Mutations*, 88(11) *Neurology* 1037, 1037 (2017), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5384833/> (exploring the “prognostic value of initial clinical and mutational findings in infants with SCN1A mutations” and concluding that, “[i]n individuals with SCN1A mutations, age at seizure onset appears to predict outcome better than mutation type” (italics omitted))). The Olivers allege that this article demonstrates that one “can have the SCN1A [gene] and *not* develop Dravet syndrome” and that E.O.’s “vaccination *triggered* the onset of seizures within his first [twelve] months” and, thus, was a but-for cause of his injuries because it “*did* impact his clinical course.” *Reply Br. 21*. Scientific “theories that are so firmly established as to have attained the status of scientific law, such as the laws of thermodynamics, properly are subject to judicial notice under Federal Rule of Evidence 201.” *Daubert*, 509 U.S. at 592 n.11, 113 S.Ct. 2786; *see Fed. R. Evid. 201(b)* (“The court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court’s territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.”). However, the Olivers have failed to establish that this theory has garnered such widespread acceptance, as evidenced by the Chief Special Master’s extensive discussion of articles with contradictory findings. *See, e.g., Oliver I*, 2017 WL 747846, at *15 (discussing “studies show[ing] that the occurrence of febrile seizures following vaccinations does not change the clinical course or outcome of Dravet syndrome”). Therefore, we decline to take judicial notice of the 2017 Article. *See Brown v. Piper*, 91 U.S. 37, 42–43, 23 L.Ed. 200 (1875) (explaining that a courts’ power to take judicial notice “is to be exercised ... with caution,” that “[c]are must be taken that the requisite notoriety exists,” and that “[e]very reasonable doubt upon the subject should be resolved promptly in the negative”). To the extent the Olivers ask us to consider findings in the 2017 Article, “studies that were not before the [Chief S]pecial [M]aster are not appropriate for consideration on appellate review.” *Whitecotton ex rel. Whitecotton v. Sec’y of Health & Human Servs.*, 81 F.3d 1099, 1104–05 (Fed. Cir. 1996) (citation omitted).
- 6 To the extent the Olivers contend that, even if the Chief Special Master did not improperly apply estoppel, the Chief Special Master abused her discretion by denying their request for an evidentiary hearing, *see Appellants’ Br. 39*, we disagree. Special masters have “wide discretion” to determine whether to hold an evidentiary hearing. *Burns ex rel. Burns v. Sec’y of Dep’t of Health & Human Servs.*, 3 F.3d 415, 417 (Fed. Cir. 1993); *see 42 U.S.C. § 300aa-12(d)(3)(B)(v)* (providing that the special master “may conduct such hearings as may be reasonable and necessary”); Rule 8(d) of App. B to the Rules of the Court of Federal Claims (permitting the special master to “decide a case on the basis of written submissions without conducting an evidentiary hearing”). Because the record was fully developed and the Olivers have not identified any factual or legal errors by the Chief Special Master that would have necessitated an evidentiary hearing, we conclude that the Chief Special Master acted within her discretion in denying the Olivers’ request for such a hearing. *See Burns*, 3 F.3d at 417.
- 1 Diphtheria-Tetanus-acellular Pertussis. J.A. 2.
- 2 The record states that E.O.’s parents do not have the mutation.

- 3 Congress recognized the consequences of government-mandated vaccination when it instituted a compensation scheme. *See* S. Hrg. 98-1060, at 5 (1984) (“In all of our States, vaccination is required before a child will be allowed to enter public school. Federal, State, and local government officials urge all parents to immunize their children. For all practical purposes, immunization pro-grams have become obligatory. Should a child sustain injury as a consequence of such an immunization pro-gram, it hardly seems fair that that child or its parents should sustain the entire burden of the consequences which may follow.”). Congress was also well aware that the DTP vaccine could cause the injuries sustained by E.O. *See* S. Hrg. 98-350, at 1 (1983) (“The occurrence of occasional central nervous system reactions to pertussis vaccines is well-established, ranging from simple, short-lived convulsions to encephalopathy with permanent brain damage and, rarely, death.”).
- 4 The Vaccine Act establishes a presumption of vaccine injury when fever and seizure occur within 3 days after immunization, 42 U.S.C. §§ 300aa-14(a); 14(b)(2).

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911 F.3d 1381

United States Court of Appeals, Federal Circuit.

Laura OLIVER, and, Eddie Oliver, Jr., Parents and
Legal Representatives of E.O., III, Petitioners-
Appellants

v.

SECRETARY OF HEALTH AND HUMAN
SERVICES, Respondent-Appellee

2017-2540

|
January 9, 2019

Appeal from the United States Court of Federal Claims in
No. 1:10-vv-00394-EDK, Judge Elaine Kaplan.

**ON PETITION FOR PANEL REHEARING AND
REHEARING EN BANC**

Attorneys and Law Firms

Clifford John Shoemaker, Shoemaker and Associates,
Vienna, VA, filed a combined petition for panel rehearing
and rehearing en banc for petitioners-appellants.

Daniel Anthony Principato, Torts Branch, Civil Division,
United States Department of Justice, Washington, DC,
filed a response to the petition for respondent-appellee.
Also represented by Joseph H. Hunt, C. Salvatore
D'Alessio, Catharine E. Reeves, Heather L. Pearlman.

Before Prost, Chief Judge, Newman, Lourie, Dyk, Moore,
O'Malley, Reyna, Wallach, Taranto, Chen, Hughes, and
Stoll, Circuit Judges.

Newman, Circuit Judge, with whom Reyna, Circuit Judge,
joins, dissents from the denial of the petition for rehearing
en banc.

ORDER

Per Curiam.

Appellants Laura Oliver and Eddie Oliver, Jr., parents and

legal representatives of E.O., III, filed a combined petition
for panel rehearing and rehearing en banc. A response to
the petition was invited by the court and filed by the
Secretary of Health and Human Services. The petition for
rehearing and response were first referred to the panel that
heard the appeal, and thereafter referred to the circuit
judges who are in regular active service. A poll was
requested, taken, and failed.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

The mandate of the court will issue on January 16, 2019.

Newman, Circuit Judge, with whom Reyna, Circuit
Judge, joins, dissenting from the denial of the petition for
rehearing en banc.

I write in dissent, for the court's ruling conflicts with the
terms and the premises of the Vaccine Act. Here, baby
Oliver ("E.O."), within hours of his 6-month well-baby
DTaP vaccinations, experienced fever and seizures,
followed by more seizures and encephalopathies and
developmental injuries. The government's position is that
the Vaccine Act is not available to E.O. because of his
genetic makeup. This ruling is legally and scientifically
incorrect. It has important implications for national vaccine
immunization programs, for scientific study now suggests
that previously unexplained vaccine injury is related to
genetic makeup. En banc attention is warranted.

****1382 The National Childhood Vaccine Injury Act of
1986***

It had long been known that a small percentage of
childhood vaccinations have led to grave injury and
permanent disability, as discussed in the legislative record:

Childhood vaccines are essential to maintain the health of our society. They have been invaluable weapons against the dread diseases that used to kill or injure hundreds of thousands of children every year: polio, measles, pertussis, diphtheria, tetanus, rubella, mumps, and smallpox. But while these vaccines have brought the gift of life and health to millions, there are a very small number of children every year who are injured by unpredictable side effects of the vaccines through no fault of their own or the vaccine manufacturers.

132 Cong. Rec. S17,343–02 (1986) (statement of Sen. Kennedy). The House Report reiterated the concern for unforeseeable injury flowing from compulsory vaccinations:

While most of the Nation's children enjoy greater benefit from immunization programs, a small but significant number have been gravely injured.

....

... But it is not always possible to predict who they will be or what reactions they will have. And since State law requires that all children be immunized before entering school, most parents have no choice but to risk the chance—small as that may be—that their child may be injured from a vaccine.

H.R. Rep. No. 99-908, at 4–6 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 6344, 6345–46.

The legislative record states that about one half of one percent of children each year experience vaccine-related injury;¹ and with four million births each year in the United States, this is about 20,000 vaccine injuries per year.² The record referred to the withdrawal of vaccine manufacturers in the United States:

[A] major vulnerability is the unresolved public policy problem of liability for unavoidable injury in mass immunization programs. The specter of high and uncertain damage awards contributes to driving manufacturers out of vaccine production

Examination of the Task Force Report on the Vaccine Pertussis: Before the Comm. on Labor & Human Res., 98th Cong. 3 (1983) (statement of Sen. Hawkins) (“S. Hrg. 98-350”). It was reported that “there is only one pharmaceutical manufacturer in the entire United States for 19 types of vaccine products and no U.S. manufacturer of 11 other vaccine products.” *Id.* Congress also recognized the concern for children whose “futures [had] been destroyed” by vaccine-related injury and whose “mounting expenses must be met.” H.R. Rep. No. 99–908, at 6 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 6344, 6347.

Thus the Vaccine Act was developed as a no-fault system to compensate “vaccine-injured persons quickly, easily, and with certainty and generosity.” *Id.* at 3. The Act is supported by payments to the Vaccine Injury Compensation Trust Fund, *1383 26 U.S.C. § 9510, funded by a tax of “75 cents per dose of any taxable vaccine.” 26 U.S.C. § 4131(b)(1).

Infant E.O.’s seizures and fever appeared the evening of his DTaP vaccinations. The government argues and the court holds that Vaccine Act compensation is not available because E.O. has a genetic mutation that might injure him at some time. This ruling negates the purpose of the Vaccine Act, for E.O. was required to be vaccinated and he was injured thereby. He is directly within the letter and the purpose of the Vaccine Act.

E.O.’s vaccine injury is typical of the vaccine injury that necessitated the Vaccine Act

On April 9, 2009 E.O. received his six-month well-baby check-up. His pediatrician administered the requisite DTaP vaccine (diphtheria-tetanus-acellular pertussis). That evening he was observed with seizures and a fever, and was taken to the emergency room. The record details his tragic history of seizures, encephalopathies, and developmental disabilities.

After E.O.’s reaction to the DTaP vaccine, his parents obtained an analysis of his DNA. It was found that E.O. has a mutation of the SCN1A gene—a mutation that has been found to sometimes be associated with an epileptic condition called “Dravet syndrome.” The government’s position is that it is irrelevant whether the vaccine triggered E.O.’s adverse reactions, for this mutation alone could have led to injury.

The government's theory is not that E.O.'s genetic mutation contributed to his injury, for that would invoke the "preexisting condition" provision of the Vaccine Act. *See* 42 U.S.C. § 300aa-33(4). Rather, the government's theory is that E.O.'s mutation would itself have caused the injury he experienced; on this reasoning, the government argued that the Vaccine Act does not apply to E.O.'s injury. The Chief Special Master and the courts agreed.

Despite record evidence that 20–30% of persons with Dravet syndrome do not have the SCN1A mutation, *see* Anne M. McIntosh et al., *Effects of Vaccination on Onset and Outcome of Dravet Syndrome: A Retrospective Study*, 9(6) *Lancet Neurol.* 592–98 (2010), my colleagues refused to consider the data that over half the persons with the SCN1A mutation do not experience Dravet syndrome, for these data were published after the Special Master's decision. *See* Valentina Cetica et al., *Clinical and Genetic Factors Predicting Dravet Syndrome in Infants With SCN1A Mutations*, 88(11) *Neurology* 1037 (2017) (reporting that "[w]e observed 123 different SCN1A mutations" and that they "could not predict with high confidence Dravet syndrome vs milder phenotypes" and "outcome is not predetermined by genetic factors only").

Nonetheless the government argues, and my colleagues affirm, that E.O. would have been gravely injured due to his SNC1A mutation—that it is his "destiny"—and that it is irrelevant that the DTaP vaccinations initiated the seizures and their consequences. However, this is precisely the event at which the Vaccine Act is aimed, lest concerned parents withhold vaccinations, and concerned manufacturers cease production of vaccines.

Advances of science provide hope for avoiding vaccine injury—not grounds for avoiding compensation for vaccine injury

The Vaccine Act and its compensation program are of national importance, and immunizations are increasing. A child born today may receive up to 25 vaccinations by the age of 18 months—three doses of hepatitis B; three doses of rotavirus; three *1384 doses of diphtheria, tetanus, and acellular pertussis; four doses of influenza type B; four doses of pneumococcal conjugate; three doses of inactivated poliovirus; one dose of influenza; one dose of measles, mumps, and rubella; one dose of varicella; and two doses of hepatitis A.³

The Vaccine Act places some injuries on a presumptive injury Table, and other injuries require evidence that the subject "sustained, or had significantly aggravated, any illness, disability, injury, or condition not set forth in the Vaccine Injury Table but which was caused by a vaccine" 42 U.S.C. § 300aa-11(c)(1)(C)(ii)(I). "Aggravation" refers to a preexisting condition. *See id.* at § 300aa-33(4) ("The term 'significant aggravation' means any change for the worse in a preexisting condition which results in markedly greater disability, pain, or illness accompanied by substantial deterioration of health.").

The role of genetic knowledge in the vaccine compensation program requires deeper understanding than the "destiny" pejorative that removed E.O. and others from the program despite the direct relation between vaccination and injury. Recent years have seen powerful advances in knowledge. The Human Genome Project, starting in 1990, involved scientists around the world in identifying and sequencing all three billion base pairs (approximately 25,000 genes) that constitute the human genome.⁴ This took 13 years and about \$2.7 billion dollars.⁵ Today genetic analysis can be completed in a few days or hours, and mechanization is continually adding speed and reducing cost.

With new analytic resources, and the ever-increasing importance of immunizations, many scientific studies have been directed to these aspects. A review states: "Just until recently, the idea of genetics influencing the response to vaccine exposure began to be further explored." John Castiblanco & Juan-Manuel Anaya, *Genetics and Vaccines in the Era of Personalized Medicine*, 16 *Current Genomics* 47, 49 (2015). These authors state:

A vaccine generally improves immunity to a particular disease upon administration by inducing specific protective and efficient immune responses in all of the receiving population. The main known factors influencing the observed heterogeneity for immune responses induced by vaccines are gender, age, co-morbidity, immune system, and genetic background.

Id. at Abstract. And "[t]he effect of the genetic status, in defining the response generated directly or indirectly with an innate or adaptative immune response, has been demonstrated across multiple viral vaccines (e.g., smallpox, influenza, measles, rubella, and mumps)." *Id.* at 47.

The scientific literature describes new fields called “vaccinomics” and “adversomics,” directed to understanding and predicting how an individual will respond to a vaccine, as further summarized by GA Poland et al., *Personalized Vaccinology: A Review*, 38 Vaccine 5350, (2018). Poland et al. earlier wrote, in *Heterogeneity in Vaccine Immune Response: The Role of Immunogenetics and the Emerging Field of Vaccinomics*, 82 Clinical Pharmacol Ther. 653 (2007):

this new golden age of vaccinology has been termed “predictive vaccinology,” which will predict the likelihood of a *1385 vaccine response or an adverse response to a vaccine, the number of doses needed and even whether a vaccine is likely to be of benefit (i.e., is the individual at risk for the outcome for which the vaccine is being administered?).

Id. at Abstract. See also Jennifer A. Whitaker et al., *Adversomics: A New Paradigm for Vaccine Safety and Design*, 14 Expert Review Vaccines 935 (2015):

[T]he field of vaccine adversomics is in its infancy. At this time, these technologies are not being used clinically. The first step in advancing this science is to use adversomics research techniques to understand the mechanisms behind adverse events that have a causal relationship with immunization The precise mechanisms of adverse reactions associated with vaccines are not well understood. Understanding the molecular/genetics/proteomics level (i.e., adversomics) involvement, specifically how genetics (genomics and transcriptomics) impact the development of vaccine adverse reactions, may aid in the design of newer and safer vaccine candidates.

Id. at 939.

Rebecca E. Chandler, *Harm Caused by Vaccines Might Vary Between Individuals*, 358 British Medical Journal (Online) (2017), refers to:

A growing number of publications in the literature describe links between [adverse events following immunization] and individual variation. ... [including] the discovery of genetic variants associated with an increased risk of febrile convulsions after the measles, mumps, and rubella and smallpox vaccines.

There’s much more. The government’s theory that the mere existence of E.O.’s SCN1A mutation doomed him to a lifetime of seizures and disability—although no sign appeared until the night of his DTaP vaccination, has been overtaken by science. The court’s ruling is a misapplication of knowledge and a distortion of the Vaccine Act.

En banc action is required, to correct our precedent in view of advances in knowledge

I am optimistic that advances in science may reduce the 20,000 new vaccine injuries per year, by providing predictability and preventive capability. Meanwhile, the court has erred in removing vaccine-injured children from access to the Vaccine Act if they are found to have a genetic mutation. Several decisions of this court have accepted this flawed premise.

In *Snyder v. Sec’y of Health & Human Servs.*, 553 F. App’x 994, 1004 (Fed. Cir. 2014), this court held that “the evidence supports a finding that the SCN1A gene mutation was, more likely than not, the sole cause” of the seizure disorders that occurred upon vaccination. This oversimplification has been discredited, see *Cetica, supra*. Until legislative attention brings the statute into conformity with advancing science it befalls the court to do our best to get it right.

In *Deribeaux ex rel. Deribeaux v. Sec’y of Health & Human Servs.*, 717 F.3d 1363, 1368 (Fed. Cir. 2013), although the infant experienced a prolonged seizure the day

after the DTaP vaccination, and continued to experience seizures and convulsions, this court affirmed the Special Master's finding that "the SCN1A gene mutation was the sole substantial cause of Deribeaux's seizure disorder and developmental delays." However, the wealth of scientific knowledge between then and now teaches that a "sole" cause is rare indeed.

In *Stone v. Sec'y of Health & Human Servs.*, 676 F.3d 1373 (Fed. Cir. 2012), *rehearing denied*, 690 F.3d 1380, 1382 (Fed. Cir. 2012), this court held that a *1386 mutation was solely responsible for the child's seizures that were initiated by the vaccination.

In all of these cases, there was a direct cause-and-effect relation between vaccination and the seizure response, yet the court held that the vaccination did not bring the injury within the Vaccine Act. This is a case of "a little knowledge" producing an over-simplification of extraordinarily complex relationships, while contravening the purposes of the Vaccine Act: to share the burden of vaccine injury, while preserving the development and manufacture of vaccines.

* * *

The government argued that E.O. would have been gravely injured independent of his six-month vaccinations. This is not only contrary to the statute; it is also contrary to the scientific evidence, for it is conceded that E.O.'s DTaP vaccinations triggered an immediate reaction of seizures and fever, followed by more seizures, encephalopathies, and ensuing disability.

The only difference between this case and a compensable case was that E.O.'s parents had his DNA analyzed. Modern science is starting to explain what had previously been inexplicable. In retrospect, had E.O.'s mutation been known before his routine six-month vaccination, the vaccination might not have occurred. But DNA analysis before vaccination is not compulsory—vaccination is compulsory.

We should rehear en banc, to apply the Vaccine Act in accordance with its purpose. From the denial of reconsideration, I respectfully dissent.

All Citations

911 F.3d 1381 (Mem)

Footnotes

- 1 *To Amend the Public Health Service Act to Provide for the Compensation of Children and Others Who Have Sustained Vaccine-Related Injury, and for Other Purposes: Hearing on S. 2117 Before the Comm. on Labor & Human Res.*, 98th Cong. 21 (1984) ("S. Hrg. 98-1060").
- 2 Joyce A. Martin et al., *Births: Final Data for 2017*, 67 National Vital Statistics Reports 1, 3 (2018), https://www.cdc.gov/nchs/data/nvsr/nvsr67/nvsr67_08508.pdf.
- 3 https://www.aap.org/en-us/Documents/immunization-_schedule2018.pdf.
- 4 <https://report.nih.gov/NIHfactsheets/ViewFactSheet.aspx?csid=45>.
- 5 <https://www.genome.gov/11006943/human-genome-project-completion-frequently-asked-questions/>.

6 N.Y.3d 563

Court of Appeals of New York.

In the Matter of PATROLMEN'S BENEVOLENT
ASSOCIATION OF THE CITY OF NEW YORK,
INC., Appellant,

v.

NEW YORK STATE PUBLIC EMPLOYMENT
RELATIONS BOARD et al., Respondents.

In the Matter of Town of Orangetown et al.,
Respondents,

v.

Orangetown Policemen's Benevolent Association
et al., Appellants.

March 28, 2006.

Synopsis

Background: Police union brought article 78 proceeding challenging determination of the Public Employment Relations Board (PERB) that certain proposed contract terms were not mandatory subjects of collective bargaining. The Supreme Court, Albany County, Sheridan, J., dismissed the application, and union appealed. The Supreme Court, Appellate Division, 13 A.D.3d 879, 786 N.Y.S.2d 269, affirmed, and appeal was taken. In separate proceeding, town sought to permanently stay arbitration of a town police officer's disciplinary dispute. The Supreme Court, Rockland County, Sherwood, J., granted petition, and police officer and his union appealed. The Supreme Court, Appellate Division, 18 A.D.3d 879, 796 N.Y.S.2d 626, affirmed, and appeal was taken.

The Court of Appeals, R.S. Smith, J., held that statutes giving local officials disciplinary authority over police departments precluded collective bargaining on subject of police discipline under the Taylor Law.

Affirmed in part and affirmed as modified in part.

Attorneys and Law Firms

***1 Kaye Scholer LLP, New York City (Peter M. Fishbein, Jay W. Waks, John D. Geelan and Christine A. Neagle of counsel), Gleason, Dunn, Walsh & O'Shea, Albany (Ronald G. Dunn of counsel), and Office of the Patrolmen's Benevolent Association of City of New York, Inc. General Counsel, New York City (***2 Michael T.

Murray of counsel), for appellant in the first above-entitled proceeding.

Sandra M. Nathan, Albany, and William L. Busler for New York State Public Employment Relations Board, respondent in the first above-entitled proceeding.

Michael A. Cardozo, Corporation Counsel, New York City (Edward F.X. Hart, Leonard Koerner and Spencer Fisher of counsel), for City of New York, respondent in the first above-entitled proceeding.

Donna M.C. Giliberto, Albany, for New York State Conference of Mayors and Municipal Officials, amicus curiae in the first above-entitled proceeding.

Patterson, Belknap, Webb & Tyler, LLP, New York City (Anthony P. Coles and Walter M. Luers of counsel), for Sergeants Benevolent Association of the City of New York, amicus curiae in the first above-entitled proceeding.

Certilman Balin Adler & Hyman, LLP, East Meadow (Wayne J. Schaefer and Michael C. Axelrod of counsel), for Police Benevolent Association of the New York State Troopers, Inc. and another, amici curiae in the first above-entitled proceeding.

Bunyan & Baumgartner, LLP, Blauvelt (Joseph P. Baumgartner and Richard P. Bunyan of counsel), for appellants in the second above-entitled proceeding.

Keane & Beane, P.C., White Plains (Lance H. Klein and Edward J. Phillips of counsel), for respondents in the second above-entitled proceeding.

Donna M.C. Giliberto, Albany, for New York State Conference of Mayors and Municipal Officials, amicus curiae in the second above-entitled proceeding.

*570 **449 OPINION OF THE COURT

R.S. SMITH, J.

We hold that police discipline may not be a subject of collective bargaining under the Taylor Law when the Legislature has expressly committed disciplinary authority over a police department to local officials.

Facts and Procedural History

Matter of Patrolmen's Benevolent Assn. of City of N.Y., Inc. v New York State Pub. Empl. Relations Bd.

The Patrolmen's Benevolent Association of the City of New York (N.Y.CPBA) seeks to annul a decision by the Public Employment Relations Board (PERB) that the City need not bargain with the NYCPBA over five subjects, even though those subjects had been dealt with in an expired collective bargaining agreement. The expired agreement had provided: (1) that police officers being questioned in a departmental investigation would have up to four hours to confer with counsel; (2) that certain guidelines for interrogation of police officers would remain unchanged; (3) that a "joint subcommittee" would "develop procedures" to assure the timely resolution of disciplinary charges; (4) that a pilot program would be established to refer disciplinary matters to an agency outside the police department; and (5) that employees charged but not found guilty could petition to have the records of disciplinary proceedings expunged. PERB found that all these provisions concerned "prohibited subjects of bargaining."

Supreme Court upheld PERB's decision on the ground that the New York City Charter and Administrative Code, as interpreted in *Matter of City of New York v. MacDonald*, 201 A.D.2d 258, 259, 607 N.Y.S.2d 24 [1st Dept.1994], required that the discipline of New York City police ****450** *****3** officers be left to the discretion of the Police Commissioner. The Appellate Division affirmed, as do we.

***571** *Matter of Town of Orangetown v Orangetown Policemen's Benevolent Assn.*

The Town of Orangetown and its Town Board brought this proceeding against the Orangetown Policemen's Benevolent Association (Orangetown PBA) and a police officer, seeking to stay arbitration of a dispute between the Town and the officer over a disciplinary issue. The Orangetown PBA and the officer had sought arbitration pursuant to article 15 of the collective bargaining agreement between the Town and the union, which prescribed detailed procedures, culminating in an arbitration, for any "dispute concerning the discipline or

discharge" of an Orangetown police officer. Supreme Court granted the application to stay arbitration. Relying on *Matter of Rockland County Patrolmen's Benevolent Assn. v. Town of Clarkstown*, 149 A.D.2d 516, 539 N.Y.S.2d 993 [2d Dept.1989] and *Matter of Town of Greenburgh (Police Assn. of Town of Greenburgh)*, 94 A.D.2d 771, 772, 462 N.Y.S.2d 718 [2d Dept.1983], Supreme Court held that article 15 is invalid under the Rockland County Police Act, because that act commits police discipline to the discretion of local authorities. The Appellate Division affirmed.

The specific issue that gave rise to this case is now moot, because the Town and the officer have settled their differences, but the Town and the Orangetown PBA continue to disagree about article 15's validity, and both sides have asked us to decide that question. We therefore convert the proceeding to a declaratory judgment action and declare that, as the courts below held, article 15 is invalid.

Discussion

We confront, not for the first time, a tension between the "strong and sweeping policy of the State to support collective bargaining under the Taylor Law" (*Matter of Cohoes City School Dist. v. Cohoes Teachers Assn.*, 40 N.Y.2d 774, 778, 390 N.Y.S.2d 53, 358 N.E.2d 878 [1976]) and a competing policy—here, the policy favoring strong disciplinary authority for those in charge of police forces. We have held that the policy of the Taylor Law prevails, and collective bargaining is required, where no legislation specifically commits police discipline to the discretion of local officials (*Matter of Auburn Police Local 195, Council 82, Am. Fedn. of State, County & Mun. Empls., AFL-CIO v. Helsby*, 46 N.Y.2d 1034, 416 N.Y.S.2d 586, 389 N.E.2d 1106 [1979], *affg. for reasons stated below* 62 A.D.2d 12, 404 N.Y.S.2d 396 [3d Dept.1978]). Since *Auburn* was decided, however, the First, Second and Third departments of the Appellate Division have held that, where such legislation ***572** is in force, the policy favoring control over the police prevails, and collective bargaining over disciplinary matters is prohibited (*MacDonald*, 201 A.D.2d at 259, 607 N.Y.S.2d 24; *Rockland County Patrolmen's Benevolent Assn.*, 149 A.D.2d at 517, 539 N.Y.S.2d 993; *Town of Greenburgh*, 94 A.D.2d at 771–772, 462 N.Y.S.2d 718; *Matter of City of Mount Vernon v. Cuevas*, 289 A.D.2d 674, 675–676, 733 N.Y.S.2d 793 [3d Dept.2001]). We decide today that these Appellate Division holdings were correct.

The Taylor Law (Civil Service Law art. 14) requires collective bargaining over all “terms and conditions of employment”:

“Where an employee organization has been certified or recognized ... the appropriate public employer shall be, and hereby is, required to negotiate collectively with such employee organization in the determination of, and administration of grievances arising under, the terms and conditions of employment of the public employees” (Civil Service Law § 204[2]).

*****4 **451** We have often stressed the importance of this policy, and have made clear that “the presumption ... that all terms and conditions of employment are subject to mandatory bargaining” cannot easily be overcome (*Matter of City of Watertown v. State of N.Y. Pub. Empl. Relations Bd.*, 95 N.Y.2d 73, 79, 711 N.Y.S.2d 99, 733 N.E.2d 171 [2000]; see also, e.g., *Matter of Board of Educ. of City School Dist. of City of N.Y. v. New York State Pub. Empl. Relations Bd.*, 75 N.Y.2d 660, 667–668, 555 N.Y.S.2d 659, 554 N.E.2d 1247 [1990]; *Board of Educ. of Union Free School Dist. No. 3 of Town of Huntington v. Associated Teachers of Huntington*, 30 N.Y.2d 122, 129, 331 N.Y.S.2d 17, 282 N.E.2d 109 [1972]).

On the other hand, we have held that some subjects are excluded from collective bargaining as a matter of policy, even where no statute explicitly says so. Thus, we have held that local boards of education may not surrender, in collective bargaining agreements, their ultimate responsibility for deciding on teacher tenure (*Cohoes*, 40 N.Y.2d at 778, 390 N.Y.S.2d 53, 358 N.E.2d 878), or their right to inspect teachers’ personnel files (*Board of Educ., Great Neck Union Free School Dist. v. Areman*, 41 N.Y.2d 527, 394 N.Y.S.2d 143, 362 N.E.2d 943 [1977]). We have held that a police department may not be required to bargain over the imposition of certain requirements on officers receiving benefits following injuries in the line of duty (*Matter of Schenectady Police Benevolent Assn. v. New York State Pub. Empl. Relations Bd.*, 85 N.Y.2d 480, 483, 626 N.Y.S.2d 715, 650 N.E.2d 373 [1995]), and that a city may not surrender, in collective bargaining, its statutory right to choose among police officers seeking promotion (***573** *Matter of Buffalo Police Benevolent Assn. [City of Buffalo]*, 4 N.Y.3d 660, 797 N.Y.S.2d 410, 830 N.E.2d 308 [2005]). And we have held that public policy bars enforcement of a provision in a collective bargaining agreement that would limit the power of the New York City Department of Investigation to interrogate city employees in a criminal investigation (*Matter of City of New York v. Uniformed Fire Officers Assn., Local 854, IAFF, AFL-CIO*, 95 N.Y.2d 273, 716 N.Y.S.2d 353, 739 N.E.2d 719 [2000]).

In none of these cases did a statute exclude a subject from collective bargaining in so many words. In each case, however, we found a public policy strong enough to warrant such an exclusion. As we explained in *Cohoes*, the scope of collective bargaining may be limited by “ ‘plain and clear, rather than express, prohibitions in the statute or decisional law’ ” or “ ‘in some instances[,] by ‘[p]ublic policy ... whether explicit or implicit in statute or decisional law, or in neither’ ” (40 N.Y.2d at 778, 390 N.Y.S.2d 53, 358 N.E.2d 878, quoting *Syracuse Teachers Assn. v. Board of Educ., Syracuse City School Dist.*, 35 N.Y.2d 743, 744, 361 N.Y.S.2d 912, 320 N.E.2d 646 [1974], and *Matter of Susquehanna Val. Cent. School Dist. at Conklin [Susquehanna Val. Teachers’ Assn.]*, 37 N.Y.2d 614, 616–617, 376 N.Y.S.2d 427, 339 N.E.2d 132 [1975]).

Is there a public policy strong enough to justify excluding police discipline from collective bargaining? It might be thought this question could be answered yes or no, but the relevant statutes and case law are not so simple. In general, the procedures for disciplining public employees, including police officers, are governed by Civil Service Law §§ 75 and 76, which provide for a hearing and an appeal. In *Auburn*, a case involving police discipline, the Appellate Division rejected the argument that these statutes should be interpreted to prohibit collective bargaining agreements “that would supplement, modify or replace” ****452 ***5** their provisions (62 A.D.2d at 15, 404 N.Y.S.2d 396), and we adopted the Appellate Division’s opinion (46 N.Y.2d at 1035–1036, 416 N.Y.S.2d 586, 389 N.E.2d 1106). Thus, where Civil Service Law §§ 75 and 76 apply, police discipline may be the subject of collective bargaining.

But Civil Service Law § 76(4) says that sections 75 and 76 shall not “be construed to repeal or modify” preexisting laws, and among the laws thus grandfathered are several that, in contrast to sections 75 and 76, provide expressly for the control of police discipline by local officials in certain communities. Such laws are applicable in the City of New York and in the Town of Orangetown, and are at the center of these two cases.

Section 434(a) of the New York City Charter provides: “The [police] commissioner shall have cognizance and control of the government, administration, disposition and discipline of the ***574** department, and of the police force of the department” (emphasis added). New York City Administrative Code § 14–115(a) provides that, in cases of police misconduct: “The commissioner shall have power, in his or her discretion, ... to punish the offending party.” Though these two provisions are now New York City legislation, both were originally enacted as state statutes;

the Charter provision was adopted by the State Legislature in 1897 (L. 1897, ch. 378, enacting N.Y. City Charter § 271), and the Code provision in 1873 (L. 1873, ch. 335, §§ 41, 55). Thus, they reflect the policy of the State that police discipline in New York City is subject to the Commissioner's authority.

The Legislature has provided similarly for the discipline of town and village police forces, including those in Rockland County, where Orangetown is located. Section 7 of the Rockland County Police Act (L. 1936, ch. 526), similar in its wording to more general statutes, Town Law § 155 and Village Law § 8–804, provides in part:

“The town board shall have the power and authority to adopt and make rules and regulations for the examination, hearing, investigation and determination of charges, made or preferred against any member or members of such police department. Except as otherwise provided by law, no member or members of such police department shall be fined, reprimanded, removed or dismissed until written charges shall have been examined, heard and investigated in such manner or by such procedure, practice, examination and investigation as the board, by rules and regulations from time to time, may prescribe.”

Thus, the Legislature has committed police discipline in Orangetown to the “power and authority” of the Orangetown Town Board.

Appellate Division cases—one of which we have referred to favorably—have consistently held that legislation of this kind overcomes the presumption in favor of collective bargaining where police discipline is concerned. Thus, in 1983 the Appellate Division, Second Department held that police discipline in the Town of Greenburgh was not subject to collective bargaining; it distinguished *Auburn* on the ground that discipline in Greenburgh was committed to the authority of the Town Board or Board of Police Commissioners by the Westchester County *575 Police Act (*Town of Greenburgh*, 94 A.D.2d at 771–772, 462 N.Y.S.2d 718). In 1989, the same Court reached a similar conclusion under the Rockland County Police Act, one of the laws at issue here (*Rockland County Patrolmen's Benevolent Assn.*, 149 A.D.2d at 517, 539 N.Y.S.2d 993).

In 1994, the Appellate Division, First Department held that the other laws at issue here—section 434 of the New York City Charter and **453 ***6 section 14–115 of the New York City Administrative Code—excluded police discipline in New York City from collective bargaining. The Court held that the legislation “discloses a legislative intent and public policy to leave the disciplining of police officers ... to the discretion of the Police Commissioner” (*MacDonald*, 201 A.D.2d at 259, 607 N.Y.S.2d 24). We quoted these words with approval in *Matter of Montella v. Bratton*, 93 N.Y.2d 424, 430, 691 N.Y.S.2d 372, 713 N.E.2d 406 [1999] where we held, in a case not involving collective bargaining, that police discipline in New York City is not subject to the procedures prescribed in Civil Service Law §§ 75 and 76. Finally, in 2001, the Appellate Division, Third Department, endorsed the decisions of the First and Second Departments in *Town of Greenburgh*, *Rockland County Patrolmen's Benevolent Assn.* and *MacDonald*, holding that the Charter of the City of Mount Vernon, like the legislation involved in the other Appellate Division cases, removed police disciplinary procedures from the scope of collective bargaining (*Mount Vernon*, 289 A.D.2d at 675–676, 733 N.Y.S.2d 793).

The NYCPBA and the Orangetown PBA argue that this line of Appellate Division cases is wrong. In this they are supported by PERB, which, although it is bound by and has followed the Appellate Division decisions, now urges us to reject them. This is not a case, however, in which we defer to PERB's judgment. The primary issue here is not the application of the Taylor Law to particular facts, an area in which PERB is entitled to deference (*Matter of Poughkeepsie Professional Firefighters' Assn., Local 596, IAFF, AFL–CIO–CLC v. New York State Pub. Empl. Relations Bd.*, 6 N.Y.3d 514, 814 N.Y.S.2d 572, 847 N.E.2d 1146 [2006] [decided today]; *Matter of West Irondequoit Teachers Assn. v. Helsby*, 35 N.Y.2d 46, 50–51, 358 N.Y.S.2d 720, 315 N.E.2d 775 [1974]), but the relative weight to be given to competing policies, including those reflected in the New York City Charter, the New York City Administrative Code, and the Rockland County Police Act—legislation not within PERB's area of expertise (see *Schenectady Police Benevolent Assn.*, 85 N.Y.2d at 485, 626 N.Y.S.2d 715, 650 N.E.2d 373). We think the Appellate Division decisions evaluated these policies correctly.

While the Taylor Law policy favoring collective bargaining is a strong one, so is the policy favoring the authority of public officials *576 over the police. As long ago as 1888, we emphasized the quasi-military nature of a police force, and said that “a question pertaining solely to the general government and discipline of the force ... must, from the nature of things, rest wholly in the discretion of

the commissioners” (*People ex rel. Masterson v. French*, 110 N.Y. 494, 499, 18 N.E. 133 [1888]). This sweeping statement must be qualified today; as *Auburn* demonstrates, the need for authority over police officers will sometimes yield to the claims of collective bargaining. But the public interest in preserving official authority over the police remains powerful. It was the basis for our holding, only last June, that the statutory right of a police commissioner to select “an officer to fill a position important to the safety of the community” may not be surrendered in a collective bargaining agreement (*Buffalo Police Benevolent Assn.*, 4 N.Y.3d at 664, 797 N.Y.S.2d 410, 830 N.E.2d 308). The same policy has determined the result of other cases, including *Matter of Silverman v. McGuire*, 51 N.Y.2d 228, 231–232, 433 N.Y.S.2d 1002, 414 N.E.2d 383 [1980], where we rejected a resolution of a police disciplinary proceeding negotiated by a subordinate official, in light of “the sensitive nature of the work of the police department and the ****454 ***7** importance of maintaining both discipline and morale.”

The New York City Charter and Administrative Code, and the Rockland County Police Act, state the policy favoring management authority over police disciplinary matters in clear terms. In New York City, the police commissioner “shall have cognizance and control of the ... discipline of the department” (N.Y. City Charter § 434[a]) and “shall have power, in his or her discretion[,] ... to punish [an] offending party” (Administrative Code of City of N.Y. § 14–115[a]). In Rockland County, the town board “shall have the power and authority to adopt and make rules and regulations for the examination, hearing, investigation and determination of charges, made or preferred against any member or members of such police department” (Rockland County Police Act § 7). These legislative commands are to be obeyed even where the result is to limit the scope of collective bargaining. The issue is not, as the unions argue, whether these enactments were intended by their authors to create an exception to the Taylor Law; obviously they were

not, since they were passed decades before the Taylor Law existed. The issue is whether these enactments express a policy so important that the policy favoring collective bargaining should give way, and we conclude that they do.

Accordingly, in *Matter of Patrolmen's Benevolent Assn. of City of N.Y., Inc. v New York State Pub. Empl. Relations Bd.*, the order ***577** of the Appellate Division should be affirmed, with costs. In *Matter of Town of Orangetown v Orangetown Policemen's Benevolent Assn.*, the proceeding should be converted to a declaratory judgment action, and the order of the Appellate Division modified to declare that article 15 of the collective bargaining agreement is invalid, and the order should otherwise be affirmed, with costs to the Town of Orangetown and the Town Board of the Town of Orangetown.

Judges G.B. SMITH, CIPARICK, ROSENBLATT, GRAFFEO and READ concur.

Chief Judge KAYE taking no part.

In *Matter of Patrolmen's Benevolent Assn. of City of N.Y., Inc. v New York State Pub. Empl. Relations Bd.*: Order affirmed, with costs.

In *Matter of Town of Orangetown v Orangetown Policemen's Benevolent Assn.*: Order modified, etc.

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34 N.Y.2d 222
Court of Appeals of New York.

In the Matter of Edwin A. PELL, Jr., Respondent-Appellant,

v.

BOARD OF EDUCATION OF UNION FREE
SCHOOL DISTRICT NO. 1 OF the TOWNS OF
SCARSDALE AND MAMARONECK,
WESTCHESTER COUNTY, Appellant-Respondent.

In the Matter of Thomas MULDOON, a Policeman
of the Syracuse Police Department, Respondent,

v.

MAYOR OF SYRACUSE et al., Appellants.

In the Matter of Irwin CHILSON, Appellant,

v.

BOARD OF EDUCATION OF the CITY OF NEW
YORK et al., Respondents.

In the Matter of Hugh BEST, Respondent,

v.

William J. RONAN, as Chairman of The New York
City Transit Authority, Appellant.

In the Matter of Kenneth ABBOTT, Respondent,

v.

Arthur PHILLIPS et al., Constituting the Board of
Trustees of the Village of Mamaroneck,
Appellants.

May 15, 1974.

Synopsis

Consolidated appeals in Article 78 proceedings. In the first proceeding, the Supreme Court, Appellate Division, Second Judicial Department, 42 A.D.2d 855, 346 N.Y.S.2d 975, after transfer by an order of the Supreme Court, Special Term, Westchester County, modified, and, as modified, affirmed a determination of board of education dismissing petitioner from his position as a tenured teacher. The board appealed and the teacher cross-appealed.

In the second proceeding, the Supreme Court, Appellate Division, Fourth Judicial Department, 40 A.D.2d 1076, 339 N.Y.S.2d 425, after transfer by an order of the Supreme Court, Onondaga County, modified, and, as modified, confirmed determination of city which dismissed petitioner from city police department. The city appealed.

In the third proceeding, the Supreme Court, Appellate Division, Second Judicial Department, 41 A.D.2d 739, 341 N.Y.S.2d 143, reversed a judgment of the Supreme Court, Special Term, Kings County, Charles R. Rubin, J., which

annulled in part and confirmed in part determination of board of education which dismissed petitioner from his position as a construction inspector. The inspector appealed.

In the fourth proceeding, the Supreme Court, Appellate Division, First Judicial Department, 41 A.D.2d 639, 341 N.Y.S.2d 125, after transfer by an order of the Supreme Court, Special Term, New York County, modified, and, as modified, confirmed the determination which dismissed bus driver from service in the New York City transit Authority. The transit Authority appealed.

In the fifth proceeding the Supreme Court, Appellate Division, Second Judicial Department, 40 A.D.2d 678, 336 N.Y.S.2d 108, after transfer by an order of the Supreme Court, Westchester County, modified, and as modified, confirmed a determination dismissing petitioner from his position as patrolman in village police department. The village board of trustees appealed. The Court of Appeals, Stevens, J., held, inter alia, that in the review of an administrative agency personnel disciplinary proceeding the determination must be upheld if it is supported by substantial evidence and is not 'arbitrary' or 'capricious'; that where the finding of guilt is confirmed and punishment has been imposed, the test is whether such punishment is so disproportionate to the offense as to be shocking to one's sense of fairness; that dismissal of tenured teacher was not shockingly disproportionate to the offense where the teacher absented himself from his teaching duties in disregard of his professional obligations, falsely certified to being ill on those occasions, and was paid therefor; that dismissal of policeman for firing his revolver from a window of the public safety building while on duty was not shockingly disproportionate to the offense; that dismissal of construction inspector for board of education was not too drastic a penalty where the inspector entered plea of guilty to misdemeanor of receiving unlawful gratuities; that dismissal of bus driver for mishandling of funds was reasonable and proper under circumstances; and that dismissal of patrolman who engaged in other employment as a deliveryman while on official sick leave was not shocking to one's conscience.

In first proceeding, 346 N.Y.S.2d 975, judgment reversed and determination of board of education reinstated; petitioner's appeal dismissed.

In second proceeding, 339 N.Y.S.2d 425, judgment reversed and determination reinstated.

In third proceeding, 341 N.Y.S.2d 143, affirmed.

In fourth proceeding, 341 N.Y.S.2d 125, reversed and determination reinstated.

In fifth proceeding, 336 N.Y.S.2d 108, reversed and determination reinstated.

Attorneys and Law Firms

***225 ***838 **324** Benjamin Burstein and Harold M. Miller, White Plains, for appellant-respondent in the first above-entitled proceeding.

***226** Jeremiah S. Gutman and Eugene N. Harley, New York City, for respondent-appellant in the first above-entitled proceeding.

***227** Edward P. Kearse, Corp. Counsel, Syracuse (Carl W. Dengel, Syracuse, of counsel) for appellants in the second above-entitled proceeding.

George T. Dunn, Syracuse, for respondent in the second above-entitled proceeding.

Samuel Resnicoff and Benjamin Heller, New York City, for appellant in the third above-entitled proceeding.

***228** Norman Redlich, Corp. Counsel, New York City (Bernard Burstein, New York City, of counsel), for respondents in the third above-entitled proceeding.

John A. Murray, John G. de Roos and Helen R. Cassidy, Brooklyn, for appellant in the fourth above-entitled proceeding.

***229** George C. Stewart and Jacques F. Rose, New York City, for respondent in the fourth above-entitled proceeding.

Michael J. Trainor, New Hyde Park, and Maurice F. Curran, for appellants in the Fifth above-entitled proceeding.

****325** John J. Martirano and Barry D. Marcus, New Rochelle, for respondent in the fifth above-entitled proceeding.

Opinion

***230** STEVENS, Judge.

In separate article 78, Consol.Laws, c. 8 proceedings each of the appellants seeks review of actions taken by the respective Appellate Divisions in matters affecting the

discipline of public employees. In recent years there has been inadequate understanding and undoubtedly some inconsistency in judicial review of administrative disciplinary determinations. For that reason it may be useful to restate some applicable principles.

The source of the jurisdiction of the Court of Appeals is the Constitution of the State of New York (N.Y.Const., art. VI, s 3), which with certain exceptions limits the court's power to the review of questions of law. For the purposes of any judicial review of administrative action, the statutes also limit the scope of review in the Supreme Court or in this court to questions of law and the extent of the sanction imposed (CPLR 7803).

*****839** In article 78 proceedings, 'the doctrine is well settled, that neither the Appellate Division nor the Court of Appeals has power to upset the determination of an administrative tribunal on a question of fact; * * * 'the courts have no right to review the facts generally as to weight of evidence, beyond seeing to it that there is 'substantial evidence.' " (Cohen and Karger, Powers of the New York Court of Appeals, s 108, p. 460; 1 N.Y.Jur., Administrative Law, ss 177, 185; see Matter of Halloran v. Kirwan, 28 N.Y.2d 689, 690, 320 N.Y.S.2d 742, 743, 269 N.E.2d 403 (dissenting opn. of Breitel, J.)). 'The approach is the same when the issue concerns the exercise of discretion by the administrative tribunals ***231** The courts cannot interfere unless there is no rational basis for the exercise of discretion or the action complained of is 'arbitrary and capricious.' " (Cohen and Karger, Powers of the New York Court of Appeals, pp. 460—461; see, also, 8 Weinstein-Korn-Miller, N.Y.Civ.Prac., par. 7803.04 Et seq.; 1 N.Y.Jur., Administrative Law, ss 177, 184; Matter of Colton v. Berman, 21 N.Y.2d 322, 329, 287 N.Y.S.2d 647, 650—651, 234 N.E.2d 679, 681—682).

The arbitrary or capricious test chiefly 'relates to whether a particular action should have been taken or is justified * * * and whether the administrative action is without foundation in fact.' (1 N.Y.Jur., Administrative Law, s 184, p. 609). Arbitrary action is without sound basis in reason and is generally taken without regard to the facts. In Matter of Colton v. Berman (supra, p. 329, 287 N.Y.S.2d p. 651, 234 N.E.2d p. 681) this court (per Breitel, J.) said 'the proper test is whether there is a rational basis for the administrative orders, The review not being of determinations made after quasi-judicial hearings required by statute or law.' (Emphasis supplied.) Where, however, a hearing is held, the determination must be supported by substantial evidence (CPLR 7803, subd. 4); and where a determination is made and the person acting has not acted in excess of his jurisdiction, in violation of lawful procedure, arbitrarily, or in abuse of his discretionary power, including discretion as to the penalty imposed, the courts have no alternative but to confirm his determination

(CPLR 7803, subd. 3; *Matter of Procaccino v. Stewart*, 25 N.Y.2d 301, 304 N.Y.S.2d 433, 251 N.E.2d 802; but see *Matter of Picconi v. Lowery*, 35 A.D.2d 693, 314 N.Y.S.2d 606, affd. 28 N.Y.2d 962, 323 N.Y.S.2d 703, 272 N.E.2d 77). Rationality is what is reviewed under both the substantial evidence rule and the arbitrary and capricious standard. (*Matter of 125 Bar Corp. v. State Liq. Auth.*, 24 N.Y.2d 174, 178, 299 N.Y.S.2d 194, 197—198, 247 N.E.2d 157, 158—159; 1 N.Y.Jur., Administrative Law, s 184.)

In *Matter of Weber v. Town of Cheektowaga*, 284 N.Y. 377, 380, 31 N.E.2d 495, 496, this court, in reversing the order of the Appellate ***840 Division and reinstating the determination of the Town Board, dismissing **326 petitioner for intoxication after an administrative disciplinary proceeding, said that ‘the determination upon the facts is for the Town Board, and such determination will not be set aside by the courts unless it is unsupported by proof sufficient to satisfy a reasonable man, of all the facts necessary to be proved in order to authorize the determination’. (See, also, *Matter of Barsky v. Board of Regents*, 305 N.Y. 89, 111 N.E.2d 222, affd. *232 347 U.S. 442, 74 S.Ct. 650, 98 L.Ed. 829; CPLR 7803, subd. 4.) ‘It is well settled that a court may not substitute its judgment for that of the board or body it reviews Unless the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion (citations omitted).’ (*Matter of Diocese of Rochester v. Planning Bd. of Town of Brighton*, 1 N.Y.2d 508, 520, 154 N.Y.S.2d 849, 857, 136 N.E.2d 827, 833.)

The scope of CPLR 7803 in providing for judicial review of administrative sanctions was unclear initially. The question arose as to whether it called for a review as broad as that which the Appellate Division would have conducted of a determination at Special Term, or limited review to such abuses of discretion as were tantamount to a true question of law. The courts, however, laid the doubts to rest and interpreted the statute so as to limit judicial review to such abuses of discretion (*Matter of Stolz v. Board of Regents*, 4 A.D.2d 361, 165 N.Y.S.2d 179; *Matter of Russell v. Stewart*, 30 A.D.2d 749, 750, 291 N.Y.S.2d 480, 481—482).

The statutes could have granted a broader or narrower power of review to the Supreme Court, including the Appellate Division. With respect to this court, however, the limitation is constitutional and the power of review limited to questions of law. As the statutes have been construed, however, the scope of review in this court and the Appellate Division would seem to be the same (*Matter of Bovino v. Scott*, 22 N.Y.2d 214, 216, 292 N.Y.S.2d 408, 409, 239 N.E.2d 345, 346).

Generally speaking, discretionary issues are not issues of

law, but even in such cases it may be urged that the bounds of discretion were exceeded. ‘(T)he inquiry is always pertinent whether in any particular case, discretion was abused, just as inquiry is always pertinent whether there is any evidence to sustain a finding of fact.’ (Cohen and Karger, Powers of the New York Court of Appeals, s 159, p. 619).

‘Prior to the adoption of subdivision 5—a of section 1296 of the Civil Practice Act (Ch. 661, L.1955), the courts had no power to review the penalty, punishment or measure of discipline imposed by an administrative agency (*Matter of Barsky v. Board of Regents*, 305 N.Y. 89, 111 N.E.2d 222, affd. 374 U.S. 442, 74 S.Ct. 650, 98 L.Ed. 829).’ ***841 (*Matter of Stolz v. Board of Regents*, 4 A.D.2d 361, 363, 165 N.Y.S.2d 179, 182, Supra.) Section 5—a permits the courts to review the measure of discipline imposed by administrative agencies, but, as noted by Mr. Justice Halpern, ‘this grant of power must be reasonably construed in the light of the settled principles governing the relationship *233 between the courts and administrative agencies. * * * We believe that, reasonably construed, the statute authorizes us to set aside a determination by an administrative agency, only if the measure of punishment or discipline imposed is so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one’s sense of fairness.’ (*Matter of Stolz v. Board of Regents*, Supra, p. 364, 165 N.Y.S.2d p. 182; see, also, Public Papers of Governor Harriman, Memorandum dated April 25, 1955, filed with Assembly Bill, Introductory No. 2834; N.Y. State Bar Assn. Memorandum No. 2834 in support of Bill 2834, N.Y. State Legis. Annual (1955), p. 32; *Matter of Mitthauer v. Patterson*, 8 N.Y.2d 37, 201 N.Y.S.2d 321, 167 N.E.2d 731.) The view expressed above still controls. (*Matter of Tannenholtz v. Waterfront Comm. of N.Y. Harbor*, 36 A.D.2d 930, 322 N.Y.S.2d 973, affd. 30 N.Y.2d 668, 332 N.Y.S.2d 103, 282 N.E.2d 888 (Jasen and Breitel, JJ., dissenting in **327 opn. by Jasen, J.)) In *Matter of Donohue v. New York State Police*, 19 N.Y.2d 954, 281 N.Y.S.2d 357, 228 N.E.2d 409, we held the sanction of dismissal of petitioner excessive as a matter of law and remanded the proceeding. ‘CPLR 7803(3) reenacts subdivision 5—a of Civil Practice Act section 1296, authorizing courts to review the measure of discipline imposed by the respondent agency or officer.’ (8 Weinstein-Korn-Miller, N.Y.Civ.Prac., par. 7803.15; *Matter of Walker v. Murphy*, 15 N.Y.2d 650, 651, 255 N.Y.S.2d 869, 870, 204 N.E.2d 201.)

Of course, as discussed earlier, whether there is evidence, in an administrative proceeding, to support a finding of guilt is a question of law which this court may review. But, where the finding of guilt is confirmed and punishment has been imposed, the test is whether such punishment is “so disproportionate to the offense, in the light of all the

circumstances, as to be shocking to one's sense of fairness'. (Matter of McDermott v. Murphy, 15 A.D.2d 479, 222 N.Y.S.2d 111, aff'd. 12 N.Y.2d 780, 234 N.Y.S.2d 723, 186 N.E.2d 570; Matter of Stolz v. Board of Regents, 4 A.D.2d 361, 165 N.Y.S.2d 179, Supra).

Finally, in Matter of Bovino v. Scott (22 N.Y.2d 214, 216, 292 N.Y.S.2d 408, 409, 239 N.E.2d 345, 346, Supra), this court (per Bergan, J. with Scileppi, Breitel and Jasen, JJ., dissenting in opn. by Jasen, J.) flatly declared: 'Both the Appellate Division and this court are vested with power, pursuant to CPLR 7803 (subd. 3), to deal As a matter of law with the measure of discipline imposed on a subordinate civil service employee (citations omitted)' (emphasis supplied).

***842 In light of the history of the statutes and the aforementioned holdings, the sanctions to be imposed may be considered to be *234 either a legal matter or a discretionary matter, the latter subject to review only as a matter of law regarding the propriety of the discretion exercised. When an administrative abuse of discretion is determined to have occurred, it may be appropriate more often to remand the matter for the fixing of the sanction by the agency initially exercising the power unless in the circumstances peculiar to a particular case we deem the record sufficient to permit the reviewing court to assess the permissible measure of punishment warranted. (Cf. Matter of Dillard v. New York City Tr. Auth., 34 A.D.2d 995, 312 N.Y.S.2d 619, where the record was found insufficient to permit a determination on the question of the review of the Authority's dismissal of petitioner for health reasons and the proceeding remanded. After a rehearing, the determination was confirmed, the Appellate Division concluding that the decision to dismiss 'was not arbitrary and capricious and was based upon substantial evidence.' Matter of Dillard v. New York City Tr. Auth., 39 A.D.2d 759, 760, 332 N.Y.S.2d 251, 253.)

Of course, terminology like 'shocking to one's sense of fairness' reflects a purely subjective response to the situation presented and is hardly satisfactory. Yet its usage has persisted for many years and through many cases. Obviously, such language reflects difficulty in articulating an objective standard. But this is not unusual in the common-law process until, by the impact of sufficient instances, a more analytical and articulated standard evolves. The process must in any event be evolutionary. At this time, it may be ventured that a result is shocking to one's sense of fairness if the sanction imposed is so grave in its impact on the individual subjected to it that it is disproportionate to the misconduct, incompetence, failure or turpitude of the individual, or to the harm or risk of harm to the agency or institution, or to the public generally visited or threatened by the derelictions of the individuals.

Additional factors would be the prospect of deterrence of the individual or of others in like situations, and therefore a reasonable prospect of recurrence of derelictions by the individual or persons similarly employed. There is also the element **328 that the sanctions reflect the standards of society to be applied to the offense involved. Thus, for a single illustrative contrast, habitual lateness or carelessness, resulting in substantial monetary *235 loss, by a lesser employee, will not be as seriously treated as an offense as morally grave as larceny, bribery, sabotage, and the like, although only small sums of money may be involved.

There is no doubt that the reason for the enactment of the statute (CPLR 7803) was to make it possible, where warranted, to ***843 ameliorate harsh impositions of sanctions by administrative agencies. That purpose should be fulfilled by the courts not only as a matter of legislative intention, but also in order to accomplish what a sense of justice would dictate. Consideration of the length of employment of the employee, the probability that a dismissal may leave the employee without any alternative livelihood, his loss of retirement benefits, and the effect upon his innocent family, all play a role, but only in cases where there is absent grave moral turpitude and grave injury to the agency involved or to the public weal. But deliberate, planned, unmitigated larceny, or bribe taking, or demonstrated lack of qualification for the assigned job is not of that kind. Paramount too, in cases of sanctions for agencies like the police, is the principle that it is the agency and not the courts which, before the public, must justify the integrity and efficiency of their operations.

Attention is now directed to the separate proceedings listed above.

Matter of Pell v. Board of Education.

Charges were preferred against Pell that on seven occasions he absented himself from his teaching duties without permission, and thereafter falsely certified in writing that he was ill on such occasions and requested payment therefor. Earlier, Pell had requested and been refused permission to absent himself three days each month (November through May inclusive) in order to attend the New York University Senate of which he was a member.

After a full hearing, Pell was found guilty of: (1) insubordination; (2) conduct unbecoming a teacher; and (3) neglect of duty. He was dismissed from his position as a tenured teacher.

The Appellate Division, two Justices dissenting, modified

the determination to strike the penalty of dismissal and provide in lieu thereof suspension without pay to the date of the order. The dissenting Justices voted to affirm the dismissal. Both *236 parties appealed. We are unanimous in our view that the cross appeal of Pell should be dismissed since he is not a party aggrieved by the modification of the Appellate Division.

The only question remaining is whether the modification with respect to punishment is warranted in light of the principles earlier discussed. It is concluded that the order of the Appellate Division should be reversed and the determination of the board reinstated.

Pell had been granted a year's leave with full pay during the 1969—1970 school year which immediately preceded his requests here. Upon denial of his application for a total of 21 days' leave, he had a right of appeal which he elected not to exercise. In disregard of his professional obligations and of his superior's decision, he absented ***844 himself from his teaching duties, thereby requiring replacements, falsely certified to being ill on those occasions, and was paid therefor. Such irresponsibility makes it impossible to conclude that the discipline imposed is shockingly disproportionate to the offense.

The judgment of the Appellate Division should be reversed and the determination of the board reinstated, without costs.

Matter of Muldoon v. Mayor of Syracuse.

Following the preferral of charges, and after a full hearing, petitioner-respondent **329 (petitioner) was found guilty of firing his revolver from a window of the Public Safety Building while on duty; of refusing a request to submit to blood analysis (such refusal creating a presumption of intoxication under the applicable police department rules and regulations); of conduct unbecoming an officer; and, of failure to file a written report, as required of any officer who discharges a firearm in the performance of duty. The acts for which petitioner was found guilty violated specific sections of the Rules and Regulations of the Police Department. Although petitioner testified that he had no recollection of the firing of his revolver, that fact was proven by other testimony. There was substantial evidence in the record to support the findings, the hearing officer recommended dismissal, and thereafter, petitioner was discharged by respondent Chief of Police. The Appellate Division modified to reduce the penalty to suspension until the date of entry of its order.

*237 At first blush, the punishment imposed might seem excessive or unduly harsh; however, policemen hold a sensitive position in a community and have an obligation to aid in safeguarding and protecting the community which they serve. Armed as they are with dangerous or deadly weapons, the use of such a weapon without conscious recollection of such use, could pose a serious future threat of possible harm to civilians and others.

The Chief of Police as the person ultimately responsible for effective discipline must seek to protect both the community and the police force from dangers reasonably foreseen and risks which might become serious liabilities, or have grave consequences. If, in the exercise of his considered judgment, he imposes punishment, the exercise of his reasonable discretion should not be disturbed unless the punishment is so disproportionate to the offense as to be shocking to one's sense of fairness (Matter of McDermott v. Murphy, 15 A.D.2d 479, 222 N.Y.S.2d 111, affd. 12 N.Y.2d 780, 234 N.Y.S.2d 723, 186 N.E.2d 570, Supra).

It cannot be said as a matter of law that the Chief of Police abused his discretion by the action taken. The discretionary power exercised ***845 by the Appellate Division in modifying the penalty is not warranted by the record.

The judgment of the Appellate Division should be reversed and the determination of respondent Chief of Police reinstated, without costs. (See Matter of Bernardini v. Port of N.Y. Auth., 34 N.Y.2d 750, 357 N.Y.S.2d 863, 314 N.E.2d 423.)

Matter of Chilson v. Board of Education.

The order of the Appellate Division which reversed a judgment of the Supreme Court and reinstated the determination of respondents should be affirmed, with costs.

Petitioner, a Senior Construction Inspector with the Board of Education, was indicted, charged with grand larceny in the first degree, bribe receiving and receiving unlawful gratuities. On May 5, 1969, petitioner was suspended for conduct unbecoming his position and 'prejudicial to the good order, efficiency and discipline of the service.' The original specifications of misconduct served upon petitioner were taken from the indictment and at petitioner's request, the disciplinary proceeding was adjourned pending disposition of the criminal prosecution. On January 18, 1971, petitioner pleaded guilty *238 to the misdemeanor of receiving unlawful gratuities and on February 9, 1971, at sentence, he was placed on probation.

The specifications were amended, without objection, to reflect the plea and disposition.

At the hearing respondent's counsel placed in evidence a certified copy of the indictment and a certified copy of the clerk's minutes of the plea and disposition. Petitioner did not testify.

The plea of guilty and the sentence provide substantial evidence for the dismissal. ****330** Indeed, petitioner only contends that the penalty of dismissal constitutes excessive punishment.

Petitioner argues that with a record of 21 years of unblemished service, dismissal with its resultant loss of pension and retirement rights, is too drastic a penalty in light of the crime for which he stands convicted.

Petitioner, a public servant, was guilty of a breach of trust and a failure to faithfully and honestly perform the duties of his position. His position was a sensitive one and the misconduct serious. The question is not whether we might have imposed another or different penalty, but whether the agency charged with disciplinary responsibility reasonably acted within the scope of its powers. The answer must be in the affirmative (see *Matter of Walker v. Murphy*, 15 N.Y.2d 650, 255 N.Y.S.2d 869, 204 N.E.2d 201; *Matter of Boris v. Murphy*, 19 N.Y.2d 873, 280 N.Y.S.2d 674, 227 N.E.2d 595). Pensions are not only compensation for services rendered, but they serve also as a reward for faithfulness to duty and honesty of performance.

*****846** *Matter of Best v. Ronan*.

This is an appeal by respondent from a judgment of the Appellate Division which modified the determination of respondent by substituting for dismissal of the petitioner a suspension without pay for a period from the date of dismissal to six months from the date of the entry of the order of modification, roughly three and one-half years as of this appeal.

The charge of 'nickeling', or the mishandling of funds belonging to the New York City Transit Authority (Authority), was established by the evidence, and the finding of guilt confirmed by the Appellate Division. Involved is a sum which by estimate of the Authority amounts to \$1.26, allegedly appropriated over a period of 18 days by the use of coins given in change to passengers which, when deposited in the coin box, ***239** registered a lesser sum than the actual value, thereby permitting petitioner to appropriate the difference.

The single question is whether dismissal was reasonable and proper under the circumstances. Or, phrased differently, was the discretionary power of review of the Appellate Division properly exercised as a matter of law? In our view it was not.

The ingenuity of the scheme used indicates a carefully thought out plan which, reasonably, could well have been operative beyond the period of direct observation and detection. While the penalty and the resulting forfeiture of pension undoubtedly will result in hardship, it cannot be said as a matter of law that the sanction imposed by the Authority for theft was so harsh and excessive, so disproportionate to the offense as to be shocking to one's conscience. Here there was a violation of a trust and a breach of duty which, if condoned and imitated, could wreak havoc with the entire system.

While heretofore the courts have, in some instances, considered prior good records of service and revoked a sentence of dismissal, substituting therefor a lesser penalty (see *Matter of Mitthauer v. Patterson*, 8 N.Y.2d 37, 201 N.Y.S.2d 321, 167 N.E.2d 731, *Supra*), it is becoming increasingly clear that the nature of the misconduct charge when weighed with the action taken, where such action is reasonably within the permissible scope of the disciplining agency, must be accorded greater weight or recognition.

The judgment appealed from should be reversed and the determination of respondent Authority reinstated, without costs.

Matter of Abbott v. Phillips.

Abbott became employed as a police officer September 1, 1968. He was dismissed September 15, 1971, after having been found guilty of dereliction of his duties as a police officer.

*****847 **331** On August 13, 1971, Abbott sustained certain injuries in an off-duty accident and remained on 'sick leave' until September 4, 1971, when he returned to work. Upon his return, Abbott was charged with a violation of the rules and regulations of the department in that, while on sick leave, he, on two different dates, engaged in other employment as a delivery man for a private firm. Abbott received his pay as an officer for the time he was on sick leave. At times other than those specified in ***240** the charges, Abbott while on sick leave, was not at home during the workday as required by departmental regulations.

After a finding of guilt on the charges, the Village Board

of Trustees (appellants herein) were free to consider Abbott's prior record in determining the punishment to be imposed. In June, 1969, he had pleaded guilty to misconduct charges in that he wrongfully discharged his revolver in a public place, while not in the line of duty, and failed to report the incident as required. However, the board, upon petitioner's objection, erroneously excluded proof of the prior violation and discharged Abbott solely on the basis of the charges for which he was on trial. Both sides now agree this was error. The question is whether, in considering this offense alone, the board acted properly in the discharge of its responsibility, or whether the matter should be remanded to the board in order that they might consider such prior violation with respect to the present punishment.

This article 78 proceeding was originally commenced in Supreme Court and transferred to the Appellate Division, which modified on the law the determination of the board by reducing the penalty to suspension for 20 days without pay.

In matter of Mitthauer v. Patterson (8 N.Y.2d 37, 42, 201 N.Y.S.2d 321, 323, 167 N.E.2d 731, 733, Supra) this court affirmed a modification by the Appellate Division, reducing a penalty of dismissal to a six-month suspension. In so doing, the majority observed that 'this woman had over 20 years of service with a good record and would lose many valuable rights if dismissed.' Assuming that was the basis for the affirmance, the factual picture in this case presents no such redeeming feature. In the cited case, the majority held that the court, in the course of its judicial inquiry as to the abuse of discretion, had complete power over the subject. (But see Little v. New York City Tr. Auth., 28 N.Y.2d 719, 321 N.Y.S.2d 111, 269 N.E.2d 821, where on a similar factual pattern, a totally different result was reached.)

A reduction of the penalty here, the determination of guilt having been confirmed, is not warranted. As a matter of law, the modification is not justified since it does not appear from the record that the board abused its discretion in fixing the punishment. Unless an irrationality appears or the punishment shocks one's conscience, sanctions imposed by an administrative agency should be upheld.

***241 ***848** The judgment should be reversed and the

determination of the board reinstated, without costs to either party. (See Matter of Bernardini v. Port of N.Y. Auth., 34 N.Y.2d 750, 357 N.Y.S.2d 863, 314 N.E.2d 423, Supra.)

It may be noted that the foregoing cases fall into one general classification as to the nature of the problems posed. However, it must always be kept in mind that the discussion above involved only disciplinary sanctions imposed internally in various administrative agencies and does not cover discipline imposed upon regulated persons or entities outside an administrative agency. That is not to say that the discussion may not be relevant to the issues raised in cases of the latter kind. Moreover, in every case there must be sensitive distinction among agencies based upon their responsibilities to the public. Thus, compare a police agency with a municipal electric utility. And, of course, always there must be a persisting discretion exercised to avoid unnecessary hardship to erring human beings ****332** not compelled by a supervening public interest. The determinations in these cases attempt to express that sensitivity.

In Matter of Pell: On respondent's appeal: Judgment reversed, without costs, and determination of Board of Education reinstated.

On petitioner's appeal: Appeal dismissed, without costs.

In Matter of Muldoon: Judgment reversed, without costs, and determination of respondents-appellants reinstated.

In Matter of Chilson: Order affirmed, with costs.

In Matter of Best: Judgment reversed, without costs, and determination of respondent-appellant reinstated.

In Matter of Abbott: Judgment reversed, without costs, and determination of respondents-appellants reinstated.

BREITEL, C.J., and JASEN, GABRIELLI, JONES, WACHTLER and RABIN, JJ., concur.

All Citations

34 N.Y.2d 222, 313 N.E.2d 321, 356 N.Y.S.2d 833

McKinney's Consolidated Laws of New York Annotated

Penal Law (Refs & Annos)

Chapter 40. Of the Consolidated Laws (Refs & Annos)

Part Two. Sentences

Title E. Sentences

Article 55. Classification and Designation of Offenses (Refs & Annos)

McKinney's Penal Law § 55.10

§ 55.10 Designation of offenses

Currentness

1. Felonies.

(a) The particular classification or subclassification of each felony defined in this chapter is expressly designated in the section or article defining it.

(b) Any offense defined outside this chapter which is declared by law to be a felony without specification of the classification thereof, or for which a law outside this chapter provides a sentence to a term of imprisonment in excess of one year, shall be deemed a class E felony.

2. Misdemeanors.

(a) Each misdemeanor defined in this chapter is either a class A misdemeanor or a class B misdemeanor, as expressly designated in the section or article defining it.

(b) Any offense defined outside this chapter which is declared by law to be a misdemeanor without specification of the classification thereof or of the sentence therefor shall be deemed a class A misdemeanor.

(c) Except as provided in paragraph (b) of subdivision three, where an offense is defined outside this chapter and a sentence to a term of imprisonment in excess of fifteen days but not in excess of one year is provided in the law or ordinance defining it, such offense shall be deemed an unclassified misdemeanor.

3. Violations. Every violation defined in this chapter is expressly designated as such. Any offense defined outside this chapter which is not expressly designated a violation shall be deemed a violation if:

(a) Notwithstanding any other designation specified in the law or ordinance defining it, a sentence to a term of imprisonment which is not in excess of fifteen days is provided therein, or the only sentence provided therein is a fine; or

(b) A sentence to a term of imprisonment in excess of fifteen days is provided for such offense in a law or ordinance enacted prior to the effective date of this chapter but the offense was not a crime prior to that date.

4. Traffic infraction. Notwithstanding any other provision of this section, an offense which is defined as a “traffic infraction” shall not be deemed a violation or a misdemeanor by virtue of the sentence prescribed therefor.

Credits

(L.1965, c. 1030. Amended L.1967, c. 791, §§ 4, 5; L.1973, c. 276, § 2; L.1978, c. 104, § 1.)

257 N.Y. 73
Court of Appeals of New York.

PEOPLE ex. rel. ST. ALBANS-SPRINGFIELD
CORPORATION
v.
CONNELL et al.

July 15, 1931.

Synopsis

Certiorari proceedings by the People, on the relation of the St. Albans-Springfield Corporation, to review a determination of the Board of Standards and Appeals of the City of New York denying relator's application for permission to erect and maintain a gasoline selling station at Foch and Springfield Boulevards in the Borough of Queens. From an order of the Appellate Division (233 App. Div. 765, 250 N. Y. S. 809) affirming an order of the Special Term, which annulled the determination on the report of a referee, and directing Henry L. Connell, as acting chairman, and others, as members, and together constituting the Board, to issue a permit, defendants appeal.

Modified, and affirmed as modified.

POUND and LEHMAN, JJ., dissenting.

****313 *74** Appeal from Supreme Court, Appellate Division, Second Department.

Attorneys and Law Firms

Arthur J. W. Hilly, Corp. Counsel, of New York City (Willard S. Allen, J. Joseph Lilly, and Martin H. Murphy, all of New York City, of counsel), for appellants.

***75** Stephen Callaghan, of New York City, for respondent.

Opinion

***76** CRANE, J.

The St. Albans-Springfield Corporation is the owner of a vacant lot on the northeast corner of Foch and Springfield boulevards, in the borough of Queens, city of New York, having a frontage of 100 feet on Foch boulevard and 86.52 feet on Springfield boulevard. The section is in the

outskirts of the city of New York in what is still a rural community and farm lands. Immediately south of Foch boulevard the land is still used for farming, and this condition exists about half a mile down Springfield boulevard toward the Merrick road. While some of the property has been laid out in building lots, almost the entire section consists of vacant land; there being only six buildings in the entire area extending 400 feet from the premises in each direction. Four of these are brick buildings, with stores in the ground floor and apartments for dwelling purposes overhead, which ****314** cannot be rented for enough to bring in a reasonable return upon the investment. As transit facilities do not reach this territory, it has been slow in development; the few families who do live in the neighborhood being transported by bus or in their own automobiles.

Pursuant to the building zone resolutions adopted in accordance with the powers given the board of estimate and apportionment, under section 242-a of the Greater New York Charter (Laws of 1901, c. 466, amended Laws of 1917, c. 601 [and Laws 1924 c. 295]), the relator's property has been placed in a business district. Finding that it could not profitably dispose of the property either for residential or business purposes, it applied to the board of standards and appeals to permit the erection upon the corner lot of a gasoline station. Section 21 of the amended building zone resolution of the city of New York permits the board of standards and appeals to vary any provision of the zoning requirements where there are practical difficulties or unnecessary hardships in the way of carrying them out. After a brief statement of the case before the board, the application was denied, whereupon the ***77** relator obtained an order of certiorari to review the decision, pursuant to section 719-a of the charter, added by Laws 1916, c. 503, § 6, and amended by Local Laws 1925, City of New York, No. 13. Upon the return of the board, the Special Term made an order referring the matter to a referee to take proof of all practical difficulties and unnecessary hardships in the way of carrying out the strict letter of the zoning resolution, reciting in the order that after hearing argument it was necessary to take testimony for the proper disposition of the case. The referee took testimony and made findings of fact and conclusions of law fully supported by the testimony taken. He found that Foch and Springfield boulevards are much-traveled arterial highways; Foch boulevard being a continuation in the city of New York of the Southern State parkway, and Springfield boulevard running at right angles from Jericho turnpike south across the Merrick road connecting with the Rockaway boulevard. Travel upon both of these streets is very heavy through traffic. Stores or business would not benefit by such use of these streets as parking on the sides

thereof would almost be prohibitive. There are no residences in the neighborhood to support a business either upon Foch boulevard or Springfield boulevard at or near the intersection thereof. Less than 13 per cent. of the lots in the area zoned for business are now used for business, and 87 per cent. of such lots are either unbuilt upon or the buildings thereon are unoccupied. Taking both sides of Foch boulevard and Springfield boulevard, for a distance of one mile north, east, south, and west of their intersection, there are 1,481 lots zoned for business. On these 1,481 lots there are now erected 189 buildings with stores, 62 being vacant. Ninety-two per cent. of the lots zoned for business are unoccupied. The entire area of property shown on the map has been laid out in streets regulated, graded, and curbed, and consequently can be used only for building, business or dwellings. The business buildings, says the referee, could not be sold for a fair price, and they could *78 not be rented, because the number of dwelling houses in the vicinity is not sufficient to support a business.

Turning to the evidence, we find officials from such large institutions as the Williamsburgh Savings Bank, the Dime Savings Bank, and the National Title Company testifying that their institutions will not loan a dollar in this business section. The property would simply come back on their hands, as the income would be insufficient to pay the carrying charges.

The referee therefore finds that loans cannot be obtained upon this business property on these highways. In addition to the taxes upon said property, there is a lien by reason of an assessment levied for the construction of sewers. Those who have purchased lots from the relator in the vicinity have been unable to pay interest on their mortgages, taxes and assessments. The referee states as a fact that the site in question is not suitable for the erection of a business building of any character whatever, and that a gasoline selling station is the only available use to which the property in question can be put.

Under such circumstances, is the relator to be deprived of all use of its property and any income therefrom by reason of this zoning resolution? There is no claim made by the relator that the zoning of this entire territory, according to the map in evidence, has been illegal and improper. It does claim, however, that as to it the restriction is unreasonable, arbitrary, and illegal.

The report of the referee was confirmed by the order appealed from, which directs the board of standards and appeals to grant the relief, and to permit the relator to erect upon his property the gasoline station as requested.

The board of standards and appeals now questions the power of the Special Term to review its order in the manner indicated, and insists that the Supreme Court is limited on

certiorari to review merely the board's jurisdiction. *79 It presses upon our attention the case of *People ex rel. Helvetia Realty Co. v. Leo* (Sup.) 183 N. Y. S. 37; affirmed **315 195 App. Div. 887, 185 N. Y. S. 949; *Id.*, 231 N. Y. 619, 132 N. E. 912. Judge Giegerich, at Special Term, said that the taking of proof, pursuant to the provisions of subdivision 4 of section 719-a of the Greater New York Charter, is limited to such matters as affected the jurisdiction of the body or officer whose action is sought to be reviewed, and hence the matter cannot be heard de novo. The affirmance of that case in this court was without opinion and without approval of this statement. The board had permitted a variance which was approved by the Special Term and on appeal. The power of review given to the courts was not directly involved as it might have been if the application for a variance had been denied and the owner's rights thus restricted.

The sections of the charter to which this opinion makes reference do not justify the limitation stated by the justice. Section 719-a gives to any person aggrieved by a decision of the board of standards and appeals a right to present to the Supreme Court a petition setting forth that the decision is illegal in whole or in part, and specifying the grounds of the illegality. The justice of the court may allow a writ of certiorari directed to the Board of Appeals to review such decision and shall prescribe the time in which a return thereto must be made. Section 719-a(4) reads: 'If, upon the hearing, it shall appear to the court that testimony is necessary for the proper disposition of the matter, it may take evidence or appoint a referee to take such evidence as it may direct and report the same to the court with his findings of fact and conclusions of law, which shall constitute a part of the proceedings upon which the determinations of the court shall be made. The court may reverse or affirm, wholly or partly, or may modify the decision brought up for review.'

This procedure is not unlike the method by which tax *80 assessments were reviewed. *People ex rel. Manhattan Ry. Co. v. Barker*, 152 N. Y. 417, 46 N. E. 875. Chapter 269 of the Laws of 1880 enacted that, on the return to a writ of certiorari, 'if, upon the hearing, it shall appear to the court that testimony is necessary for the proper disposition of the matter, the court may take evidence or may appoint a referee to take such evidence as the court may direct, and report the same to the court, and such testimony shall constitute a part of the proceedings upon which the determination of the court shall be made.' Section 4. This court in the opinion in that case noted the 'novel functions' attached to the writ of certiorari hitherto unknown to such methods of review. 'The special statutory writ now before us differs from its predecessors in one remarkable respect, in that it permits a redetermination of all questions of fact

upon evidence, taken, in part at least, by the special term, or under its direction.' Page 430 of 152 N. Y., 46 N. E. 875, 879.

The charter provisions, above referred to, likewise have this novel feature, that upon an appeal by the order of certiorari to the Supreme Court additional testimony may be taken upon which the court may reverse, or affirm wholly, or partly, or may modify, the decision brought up for review. Practice followed in *Anderson v. Jester*, 206 Iowa, 452, 221 N. W. 354; *Sundlun v. Zoning Board of Review of City of Pawtucket*, 50 R. I. 108, 145 A. 451; *McCabe v. Zoning Board of Review of City of Providence*, 50 R. I. 449, 148 A. 601.

Because of the rather informal procedure before the board of standards and appeals (*Matter of Caponi v. Walsh*, 228 App. Div. 86, 90, 238 N. Y. S. 438), a further and more formal and judicial review by the Supreme Court was no doubt considered necessary in some circumstances. See, also, *People ex rel. Fordham Manor Reformed Church v. Walsh*, 244 N. Y. 280, 286, 155 N. E. 575. All powers, however, have their inherent limitations to be applied with wisdom, judgment, and discretion. A Special Term of the Supreme Court having this rather wide power to supplement the record is not *81 supposed to exercise it as though it were the board of standards and appeals. The power is to be used cautiously, with extreme care where there appears to be a probability that the effect of the additional testimony, if it is received, will be to show the ruling complained of to be wrong; and, when the whole case comes to be decided upon the new testimony and the old, the court, even then, is not to put itself in the position of the board, is not to substitute its own discretion for that of the administrative agency established by the statute in a situation where the exercise of discretion is possible. The necessity for a variance is to be determined under section 21 of the amended building zone resolution by the board of standards and appeals. Its judgment should be final unless it clearly appears to be arbitrary or contrary to the law. The powers of the board, as outlined in section 719, are very largely administrative, including much that has to do with the zoning situation. The courts must not trespass upon this administrative work, but confine their review to correcting legal errors. *Zahn v. Board of Public Works of City of Los Angeles*, 195 Cal. 497, 234 P. 388; *Sundlun v. Zoning Board of Review of City of Pawtucket*, 50 R. I. 108, 145 A. 451.

****316** How far zone planning may encroach upon the free use of private property was considered by the United States Supreme Court in *Nectow v. City of Cambridge*, 277 U. S. 183, 48 S. Ct. 447, 448, 72 L. Ed. 842. The zoning plan, legal as to other property included within the district, was considered unconstitutional as to the particular property

owned by one who sought relief from its restrictions. The master to whom the matter had been referred had reported that the districting of the plaintiff's land in a residence district would not promote the health, safety, convenience, and general welfare of the inhabitants, taking into account the natural development of the city and the character of the district and the resulting benefit to accrue to the whole city. In deciding that the limitation was unconstitutional as to the owner, the court said: 'The governmental power *82 to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, and, other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare.' Page 188 of 277 U. S., 48 S. Ct. 447, 448. The court, however, added a word of caution: 'A court should not set aside the determination of public officers in such a matter unless it is clear that their action 'has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense.' Page 187 of 277 U. S., 48 S. Ct. 447, 448.

We think substantially the same restrictions define the power of the court in nullifying the orders of the board of standards and appeals.

Considering the nature of the relator's property in this case, and the finding of the referee, the ruling of the board of standards and appeals deprives the owner of any beneficial use of his property. When, if ever, the city grows and develops so that business may be profitably conducted in the neighborhood or on Springfield and Foch boulevards, the legal proposition may also change with the situation. Law is applied to facts, and as the facts change in the process of time the law adapts itself accordingly. That which may be unconstitutional to-day may be legal years hence. The zoning of farm land is different from the zoning of a city. Consequently, the erection and maintenance of a gasoline station on this property on the northeast corner of Foch and Springfield boulevards, while a proper use to-day, may become unnecessary with the development of business. We may take judicial notice of the fact that the capital expenditure for such a structure will be comparatively slight. The erection of the station in order to meet a temporary need will not be permitted to thwart for all time a far-sighted system of municipal development.

***83** To what extent and in what circumstances long-time planning for zoning purposes is a valid exercise of legislative power is a question with aspects too many to be answered in one decision. We are not required to say that a merely temporary restraint of beneficial enjoyment is unlawful where the interference is necessary to promote the ultimate good either of the municipality as a whole or of the immediate neighborhood. Such problems will have to

be solved when they arise. If we assume that the restraint may be permitted, the interference must be not unreasonable, but on the contrary must be kept within the limits of necessity. Where as here the ultimate good can be attained and a productive use allowed, a use that will be temporary and provisional and readily terminable when new conditions supervene, the landowner is wronged if the allowance is refused.

The order, therefore, of the court below, which authorizes and permits the erection and use of this gasoline station, must be modified by a direction that, when the circumstances so change by the development of the city that the property is reasonably susceptible of being applied to business uses, then, upon the application of the authorities or any one interested, the gasoline station must be removed.

The order should be modified as directed in this opinion, and, as thus modified, affirmed, without costs.

CARDOZO, C. J., and KELLOGG, O'BRIEN, and HUBBS, JJ., concur.

POUND and LEHMAN, JJ., dissent on the ground that the statute does not contemplate a judicial review and determination by the court on the merits.

Ordered accordingly.

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140 Misc.2d 712
Criminal Court, City of New York,
New York County, SAPP 2.

The PEOPLE of the State of New York,
v.
Ben NEMADI, Sharok Jacobi, Shaben Realty
Associates, Inc., Defendants.

June 21, 1988.

Synopsis

Apartment building owners charged with violations of provisions requiring installation of window guards in apartments inhabited by children under age 11 moved to dismiss the charges. The Criminal Court of the City of New York, New York County, Gans, J., held that: (1) violators of window guard provisions could be held culpable on the basis of strict liability; (2) window guard rules did not create improper irrebuttable presumption in violation of due process; (3) defendants failed to show classification of charges as misdemeanor was arbitrary; and (4) defendants failed to show selective enforcement.

Motion denied.

Attorneys and Law Firms

****695 *713** Office of the Corp. Counsel of the City of New York (Linda Stanch, of counsel and Peter L. Zimroth), New York City, for the People.

Robert Cahn, of counsel and Walter Cohen, New York City, for defendants.

Opinion

LOUISE GRUNER GANS, Judge.

Defendants, owners of a multiple dwelling at 219–21 West 145th Street, Manhattan, are charged by two separate informations, with failing to “provide, install and maintain window guards” in a number of apartments in that building, in violation of New York City Health Code Section 131.15 as amended and of Local Laws, 1940, No. 33 of the City of New York (Admin.Code, Section 17–123). These sections of the New York City Health and Administrative Codes require the installation of window guards in apartments inhabited by children under the age of 11. The alleged

failure to install window guards, where required, is the basis for the additional charges of failure “reasonably to act and to take necessary precautions” to protect human life and health, New York City Health Code, Section 3.09, and of maintaining a nuisance, New York City Health Code, Section 3.11.

Defendants have moved to dismiss the charges against them claiming that the window guard regulations, as recently amended, are void because they were never published in the City Record. The regulations are also said to contravene numerous unspecified constitutional requirements in that 1. no intent or *mens rea* is allegedly required to establish a violation of the window guard regulations; 2. culpability under the window guard regulations is premised on an irrebuttable presumption of guilt; 3. Section 558(e) of the City Charter arbitrarily classifies the violation of every New York City Health Code regulation, including Section 131.5, as a misdemeanor; 4. these provisions are enforced in a discriminatory fashion in that only private landlords and not managers of publicly owned housing are prosecuted; 5. the regulations constitute an unauthorized tax; and 6. they subject the defendants to severe economic hardship.

Extensive consideration of defendants’ omnibus challenge to New York City Health Code, Section 131.15 shows it to be without merit.

A brief description of the underlying statutory/regulatory scheme may be helpful to an understanding of the issues and ***714** the applicable law. Section 131.15 of the New York City Health Code, requiring the installation of window guards in apartments where children under the age of 11 reside, was first enacted in 1976. The Section set forth a detailed landlord-tenant inquiry-response procedure to be followed by landlords in order to determine which apartments require window guards. Under the 1976 enactment, property owners subjected to criminal prosecution or civil penalties for failure to install these safety devices could defend by showing that they had made the proper inquiries and had received either a negative response or no response from their tenants. Former Section 131.15(b).

In 1986, the New York City Administrative Code was amended and implementing regulations (“the regulations”) promulgated. Local Laws No. 33 of 1986, codified at N.Y.C. Administrative Code, Section 17–123. The amendments and regulations were duly published.¹ Instead of the previous landlord-tenant inquiry response procedure, the amendments and regulations require landlords to provide their tenants with annual notices prescribed by the

Department of Health, and to attach the notices to all leases. Sections 2, 3 of the regulations.

Window guards must now be installed not only where children under the age of 11 reside, but also on request, even where no children are in residence. Regulations, **696 Section 3(a), (c), (d). When those in control of a multiple dwelling lack knowledge of a tenant's need or desire for window guards, they are required to conduct an inspection of the affected apartment or apartments. Landlords must inform the Health Department and request its assistance when notices provided pursuant to regulations, Section 3(a), (b), (d) are not returned, and whenever they are refused access to a housing unit in order to conduct an inspection. A tenant's negative response or failure to respond was eliminated as a defense if the owner had actual knowledge of the need or desire for window guards or did not make the required effort to find out. Regulations, Section 3. For the first time, the regulations penalize conduct by tenants impeding the effectiveness of the window guard program. Refusal to *715 respond to a landlord's notice or to permit inspection is prohibited. Regulations, Section 4.

The 1986 amendments to the New York City Administrative Code were accompanied by amendments to the New York City Health Code, Section 131.15, including the expanded obligation to provide window guards on request, Section 131.15(c). Not only was the defense based on a tenant's failure to respond or on a negative response deleted, but the new Section 131.15 made it the "duty of each such person who manages or controls a multiple dwelling to ascertain whether such child resides therein...." New York City Health Code, Section 131.15(a). In addition, failure to install or maintain window guards is declared to be a public nuisance, as well as a condition dangerous to life and health, Section 131.15(d).

Taken together, Health Code, Section 131.15 as amended in 1986, and Section 17–123 of the Administrative Code along with the implementing regulations will be referred to hereafter as the "Window Guard Rules."

STRICT LIABILITY

Defendants contend that the imposition of criminal sanctions for violation of Section 131.15 of the New York City Health Code may not be premised on strict liability.

It is true that "criminal offenses requiring no *mens rea* have a 'generally disfavored status.'" *Liparota v. United States*, 471 U.S. 419, 426, 105 S.Ct. 2084, 2088, 85 L.Ed.2d 434

(1985). However, particularly in areas affecting public health and safety, it has long been recognized that the creation of strict liability offenses was a valid exercise of state and local police power. Typically, strict liability offenses are prescribed as a matter of legislative policy rather than because of their intrinsically evil nature. *Morissette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952); *United States v. Dotterweich*, 320 U.S. 277, 64 S.Ct. 134, 88 L.Ed. 48 (1943); *People v. Munoz*, 9 N.Y.2d 51, 211 N.Y.S.2d 146, 172 N.E.2d 535 (1961); *People v. Swift and Co.*, 286 N.Y. 64, 35 N.E.2d 652 (1941); *People ex rel. Price v. Sheffield Farms-Slawson-Decker Co.*, 225 N.Y. 25, 121 N.E. 474 (1918); *Tenement House Department v. McDevitt*, 215 N.Y. 160, 109 N.E. 88 (1915); *People v. Miller*, 138 Misc.2d 639, 524 N.Y.S.2d 622 (Sup.Ct., N.Y.Co., 1988).

Indeed, Penal Law, Sections 15.10 and 15.15 recognize that strict liability offenses may be created by the Penal Law. *People v. Davis*, 112 Misc.2d 138, 446 N.Y.S.2d 159 (Crim.Ct., Bronx Co., 1981).

In enacting Admin.Code, Section 17–123 and Health Code, Section 131.15 pursuant to City Charter, Section 558(e), the City Council and Health Department respectively have acted *716 to protect the lives of young children from accidental death and injury resulting from window falls, based on extensive findings concerning the frequency of such accidents, as noted in *Bryant Westchester Realty Corp. v. Bd. of Health*, 91 Misc.2d 56, 397 N.Y.S.2d 322 (Sup.Ct., N.Y.Co., 1977) and *Sorbonne Apts. v. Bd. of Health*, 88 Misc.2d 970, 390 N.Y.S.2d 358 (Sup.Ct., N.Y.Co., 1976).

The hazard sought to be prevented by the Window Guard Rules is of the sort traditionally dealt with by means of strict liability offenses. The complexity of modern life, especially in modern urban areas, has "call[ed] into existence new duties and crimes which disregard any ingredient of **697 intent." *Morissette v. United States*, 342 U.S. at 253, 72 S.Ct. at 245. Numerous and detailed regulations controlling the exposure of workers to industrial hazards, the high speed of mechanized transport, the crowding and conditions of living quarters, and mass distribution of food and drugs all seek to minimize risk to the public health safety or welfare. *Id.* at 254, 72 S.Ct. at 245. Like these programs, the several provisions governing window guards are a comprehensive scheme to protect the lives and safety of young children by requiring of those who control and are obligated by law to maintain residential property that they take the elemental precautions dictated by common sense. Effective enforcement of such broad based programs would be illusory if intent were made an element of these offenses. *People v. Swift*, 286 N.Y. 64, 68–69, 35 N.E.2d 652 (1941);

People v. Ortiz, 125 Misc.2d 318, 479 N.Y.S.2d 613 (Crim.Ct., Bronx Co., 1984).

The recent decision by the Court of Appeals in *People v. Coe*, 71 N.Y.2d 852, 527 N.Y.S.2d 741, 522 N.E.2d 1039 (1988), addressed the question of when criminal prosecution of violations of the Public Health Law was permissible on the basis of strict liability.

Coe, supra, involved an interpretation of the language of Section 12-b(2) of the Public Health Law imposing sanctions on any person who “wilfully violates” a provision or regulation of the Public Health Law. The Court of Appeals recognized that for a statute to impose strict liability, “a clear legislative intent to impose strict criminal liability” is required. At 855, 527 N.Y.S.2d 741, 522 N.E.2d 1039, Penal Law, Section 15.15(2). Not finding evidence of such intent, the Court held that the phrase “wilfully violates” in P.H.L., Section 12-b(2) requires a showing that the underlying offense (a violation of P.H.L., Section 2803-d(7)), was committed “knowingly,” that is, with a culpable mental state.

***717** Sanctions for violations of regulations promulgated by local boards of health are prescribed by P.H.L., Section 12-b(1) rather than 12-b(2). However, the language used in both is similar.²

Assuming without deciding that *Coe* does import into Public Health Law, Section 12-b(1) from Section 12-b(2) the reading given by *Coe* of “wilfully” as equivalent to “knowingly,” *Coe*, at 855, 527 N.Y.S.2d 741, 522 N.E.2d 1039, it still remains to be determined whether in the instant case this prevents the City of New York from enforcing provisions of its own health code on a strict liability basis.

The Court concludes that *Coe* poses no obstacle to prosecution of the proceedings at bar on the basis of strict liability, first, because the Window Guard Rules clearly show that they are intended to be enforced on that basis, second, because the sanctions for their violation are prescribed pursuant to New York City Charter, Section 558(e) and not pursuant to Public Health Law, Section 12-b, and third, because such prosecution is neither preempted by nor inconsistent with enforcement of a state scheme.

An unambiguous intention to hold violators culpable on the basis of strict liability permeates the regulatory scheme concerning window guards. Each provision reveals the intent of the authors to hold those in control of residential property liable without a requirement of mental culpability. Neither Section 558(e) of the City Charter, nor Section 131.15 of the Health Code, nor Section 17-123 of the

Administrative Code with its implementing regulations contains any wording such as intentionally, knowingly, wilfully, recklessly or negligently ****698** to indicate that violations of these sections involve a *mens rea* element. Penal Law, Sections 15.10, 15.15. Throughout, the language used is that of absolute command.

***718** The elaborate pattern of individualized notice and response forms, of apartment inspections and Health Department assistance is designed to eliminate, or reduce to a minimum, those circumstances from occurring which would provide a subjective basis for noncompliance. Leases “must” contain the required notices, Admin.Code, Section 17-123(a), and landlords and others “must cause” annual notices to be delivered, Admin.Code, Section 17-123(b). Window guards “shall be installed,” and, “it shall be the duty” of a landlord or other responsible person to ascertain whether they are required. Health Code, Section 131.15(a). Further, pursuant to City Charter, Section 558(e) “[a]ny violation of the health code shall be treated and punished as a misdemeanor,” and Administrative Code, Section 17-123(d) states that any person who violates the provisions of Section 17-123, or its implementing regulations, “shall be guilty of a misdemeanor.” In summary, in enacting the window guard requirements and sanctions, the New York City Council and Board of Health clearly intended to create strict liability offenses.

The City’s authority to create such offenses derives not from Public Health Law, Section 12-b(1), but from Section 558(e) of the New York City Charter. In New York State, regulation of local health matters has by law and tradition been committed to local governments and health boards. New York Constitution, Art. IX, Section 2(c)(10); Municipal Home Rule Law, Sections 10(1)(ii)(a)(12) and 10(4)(a), (b); *Grossman v. Baumgartner*, 17 N.Y.2d 345, 271 N.Y.S.2d 195, 218 N.E.2d 259 (1966); *People v. Blanchard*, 288 N.Y. 145, 42 N.E.2d 7 (1942). Through these enactments, the State has delegated to localities the power to promulgate local laws on matters of public health and to declare violations of local laws to be misdemeanors, offenses or infractions. Pursuant to this scheme, New York City has enacted extensive public health regulations. See New York City Administrative Code, Title 17; New York City Health Code. Authority to promulgate health code regulations is vested by City Charter, Sections 558(a), (b) and (c) in the City Board of Health. Section 27(a) of the New York City Charter gives to the City Council the power to enforce its laws by means of criminal sanctions as authorized by the Municipal Home Rule Law, Section 10(4)(a) and (b). Section 558(e) of the City Charter defines violations of the Health Code as misdemeanors; City Charter, Section 562 authorizes prosecution of these violations in the Criminal Court.

The State legislature itself, however, has also criminalized violations of the orders and regulations of local boards of *719 health. P.H.L., Section 12-b(1), the successor statute to former Penal Law Section 1740. *See* page 697, fn. 2, *supra*.

As a consequence of these dual sources of authority to prescribe sanctions for public health violations, the City may rely on Public Health Law, Section 12-b(1) to define the offense, or it may define the offense legislatively pursuant to Section 558(e) of the City Charter.

In prescribing sanctions for the Health Code and Administrative Code and implementing regulations concerning window guards, the City has exercised its power pursuant to Section 558(e) of the City Charter rather than rely on Public Health Law, Section 12-b(1). *People v. Coe, supra*, neither bars the City from defining the sanctions for violation of its Health Code and Administrative Code pursuant to City Charter, Section 558(e), nor from defining them on a strict liability basis.

Moreover, N.Y.C. Health Code, Section 131.15; N.Y.C.Admin.Code, Section 17-123 and implementing regulations, and N.Y.C. Charter Section 558(e) are neither preempted by nor inconsistent with state law, P.H.L., Section 12-b(1). Article IX, Section 2(c) of the New York Constitution and Section 10(1)(ii) of the Municipal Home Rule Law confer broad authority on localities to legislate pursuant to the police power, provided such local laws are not inconsistent with the Constitution or general laws. A **699 local government may not “exercise its police power when the [State] Legislature has restricted such an exercise by preempting the area of regulation.” *New York State Club Assn. v. City of New York*, 69 N.Y.2d 211, 217, 513 N.Y.S.2d 349, 505 N.E.2d 915 (1987), *aff’d on other grounds*, 487 U.S. 1, 108 S.Ct. 2225, 101 L.Ed.2d 1 (1988), *citing Consolidated Edison Co. v. Town of Red Hook*, 60 N.Y.2d 99, 105, 468 N.Y.S.2d 596, 456 N.E.2d 487 (1983).

Only when the State has evidenced a desire to occupy the entire field to the exclusion of local law will there be preemption. *Jancyn Manufacturing Corp. v. Suffolk County*, 71 N.Y.2d 91, 524 N.Y.S.2d 8, 518 N.E.2d 903 (1987); *People v. Judiz*, 38 N.Y.2d 529, 532, 381 N.Y.S.2d 467, 344 N.E.2d 399 (1976); *People v. Cook*, 34 N.Y.2d 100, 109, 356 N.Y.S.2d 259, 312 N.E.2d 452 (1974); *People v. Ortiz*, 125 Misc.2d 318, 479 N.Y.S.2d 613 (Crim.Ct., N.Y.City, 1984). The intent to preempt may be found in an express or implied declaration of State policy or the enactment of a comprehensive and detailed regulatory scheme in a particular area. *New York State Club Assn. v. City of New York*, 69 N.Y.2d at 217, 513 N.Y.S.2d

349, 505 N.E.2d 915, *People v. Ortiz, supra*.

Consistently with traditional State delegation of authority to municipalities to regulate local health matters, Sections 312 *720 and 228(3) of the Public Health Law respectively exempt New York City from the State’s requirements pertaining to local health boards and allow localities to enact and enforce, as not inconsistent with the state sanitary code (10 NYCRR ch. I), their own health codes “which comply with at least the minimum applicable standards set forth in the sanitary code....” Such a scheme indicates an intent to leave to New York City a very broad field in which to regulate. Thus, there is no preemption here.

This scheme contemplates that state and local government may both be active regarding the same matters. The mere fact that a local law touches upon state regulated areas or that the two regulatory schemes overlap does not render the local enactments invalid. *Council for Owner Occupied Housing, Inc. v. Koch*, 119 Misc.2d 241, 244, 462 N.Y.S.2d 762 (Sup.Ct., N.Y.Co., 1983), *aff’d* on opn. below, 61 N.Y.2d 942, 475 N.Y.S.2d 279, 463 N.E.2d 620 (1984); *People v. Judiz*, 38 N.Y.2d at 531-32, 381 N.Y.S.2d 467, 344 N.E.2d 399; *People v. Cook*, 34 N.Y.2d at 109, 356 N.Y.S.2d 259, 312 N.E.2d 452; *People v. Ortiz, supra*. The Sanitary Code does not touch upon the specific duty to install window guards. Clearly, the State has not chosen to regulate substantively in this area, but merely retains the power to prosecute violations of local codes.

Even assuming that under Section 12-b(1) of the Public Health Law, the State has proscribed knowing violations of the Window Guard Rules, no right to commit such violations with lesser or no intent has been granted by State law. *See Robin v. Incorporated Village of Hempstead*, 30 N.Y.2d 347, 350-52, 334 N.Y.S.2d 129, 285 N.E.2d 285 (1972). Accordingly, nothing in the statutory scheme, enforcement process or specific wording of P.H.L. 12-b(1) requires that New York City’s efforts to outlaw this conduct on a strict liability basis be invalidated.

Moreover, even if the local law is inconsistent with the state’s general law, it will be upheld if it is designed to deal with a specific local problem. *People v. Cook*, 34 N.Y.2d at 109, 356 N.Y.S.2d 259, 312 N.E.2d 452; *Robin v. Incorporated Village of Hempstead*, 30 N.Y.2d at 351, 334 N.Y.S.2d 129, 285 N.E.2d 285 (1972); *Matter of Kress & Co. v. Dept. of Health*, 283 N.Y. 55 at 59, 27 N.E.2d 431 (1940); *People v. Ortiz, supra*. As the State’s largest urban area, New York City suffers a unique problem in the sheer numbers of children at risk, and large multi-story dwellings suffering managerial neglect. “[A]dditional government control is necessary to meet the special housing problems existing in the City of New York.” *Council for Owner*

Occupied Housing, Inc. v. Koch, 119 Misc.2d at 246, 462 N.Y.S.2d 762. Thus, even if the Window Guard Rules were inconsistent, the City has addressed a special condition distinct in its intensity and **700 *721 volume from that found elsewhere in the State, and therefore, they may be enforced on a strict liability basis.

IRREBUTTABLE PRESUMPTION

Defendants contend that Health Code, Section 131.15, as amended in 1986 to remove the previously available “automatic defense,” creates an irrebuttable presumption that “an owner of a building knows that a child under 10 years old lives in an apartment, despite lack of access, false answers by tenants to inquiries on the subject, or the absence of any response to inquiries.” (Cohen Affirmation, Paragraphs 6, 8). This irrebuttable presumption is said to violate due process.

Prior to the 1986 amendment, Health Code, Section 131.5(b) provided that property owners could defend against prosecutions for violations of Health Code, Section 131.15, by showing that they had made proper inquiries of a tenant and had received either a negative response or no response thereto; or, had received a negative response and had not been notified that a child under the age of 11 had subsequently moved in. Health Code, former Section 131.15(b), 1976.

The fact that the 1986 amendments to Section 131.15 removed these provisions, does not mean either that an irrebuttable presumption was created, or that defendants prosecuted for violations of Health Code, Section 131.15 were deprived of all defenses.

An irrebuttable or conclusive presumption is a rule of law which requires that a particular inference must be drawn from certain ascertained facts and cannot be rebutted. Such a presumption is equivalent to a substantive rule of law expressed in terms of rules of evidence. *See* Richardson, Evidence, Sections 55, 57 (10th Ed., 1973); *People v. Robinson*, 97 Misc.2d 47, 411 N.Y.S.2d 793 (Crim.Ct., Kings Co., 1978); *People v. Fauntleroy*, 94 Misc.2d 606, 405 N.Y.S.2d 931 (West.Co.Ct., 1978), *rev'd on other grounds*, 74 A.D.2d 612, 424 N.Y.S.2d 736 (2d Dept.1980).

While the presence of an irrebuttable presumption in a penal statute may raise due process concerns, *See Turner v. United States*, 396 U.S. 398, 90 S.Ct. 642, 24 L.Ed.2d 610 (1970); *Leary v. United States*, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969); *Tot v. United States*, 319 U.S. 463, 63 S.Ct. 1241, 87 L.Ed. 1519 (1943); *People v. Leyva*, 38

N.Y.2d 160, 379 N.Y.S.2d 30, 341 N.E.2d 546 (1975), Health Code, Section 131.15 does not create any presumption at all, rebuttable or irrebuttable. To establish that defendants violated Section 131.15(a), the People must establish beyond a reasonable *722 doubt and as a matter of fact that defendants are the owners or other persons who manage and control the property; that defendants failed to install window guards in the apartments specified in the information; and, that one or more children under the age of 11 resided in each of the apartments in question at the time specified in the respective informations, or, that window guards were requested prior to the specified time.

Defendants may defend on a number of grounds. They may show that no violation existed at the time and place charged. Additionally, owners who can show efforts at compliance with Admin.Code, Section 17–123 and implementing regulations, and the frustration of those efforts by others, may defend on that basis.

For example, Section 3(e) of the implementing regulations provides that where a tenant fails to respond to the owner’s annual notice and the owner has no actual knowledge of a tenant’s need or desire for window guards, the owner or the owner’s agent must conduct an inspection of the premises to ascertain whether one or more children under the age of 11 reside there, and if so, whether window guards have been installed. Section 4 of the implementing regulations provides that tenants may not “refuse, prevent or obstruct” such an inspection, and Section 3(f) requires a landlord who has been denied access to an apartment for purposes of such an inspection to notify in writing and request the assistance of the Health Department’s Window Falls Prevention Program. Barring proof of the owner’s actual knowledge of **701 the need for window guards, an owner who has received no response to the annual window guard notice [Admin.Code, Section 17–123(b), Implementing Reg., Section 3(a)–(c)], who has been refused access to a tenant’s apartment, and who has notified the Health Department in accordance with Implementing Regulations, Sections 3(a) and 3(f) will have a defense to a prosecution for failure to install window guards as required by Health Code, Section 131.15(a).

Similarly, a tenant’s negative response concerning the need for window guards will be a defense to a prosecution for violation of Health Code, Section 131.15(a), as long as the owner had no actual knowledge of the need for window guards and made the mandated efforts to find out whether they were required. Implementing Regulations, Section 3. The tenant’s provision of false information is itself unlawful. Admin.Code, Section 17–123(d); Implementing Regulations, Section 4.

***723** The defense of impossibility, in which a defendant shows that he or she was not, for some reason beyond control, capable of compliance, likewise remains available to defendants. *People v. Sakow*, 45 N.Y.2d 131, 408 N.Y.S.2d 27, 379 N.E.2d 1157 (1978); *People v. Fremd*, 41 N.Y.2d 372, 393 N.Y.S.2d 331, 361 N.E.2d 981 (1977); *Oriental Boulevard Company v. Heller*, 27 N.Y.2d 212, 316 N.Y.S.2d 226, 265 N.E.2d 72 (1970), *appeal dismissed*, 401 U.S. 986, 91 S.Ct. 1234, 28 L.Ed.2d 527 (1971).

Finally, there are safeguards within the Health Code and 1986 implementing regulations which protect owners against liability when compliance is difficult or impossible. Section 131.17 of the Health Code provides that owners complaining that compliance with Section 131.15 presents hardships and difficulties may seek a modification of the requirements from the Commissioner of Health.

Plainly, defendants are not faced with an irrebuttable presumption of guilt merely by virtue of the absence of window guards on their properties. The combined provisions of Admin.Code, Section 17–123, the implementing regulations, and Health Code, Section 131.15, as well as the presumption of innocence, safeguard their rights to contradict the People's case as well as to interpose an appropriate defense.

ARBITRARY MISDEMEANOR CLASSIFICATION

Defendants challenge the constitutional validity of Section 558(e) of the City Charter because it classifies the violation of every Health Code regulation, including Section 131.15, as a misdemeanor, and none as either a felony, an offense or an infraction. While claiming that this feature of Section 558(e) results in an unlawful delegation of legislative power to the Board of Health, defendants acknowledge the authority of *People v. Blanchard*, 288 N.Y. 145, 42 N.E.2d 7 (1942). *People v. Blanchard* held with respect to virtually the same statutes and statutory scheme that there was no unlawful delegation of legislative authority to the Board of Health either pursuant to City Charter, Section 558(e) or former Penal Law, Section 1740, the predecessor statute to Public Health Law, Section 12–b.

Defendants have not offered any analysis to show that the classification of all Health Code violations as misdemeanors involves a question of delegation of legislative power other than that already determined by *People v. Blanchard*, *supra*. They appear to have mischaracterized their argument. Defendants' objection to Section 558(e) ***724** seems to be that it is arbitrary to classify all Health Code violations as misdemeanors,

regardless of the nature of the underlying offense.

Defendants do not have standing to raise objections to the classification of those sections of the Health Code with which they are not charged.

[A] person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court. *Parker v. Levy*, 417 U.S. 733, 759 [94 S.Ct. 2547, 2563, 41 L.Ed.2d 439] (1974), *quoting*, *Broadrick v. Oklahoma*, 413 U.S. 601, 610, [93 S.Ct. 2908, 2915, 37 L.Ed.2d 830] (1973); *People v. Hollman*, 68 N.Y.2d 202 [507 N.Y.S.2d 977, 500 N.E.2d 297] (1986); *People v. Smith*, 89 Misc.2d 789, 791 [392 N.Y.S.2d 968] (App.Term, 2d Dept., 1977); *People v. Harris*, 129 Misc.2d 577, 579 [493 N.Y.S.2d 733] (Crim.Ct., N.Y.Co., 1985); *People v. Darryl M.*, 123 Misc.2d 723 [475 N.Y.S.2d 704] (Crim.Ct., N.Y.Co., 1984).

Notably absent from defendants' submissions are any assertions that the classification of Class A misdemeanor,³ into which violations of Health Code, Section 131.15 fall, is disproportionate to the offense.

Penal Law, Section 10.00(4) defines a misdemeanor as "an offense, other than a 'traffic infraction,' for which a sentence to a term of imprisonment in excess of fifteen days may be imposed, but for which a sentence to a term of imprisonment in excess of one year cannot be imposed." There is no minimum or maximum on the imposable fines. Penal Law, Sections 55.10(2)(a), (c); 80.05(1) and (3).

In enacting City Charter, Section 558(e), the City, within the limits of its powers, thus determined that no Health Code violation should be punishable by less than 15 days imprisonment and that there be no limit to the fines that may be imposed. Defendants have not demonstrated, ***725** nor does the Court find, that this determination affecting the pre-eminently important sphere of public health is arbitrary either with respect to Health Code violations in general or with respect to Section 131.15 in particular. In densely populated, urban areas like New York City,

violations of public health requirements may jeopardize the lives, health and safety of large numbers of people, and significant penalties to deter their commission can be justified.

SELECTIVE ENFORCEMENT

According to defendants, Section 131.15 of the New York City Health Code and Section 17–123 of the Administrative Code are enforced in a discriminatory fashion, singling out private landlords and not managers of City-owned housing. Their supporting affidavits present no facts to support this assertion.

Selective enforcement of an otherwise valid law may deny the right to equal protection of the laws as guaranteed by the United States and New York Constitutions. U.S. Constitution, Amendment 14; N.Y. Constitution, Art. I, Section 11; *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886); *Matter of 303 West 42nd St. Corp. v. Klein*, 46 N.Y.2d 686, 416 N.Y.S.2d 219, 389 N.E.2d 815 (1979). However, in order to succeed on a claim of selective enforcement, defendants bear a heavy burden of proving intentional or conscious discrimination. *People v. Goodman*, 31 N.Y.2d 262, 338 N.Y.S.2d 97, 290 N.E.2d 139 (1972); *People v. Utica Daw's Drug Company, Inc.*, 16 A.D.2d 12, 18, 225 N.Y.S.2d 128, 135 (4th Dept.1962). A party claiming selective or discriminatory enforcement must show not only that the law is not applied to others similarly situated, but that it has deliberately been applied unevenly based upon an arbitrary or prohibited classification. *Matter of 303 West 42nd St. Corp. v. Klein*, *supra*; *DiMaggio v. Brown*, 19 N.Y.2d 283, 289, 279 N.Y.S.2d 161, 165, 225 N.E.2d 871 (1967).

No violation of equal protection occurs where an administrative decision to enforce a law against a segment of wrongdoers is **703 made, for example, on the basis of resource allocation, or deterrent effect. *Matter of 303 West 42nd St. Corp. v. Klein*, 46 N.Y.2d at 694, 416 N.Y.S.2d at

224, 389 N.E.2d at 819. Assuming, *arguendo*, that, as defendants assert in a conclusory fashion, noncompliant managers of city-owned dwellings are not prosecuted for window guard violations, this might well be because the City as their employer or supervisor has other more direct means of securing their compliance.

Defendants' bare assertions are insufficient to establish even a colorable claim of selective prosecution. An identical challenge *726 to the Window Guard Rules was rejected in 1976 in *Sorbonne Apartments Co. v. Board of Health*, 88 Misc.2d 970, 390 N.Y.S.2d 358 (Sup.Ct., N.Y.Co.1976) and nothing has been presented to this Court to require a different result.

UNAUTHORIZED TAX/HARDSHIP

Defendants' claims, unsupported by any factual showing, that the Window Guard Rules constitute an unauthorized tax and impose an economic hardship do not require extended consideration. They have not shown that the Window Guard Rules are a revenue raising measure. *People ex rel. Einsfeld v. Murray*, 149 N.Y. 367, 377–78, 44 N.E. 146 (1896). Further, the same claim of economic hardship has been rejected twice. *Bryant Westchester Realty Corp. v. Bd. of Health*, 91 Misc.2d 56, 397 N.Y.S.2d 322 (Sup.Ct., N.Y.Co., 1977); *Sorbonne Apts. v. Bd. of Health*, 88 Misc.2d 970, 390 N.Y.S.2d 358 (Sup.Ct., N.Y.Co., 1976). The Court agrees with the conclusions in the cases cited.

For all the foregoing reasons, the defendants' motion to dismiss is denied in its entirety.

All Citations

140 Misc.2d 712, 531 N.Y.S.2d 693

Footnotes

¹ The amendments to the New York City Health Code and implementing regulations at issue have all appeared in the City Record, as required by New York City Charter Section 558(f) and (g). Regulations implementing Section 17–123 of the Administrative Code appeared in the City Record on October 14, 1986; the amendments to the New York City Health Code were printed in the City Record on October 24, 1986.

² Section 12–b(1) of the Public Health Law reads in relevant part:
A person who wilfully violates or refuses or omits to comply with any lawful order or regulation prescribed by any local board of health or health officer, is guilty of a misdemeanor[.] ...
Section 12–b(2), on the other hand, is concerned with violations of the Public Health Law and State sanitary code.
A person who wilfully violates any provision of this chapter, or any regulation lawfully made or established by any public

officer or board under authority of this chapter, the punishment for violating which is not otherwise prescribed by this chapter or any other law, is punishable by imprisonment not exceeding one year, or by a fine not exceeding two thousand dollars or by both.

- 3 Violations of the Health Code are Class A misdemeanors. City Charter, Section 558(e); Penal Law, 55.10(2)(b). They entail a fine not to exceed \$1,000, Penal Law, Section 80.05(1), and/or a term of imprisonment not to exceed one year, Penal Law, Section 70.15(1).

Violations of Admin.Code, Section 17–123 or the Implementing Regulations, however, are unclassified misdemeanors which carry a fine of up to \$500 and/or a prison term of up to 6 months. Admin.Code, Section 17–123(d); Penal Law, Section 55.10(2)(c). In those instances where the municipality wishes to impose fines for violations of the health regulations in excess of those fixed by Penal Law, Section 80.05(1) for class A misdemeanors, it may do so by enacting an unclassified misdemeanor in which “the provisions of the law or ordinance that defines the crime” also prescribe the fine to be paid. Penal Law, Sections 55.10(2)(c), 80.05(3).

McKinney's Consolidated Laws of New York Annotated

Public Health Law (Refs & Annos)

Chapter 45. Of the Consolidated Laws (Refs & Annos)

Article 21. Control of Acute Communicable Diseases (Refs & Annos)

Title I. General Provisions (Refs & Annos)

McKinney's Public Health Law § 2100

§ 2100. Communicable diseases; local boards of health and health officers; powers and duties

Currentness

1. Every local board of health and every health officer shall guard against the introduction of such communicable diseases as are designated in the sanitary code, by the exercise of proper and vigilant medical inspection and control of all persons and things infected with or exposed to such diseases.

2. Every local board of health and every health officer may:

(a) provide for care and isolation of cases of communicable disease in a hospital or elsewhere when necessary for protection of the public health and,

(b) subject to the provisions of the sanitary code, prohibit and prevent all intercourse and communication with or use of infected premises, places and things, and require, and if necessary, provide the means for the thorough purification and cleansing of the same before general intercourse with the same or use thereof shall be allowed.

Credits

(L.1953, c. 879, § 1.)

Notes of Decisions (17)

McKinney's Public Health Law § 2100, NY PUB HEALTH § 2100

Current through L.2019, chapter 373. Some statute sections may be more current, see credits for details.

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McKinney's Consolidated Laws of New York Annotated
Public Health Law (Refs & Annos)
Chapter 45. Of the Consolidated Laws (Refs & Annos)
Article 6. State Aid to Cities and Counties
Title II. State Aid for Additional Services

McKinney's Public Health Law § 613

§ 613. State aid; immunization

Effective: July 25, 2017

Currentness

1. (a) The commissioner shall develop and supervise the execution of a program of immunization, surveillance and testing, to raise to the highest reasonable level the immunity of the children of the state against communicable diseases including, but not limited to, influenza, poliomyelitis, measles, mumps, rubella, haemophilus influenzae type b (Hib), diphtheria, pertussis, tetanus, varicella, hepatitis B, pneumococcal disease, and the immunity of adults of the state against diseases identified by the commissioner, including but not limited to influenza, smallpox, hepatitis and such other diseases as the commissioner may designate through regulation. Municipalities in the state shall maintain local programs of immunization to raise the immunity of the children and adults of each municipality to the highest reasonable level, in accordance with an application for state aid submitted by the municipality and approved by the commissioner. Such programs shall include assurance of provision of vaccine, serological testing of individuals and educational efforts to inform health care providers and target populations or their parents, if they are minors, of the facts relative to these diseases and immunizations to prevent their occurrence.

(b) In connection with efforts to raise the immunity of children against influenza, the commissioner shall administer a program of influenza education to the families of children ages six months to eighteen years of age who attend licensed and registered day care programs, nursery schools, pre-kindergarten, kindergarten, school age child care programs, public schools or non-public schools. Such program shall include educational materials on influenza and the benefits of influenza immunizations to be made available on the department's website in anticipation of times of highest risk for contraction of influenza as determined by the commissioner. The office of children and family services, the department of education, and the New York city department of health and mental hygiene shall, as part of their routine notification processes, notify licensed and registered day care programs, nursery schools, pre-kindergarten programs, kindergarten programs, school age child care programs, public schools and non-public schools that the information regarding immunizations for influenza is free and accessible on the department's website and such information shall be posted in such licensed and registered day care programs, nursery schools, pre-kindergartens, kindergartens, school age child care programs, public schools and non-public schools in plain view in anticipation of such times of highest risk for contraction of influenza as determined by the commissioner.

(c) The commissioner shall invite and encourage the active assistance and cooperation in such education activities of: the medical societies, organizations of other licensed health personnel, hospitals, corporations subject to article forty-three of the insurance law, trade unions, trade associations, parents and teachers and their associations, organizations of child care resource and referral agencies, the media of mass communication, and such other voluntary groups and organizations of citizens as he or she shall deem appropriate. The public health and health planning council, the department of education, the department of family assistance, and the department of mental hygiene shall provide the commissioner with such assistance in carrying out

the program as he or she shall request. All other state agencies shall also render such assistance as the commissioner may reasonably require for this program. Nothing in this subdivision shall authorize mandatory immunization of adults or children, except as provided in sections twenty-one hundred sixty-four and twenty-one hundred sixty-five of this chapter.

2. The commissioner shall set such standards as he shall deem necessary for the proper, safe, and efficient administration of the program. He shall direct an annual survey to determine the immunization level of children entering school, and shall conduct annually an audit of such survey and an audit of the immunization level of children attending school. State aid provided by this article shall be reduced by ten percent, provided however that state aid for essential public health activities shall not be reduced, unless a municipality has submitted, in cooperation with local school districts, a plan within ninety days after the commissioner shall have certified to such municipality the results of his survey of the immunization level of children entering schools in such local school districts. Such plan shall be submitted for the next ensuing school year and a subsequent plan shall be submitted annually thereafter for assuring that immunizing agents are administered to pre-school children within a reasonable time prior to but, in any event, no later than their entrance into school, and to students generally, as required pursuant to section twenty-one hundred sixty-four of this chapter. Such plan shall include the manner in which immunization activities are coordinated among the local health authority and the school districts. Such reduction in state aid and the requirement that a municipality submit an immunization plan shall not be applicable to any municipality where ninety percent or more of its children entering school are immunized. The determination of the percentage of immunization shall be made by the commissioner based upon his audit of immunization surveys.

3. The commissioner shall expend such funds as the legislature shall make available for the purpose of adult and child immunization programs, including quality assurance and immunization education:

(a) directly through the department;

(b) by allocation to municipalities with qualifying programs for reimbursement in accordance with provisions of this section; or

(c) by contract.

4. The commissioner shall expend such funds as the legislature shall make available for the purchase of the vaccines described in subdivision one of this section. Vaccines purchased with funds made available under this section shall be made available without charge to licensed private physicians, hospitals, clinics and such others as the commissioner shall determine, and no charge shall be made to any patient for such vaccines.

5. *Repealed by L.2017, c. 121, § 3, eff. July 25, 2017.*

6. *Renumbered as 5 by L.2013, c. 56, pt. E, § 25, eff. March 28, 2013, deemed eff. April 1, 2013.*

7. *Repealed by L.2013, c. 56, pt. E, § 25, eff. March 28, 2013, deemed eff. April 1, 2013.*

Credits

(Added L.1986, c. 901, § 2, eff. Jan. 1, 1988. Amended L.1989, c. 538, § 1; L.2004, c. 207, § 5, eff. July 20, 2004; L.2006, c. 189, § 2, eff. July 26, 2006; L.2008, c. 58, pt. A, § 3-a, eff. April 23, 2008, deemed eff. April 1, 2008; L.2010, c. 36, § 1, eff. April 20, 2011; L.2013, c. 56, pt. E, § 24, eff. Jan. 1, 2014; L.2013, c. 56, pt. E, § 25, eff. March 28, 2013, deemed eff. April 1, 2013; L.2017, c. 121, § 3, eff. July 25, 2017.)

Notes of Decisions (2)

McKinney's Public Health Law § 613, NY PUB HEALTH § 613

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McKinney's Consolidated Laws of New York Annotated

Public Health Law (Refs & Annos)

Chapter 45. Of the Consolidated Laws (Refs & Annos)

Article 1. Short Title and Definitions: General Provisions

Title II. General Provisions

McKinney's Public Health Law § 12-b

§ 12-b. Wilful violation of health laws

Effective: April 1, 2014

Currentness

1. A person who wilfully violates or refuses or omits to comply with any lawful order or regulation prescribed by any local board of health or local health officer, is guilty of a misdemeanor; except, however, that where such order or regulation applies to a tenant with respect to his own dwelling unit or to an owner occupied one or two family dwelling, such person is guilty of an offense for the first violation punishable by a fine not to exceed fifty dollars and for a second or subsequent violation is guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars or by imprisonment not to exceed six months or by both such fine and imprisonment.

2. [Eff. until April 1, 2020, pursuant to L.2008, c. 58, pt. A, § 32. See, also, subd. 2 below.] A person who wilfully violates any provision of this chapter, or any regulation lawfully made or established by any public officer or board under authority of this chapter, the punishment for violating which is not otherwise prescribed by this chapter or any other law, is punishable by imprisonment not exceeding one year, or by a fine not exceeding ten thousand dollars or by both. Effective on and after April first, two thousand eight the comptroller is hereby authorized and directed to deposit amounts collected in excess of two thousand dollars per violation to the patient safety center account to be used for purposes of the patient safety center created by title two of article twenty-nine-D of this chapter.

2. [Eff. April 1, 2020, pursuant to L.2008, c. 58, pt. A, § 32. See, also, subd. 2 above.] A person who wilfully violates any provision of this chapter, or any regulation lawfully made or established by any public officer or board under authority of this chapter, the punishment for violating which is not otherwise prescribed by this chapter or any other law, is punishable by imprisonment not exceeding one year, or by a fine not exceeding two thousand dollars or by both.

Credits

(Added L.1965, c. 1031, § 164. Amended L.1969, c. 463, § 1; L.2008, c. 58, pt. A, § 17, eff. April 23, 2008, deemed eff. April 1, 2008.)

Notes of Decisions (14)

§ 12-b. Wilful violation of health laws, NY PUB HEALTH § 12-b

McKinney's Public Health Law § 12-b, NY PUB HEALTH § 12-b

Current through L.2019, chapter 373. Some statute sections may be more current, see credits for details.

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McKinney's Consolidated Laws of New York Annotated

Public Health Law (Refs & Annos)

Chapter 45. Of the Consolidated Laws (Refs & Annos)

Article 21. Control of Acute Communicable Diseases (Refs & Annos)

Title VI. Poliomyelitis and Other Diseases (Refs & Annos)

McKinney's Public Health Law § 2164

§ 2164. Definitions; immunization against poliomyelitis, mumps, measles, diphtheria, rubella, varicella, Haemophilus influenzae type b (Hib), pertussis, tetanus, pneumococcal disease, meningococcal disease, and hepatitis B

Effective: June 13, 2019

Currentness

1. As used in this section, unless the context requires otherwise:

a. The term “school” means and includes any public, private or parochial child caring center, day nursery, day care agency, nursery school, kindergarten, elementary, intermediate or secondary school.

b. The term “child” shall mean and include any person between the ages of two months and eighteen years.

c. The term “person in parental relation to a child” shall mean and include his father or mother, by birth or adoption, his legally appointed guardian, or his custodian. A person shall be regarded as the custodian of a child if he has assumed the charge and care of the child because the parents or legally appointed guardian of the minor have died, are imprisoned, are mentally ill, or have been committed to an institution, or because they have abandoned or deserted such child or are living outside the state or their whereabouts are unknown, or have designated the person pursuant to title fifteen-A of article five of the general obligations law¹ as a person in parental relation to the child.

d. The term “health practitioner” shall mean any person authorized by law to administer an immunization.

2. a. Every person in parental relation to a child in this state shall have administered to such child an adequate dose or doses of an immunizing agent against poliomyelitis, mumps, measles, diphtheria, rubella, varicella, Haemophilus influenzae type b (Hib), pertussis, tetanus, pneumococcal disease, and hepatitis B, which meets the standards approved by the United States public health service for such biological products, and which is approved by the department under such conditions as may be specified by the public health council.

b. Every person in parental relation to a child in this state born on or after January first, nineteen hundred ninety-four and entering sixth grade or a comparable age level special education program with an unassigned grade on or after September first, two thousand seven, shall have administered to such child a booster immunization containing diphtheria and tetanus toxoids, and an acellular pertussis vaccine, which meets the standards approved by the United States public health service for such biological products, and which is approved by the department under such conditions as may be specified by the public health council.

c. Every person in parental relation to a child in this state entering or having entered seventh grade and twelfth grade or a comparable age level special education program with an unassigned grade on or after September first, two thousand sixteen, shall have administered to such child an adequate dose or doses of immunizing agents against meningococcal disease as recommended by the advisory committee on immunization practices of the centers for disease control and prevention, which meets the standards approved by the United States public health service for such biological products, and which is approved by the department under such conditions as may be specified by the public health and planning council.

3. The person in parental relation to any such child who has not previously received such immunization shall present the child to a health practitioner and request such health practitioner to administer the necessary immunization against poliomyelitis, mumps, measles, diphtheria, Haemophilus influenzae type b (Hib), rubella, varicella, pertussis, tetanus, pneumococcal disease, meningococcal disease, and hepatitis B as provided in subdivision two of this section.

4. If any person in parental relation to such child is unable to pay for the services of a private health practitioner, such person shall present such child to the health officer of the county in which the child resides, who shall then administer the immunizing agent without charge.

5. The health practitioner who administers such immunizing agent against poliomyelitis, mumps, measles, diphtheria, Haemophilus influenzae type b (Hib), rubella, varicella, pertussis, tetanus, pneumococcal disease, meningococcal disease, and hepatitis B to any such child shall give a certificate of such immunization to the person in parental relation to such child.

6. In the event that a person in parental relation to a child makes application for admission of such child to a school or has a child attending school and there exists no certificate or other acceptable evidence of the child's immunization against poliomyelitis, mumps, measles, diphtheria, rubella, varicella, hepatitis B, pertussis, tetanus, and, where applicable, Haemophilus influenzae type b (Hib), meningococcal disease, and pneumococcal disease, the principal, teacher, owner or person in charge of the school shall inform such person of the necessity to have the child immunized, that such immunization may be administered by any health practitioner, or that the child may be immunized without charge by the health officer in the county where the child resides, if such person executes a consent therefor. In the event that such person does not wish to select a health practitioner to administer the immunization, he or she shall be provided with a form which shall give notice that as a prerequisite to processing the application for admission to, or for continued attendance at, the school such person shall state a valid reason for withholding consent or consent shall be given for immunization to be administered by a health officer in the public employ, or by a school physician or nurse. The form shall provide for the execution of a consent by such person and it shall also state that such person need not execute such consent if subdivision eight of this section applies to such child.

7. (a) [Eff. until June 30, 2020, pursuant to L.2019, c. 35, § 4. See, also, par. (a) below.] No principal, teacher, owner or person

in charge of a school shall permit any child to be admitted to such school, or to attend such school, in excess of fourteen days, without the certificate provided for in subdivision five of this section or some other acceptable evidence of the child's immunization against poliomyelitis, mumps, measles, diphtheria, rubella, varicella, hepatitis B, pertussis, tetanus, and, where applicable, Haemophilus influenzae type b (Hib), meningococcal disease, and pneumococcal disease; provided, however, such fourteen day period may be extended to not more than thirty days for an individual student by the appropriate principal, teacher, owner or other person in charge where such student is transferring from out-of-state or from another country and can show a good faith effort to get the necessary certification or other evidence of immunization or where the parent, guardian, or any other person in parental relationship to such child can demonstrate that a child has received at least the first dose in each immunization series required by this section and has age appropriate appointments scheduled to complete the immunization series according to the Advisory Committee on Immunization Practices Recommended Immunization Schedules for Persons Aged 0 through 18 Years.

(a) [Eff. June 30, 2020, pursuant to L.2019, c. 35, § 4. See, also, par. (a) above.] No principal, teacher, owner or person in charge of a school shall permit any child to be admitted to such school, or to attend such school, in excess of fourteen days, without the certificate provided for in subdivision five of this section or some other acceptable evidence of the child's immunization against poliomyelitis, mumps, measles, diphtheria, rubella, varicella, hepatitis B, pertussis, tetanus, and, where applicable, Haemophilus influenzae type b (Hib), meningococcal disease, and pneumococcal disease; provided, however, such fourteen day period may be extended to not more than thirty days for an individual student by the appropriate principal, teacher, owner or other person in charge where such student is transferring from out-of-state or from another country and can show a good faith effort to get the necessary certification or other evidence of immunization.

(b) A parent, a guardian or any other person in parental relationship to a child denied school entrance or attendance may appeal by petition to the commissioner of education in accordance with the provisions of section three hundred ten of the education law.

8. If any physician licensed to practice medicine in this state certifies that such immunization may be detrimental to a child's health, the requirements of this section shall be inapplicable until such immunization is found no longer to be detrimental to the child's health.

8-a. Whenever a child has been refused admission to, or continued attendance at, a school as provided for in subdivision seven of this section because there exists no certificate provided for in subdivision five of this section or other acceptable evidence of the child's immunization against poliomyelitis, mumps, measles, diphtheria, rubella, varicella, hepatitis B, pertussis, tetanus, and, where applicable, Haemophilus influenzae type b (Hib), meningococcal disease, and pneumococcal disease, the principal, teacher, owner or person in charge of the school shall:

a. forward a report of such exclusion and the name and address of such child to the local health authority and to the person in parental relation to the child together with a notification of the responsibility of such person under subdivision two of this section and a form of consent as prescribed by regulation of the commissioner, and

b. provide, with the cooperation of the appropriate local health authority, for a time and place at which an immunizing agent or agents shall be administered, as required by subdivision two of this section, to a child for whom a consent has been obtained. Upon failure of a local health authority to cooperate in arranging for a time and place at which an immunizing agent or agents shall be administered as required by subdivision two of this section, the commissioner shall arrange for such administration

and may recover the cost thereof from the amount of state aid to which the local health authority would otherwise be entitled.

9. *Repealed by L.2019, c. 35, § 1, eff. June 13, 2019.*

10. The commissioner may adopt and amend rules and regulations to effectuate the provisions and purposes of this section.

11. Every school shall annually provide the commissioner, on forms provided by the commissioner, a summary regarding compliance with the provisions of this section.

Credits

(Added L.1966, c. 994, § 1. Amended L.1968, c. 1094, § 4; L.1970, c. 265, § 1; L.1971, c. 974, § 1; L.1972, c. 145, § 1; L.1975, c. 633, §§ 1, 2; L.1976, c. 926, §§ 1, 2; L.1978, c. 550, § 37; L.1979, c. 443, §§ 2, 3; L.1981, c. 116, § 1; L.1989, c. 405, § 2; L.1989, c. 538, §§ 2, 3; L.1990, c. 634, § 1; L.1994, c. 521, §§ 1 to 8; L.1999, c. 416, §§ 1 to 3, eff. Aug. 31, 1999; L.2004, c. 157, § 1, eff. Jan. 1, 2005; L.2004, c. 207, §§ 1 to 3, eff. July 20, 2004; L.2004, c. 430, § 1, eff. Jan. 1, 2005; L.2005, c. 119, § 3, eff. June 30, 2005; L.2006, c. 189, § 1, eff. July 26, 2006; L.2006, c. 506, § 1, eff. Sept. 1, 2007; L.2015, c. 401, § 1, eff. Oct. 26, 2015; L.2019, c. 35, §§ 1, 2, eff. June 13, 2019.)

Notes of Decisions (60)

Footnotes

¹

General Obligations Law § 5-1551 et seq.

McKinney's Public Health Law § 2164, NY PUB HEALTH § 2164

Current through L.2019, chapter 373. Some statute sections may be more current, see credits for details.

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McKinney's Consolidated Laws of New York Annotated

Public Health Law (Refs & Annos)

Chapter 45. Of the Consolidated Laws (Refs & Annos)

Article 1. Short Title and Definitions: General Provisions

Title II. General Provisions

McKinney's Public Health Law § 14

§ 14. Actions against persons rendering professional services at the request of the department; defense and indemnification

Currentness

The provisions of section seventeen of the public officers law shall apply to any physician, dentist, nurse or other health care professional who: (i) is licensed to practice pursuant to article one hundred thirty-one, one hundred thirty-one-B, one hundred thirty-three, one hundred thirty-six, one hundred thirty-seven, one hundred thirty-nine, one hundred forty-three, one hundred fifty-six, one hundred fifty-seven, one hundred fifty-nine or one hundred sixty-four of the education law and who is rendering professional treatment or consultation in connection with professional treatment authorized under such license at the request of the department, or at a departmental facility, including clinical practice provided pursuant to a clinical practice plan established pursuant to subdivision fourteen of section two hundred six of this chapter, to patients receiving care or professional consultation from the department while rendering such professional treatment or consultation; (ii) is rendering consultation in connection with an audit or prepayment review of claims or treatment requests under the medical assistance program; or (iii) assists the department as consultants or expert witnesses in the investigation or prosecution of alleged violations of article twenty-eight, thirty-six, forty-four or forty-seven of this chapter or rules and regulations adopted pursuant thereto.

Credits

(Added L.1979, c. 442, § 1. Amended L.1982, c. 601, § 1; L.1992, c. 293, § 1; L.1995, c. 505, § 1; L.1998, c. 2, § 31, eff. Sept. 24, 1998.)

Notes of Decisions (1)

McKinney's Public Health Law § 14, NY PUB HEALTH § 14

Current through L.2019, chapter 373. Some statute sections may be more current, see credits for details.

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89 S.Ct. 1322
Supreme Court of the United States

Bernard SHAPIRO, Commissioner of Welfare of
the State of Connecticut, Appellant,

v.

Vivian THOMPSON.

Walter E. WASHINGTON et al., Appellants,

v.

Clay Mae LEGRANT et al.

Roger A. REYNOLDS et al., Appellants,

v.

Juanita SMITH et al.

Nos. 9, 33, and 34.

Reargued Oct. 23 and 24, 1968.

Decided April 21, 1969.

*621 Mr. Justice BRENNAN delivered the opinion of the Court.

These three appeals were restored to the calendar for reargument. 392 U.S. 920, 88 S.Ct. 2272, 20 L.Ed.2d 1381 (1968). Each is an appeal from a decision of a three-judge District Court holding *622 unconstitutional a State or District of Columbia statutory provision which denies welfare assistance to residents of the State or District who have not resided within their jurisdictions for at least one year immediately preceding their applications for such assistance.¹ We affirm **1325 the judgments of the District Courts in the three cases.

Synopsis

Appeals from decisions of three-judge District Courts for District of Connecticut, District of Columbia, and Eastern District of Pennsylvania, 270 F.Supp. 331, 277 F.Supp. 65, 279 F.Supp. 22, holding unconstitutional a state or District of Columbia statutory provision denying welfare assistance to residents of state or district who have not resided within their jurisdictions for at least one year immediately preceding their applications for such assistance. The Supreme Court, Mr. Justice Brennan, held that statutory prohibition of welfare benefits to residents of less than a year creates a classification which constitutes an invidious discrimination denying them equal protection of the laws.

Affirmed.

Mr. Chief Justice Warren, Mr. Justice Black, and Mr. Justice Harlan dissented.

Attorneys and Law Firms

**1324 *620 Francis J. MacGregor, Fairfield, Conn., Richard W. Barton, Washington, D.C., and William C. Sennett, Harrisburg, Pa., for appellants.

Archibald Cox, Washington, D.C., for appellees.

Lorna L. Williams, Sp. Asst. Atty. Gen., Des Moines, Iowa, for State or Iowa, as amicus curiae.

Opinion

I.

In No. 9, the Connecticut Welfare Department invoked s 17—2d of the Connecticut General Statutes² to *623 deny the application of appellee Vivian Marie Thompson for assistance under the program for Aid to Families with Dependent Children (AFDC). She was a 19-year-old unwed mother of one child and pregnant with her second child when she changed her residence in June 1966 from Dorchester, Massachusetts, to Hartford, Connecticut, to live with her mother, a Hartford resident. She moved to her own apartment in Hartford in August 1966, when her mother was no longer able to support her and her infant son. Because of her pregnancy, she was unable to work or enter a work training program. Her application for AFDC assistance, filed in August, was denied in November solely on the ground that, as required by s 17—2d, she had not lived in the State for a year before her application was filed. She brought this action in the District Court for the District of Connecticut where a three-judge court, one judge dissenting, declared s 17—2d unconstitutional. 270 F.Supp. 331 (1967). The majority held that the waiting-period requirement is unconstitutional because it ‘has a chilling effect on the right to travel.’ Id., at 336. The majority also held that the provision was a violation of the Equal Protection Clause of the Fourteenth Amendment because the denial of relief to those resident in the State for less than a year is not based on any permissible purpose but is solely designed as ‘Connecticut states quite frankly,’ ‘to protect its fisc by discouraging entry of those who come needing relief.’ Id., at 336—337. We noted probable jurisdiction. 389 U.S. 1032, 88 S.Ct. 784, 19 L.Ed.2d 820 (1968).

In No. 33, there are four appellees. Three of them—appellees Harrell, Brown, and Legrant—applied for and were denied AFDC aid. The fourth, appellee Barley, applied for and was denied benefits under the program for Aid to the Permanently and Totally Disabled. The denial in each case was on the ground that the applicant had not resided in the District of Columbia for one year *624 immediately preceding the filing of her application, as required by s 3—203 of the District of Columbia Code.³

****1326** Appellee Minnie Harrell, now deceased, had moved with her three children from New York to Washington in September 1966. She suffered from cancer and moved to be near members of her family who lived in Washington.

Appellee Barley, a former resident of the District of Columbia, returned to the District in March 1941 and was committed a month later to St. Elizabeths Hospital as mentally ill. She has remained in that hospital ever since. She was deemed eligible for release in 1965, and a plan was made to transfer her from the hospital to a foster home. The plan depended, however, upon Mrs. Barley's obtaining welfare assistance for her support. Her application for assistance under the program for Aid to the Permanently and Totally Disabled was denied because her time spent in the hospital did not count in determining compliance with the one-year requirement.

Appellee Brown lived with her mother and two of her three children in Fort Smith, Arkansas. Her third child was living with appellee Brown's father in the District of Columbia. When her mother moved from Fort Smith of Oklahoma, appellee Brown, in February 1966, returned to the District of Columbia where she lived as a child. Her application for AFDC assistance was approved insofar as it sought assistance for the child who *625 had lived in the District with her father but was denied to the extent it sought assistance for the two other children.

Appellee Legrant moved with her two children from South Carolina to the District of Columbia in March 1967 after the death of her mother. She planned to live with a sister and brother in Washington. She was pregnant and in ill health when she applied for and was denied AFDC assistance in July 1967.

The several cases were consolidated for trial, and a three-judge District Court was convened.⁴ The court, one judge dissenting, held s 3—203 unconstitutional. 279 F.Supp. 22 (1967). The majority rested its decision on the ground that the one-year requirement was unconstitutional as a denial of the right to equal protection secured by the Due Process Clause of the Fifth Amendment. We noted probable jurisdiction. *Washington v. Harrell*, 390 U.S. 940, 88 S.Ct.

1053, 19 L.Ed.2d 1129 (1968).

In No. 34, there are two appellees, Smith and Foster, who were denied AFDC aid on the sole ground that they had not been residents of Pennsylvania for a year prior to their applications as required by s 432(6) of the Pennsylvania ****1327 *626** Welfare Code.⁵ Appellee Smith and her five minor children moved in December 1966 from Delaware to Philadelphia, Pennsylvania, where her father lived. Her father supported her and her children for several months until he lost his job. Appellee then applied for AFDC assistance and had received two checks when the aid was terminated. Appellee Foster, after living in Pennsylvania from 1953 to 1965, had moved with her four children to South Carolina to care for her grandfather and invalid grandmother and had returned to Pennsylvania in 1967. A three-judge District Court for the Eastern District of Pennsylvania, one judge dissenting, declared s 432(6) unconstitutional. 277 F.Supp. 65 (1967). The majority held that the classification established by the waiting-period requirement is 'without rational basis and without legitimate purpose or function' and therefore a violation of the Equal Protection Clause. *Id.*, at 67. The majority noted further that if the purpose of the statute was 'to erect a barrier against the movement of indigent persons into the State or to *627 effect their prompt departure after they have gotten there,' it would be 'patently improper and its implementation plainly impermissible.' *Id.*, at 67—68. We noted probable jurisdiction. 390 U.S. 940, 88 S.Ct. 1054, 19 L.Ed.2d 1129 (1968).

II.

There is no dispute that the effect of the waiting-period requirement in each case is to create two classes of needy resident families indistinguishable from each other except that one is composed of residents who have resided a year or more, and the second of residents who have resided less than a year, in the jurisdiction. On the basis of this sole difference the first class is granted and the second class is denied welfare aid upon which may depend the ability of the families to obtain the very means to subsist—food, shelter, and other necessities of life. In each case, the District Court found that appellees met the test for residence in their jurisdictions, as well as all other eligibility requirements except the requirement of residence for a full year prior to their applications. On reargument, appellees' central contention is that the statutory prohibition of benefits to residents of less than a year creates a classification which constitutes an invidious discrimination denying them equal protection of the laws.⁶

We agree. The interests which appellants assert are promoted by the classification either may not constitutionally be promoted by government or are not compelling governmental interests.

****1328 III.**

Primarily, appellants justify the waiting-period requirement as a protective device to preserve the fiscal integrity of state public assistance programs. It is asserted that people who require welfare assistance during their first *628 year of residence in a State are likely to become continuing burdens on state welfare programs. Therefore, the argument runs, if such people can be deterred from entering the jurisdiction by denying them welfare benefits during the first year, state programs to assist long-time residents will not be impaired by a substantial influx of indigent newcomers.⁷

There is weighty evidence that exclusion from the jurisdiction of the poor who need or may need relief was the specific objective of these provisions. In the Congress, sponsors of federal legislation to eliminate all residence requirements have been consistently opposed by representatives of state and local welfare agencies who have stressed the fears of the States that elimination of the requirements would result in a heavy influx of individuals into States providing the most generous benefits. See, e.g., Hearings on H.R. 10032 before the House Committee on Ways and Means, 87th Cong., 2d Sess., 309—310, 644 (1962); Hearings on H.R. 6000 before the Senate Committee on Finance, 81st Cong., *629 2d Sess., 324—327 (1950). The sponsor of the Connecticut requirement said in its support: ‘I doubt that Connecticut can and should continue to allow unlimited migration into the state on the basis of offering instant money and permanent income to all who can make their way to the state regardless of their ability to contribute to the economy.’ H.B. 82, Connecticut General Assembly House Proceedings, February Special Session, 1965, Vol. II, pt. 7, p. 3504. In Pennsylvania, shortly after the enactment of the one-year requirement, the Attorney General issued an opinion construing the one-year requirement strictly because ‘(a)ny other conclusion would tend to attract the dependents of other states to our Commonwealth.’ 1937—1938 Official Opinions of the Attorney General, No. 240, p. 110. In the District of Columbia case, the constitutionality of s 3—203 was frankly defended in the District Court and in this Court on the ground that it is designed to protect the jurisdiction from an influx of persons seeking more generous public

assistance than might be available elsewhere.

We do not doubt that the one-year waiting period device is well suited to discourage the influx of poor families in need of assistance. An indigent who desires to migrate, resettle, find a new job, and start a new life will doubtless hesitate if he knows that he must risk making the move without the possibility of falling back on state welfare assistance during his first year of residence, when his need may be most acute. But **1329 the purpose of inhibiting migration by needy persons into the State is constitutionally impermissible.

This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement. That *630 proposition was early stated by Chief Justice Taney in the Passenger Cases, 7 How. 283, 492, 12 L.Ed. 702 (1849):

‘For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States.’

We have no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision.⁸ It suffices that, as Mr. Justice Stewart said for the Court in *United States v. Guest*, 383 U.S. 745, 757—758, 86 S.Ct. 1170, 1178, 16 L.Ed.2d 239 (1966):

‘The constitutional right to travel from one State to another * * * occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized.

* * * (The) right finds no explicit mention in the Constitution. The reason, it has been suggested, is *631 that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created. In any event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution.’

Thus, the purpose of deterring the in-migration of

indigents cannot serve as justification for the classification created by the one-year waiting period, since that purpose is constitutionally impermissible. If a law has ‘no other purpose * * * than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it (is) patently unconstitutional.’ *United States v. Jackson*, 390 U.S. 570, 581, 88 S.Ct. 1209, 1216, 20 L.Ed.2d 138 (1968).

Alternatively, appellants argue that even if it is impermissible for a State to attempt to deter the entry of all indigents, the challenged classification may be justified as a permissible state attempt to discourage those indigents who would enter the State solely to obtain larger benefits. We observe first that none of the statutes before us is ****1330** tailored to serve that objective. Rather, the class of barred newcomers is all-inclusive, lumping the great majority who come to the State for other purposes with those who come for the sole purpose of collecting higher benefits. In actual operation, therefore, the three statutes enact what in effect are non-rebuttable presumptions that every applicant for assistance in his first year of residence came to the jurisdiction solely to obtain higher benefits. Nothing whatever in any of these records supplies any basis in fact for such a presumption.

More fundamentally, a State may no more try to fence out those indigents who seek higher welfare benefits than it may try to fence out indigents generally. Implicit in any such distinction is the notion that indigents who enter a State with the hope of securing higher welfare benefits are somehow less deserving than indigents who do not ***632** take this consideration into account. But we do not perceive why a mother who is seeking to make a new life for herself and her children should be regarded as less deserving because she considers, among others factors, the level of a State’s public assistance. Surely such a mother is no less deserving than a mother who moves into a particular State in order to take advantage of its better educational facilities.

Appellants argue further that the challenged classification may be sustained as an attempt to distinguish between new and old residents on the basis of the contribution they have made to the community through the payment of taxes. We have difficulty seeing how long-term residents who qualify for welfare are making a greater present contribution to the State in taxes than indigent residents who have recently arrived. If the argument is based on contributions made in the past by the long-term residents, there is some question, as a factual matter, whether this argument is applicable in Pennsylvania where the record suggests that some 40% of those denied public assistance because of the waiting period had lengthy prior residence in the State.⁹ But we need not rest on the particular facts of these cases. Appellants’ reasoning would logically permit the State to

bar new residents from schools, parks, and libraries or deprive them of police and fire protection. Indeed it would permit the State to apportion all benefits and services according to the past tax contributions of its ***633** citizens. The Equal Protection Clause prohibits such an apportionment of state services.¹⁰

We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. It could not, for example, reduce expenditures for education by barring indigent children from its schools. Similarly, in the cases before us, appellants must do more than show that denying welfare benefits to new residents saves money. The saving of welfare costs cannot justify an otherwise invidious classification.¹¹

****1331** In sum, neither deterrence of indigents from migrating to the State nor limitation of welfare benefits to those regarded as contributing to the State is a constitutionally permissible state objective.

IV.

Appellants next advance as justification certain administrative and related governmental objectives allegedly served by the waiting-period requirement.¹² They argue ***634** that the requirement (1) facilitates the planning of the welfare budget; (2) provides an objective test of residency; (3) minimizes the opportunity for recipients fraudulently to receive payments from more than one jurisdiction; and (4) encourages early entry of new residents into the labor force.

At the outset, we reject appellants’ argument that a mere showing of a rational relationship between the waiting period and these four admittedly permissible state objectives will suffice to justify the classification. See *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78, 31 S.Ct. 337, 340, 55 L.Ed. 369 (1911); *Flemming v. Nestor*, 363 U.S. 603, 611, 80 S.Ct. 1367, 1372, 4 L.Ed.2d 1435 (1960); *McGowan v. Maryland*, 366 U.S. 420, 426, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393 (1961). The waiting-period provision denies welfare benefits to otherwise eligible applicants solely because they have recently moved into the jurisdiction. But in moving from State to State or to the District of Columbia appellees were exercising a constitutional right, and any classification which serves to

penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional. Cf. *Skinner v. Oklahoma*, 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L.Ed. 1655 (1942); *Korematsu v. United States*, 323 U.S. 214, 216, 65 S.Ct. 193, 194, 89 L.Ed. 194 (1944); *Bates v. Little Rock*, 361 U.S. 516, 524, 80 S.Ct. 412, 417, 4 L.Ed.2d 480 (1960); *Sherbert v. Verner*, 374 U.S. 398, 406, 83 S.Ct. 1790, 1795, 10 L.Ed.2d 965 (1963).

The argument that the waiting-period requirement facilitates budget predictability is wholly unfounded. The records in all three cases are utterly devoid of evidence that either State or the District of Columbia in fact uses the one-year requirement as a means to predict the number of people who will require assistance in the budget year. None of the appellants takes a census of new residents or collects any other data that would reveal the number of newcomers in the State less than a year. *635 Nor are new residents required to give advance notice of their need for welfare assistance.¹³ Thus, the welfare authorities cannot know how many new residents come into the jurisdiction in any year, much less how many of them will require public assistance. In these circumstances, there is simply no basis for the claim that the one-year waiting requirement serves the purpose of making the welfare budget more predictable. **1332 In Connecticut and Pennsylvania the irrelevance of the one-year requirement to budgetary planning is further underscored by the fact that temporary, partial assistance is given to some new residents¹⁴ and full assistance is given to other new residents under reciprocal agreements.¹⁵ Finally, the claim that a one-year waiting requirement is used for planning purposes is plainly belied by the fact that the requirement is not also imposed on applicants who are long-term residents, the group that receives the bulk of welfare payments. In short, the States rely on methods other than the one-year requirement to make budget estimates. In No. 34, the Director of the Pennsylvania Bureau of Assistance Policies and Standards testified that, based on experience in Pennsylvania and elsewhere, her office had already estimated how much the elimination of the one-year requirement would cost and that the estimates of costs of other changes in regulations 'have proven exceptionally accurate.'

*636 The argument that the waiting period serves as an administratively efficient rule of thumb for determining residency similarly will not withstand scrutiny. The residence requirement and the one-year waiting-period requirement are distinct and independent prerequisites for assistance under these three statutes, and the facts relevant to the determination of each are directly examined by the welfare authorities.¹⁶ Before granting an application, the welfare authorities investigate the applicant's employment,

housing, and family situation and in the course of the inquiry necessarily learn the facts upon which to determine whether the applicant is a resident.¹⁷

**1333 *637 Similarly, there is no need for a State to use the one-year waiting period as a safeguard against fraudulent receipt of benefits;¹⁸ for less drastic means are available, and are employed, to minimize that hazard. Of course, a State has a valid interest in preventing fraud by any applicant, whether a newcomer or a long-time resident. It is not denied, however, that the investigations now conducted entail inquiries into facts relevant to that subject. In addition, cooperation among state welfare departments is common. The District of Columbia, for example, provides interim assistance to its former residents who have moved to a State which has a waiting period. As a matter of course, District officials send a letter to the welfare authorities in the recipient's new community 'to request the information needed to continue assistance.'¹⁹ A like procedure would be an effective safeguard against the hazard of double payments. Since double payments can be prevented by a letter or a telephone call, it is unreasonable to accomplish this objective by the blunderbuss method of denying assistance to all indigent newcomers for an entire year.

Pennsylvania suggests that the one-year waiting period is justified as a means of encouraging new residents to join the labor force promptly. But this logic would also require a similar waiting period for long-term residents of the State. A state purpose to encourage employment *638 provides no rational basis for imposing a one-year waiting-period restriction on new residents only.

We conclude therefore that appellants in these cases do not use and have no need to use the one-year requirement for the governmental purposes suggested. Thus, even under traditional equal protection tests a classification of welfare applicants according to whether they have lived in the State for one year would seem irrational and unconstitutional.²⁰ But, of course, the traditional criteria do not apply in these cases. Since the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a compelling state interest. Under this standard, the waiting-period requirement clearly violates the Equal Protection Clause.²¹

V.

Connecticut and Pennsylvania argue, however, that the constitutional challenge to the waiting-period requirements must fail because Congress expressly approved the imposition of the requirement by the States as part of the jointly funded AFDC program.

Section 402(b) of the Social Security Act of 1935, as amended, 42 U.S.C. s 602(b), provides that:

‘The Secretary shall approve any (state assistance) plan which fulfills the conditions specified in subsection *639 (a) of this section, except that he **1334 shall not approve any plan which imposes as a condition of eligibility for aid to families with dependent children, a residence requirement which denies aid with respect to any child residing in the State (1) who has resided in the State for one year immediately preceding the application for such aid, or (2) who was born within one year immediately preceding the application, if the parent or other relative with whom the child is living has resided in the State for one year immediately preceding the birth.’

On its face, the statute does not approve, much less prescribe, a one-year requirement. It merely directs the Secretary of Health, Education, and Welfare not to disapprove plans submitted by the States because they include such a requirement.²² The suggestion that Congress enacted that directive to encourage state participation in the AFDC program is completely refuted by the legislative history of the section. That history discloses that Congress enacted the directive to curb hardships resulting from lengthy residence requirements. Rather than constituting an approval or a prescription of the requirement in state plans, the directive was the means chosen by Congress to deny federal funding to any State which persisted in stipulating excessive residence requirements as a condition of the payment of benefits.

One year before the Social Security Act was passed, 20 of the 45 States which had aid to dependent children programs required residence in the State for two or more years. Nine other States required two or more years of *640 residence in a particular town or county. And 33 jurisdictions required at least one year of residence in a particular town or county.²³ Congress determined to combat this restrictionist policy. Both the House and Senate Committee

Reports expressly stated that the objective of s 402(b) was to compel ‘(l)iberality of residence requirement.’²⁴ Not a single instance can be found in the debates or committee reports supporting the contention that s 402(b) was enacted to encourage participation by the States in the AFDC program. To the contrary, those few who addressed themselves to waiting-period requirements emphasized that participation would depend on a State’s repeal or drastic revision of existing requirements. A congressional demand on 41 States to repeal or drastically revise offending statutes is hardly a way to enlist their cooperation.²⁵

**1335 *641 But even if we were to assume, arguendo, that Congress did approve the imposition of a one-year waiting period, it is the responsive state legislation which infringes constitutional rights. By itself s 402(b) has absolutely no restrictive effect. It is therefore not that statute but only the state requirements which pose the constitutional question.

Finally, even if it could be argued that the constitutionality of s 402(b) is somehow at issue here, it follows from what we have said that the provision, insofar as it permits the one-year waiting-period requirement, would be unconstitutional. Congress may not authorize the States to violate the Equal Protection Clause. Perhaps Congress could induce wider state participation in school construction if it authorized the use of joint funds for the building of segregated schools. But could it seriously be contended that Congress would be constitutionally justified in such authorization by the need to secure state cooperation? Congress is without power to enlist state cooperation in a joint federal-state program by legislation which authorizes the States to violate the Equal Protection Clause. *Katzenbach v. Morgan*, 384 U.S. 641, 651, 86 S.Ct. 1717, 1723, 16 L.Ed.2d 828, n. 10 (1966).

VI.

The waiting-period requirement in the District of Columbia Code involved in No. 33 is also unconstitutional even though it was adopted by Congress as an exercise of federal power. In terms of federal power, the discrimination created by the one-year requirement violates the Due *642 Process Clause of the Fifth Amendment. ‘(W)hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is ‘so unjustifiable as to be violative of due process.’“ *Schneider v. Rusk*, 377 U.S. 163, 168, 84 S.Ct. 1187, 1190, 12 L.Ed.2d 218 (1964); *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954). For the

reasons we have stated in invalidating the Pennsylvania and Connecticut provisions, the District of Columbia provision is also invalid—the Due Process Clause of the Fifth Amendment prohibits Congress from denying public assistance to poor persons otherwise eligible solely on the ground that they have not been residents of the District of Columbia for one year at the time their applications are filed.

Accordingly, the judgments in Nos. 9, 33, and 34 are

Affirmed.

Mr. Justice STEWART, concurring.

In joining the opinion of the Court, I add a word in response to the dissent of my Brother HARLAN, who, I think, has quite misapprehended what the Court's opinion says.

The Court today does not 'pick out particular human activities, characterize them as 'fundamental,' and give them added protection * * *.' To the contrary, the Court simply recognizes, as it must, an established constitutional right, and gives to that right no less protection than the Constitution itself demands.

'The constitutional right to travel from one State to another * * * has been firmly established and repeatedly recognized.' *United States v. Guest*, 383 U.S. 745, 757, 86 S.Ct. 1170, 1178, 16 L.Ed.2d 239. This constitutional right, which, of course, includes the right of 'entering and abiding in any state in **1336 the Union,' *Truax v. Raich*, 239 U.S. 33, 39, 36 S.Ct. 7, 9, 60 L.Ed. 131, is not a mere conditional liberty subject to regulation and control under conventional *643 due process or equal protection standards.¹ '(T)he right to travel freely from State to State finds constitutional protection that is quite independent of the Fourteenth Amendment.' *United States v. Guest*, supra, at 760, 86 S.Ct. at 1179, n. 17.² As we made clear in *Guest*, it is a right broadly assertable against private interference as well as governmental action.³ Like the right of association, *NAACP v. Alabama*, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488, it is a virtually unconditional personal right,⁴ guaranteed by the Constitution to us all.

It follows, as the Court says, that 'the purpose of deterring the in-migration of indigents cannot serve as justification for the classification created by the one-year waiting period, since that purpose is constitutionally impermissible.' And it further follows, as the Court says, that any other purposes offered in support of a *644 law that so clearly impinges

upon the constitutional right of interstate travel must be shown to reflect a compelling governmental interest. This is necessarily true whether the impinging law be a classification statute to be tested against the Equal Protection Clause, or a state or federal regulatory law, to be tested against the Due Process Clause of the Fourteenth or Fifth Amendment. As Mr. Justice Harlan wrote for the Court more than a decade ago, '(T)o justify the deterrent effect * * * on the free exercise * * * of their constitutionally protected right * * * a '*** subordinating interest of the State must be compelling.' " *NAACP v. Alabama*, supra, at 463, 78 S.Ct. at 1172.

The Court today, therefore, is not 'contriving new constitutional principles.' It is deciding these cases under the aegis of established constitutional law.⁵

Mr. Chief Justice WARREN, with whom Mr. Justice BLACK joins, dissenting.

In my opinion the issue before us can be simply stated: May Congress, acting under one of its enumerated powers, impose minimal nationwide residence requirements or authorize the States to do so? Since I believe that Congress does have this power and has constitutionally exercised it in these cases, I must dissent.

**1337 I.

The Court insists that s 402(b) of the Social Security Act 'does not approve, much less prescribe, a one-year requirement.' Ante, at 1334. From its reading of the legislative history it concludes that Congress did not intend to authorize the States to impose residence requirements. *645 An examination of the relevant legislative materials compels, in my view, the opposite conclusion, i.e., Congress intended to authorize state residence requirements of up to one year.

The Great Depression of the 1930's exposed the inadequacies of state and local welfare programs and dramatized the need for federal participation in welfare assistance. See J. Brown, *Public Relief 1929—1939* (1940). Congress determined that the Social Security Act, containing a system of unemployment and old-age insurance as well as the categorical assistance programs now at issue, was to be a major step designed to ameliorate the problems of economic insecurity. The primary purpose

of the categorical assistance programs was to encourage the States to provide new and greatly enhanced welfare programs. See, e.g., S.Rep.No.628, 74th Cong., 1st Sess., 5—6, 18—19 (1935); H.R.Rep.No.615, 74th Cong., 1st Sess., 4 (1935). Federal aid would mean an immediate increase in the amount of benefits paid under state programs. But federal aid was to be conditioned upon certain requirements so that the States would remain the basic administrative units of the welfare system and would be unable to shift the welfare burden to local governmental units with inadequate financial resources. See Advisory Commission on Intergovernmental Relations, *Statutory and Administrative Controls Associated with Federal Grants for Public Assistance* 9—26 (1964). Significantly, the categories of assistance programs created by the Social Security Act corresponded to those already in existence in a number of States. See J. Brown, *Public Relief 1929—1939*, at 26—32. Federal entry into the welfare area can therefore be best described as a major experiment in ‘cooperative federalism,’ *King v. Smith*, 392 U.S. 309, 317, 88 S.Ct. 2128, 2133, 20 L.Ed.2d 1118 (1968), combining state and federal participation to solve the problems of the depression.

*646 Each of the categorical assistance programs contained in the Social Security Act allowed participating States to impose residence requirements as a condition of eligibility for benefits. Congress also imposed a one-year requirement for the categorical assistance programs operative in the District of Columbia. See H.R.Rep.No.891, 74th Cong., 1st Sess. (1935) (old-age pensions); H.R.Rep.No.201, 74th Cong., 1st Sess. (1935) (aid to the blind). The congressional decision to allow the States to impose residence requirements and to enact such a requirement for the District was the subject of considerable discussion. Both those favoring lengthy residence requirements¹ and those opposing all requirements² pleaded their case during the congressional hearings on the Social Security Act. Faced with the competing claims of States which feared that abolition of residence requirements would result in an influx of persons seeking higher welfare payments and of organizations which stressed the unfairness of such requirements to transient workers forced by the economic dislocation of the depression to seek work far from their homes. Congress chose a middle course. It required those States seeking federal grants for categorical assistance to reduce their existing residence requirements to what Congress viewed as an acceptable maximum. However, **1338 Congress accommodated state fears by allowing the States to retain minimal residence requirements.

Congress quickly saw evidence that the system of welfare assistance contained in the Social Security Act including residence requirements was operating to encourage States

to expand and improve their categorical *647 assistance programs. For example, the Senate was told in 1939:

‘The rapid expansion of the program for aid to dependent children in the country as a whole since 1935 stands in marked contrast to the relatively stable picture of mothers’ aid in the preceding 4-year period from 1932 through 1935. The extension of the program during the last 3 years is due to Federal contributions which encouraged the matching of State and local funds.’ S.Rep.No.734, 76th Cong., 1st Sess., 29 (1939).

The trend observed in 1939 continued as the States responded to the federal stimulus for improvement in the scope and amount of categorical assistance programs. See Wedemeyer & Moore, *The American Welfare System*, 54 Calif.L.Rev. 326, 347—356 (1966). Residence requirements have remained a part of this combined state-federal welfare program for 34 years. Congress has adhered to its original decision that residence requirements were necessary in the face of repeated attacks against these requirements.³ The decision to retain residence requirements, combined with Congress’ continuing desire to encourage wider state participation in categorical assistance programs, indicates to me that Congress has authorized the imposition by the States of residence requirements.

II.

Congress has imposed a residence requirement in the District of Columbia and authorized the States to impose similar requirements. The issue before us must therefore be framed in terms of whether Congress may *648 create minimal residence requirements, not whether the States, acting alone, may do so. See *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 66 S.Ct. 1142, 90 L.Ed. 1342 (1946); *In re Rahrer*, 140 U.S. 545, 11 S.Ct. 865, 32 S.Ct. 572 (1891). Appellees insist that a congressionally mandated residence requirement would violate their right to travel. The import of their contention is that Congress, even under its ‘plenary’⁴ power to control interstate commerce, is constitutionally prohibited from imposing residence requirements. I reach a contrary conclusion for I am convinced that the extent of the burden on interstate travel when compared with the justification for its imposition requires the Court to uphold this exertion of federal power.

Congress, pursuant to its commerce power, has enacted a

variety of restrictions upon interstate travel. It has taxed air and rail fares and the gasoline needed to power cars and trucks which move interstate. 26 U.S.C. s 4261 (air fares); 26 U.S.C. s 3469 (1952 ed.), repealed in part by Pub.L. 87—508, s 5(b), 76 Stat. 115 (rail fares); 26 U.S.C. s 4081 (gasoline). Many of the federal safety regulations of common carriers which cross state lines burden the right to travel. 45 U.S.C. ss 1—43 (railroad safety appliances); 49 U.S.C. s 1421 (air safety regulations). And Congress has prohibited by criminal statute interstate travel for certain purposes. E.g., 18 U.S.C. s 1952. Although these restrictions operate as a limitation upon free ****1339** interstate movement of persons, their constitutionality appears well settled. See *Texas & Pacific R. Co. v. Rigsby*, 241 U.S. 33, 41, 36 S.Ct. 482, 485, 60 L.Ed. 874 (1916); *Southern R. Co. v. United States*, 222 U.S. 20, 32 S.Ct. 2, 56 L.Ed. 72 (1911); *United States v. Zizzo*, 338 F.2d 577 (C.A.7th Cir., 1964), cert. denied, 381 U.S. 915, 85 S.Ct. 1530, 14 L.Ed.2d 435 (1965). As the Court observed in *Zemel v. Rusk*, 381 U.S. 1, 14, 85 S.Ct. 1271, 1279, 14 L.Ed.2d 179 (1965), ‘the fact that a liberty cannot be inhibited without due ***649** process of law does not mean that it can under no circumstances be inhibited.’

The Court’s right-to-travel cases lend little support to the view that congressional action is invalid merely because it burdens the right to travel. Most of our cases fall into two categories: those in which state-imposed restrictions were involved, see, e.g., *Edwards v. California*, 314 U.S. 160, 62 S.Ct. 164, 86 L.Ed. 119 (1941); *Crandall v. Nevada*, 6 Wall. 35, 18 L.Ed. 744 (1868), and those concerning congressional decisions to remove impediments to interstate movement, see, e.g., *United States v. Guest*, 383 U.S. 745, 86 S.Ct. 1170, 16 L.Ed.2d 239 (1966). Since the focus of our inquiry must be whether Congress would exceed permissible bounds by imposing residence requirements, neither group of cases offers controlling principles.

In only three cases have we been confronted with an assertion that Congress has impermissibly burdened the right to travel. *Kent v. Dulles*, 357 U.S. 116, 78 S.Ct. 1113, 2 L.Ed.2d 1204 (1958), did invalidate a burden on the right to travel; however, the restriction was voided on the nonconstitutional basis that Congress did not intend to give the Secretary of State power to create the restriction at issue. *Zemel v. Rusk*, supra, on the other hand, sustained a flat prohibition of travel to certain designated areas and rejected an attack that Congress could not constitutionally impose this restriction. *Aptheker v. Secretary of State*, 378 U.S. 500, 84 S.Ct. 1659, 12 L.Ed.2d 992 (1964), is the only case in which this Court invalidated on a constitutional basis a congressionally imposed restriction. *Aptheker* also involved a flat prohibition but in combination with a claim that the congressional restriction compelled a potential

traveler to choose between his right to travel and his First Amendment right of freedom of association. It was this Hobson’s choice, we later explained, which forms the rationale of *Aptheker*. See *Zemel v. Rusk*, supra, at 16, 85 S.Ct. at 1280. *Aptheker* thus contains two characteristics distinguishing it from the appeals now before the Court: a combined ***650** infringement of two constitutionally protected rights and a flat prohibition upon travel. Residence requirements do not create a flat prohibition, for potential welfare recipients may move from State to State and establish residence wherever they please. Nor is any claim made by appellees that residence requirements compel them to choose between the right to travel and another constitutional right.

Zemel v. Rusk, the most recent of the three cases, provides a framework for analysis. The core inquiry is ‘the extent of the governmental restriction imposed’ and the ‘extent of the necessity for the restriction.’ *Id.*, at 14, 85 S.Ct. at 1279. As already noted, travel itself is not prohibited. Any burden inheres solely in the fact that a potential welfare recipient might take into consideration the loss of welfare benefits for a limited period of time if he changes his residence. Not only is this burden of uncertain degree,⁵ but appellees themselves assert ****1340** there is evidence that few welfare recipients have in fact been deterred by residence requirements. See Harvith, *The Constitutionality of Residence Tests for General and Categorical Assistance Programs*, 54 Calif.L.Rev. 567, 615—618 (1966); Note, *Residence Requirements in State Public Welfare Statutes*, 51 Iowa L.Rev. 1080, 1083—1085 (1966).

The insubstantiality of the restriction imposed by residence requirements must then be evaluated in light of the possible congressional reasons for such requirements. See, e.g., *McGowan v. Maryland*, 366 U.S. 420, 425—427, 81 S.Ct. 1101, 1104—1105, 6 L.Ed.2d 393 (1961). One fact which does emerge with clarity from the legislative history is Congress’ belief that a program of cooperative federalism combining federal aid with ***651** enhanced state participation would result in an increase in the scope of welfare programs and level of benefits. Given the apprehensions of many States that an increase in benefits without minimal residence requirements would result in an inability to provide an adequate welfare system, Congress deliberately adopted the intermediate course of a cooperative program. Such a program, Congress believed, would encourage the States to assume greater welfare responsibilities and would give the States the necessary financial support for such an undertaking. Our cases require only that Congress have a rational basis for finding that a chosen regulatory scheme is necessary to the furtherance of interstate commerce. See, e.g., *Katzenbach v. McClung*, 379 U.S. 294, 85 S.Ct. 377, 13 L.Ed.2d 290 (1964); *Wickard v. Filburn*, 317 U.S. 111, 63 S.Ct. 82, 87

L.Ed. 122 (1942). Certainly, a congressional finding that residence requirements allowed each State to concentrate its resources upon new and increased programs of rehabilitation ultimately resulting in an enhanced flow of commerce as the economic condition of welfare recipients progressively improved is rational and would justify imposition of residence requirements under the Commerce Clause. And Congress could have also determined that residence requirements fostered personal mobility. An individual no longer dependent upon welfare would be presented with an unfettered range of choices so that a decision to migrate could be made without regard to considerations of possible economic dislocation.

Appellees suggest, however, that Congress was not motivated by rational considerations. Residence requirements are imposed, they insist, for the illegitimate purpose of keeping poor people from migrating. Not only does the legislative history point to an opposite conclusion, but it also must be noted that ‘(i)nto the motives which induced members of Congress to (act) * * * this court may not inquire.’ *Arizona v. California*, 283 U.S. 423, 455, 51 S.Ct. 522, 526, 75 L.Ed. 1154 (1931). We do not attribute *652 an impermissible purpose to Congress if the result would be to strike down an otherwise valid statute. *United States v. O’Brien*, 391 U.S. 367, 383, 88 S.Ct. 1673, 1682, 20 L.Ed.2d 672 (1968); *McCray v. United States*, 195 U.S. 27, 56, 24 S.Ct. 769, 776, 49 L.Ed. 78 (1904). Since the congressional decision is rational and the restriction on travel insubstantial, I conclude that residence requirements can be imposed by Congress as an exercise of its power to control interstate commerce consistent with the constitutionally guaranteed right to travel.

Without an attempt to determine whether any of Congress’ enumerated powers would sustain residence requirements, the Court holds that congressionally imposed requirements violate the Due Process Clause of the Fifth Amendment. It thus suggests that, even if residence requirements would be a permissible exercise of the commerce power, they are ‘so unjustifiable as to be violative of due process.’ *Ante*, at 1335. While the reasons for this conclusion are not fully explained, the Court apparently **1341 believes that, in the words of *Bolling v. Sharpe*, 347 U.S. 497, 500, 74 S.Ct. 693, 694, 98 L.Ed. 884 (1954), residence requirements constitute ‘an arbitrary deprivation’ of liberty.

If this is the import of the Court’s opinion, then it seems to have departed from our precedents. We have long held that there is no requirement of uniformity when Congress acts pursuant to its commerce power. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 401, 60 S.Ct. 907, 916, 84 L.Ed. 1263 (1940); *Curran v. Wallace*, 306 U.S. 1, 13–14, 59 S.Ct. 379, 385–386, 83 L.Ed. 441 (1939).⁶ I do not suggest that Congress is completely free when legislating

under one of its enumerated powers to enact wholly arbitrary classifications, for *Bolling v. Sharpe*, *supra*, and *Schneider v. Rusk*, 377 U.S. 163, 84 S.Ct. 1187, 12 L.Ed.2d 218 (1964) *653 counsel otherwise. Neither of these cases, however, is authority for invalidation of congressionally imposed residence requirements. The classification in *Bolling* required racial segregation in the public schools of the District of Columbia and was thus based upon criteria which we subject to the most rigid scrutiny. *Loving v. Virginia*, 388 U.S. 1, 11, 87 S.Ct. 1817, 1823, 18 L.Ed.2d 1010 (1967). *Schneider* involved an attempt to distinguish between native-born and naturalized citizens solely for administrative convenience. By authorizing residence requirements Congress acted not to facilitate an administrative function but to further its conviction that an impediment to the commercial life of this Nation would be removed by a program of cooperative federalism combining federal contributions with enhanced state benefits. Congress, not the courts, is charged with determining the proper prescription for a national illness. I cannot say that Congress is powerless to decide that residence requirements would promote this permissible goal and therefore must conclude that such requirements cannot be termed arbitrary.

The Court, after interpreting the legislative history in such a manner that the constitutionality of s 402(b) is not at issue, gratuitously adds that s 402(b) is unconstitutional. This method of approaching constitutional questions is sharply in contrast with the Court’s approach in *Street v. New York*, 394 U.S. 576, at 585–590, 89 S.Ct. 1354, at 1362–1365, 22 L.Ed.2d 572. While in *Street* the Court strains to avoid the crucial constitutional question, here it summarily treats the constitutionality of a major provision of the Social Security Act when, given the Court’s interpretation of the legislative materials, that provision is not at issue. Assuming that the constitutionality of s 402(b) is properly treated by the Court, the cryptic footnote in *Katzenbach v. Morgan*, 384 U.S. 641, 651–652, 86 S.Ct. 1717, 1723–1724, 16 L.Ed.2d 828, n. 10 (1966), does not support its conclusion. Footnote 10 indicates that Congress is without power to undercut the equal-protection guarantee of racial equality in the guise of implementing *654 the Fourteenth Amendment. I do not mean to suggest otherwise. However, I do not understand this footnote to operate as a limitation upon Congress’ power to further the flow of interstate commerce by reasonable residence requirements. Although the Court dismisses s 402(b) with the remark that Congress cannot authorize the States to violate equal protection, I believe that the dispositive issue is whether under its commerce power Congress can impose residence requirements.

**1342 Nor can I understand the Court’s implication, *ante*, at 1333, n. 21, that other state residence requirements such

as those employed in determining eligibility to vote do not present constitutional questions. Despite the fact that in *Drueding v. Devlin*, 380 U.S. 125, 85 S.Ct. 807, 13 L.Ed.2d 792 (1965), we affirmed an appeal from a three-judge District Court after the District Court had rejected a constitutional challenge to Maryland's one-year residence requirement for presidential elections, 292 F.Supp. 610, the rationale employed by the Court in these appeals would seem to require the opposite conclusion. If a State would violate equal protection by denying welfare benefits to those who have recently moved interstate, then it would appear to follow that equal protection would also be denied by depriving those who have recently moved interstate of the fundamental right to vote. There is nothing in the opinion of the Court to explain this dichotomy. In any event, since the constitutionality of a state residence requirement as applied to a presidential election is raised in a case now pending, *Hall v. Beals*, No. 950, 1968 Term, I would await that case for a resolution of the validity of state voting residence requirements.

III.

The era is long past when this Court under the rubric of due process has reviewed the wisdom of a congressional decision that interstate commerce will be fostered by the enactment of certain regulations. Compare *655 *Adkins v. Children's Hospital*, 261 U.S. 525, 43 S.Ct. 394, 67 L.Ed. 785 (1923), with *United States v. Darby*, 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609 (1941). Speaking for the Court in *Helvering v. Davis*, 301 U.S. 619, 644, 57 S.Ct. 904, 910, 81 L.Ed. 1307 (1937), Mr. Justice Cardozo said of another section of the Social Security Act:

'Whether wisdom or unwisdom resides in the scheme of benefits set forth * * * is not for us to say. The answer to such inquiries must come from Congress, not the courts. Our concern here, as often, is with power, not with wisdom.'

I am convinced that Congress does have power to enact residence requirements of reasonable duration or to authorize the States to do so and that it has exercised this power.

The Court's decision reveals only the top of the iceberg. Lurking beneath are the multitude of situations in which States have imposed residence requirements including eligibility to vote, to engage in certain professions or occupations or to attend a state-supported university. Although the Court takes pains to avoid acknowledging the ramifications of its decision, its implications cannot be ignored. I dissent.

Mr. Justice HARLAN, dissenting.

The Court today holds unconstitutional Connecticut, Pennsylvania, and District of Columbia statutes which restrict certain kinds of welfare benefits to persons who have lived within the jurisdiction for at least one year immediately preceding their applications. The Court has accomplished this result by an expansion of the comparatively new constitutional doctrine that some state statutes will be deemed to deny equal protection of the laws unless justified by a 'compelling' governmental interest, and by holding that the Fifth Amendment's Due Process Clause imposes a similar limitation on federal enactments. Having decided that the 'compelling interest' principle *656 is applicable, the Court then finds that the governmental interests here asserted are either wholly impermissible or are not 'compelling.' For reasons which follow, I disagree both with the Court's result and with its reasoning.

I.

These three cases present two separate but related questions for decision. The **1343 first, arising from the District of Columbia appeal, is whether Congress may condition the right to receive Aid to Families with Dependent Children (AFDC) and aid to the permanently and totally disabled in the District of Columbia upon the recipient's having resided in the District for the preceding year.¹ The second, presented in the Pennsylvania and Connecticut appeals, is whether a State may, with the approval of Congress, impose the same conditions with *657 respect to eligibility for AFDC assistance.² In each instance, the welfare residence requirements are alleged to be unconstitutional on two grounds: first, because they impose an undue burden upon the constitutional right of welfare applicants to travel interstate; second, because they deny to persons who have recently moved interstate and would otherwise be eligible for welfare assistance the equal

protection of the laws assured by the Fourteenth Amendment (in the state cases) or the analogous protection afforded by the Fifth Amendment (in the District of Columbia case). Since the Court basically relies upon the equal protection ground, I shall discuss it first.

****1344 *658 II.**

In upholding the equal protection argument,³ the Court has applied an equal protection doctrine of relatively recent vintage: the rule that statutory classifications which either are based upon certain 'suspect' criteria or affect 'fundamental rights' will be held to deny equal protection unless justified by a 'compelling' governmental interest. See ante, at 1327, 1331, 1333.

The 'compelling interest' doctrine, which today is articulated more explicitly than ever before, constitutes an increasingly significant exception to the longestablished rule that a statute does not deny equal protection if it is rationally related to a legitimate governmental objective.⁴ The 'compelling interest' doctrine has two branches. The branch which requires that classifications based upon 'suspect' criteria be supported by a compelling interest apparently had its genesis in cases involving racial classifications, which have, at least since *Korematsu v. United States*, 323 U.S. 214, 216, 65 S.Ct. 193, 194, 89 L.Ed. 194 (1944), been regarded as inherently 'suspect.'⁵ The criterion of 'wealth' apparently was added to the list of 'suspects' as an alternative justification for the rationale in *659 *Harper v. Virginia Bd. of Elec. tions*, 383 U.S. 663, 668, 86 S.Ct. 1079, 1082, 16 L.Ed.2d 169 (1966), in which Virginia's poll tax was struck down. The criterion of political allegiance may have been added in *Williams v. Rhodes*, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968).⁶ Today the list apparently has been further enlarged to include classifications based upon recent interstate movement, and perhaps those based upon the exercise of any constitutional right, for the Court states, ante, at 1331: 'The waiting-period provision denies welfare benefits to otherwise eligible applicants solely because they have recently moved into the jurisdiction. But in moving * * * appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional.'⁷

I think that this branch of the 'compelling interest' doctrine is sound when applied to racial classifications, for

historically the Equal Protection Clause was largely a product of the desire to eradicate legal distinctions founded upon race. However, I believe that the more recent extensions have been unwise. For the reasons stated in my dissenting opinion in *Harper v. Virginia Bd. of Elections*, supra, at 680, 683—686, 86 S.Ct. at 1088, 1090—1092, I do not consider wealth a 'suspect' statutory criterion. And when, as in *Williams v. Rhodes*, supra, and the present case, a classification is based upon the exercise of rights guaranteed against state infringement by the Federal **1345 Constitution, then there is no need for any resort to the Equal Protection Clause; in such instances, this Court may properly and straightforwardly invalidate any undue burden upon those rights under the Fourteenth Amendment's Due Process Clause. See, e.g., my separate opinion in *Williams v. Rhodes*, supra, at 41, 89 S.Ct. at 15. *660 The second branch of the 'compelling interest' principle is even more troublesome. For it has been held that a statutory classification is subject to the 'compelling interest' test if the result of the classification may be to affect a 'fundamental right,' regardless of the basis of the classification. This rule was foreshadowed in *Skinner v. Oklahoma*, 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L.Ed. 1655 (1942), in which an Oklahoma statute providing for compulsory sterilization of 'habitual criminals' was held subject to 'strict scrutiny' mainly because it affected 'one of the basic civil rights.' After a long hiatus, the principle re-emerged in *Reynolds v. Sims*, 377 U.S. 533, 561—562, 84 S.Ct. 1362, 1381, 12 L.Ed.2d 506 (1964), in which state apportionment statutes were subjected to an unusually stringent test because 'any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.' Id., at 562, 84 S.Ct. at 1381. The rule appeared again in *Carrington v. Rash*, 380 U.S. 89, 96, 85 S.Ct. 775, 780, 13 L.Ed.2d 675 (1965), in which, as I now see that case,⁸ the Court applied an abnormally severe equal protection standard to a Texas statute denying certain servicemen the right to vote, without indicating that the statutory distinction between servicemen and civilians was generally 'suspect.' This branch of the doctrine was also an alternate ground in *Harper v. Virginia Bd. of Elections*, supra, see 383 U.S., at 670, 86 S.Ct., at 1083 and apparently was a basis of the holding in *Williams v. Rhodes*, supra.⁹ It *661 has reappeared today in the Court's cryptic suggestion, ante, at 1327, that the 'compelling interest' test is applicable merely because the result of the classification may be to deny the appellees 'food, shelter, and other necessities of life,' as well as in the Court's statement, ante, at 1333, that '(s)ince the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a compelling state interest.'¹⁰

I think this branch of the 'compelling interest' doctrine

particularly unfortunate and unnecessary. It is unfortunate because it creates an exception which threatens to swallow the standard equal protection rule. Virtually every state statute affects important rights. This Court has repeatedly held, for example, that the traditional equal protection standard is applicable to statutory classifications affecting such fundamental ****1346** matters as the right to pursue a particular occupation,¹¹ the right to receive greater or smaller wages¹² or to work more or less hours,¹³ and the right to inherit property.¹⁴ Rights such as these are in principle indistinguishable from those involved here, and to extend the 'compelling interest' rule to all cases in which such rights are affected would go far toward making this Court a 'super-legislature.' This branch of the doctrine is also unnecessary. When the right affected is one assured by ***662** the Federal Constitution, any infringement can be dealt with under the Due Process Clause. But when a statute affects only matters not mentioned in the Federal Constitution and is not arbitrary or irrational, I must reiterate that I know of nothing which entitles this Court to pick out particular human activities, characterize them as 'fundamental,' and give them added protection under an unusually stringent equal protection test.

I shall consider in the next section whether welfare residence requirements deny due process by unduly burdening the right of interstate travel. If the issue is regarded purely as one of equal protection, then, for the reasons just set forth, this nonracial classification should be judged by ordinary equal protection standards. The applicable criteria are familiar and well established. A legislative measure will be found to deny equal protection only if 'it is without any reasonable basis, and therefore is purely arbitrary.' *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78, 31 S.Ct. 337, 340, 55 L.Ed. 369 (1911). It is not enough that the measure results incidentally 'in some inequality,' or that it is not drawn 'with mathematical nicety,' *ibid.*; the statutory classification must instead cause 'different treatments * * * so disparate, relative to the difference in classification, as to be wholly arbitrary.' *Walters v. City of St. Louis*, 347 U.S. 231, 237, 74 S.Ct. 505, 509, 98 L.Ed. 660 (1954). Similarly, this Court has stated that where, as here, the issue concerns the authority of Congress to withhold 'a noncontractual benefit under a social welfare program * * *,' the Due Process Clause (of the Fifth Amendment) can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification.' *Flemming v. Nestor*, 363 U.S. 603, 611, 80 S.Ct. 1367, 1372, 1373, 4 L.Ed.2d 1435 (1960).

For reasons hereafter set forth, see *infra*, at 1351—1354, a legislature might rationally find that the imposition of a welfare residence requirement would aid in the accomplishment of at least four valid governmental

objectives. ***663** It might also find that residence requirements have advantages not shared by other methods of achieving the same goals. In light of this undeniable relation of residence requirements to valid legislative aims, it cannot be said that the requirements are 'arbitrary' or 'lacking in rational justification.' Hence, I can find no objection to these residence requirements under the Equal Protection Clause of the Fourteenth Amendment or under the analogous standard embodied in the Due Process Clause of the Fifth Amendment.

III.

The next issue, which I think requires fuller analysis than that deemed necessary ****1347** by the Court under its equal protection rationale, is whether a one-year welfare residence requirement amounts to an undue burden upon the right of interstate travel. Four considerations are relevant: First, what is the constitutional source and nature of the right to travel which is relied upon? Second, what is the extent of the interference with that right? Third, what governmental interests are served by welfare residence requirements? Fourth, how should the balance of the competing considerations be struck?

The initial problem is to identify the source of the right to travel asserted by the appellees. Congress enacted the welfare residence requirement in the District of Columbia, so the right to travel which is invoked in that case must be enforceable against congressional action. The residence requirements challenged in the Pennsylvania and Connecticut appeals were authorized by Congress in 42 U.S.C. s 602(b), so the right to travel relied upon in those cases must be enforceable against the States even though they have acted with congressional approval.

In my view, it is playing ducks and drakes with the statute to argue, as the Court does, *ante*, at 1333—1335, that Congress did not mean to approve these state residence ***664** requirements. In 42 U.S.C. s 602(b), quoted more fully, *ante*, at 1333, Congress directed that:

'(t)he Secretary shall approve any (state assistance) plan which fulfills the conditions specified in subsection (a) of this section, except that he shall not approve any plan which imposes as a condition of eligibility for (AFDC aid) a residence requirement (equal to or greater than one year).'

I think that by any fair reading this section must be regarded as conferring congressional approval upon any plan containing a residence requirement of up to one year.

If any reinforcement is needed for taking this statutory language at face value, the overall scheme of the AFDC program and the context in which it was enacted suggest strong reasons why Congress would have wished to approve limited state residence requirements. Congress determined to enlist state assistance in financing the AFDC program, and to administer the program primarily through the States. A previous Congress had already enacted a one-year residence requirement with respect to aid for dependent children in the District of Columbia.¹⁵ In these circumstances, I think it only sensible to conclude that in allowing the States to impose limited residence conditions despite their possible impact on persons who wished to move interstate,¹⁶ Congress was motivated by a desire to encourage state participation in *665 the AFDC program,¹⁷ as well as by a feeling that the States should at least be permitted to impose residence requirements as strict as that already authorized for the District of Columbia. Congress therefore had a genuine federal purpose in allowing the States to use residence tests. And I fully agree with THE CHIEF JUSTICE that this purpose would render s 602(b) a permissible exercise **1348 of Congress' power under the Commerce Clause, unless Congress were prohibited from acting by another provision of the Constitution. Nor do I find it credible that Congress intended to refrain from expressing approval of state residence requirements because of doubts about their constitutionality or their compatibility with the Act's beneficent purposes. With respect to constitutionality, a similar residence requirement was already in effect for the District of Columbia, and the burdens upon travel which might be caused by such requirements must, even in 1935, have been regarded as within the competence of Congress under its commerce power. If Congress had thought residence requirements entirely incompatible with the aims of the Act, it could simply have provided that state assistance plans containing such requirements should not be approved at all, rather than having limited approval to plans containing residence requirements of less than one year. Moreover, when Congress in 1944 revised the AFDC program in the District of Columbia to conform with the standards of the Act, it chose to condition eligibility upon one year's residence,¹⁸ thus strongly indicating that *666 it doubted neither the constitutionality of such a provision nor its consistency with the Act's purposes.¹⁹

Opinions of this Court and of individual Justices have suggested four provisions of the Constitution as possible sources of a right to travel enforceable against the federal

or state governments: the Commerce Clause;²⁰ the Privileges and Immunities Clause of Art. IV, s 2;²¹ the Privileges and Immunities Clause of the Fourteenth Amendment;²² and the Due Process Clause of the Fifth Amendment.²³ The Commerce Clause can be of no assistance to these appellees, since that clause grants plenary power to Congress,²⁴ and Congress either enacted or approved all of the residence requirements here challenged. The Privileges and Immunities Clause of Art. IV, s 2,²⁵ is irrelevant, for it appears settled that this clause neither limits federal power nor prevents a State from distinguishing among its own citizens, but simply 'prevents a state from discriminating against citizens of other states in favor of its own.' *Hague v. CIO*, 307 U.S. 496, 511, 59 S.Ct. 954, 962, 83 L.Ed. 1423 (1939) (opinion of Roberts, J.); see *Slaughter-House Cases*, 16 Wall. 36, 77, 21 L.Ed. 394 (1873). Since Congress enacted the District of Columbia residence statute, and since the Pennsylvania and Connecticut appellees were residents *667 and therefore citizens of those States when they sought welfare, the clause can have no application in any of these cases.

**1349 The Privileges and Immunities Clause of the Fourteenth Amendment provides that: 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.' It is evident that this clause cannot be applicable in the District of Columbia appeal, since it is limited in terms to instances of state action. In the Pennsylvania and Connecticut cases, the respective States did impose and enforce the residence requirements. However, Congress approved these requirements in 42 U.S.C. s 602(b). The fact of congressional approval, together with this Court's past statements about the nature of the Fourteenth Amendment Privileges and Immunities Clause, leads me to believe that the clause affords no additional help to these appellees, and that the decisive issue is whether Congress itself may impose such requirements. The view of the Privileges and Immunities Clause which has most often been adopted by the Court and by individual Justices is that it extends only to those 'privileges and immunities' which 'arise or grow out of the relationship of United States citizens to the national government.' *Hague v. CIO*, 307 U.S. 496, 520, 59 S.Ct. 954, 966 (1939) (opinion of Stone, J.).²⁶ On the authority of *Crandall v. Nevada*, 6 Wall. 35, 18 L.Ed. 744 (1868), those privileges and immunities have repeatedly been said to include the right to travel from State to State,²⁷ presumably for the reason assigned in *Crandall*: that state restrictions on travel *668 might interfere with intercourse between the Federal Government and its citizens.²⁸ This kind of objection to state welfare residence requirements would seem necessarily to vanish in the face of congressional authorization, for except in those instances when its authority is limited by a constitutional provision binding upon it (as the Fourteenth Amendment is not),

Congress has full power to define the relationship between citizens and the Federal Government.

Some Justices, notably the dissenters in the Slaughter-House Cases, 16 Wall. 36, 83, 111, 124 (1873) (Field, Bradley, and Swayne, JJ., dissenting), and the concurring Justices in *Edwards v. California*, 314 U.S. 160, 177, 181, 62 S.Ct. 164, 168, 170 (1941) (Douglas and Jackson, JJ., concurring), have gone further and intimated that the Fourteenth Amendment right to travel interstate is a concomitant of federal citizenship which stems from sources even more basic than the need to protect citizens in their relations with the Federal Government. The Slaughter-House dissenters suggested that the privileges and immunities of national citizenship, including freedom to travel, were those natural rights 'which of right belong to the citizens of all free governments,' 16 Wall., at 98 (Field, J.). However, since such rights are 'the rights of citizens of any free government,' *id.*, at 114 (Bradley, J.), it would appear that they must be immune from national as well as state abridgement. To the extent that they may be validly limited by Congress, there would seem to be no reason why they may not be similarly abridged by States acting with congressional approval.

****1350** The concurring Justices in *Edwards* laid emphasis not upon natural rights but upon a generalized concern for the functioning of the federal system, stressing that to ***669** allow a State to curtail 'the rights of national citizenship would be to contravene every conception of national unity,' 314 U.S., at 181, 62 S.Ct., at 170 (Douglas, J.), and that '(i)f national citizenship means less than (the right to move interstate) it means nothing.' *Id.*, at 183, 62 S.Ct., at 171 (Jackson, J.). However, even under this rationale the clause would appear to oppose no obstacle to congressional delineation of the rights of national citizenship, insofar as Congress may do so without infringing other provisions of the Constitution. Mr. Justice Jackson explicitly recognized in *Edwards* that: 'The right of the citizen to migrate from state to state * * * (is) subject to all constitutional limitations imposed by the federal government,' *id.*, at 184, 62 S.Ct., at 172. And nothing in the nature of federalism would seem to prevent Congress from authorizing the States to do what Congress might validly do itself. Indeed, this Court has held, for example, that Congress may empower the States to undertake regulations of commerce which would otherwise be prohibited by the negative implications of the Commerce Clause. See *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 66 S.Ct. 1142, 90 L.Ed. 1342 (1946). Hence, as has already been suggested, the decisive question is whether Congress may legitimately enact welfare residence requirements, and the Fourteenth Amendment Privileges and Immunities Clause adds no extra force to the appellees' attack on the requirements.

The last possible source of a right to travel is one which does operate against the Federal Government: the Due Process Clause of the Fifth Amendment.²⁹ It is now settled ***670** that freedom to travel is an element of the 'liberty' secured by that clause. In *Kent v. Dulles*, 357 U.S. 116, 125—126, 78 S.Ct. 1113, 1118, 2 L.Ed.2d 1204 (1958), the Court said:

'The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment. * * * Freedom of movement across frontiers * * *, and inside frontiers as well, was a part of our heritage. * * *'

The Court echoed these remarks in *Aptheker v. Secretary of State*, 378 U.S. 500, 505—506, 84 S.Ct. 1659, 1663, 12 L.Ed.2d 992 (1964), and added:

'Since this case involves a personal liberty protected by the Bill of Rights, we believe that the proper approach to legislation curtailing that liberty must be that adopted by this Court in *NAACP v. Button*, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405, and *Thornhill v. Alabama*, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093. * * * (S)ince freedom of travel is a constitutional liberty closely related to rights of free speech and association, we believe that appellants * * * should not be required to assume the burden of demonstrating that Congress could not have written a statute constitutionally prohibiting their travel.' *Id.*, at 516—517, 84 S.Ct., at 1669.

However, in *Zemel v. Rusk*, 381 U.S. 1, 85 S.Ct. 1271, 14 L.Ed.2d 179 (1965), the First Amendment cast of the *Aptheker* opinion was explained as having stemmed from the fact that *Aptheker* was forbidden to travel because of 'expression or association on his part,' *id.*, at 16, 85 S.Ct. at 1280. The Court noted that *Zemel* was 'not being forced to ***1351** choose between membership in an organization and freedom to travel,' *ibid.*, and held that the mere circumstance that *Zemel's* proposed journey to Cuba might be used to collect information of political and social significance was not enough to bring the case within the First Amendment category.

Finally, in *United States v. Guest*, 383 U.S. 745, 86 S.Ct. 1170, 16 L.Ed.2d 239 (1966), the Court again had occasion to consider the right of ***671** interstate travel. Without specifying the source of that right, the Court said: 'The constitutional right to travel from one State to another * * * occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized. * * * (The) right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created. In any event, freedom to

travel throughout the United States has long been recognized as a basic right under the Constitution.’ Id. at 757—758, 86 S.Ct. at 1178. (Footnotes omitted.)

I therefore conclude that the right to travel interstate is a ‘fundamental’ right which, for present purposes, should be regarded as having its source in the Due Process Clause of the Fifth Amendment.

The next questions are: (1) To what extent does a one-year residence condition upon welfare eligibility interfere with this right to travel?; and (2) What are the governmental interests supporting such a condition? The consequence of the residence requirements is that persons who contemplate interstate changes of residence, and who believe that they otherwise would qualify for welfare payments, must take into account the fact that such assistance will not be available for a year after arrival. The number or proportion of persons who are actually deterred from changing residence by the existence of these provisions is unknown. If one accepts evidence put forward by the appellees,³⁰ to the effect *672 that there would be only a minuscule increase in the number of welfare applicants were existing residence requirements to be done away with, it follows that the requirements do not deter an appreciable number of persons from moving interstate.

Against this indirect impact on the right to travel must be set the interests of the States, and of Congress with respect to the District of Columbia, in imposing residence conditions. There appear to be four such interests. First, it is evident that a primary concern of Congress and the Pennsylvania and Connecticut Legislatures was to deny welfare benefits to persons who moved into the jurisdiction primarily in order to collect those benefits.³¹ This seems to me an entirely legitimate objective. A legislature is certainly not obliged to furnish welfare assistance to every inhabitant of the jurisdiction, and it is entirely rational to deny benefits to those who enter primarily in order to receive them, since this will make more funds available for those whom the legislature deems more worthy of subsidy.³²

****1352 *673** A second possible purpose of residence requirements is the prevention of fraud. A residence requirement provides an objective and workable means of determining that an applicant intends to remain indefinitely within the jurisdiction. It therefore may aid in eliminating fraudulent collection of benefits by nonresidents and persons already receiving assistance in other States. There can be no doubt that prevention of fraud is a valid legislative goal. Third, the requirement of a fixed period of residence may help in predicting the budgetary amount which will be needed for public assistance in the future. While none of the appellant jurisdictions appears to keep data sufficient to permit the making of detailed budgetary

predictions in consequence of the requirement,³³ it is probable that in the event of a very large increase or decrease in the number of indigent newcomers the waiting period would give the legislature time to make needed adjustments in the welfare laws. Obviously, this is a proper objective. Fourth, the residence requirements conceivably may have been predicated upon a legislative desire to restrict welfare payments financed in part by state tax funds to persons who have *674 recently made some contribution to the State’s economy, through having been employed, having paid taxes, or having spent money in the State. This too would appear to be a legitimate purpose.³⁴

The next question is the decisive one: whether the governmental interests served by residence requirements outweigh the burden imposed upon the right to travel. In my view, a number of considerations militate in favor of constitutionality. First, as just shown, four separate, legitimate governmental interests are furthered by residence requirements. Second, the impact of the requirements upon the freedom of individuals to travel interstate is indirect and, according to evidence put forward by the appellees themselves, insubstantial. Third, these are not cases in which a State or States, acting alone, have attempted to interfere with the right of citizens to travel, but one in which the States have acted within the terms of a limited authorization by the National Government, and in which Congress itself has laid down a like rule for the ****1353** District of Columbia. Fourth, the legislatures which enacted these statutes have been fully exposed to the arguments of the appellees as to why these residence requirements are unwise, and have rejected them. This is not, therefore, an instance in which legislatures have acted without mature deliberation.

Fifth, and of longer-range importance, the field of welfare assistance is one in which there is a widely recognized need for fresh solutions and consequently for experimentation. Invalidation of welfare residence *675 requirements might have the unfortunate consequence of discouraging the Federal and State Governments from establishing unusually generous welfare programs in particular areas on an experimental basis, because of fears that the program would cause an influx of persons seeking higher welfare payments. Sixth and finally, a strong presumption of constitutionality attaches to statutes of the types now before us. Congressional enactments come to this Court with an extremely heavy presumption of validity. See, e.g., *Brown v. Maryland*, 12 Wheat. 419, 436, 6 L.Ed. 678 (1827); *Hardware Dealers Mutual Fire Insurance Co. v. Glidden Co.*, 284 U.S. 151, 158, 52 S.Ct. 69, 71, 76 L.Ed. 214 (1931); *United States v. Butler*, 297 U.S. 1, 67, 56 S.Ct. 312, 319, 80 L.Ed. 477 (1936); *United States v. National Dairy Corp.*, 372 U.S. 29, 32, 83 S.Ct. 594, 597, 9 L.Ed.2d 561 (1963). A similar presumption of constitutionality

attaches to state statutes, particularly when, as here, a State has acted upon a specific authorization from Congress. See, e.g., *Powell v. Pennsylvania*, 127 U.S. 678, 684—685, 8 S.Ct. 992, 995—996, 32 L.Ed. 253 (1888); *United States v. Des Moines Nav. & R. Co.*, 142 U.S. 510, 544—545, 12 S.Ct. 308, 317—318, 35 L.Ed. 1099 (1892).

I do not consider that the factors which have been urged to outweigh these considerations are sufficient to render unconstitutional these state and federal enactments. It is said, first, that this Court, in the opinions discussed, *supra*, at 1350—1351, has acknowledged that the right to travel interstate is a ‘fundamental’ freedom. Second, it is contended that the governmental objectives mentioned above either are ephemeral or could be accomplished by means which do not impinge as heavily on the right to travel, and hence that the requirements are unconstitutional because they ‘sweep unnecessarily broadly and thereby invade the area of protected freedoms.’ *NAACP v. Alabama*, 377 U.S. 288, 307, 84 S.Ct. 1302, 1314, 12 L.Ed.2d 325 (1964). The appellees claim that welfare payments could be denied those who come primarily to collect welfare by means of less restrictive provisions, such as New York’s *676 Welfare Abuses Law;³⁵ that fraud could be prevented by investigation of individual applicants or by a much shorter residence period; that budgetary predictability is a remote and speculative goal; and that assurance of investment in the community could be obtained by a shorter residence period or by taking into account prior intervals of residence in the jurisdiction.

Taking all of these competing considerations into account, I believe that the balance definitely favors constitutionality. In reaching that conclusion, I do not minimize the importance of the right to travel interstate. However, the impact of residence conditions upon that right is indirect and apparently quite insubstantial. On the other hand, the governmental purposes served by the requirements are legitimate and real, and the residence requirements are clearly **1354 suited to their accomplishment. To abolish residence requirements might well discourage highly worthwhile experimentation in the welfare field. The statutes come to us clothed with the authority of Congress and attended by a correspondingly heavy presumption of constitutionality. Moreover, although the appellees assert that the same objectives could have been achieved by less

restrictive means, this is an area in which the judiciary should be especially slow to fetter the judgment of Congress and of some 46 state legislatures³⁶ in the choice of methods. Residence requirements have *677 advantages, such as administrative simplicity and relative certainty, which are not shared by the alternative solutions proposed by the appellees. In these circumstances, I cannot find that the burden imposed by residence requirements upon ability to travel outweighs the governmental interests in their continued employment. Nor do I believe that the period of residence required to these cases—one year—is so excessively long as to justify a finding of unconstitutionality on that score.

I conclude with the following observations. Today’s decision, it seems to me, reflects to an unusual degree the current notion that this Court possesses a peculiar wisdom all its own whose capacity to lead this Nation out of its present troubles is contained only by the limits of judicial ingenuity in contriving new constitutional principles to meet each problem as it arises. For anyone who, like myself, believes that it is an essential function of this Court to maintain the constitutional divisions between state and federal authority and among the three branches of the Federal Government, today’s decision is a step in the wrong direction. This resurgence of the expansive view of ‘equal protection’ carries the seeds of more judicial interference with the state and federal legislative process, much more indeed than does the judicial application of ‘due process’ according to traditional concepts (see my dissenting opinion in *Duncan v. Louisiana*, 391 U.S. 145, 171, 88 S.Ct. 1444, 1458, 20 L.Ed.2d 491, 522 (1968)), about which some members of this Court have expressed fears as to its potentialities for setting us judges ‘at large.’³⁷ I consider it particularly unfortunate that this judicial roadblock to the powers of Congress in this field should occur at the very threshold of the current discussions regarding the ‘federalizing’ of these aspects of welfare relief.

All Citations

394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600

Footnotes

¹ Accord: *Robertson v. Ott*, 284 F.Supp. 735 (D.C.Mass.1968); *Johnson v. Robinson* (D.C.N.D.Ill.1968); *Ramos v. Health and Social Services Bd.*, 276 F.Supp. 474 (D.C.E.D.Wis.1967); *Green v. Dept. of Pub. Welfare*, 270 F.Supp. 173 (D.C.Del.1967). Contra: *Waggoner v. Rosenn*, 286 F.Supp. 275 (D.C.M.D.Pa.1968); see also *People ex rel. Heydenreich v. Lyons*, 374 Ill. 557, 30 N.E.2d 46, 132 A.L.R. 511 (1940).

All but one of the appellees herein applied for assistance under the Aid to Families with Dependent Children (AFDC) program which was established by the Social Security Act of 1935. 49 Stat. 627, as amended, 4 U.S.C. ss 601—609. The program provides partial federal funding of state assistance plans which meet certain specifications. One appellee applied for Aid to the Permanently and

Totally Disabled which is also jointly funded by the States and the Federal Government. 42 U.S.C. ss 1351—1355.

- 2 Conn.Gen.Stat.Rev. s 17—2d (1965 Supp.), now s 17—2c, provides:
‘When any person comes into this state without visible means of support for the immediate future and applies for aid to dependent children under chapter 301 or general assistance under part I of chapter 308 within one year from his arrival, such person shall be eligible only for temporary aid or care until arrangements are made for his return, provided ineligibility for aid to dependent children shall not continue beyond the maximum federal residence requirement.’
An exception is made for those persons who come to Connecticut with a bona fide job offer or are self-supporting upon arrival in the State and for three months thereafter. 1 Conn.Welfare Manual, c. II, ss 219.1—219.2 (1966).
- 3 D.C.Code Ann. s 3—203 (1967) provides:
‘Public assistance shall be awarded to or on behalf of any needy individual who either (a) has resided in the District for one year immediately preceding the date of filing his application for such assistance; or (b) who was born within one year immediately preceding the application for such aid, if the parent or other relative with whom the child is living has resided in the District for one year immediately preceding the birth; or (c) is otherwise within one of the categories of public assistance established by this chapter.’
See D. C. Handbook of Pub. Assistance Policies and Procedures, HPA—2, EL 9.1, I, III (1966) (hereinafter cited as D. C. Handbook).
- 4 In *Ex parte Cogdell*, 342 U.S. 163, 72 S.Ct. 196, 96 L.Ed. 181 (1951), this Court remanded to the Court of Appeals for the District of Columbia Circuit to determine whether 28 U.S.C. s 2282, requiring a three-judge court when the constitutionality of an Act of Congress is challenged, applied to Acts of Congress pertaining solely to the District of Columbia. The case was mooted below, and the question has never been expressly resolved. However, in *Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954), this Court heard an appeal from a three-judge court in a case involving the constitutionality of a District of Columbia statute. Moreover, three-judge district courts in the District of Columbia have continued to hear cases involving such statutes. See, e.g., *Hobson v. Hansen*, 265 F.Supp. 902 (1967). Section 2282 requires a three-judge court to hear a challenge to the constitutionality of ‘any Act of Congress.’ (Emphasis supplied.) We see no reason to make an exception for Acts of Congress pertaining to the District of Columbia.
- 5 Pa.Stat., Tit. 62, s 432(6) (1968). See also Pa.Pub. Assistance Manual ss 3150—3151 (1962). Section 432(6) provides:
‘Assistance may be granted only to or in behalf of a person residing in Pennsylvania who (i) has resided therein for at least one year immediately preceding the date of application; (ii) last resided in a state which, by law, regulation or reciprocal agreement with Pennsylvania, grants public assistance to or in behalf of a person who has resided in such state for less than one year; (iii) is a married woman residing with a husband who meets the requirement prescribed in subclause (i) or (ii) of this clause; or (iv) is a child less than one year of age whose parent, or relative with whom he is residing, meets the requirement prescribed in subclause (i), (ii) or (iii) of this clause or resided in Pennsylvania for at least one year immediately preceding the child’s birth. Needy persons who do not meet any of the requirements stated in this clause and who are transients or without residence in any state, may be granted assistance in accordance with rules, regulations, and standards established by the department.’
- 6 This constitutional challenge cannot be answered by the argument that public assistance benefits are a ‘privilege’ and not a ‘right.’ See *Sherbert v. Verner*, 374 U.S. 398, 404, 83 S.Ct. 1790, 1794, 10 L.Ed.2d 965 (1963).
- 7 The waiting-period requirement has its antecedents in laws prevalent in England and the American Colonies centuries ago which permitted the ejection of individuals and families if local authorities thought they might become public charges. For example, the preamble of the English Law of Settlement and Removal of 1662 expressly recited the concern, also said to justify the three statutes before us, that large numbers of the poor were moving to parishes where more liberal relief policies were in effect. See generally Coll, *Perspectives in Public Welfare: The English Heritage*, 4 *Welfare in Review* No. 3, p. 1 (1966). The 1662 law and the earlier Elizabethan Poor Law of 1601 were the models adopted by the American Colonies. Newcomers to a city, town, or county who might become public charges were ‘warned out’ or ‘passed on’ to the next locality. Initially, the funds for welfare payments were raised by local taxes, and the controversy as to responsibility for particular indigents was between localities in the same State. As States—first alone and then with federal grants—assumed the major responsibility, the contest of nonresponsibility became interstate.
- 8 In *Corfield v. Coryell*, 6 Fed.Cas. pp. 546, 552 (No. 3230) (C.C.E.D.Pa.1825), *Paul v. Virginia*, 8 Wall. (75 U.S.) 168, 180, 19 L.Ed. 357 (1869), and *Ward v. Maryland*, 12 Wall. (79 U.S.) 418, 430 20 L.Ed. 449 (1871), the right to travel interstate was grounded upon the Privileges and Immunities Clause of Art. IV, s 2. See also *Slaughter-House Cases*, 16 Wall. 36, 79, 21 L.Ed. 394 (1873); *Twining v. New Jersey*, 211 U.S. 78, 97, 29 S.Ct. 14, 18, 53 L.Ed. 97 (1908). In *Edwards v. California*, 314 U.S. 160, 181, 183—185, 62 S.Ct. 164, 170, 171—172, 86 L.Ed. 119 (1941) (Douglas and Jackson, JJ., concurring), and *Twining v. New Jersey*, *supra*, reliance was placed on the Privileges and Immunities Clause of the Fourteenth Amendment. See also *Crandall v. Nevada*, 6 Wall. (73 U.S.) 35, 18 L.Ed. 744 (1868). In *Edwards v. California*, *supra*, and the *Passenger Cases*, 7 How. 283 (1849), a Commerce Clause approach was employed.
See also *Kent v. Dulles*, 357 U.S. 116, 125, 78 S.Ct. 1113, 1118, 2 L.Ed.2d 1204 (1958); *Aptheker v. Secretary of State*, 378 U.S. 500, 505—506, 84 S.Ct. 1659, 1663, 12 L.Ed.2d 992 (1964); *Zemel v. Rusk*, 381 U.S. 1, 14, 85 S.Ct. 1271, 1279, 14 L.Ed.2d 179 (1965), where the freedom of Americans to travel outside the country was grounded upon the Due Process Clause of the Fifth Amendment.

- 9 Furthermore, the contribution rationale can hardly explain why the District of Columbia and Pennsylvania bar payments to children who have not lived in the jurisdiction for a year regardless of whether the parents have lived in the jurisdiction for that period. See D.C. Code s 3—203; D.C. Handbook, EL 9.1, I(C) (1966); Pa.Stat., Tit. 62, s 432(6) (1968). Clearly, the children who were barred would not have made a contribution during that year.
- 10 We are not dealing here with state insurance programs which may legitimately tie the amount of benefits to the individual's contributions.
- 11 In *Rinaldi v. Yeager*, 384 U.S. 305, 86 S.Ct. 1497, 16 L.Ed.2d 577 (1966), New Jersey attempted to reduce expenditures by requiring prisoners who took an unsuccessful appeal to reimburse the State out of their institutional earnings for the cost of furnishing a trial transcript. This Court held the New Jersey statute unconstitutional because it did not require similar repayments from unsuccessful appellants given a suspended sentence, placed on probation, or sentenced only to a fine. There was no rational basis for the distinction between unsuccessful appellants who were in prison and those who were not.
- 12 Appellant in No. 9, the Connecticut Welfare Commissioner, disclaims any reliance on this contention. In No. 34, the District Court found as a fact that the Pennsylvania requirement served none of the claimed functions. 277 F.Supp. 65, 68 (1967).
- 13 Of course, such advance notice would inevitably be unreliable since some who registered would not need welfare a year later while others who did not register would need welfare.
- 14 See Conn.Gen.Stat.Rev. s 17—2d, now s 17—2c, and Pa. Pub.Assistance Manual s 3154 (1968).
- 15 Both Connecticut and Pennsylvania have entered into open-ended interstate compacts in which they have agreed to eliminate the durational requirement for anyone who comes from another State which has also entered into the compact. Conn.Gen.Stat.Rev. s 17—21a (1968); Pa. Pub.Assistance Manual s 3150, App. I (1966).
- 16 In Pennsylvania, the one-year waiting-period requirement, but not the residency requirement, is waived under reciprocal agreements. Pa.Stat., Tit. 62, s 432(6) (1968); Pa.Pub.Assistance Manual s 3151.21 (1962).
1 Conn.Welfare Manual, c. II, s 220 (1966), provides that '(r)esidence within the state shall mean that the applicant is living in an established place of abode and the plan is to remain.' A person who meets this requirement does not have to wait a year for assistance if he entered the State with a bona fide job offer or with sufficient funds to support himself without welfare for three months. *Id.*, at s 219.2.
HEW Handbook of Pub. Assistance Administration, pt. IV, s 3650 (1946), clearly distinguishes between residence and duration of residence. It defines residence, as is conventional, in terms of intent to remain in the jurisdiction, and it instructs interviewers that residence and length of residence 'are two distinct aspects * * *.'
- 17 See, e.g., D. C. Handbook, chapters on Eligibility Payments, Requirements, Resources and Reinvestigation for an indication of how thorough these investigations are. See also 1 Conn.Welfare Manual, c. I (1967); Pa.Pub.Assistance Manual ss 3170—3330 (1962). The Department of Health, Education, and Welfare has proposed the elimination of individual investigations, except for spot checks, and the substitution of a declaration system, under which the 'agency accepts the statements of the applicant for or recipient of assistance, about facts that are within his knowledge and competence * * * as a basis for decisions regarding his eligibility and extent of entitlement.' HEW, Determination of Eligibility for Public Assistance Programs, 33 Fed.Reg. 17189 (1968). See also Hoshino, Simplification of the Means Test and its Consequences, 41 Soc.Serv.Rev. 237, 241—249 (1967); Burns, What's Wrong With Public Welfare?, 36 Soc.Serv.Rev. 111, 114—115 (1962). Presumably the statement of an applicant that he intends to remain in the jurisdiction would be accepted under a declaration system.
- 18 The unconcern of Connecticut and Pennsylvania with the one-year requirement as a means of preventing fraud is made apparent by the waiver of the requirement in reciprocal agreements with other States. See n. 15, *supra*.
- 19 D.C. Handbook, RV 2.1, I, II (B) (1967). See also Pa.Pub.Assistance Manual s 3153 (1962).
- 20 Under the traditional standard, equal protection is denied only if the classification is 'without any reasonable basis,' *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78, 31 S.Ct. 337, 340, 55 L.Ed. 369 (1911); see also *Flemming v. Nestor*, 363 U.S. 603, 80 S.Ct. 1367 (1960).
- 21 We imply no view of the validity of waiting-period or residence requirements determining eligibility to vote, eligibility for tuition-free education, to obtain a license to practice a profession, to hunt or fish, and so forth. Such requirements may promote compelling state interests on the one hand, or, on the other, may not be penalties upon the exercise of the constitutional right of interstate travel.

- 22 As of 1964, 11 jurisdictions imposed no residence requirement whatever for AFDC assistance. They were Alaska, Georgia, Hawaii, Kentucky, New Jersey, New York, Rhode Island, Vermont, Guam, Puerto Rico, and the Virgin Islands. See HEW, Characteristics of State Public Assistance Plans under the Social Security Act (Pub.Assistance Rep.No. 50, 1964 ed.).
- 23 Social Security Board, Social Security in America 235—236 (1937).
- 24 H.R.Rep.No. 615, 74th Cong., 1st Sess., 24; S.Rep.No. 628, 74th Cong., 1st Sess., 35. Furthermore, the House Report cited President Roosevelt's statement in his Social Security Message that 'People want decent homes to live in; they want to locate them where they can engage in productive work * * *.' H.R.Rep. supra, at 2. Clearly this was a call for greater freedom of movement. In addition to the statement in the above Committee report, see the remarks of Rep. Doughton (floor manager of the Social Security bill in the House) and Rep. Vinson. 79 Cong.Rec. 5474, 5602—5603 (1935). These remarks were made in relation to the waiting-period requirements for old-age assistance, but they apply equally to the AFDC program.
- 25 Section 402(b) required the repeal of 30 state statutes which imposed too long a waiting period in the State or particular town or county and 11 state statutes (as well as the Hawaii statute) which required residence in a particular town or county. See Social Security Board, Social Security in America 235—236 (1937). It is apparent that Congress was not intimating any view of the constitutionality of a one-year limitation. The constitutionality of any scheme of federal social security legislation was a matter of doubt at that time in light of the decision in *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570 (1935). Throughout the House debates congressmen discussed the constitutionality of the fundamental taxing provisions of the Social Security Act, see, e.g., 79 Cong.Rec. 5783 (1935) (remarks of Rep. Cooper), but not once did they discuss the constitutionality of s 402(b).
- 1 By contrast, the 'right' of international travel has been considered to be no more than an aspect of the 'liberty' protected by the Due Process Clause of the Fifth Amendment. *Kent v. Dulles*, 357 U.S. 116, 125, 78 S.Ct. 1113, 1118, 2 L.Ed.2d 1204; *Aptheker v. Secretary of State*, 378 U.S. 500, 505—506, 84 S.Ct. 1659, 1663, 12 L.Ed.2d 992. As such, this 'right,' the Court has held, can be regulated within the bounds of due process. *Zemel v. Rusk*, 381 U.S. 1, 85 S.Ct. 1271, 14 L.Ed.2d 179.
- 2 The constitutional right of interstate travel was fully recognized long before adoption of the Fourteenth Amendment. See the statement of Chief Justice Taney in the *Passenger Cases*. 7 How. 283, 492, 12 L.Ed. 702: 'For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States.'
- 3 Mr. Justice Harlan was alone in dissenting from this square holding in *Guest*. Supra, at 762, 86 S.Ct., at 1180.
- 4 The extent of emergency governmental power temporarily to prevent or control interstate travel, e.g., to a disaster area, need not be considered in these cases.
- 5 It is to be remembered that the Court today affirms the judgment of three different federal district courts, and that at least four other federal courts have reached the same result. See ante, at 1324, n. 1.
- 1 See, e.g., Hearings on H.R. 4120 before the House Committee on Ways and Means, 74th Cong., 1st Sess., 831—832, 861—871 (1935).
- 2 See, e.g., Hearings on S. 1130 before the Senate Committee on Finance, 74th Cong., 1st Sess., 522—540, 643, 656 (1935).
- 3 See e.g., Hearings on H.R. 10032 before the House Committee on Ways and Means, 87th Cong., 2d Sess., 355, 385—405, 437 (1962); Hearings on H.R. 6000 before the Senate Committee on Finance, 81st Cong., 2d Sess., 142—143 (1950).
- 4 See e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 256—260, 85 S.Ct. 348, 356—359, 13 L.Ed.2d 258 (1964).
- 5 The burden is uncertain because indigents who are disqualified from categorical assistance by residence requirements are not left wholly without assistance. All the appellees in these cases found alternative sources of assistance after their disqualification.
- 6 Some of the cases go so far as to intimate that at least in the area of taxation Congress is not inhibited by any problems of classification. See *Helvering v. Lerner Stores Corp.*, 314 U.S. 463, 468, 62 S.Ct. 341, 343, 86 L.Ed. 343 (1941); *Steward Machine Co. v. Davis*, 301 U.S. 548, 584, 57 S.Ct. 883, 889, 81 L.Ed. 1279 (1937); *LaBelle Iron Works v. United States*, 256 U.S. 377, 392,

41 S.Ct. 528, 532, 65 L.Ed. 998 (1921).

1 Of the District of Columbia appellees, all sought AFDC assistance except appellee Barley, who asked for Aid to the Permanently and Totally Disabled. In 42 U.S.C. s 602(b). Congress has authorized 'States' (including the District of Columbia, see 42 U.S.C. s 1301(a)(1)) to require up to one year's immediately prior residence as a condition of eligibility for AFDC assistance. See n. 15, *infra*. In 42 U.S.C. ss 1352(b)(1) and 1382(b)(2), Congress has permitted 'States' to condition disability payments upon the applicant's having resided in the State for up to five of the preceding nine years. However, D.C.Code s 3—203 prescribes a one-year residence requirement for both types of assistance, so the question of the constitutionality of a longer required residence period is not before us.

Appellee Barley also challenged in the District Court the constitutionality of a District of Columbia regulation which provided that time spent in a District of Columbia institution as a public charge did not count as residence for purposes of welfare eligibility. The District Court held that the regulation must fall for the same reasons as the residence statute itself. Since I believe that the District Court erred in striking down the statute, and since the issue of the regulation's constitutionality has been argued in this Court only in passing, I would remand appellee Barley's cause for further consideration of that question.

2 I do not believe that the Pennsylvania appeal presents the additional question of the validity of a residence condition for a purely state-financed and state-authorized public assistance program. The Pennsylvania welfare eligibility provision, Pa. Stat. Ann., Tit. 62, s 432 (1968), states:

'Except as hereinafter otherwise provided * * *, needy persons of the classes defined in clauses (1) and (2) of this section shall be eligible for assistance:

'(1) Persons for whose assistance Federal financial participation is available to the Commonwealth as * * * aid to families with dependent children, * * * and which assistance is not precluded by other provisions of law.

'(2) Other persons who are citizens of the United States * * *.

'(6) Assistance may be granted only to or in behalf of a person residing in Pennsylvania who (i) has resided therein for at least one year immediately preceding the date of application * * *.'

As I understand it, this statute initially divides Pennsylvania welfare applicants into two classes: (1) persons for whom federal financial assistance is available and not precluded by other provisions of federal law (if state law, including the residence requirement, were intended, the 'Except as hereinafter otherwise provided' proviso at the beginning of the entire section would be surplusage); (2) other persons who are citizens. The residence requirement applies to both classes. However, since all of the Pennsylvania appellees clearly fall into the first or federally assisted class, there is no need to consider whether residence conditions may constitutionally be imposed with respect to the second or purely state-assisted class.

3 In characterizing this argument as one based on an alleged denial of equal protection of the laws, I do not mean to disregard the fact that this contention is applicable in the District of Columbia only through the terms of the Due Process Clause of the Fifth Amendment. Nor do I mean to suggest that these two constitutional phrases are 'always interchangeable,' see *Bolling v. Sharpe*, 347 U.S. 497, 499, 74 S.Ct. 693, 694, 98 L.Ed. 884 (1954). In the circumstances of this case, I do not believe myself obliged to explore whether there may be any differences in the scope of the protection afforded by the two provisions.

4 See, e.g., *New York Rapid Transit Corp. v. City of New York*, 303 U.S. 573, 578, 58 S.Ct. 721, 724, 82 L.Ed. 1024 (1938). See also *infra*, at 1346.

5 See *Loving v. Virginia*, 388 U.S. 1, 11, 87 S.Ct. 1817, 1823, 18 L.Ed.2d 1010 (1967); cf. *Bolling v. Sharpe*, 347 U.S. 497, 499, 74 S.Ct. 693, 694 (1954). See also *Hirabayashi v. United States*, 320 U.S. 81, 100, 63 S.Ct. 1375, 1385, 87 L.Ed. 1774 (1943); *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886).

6 See n. 9, *infra*.

7 See n. 9, *infra*.

8 I recognize that in my dissenting opinion in *Harper v. Virginia Bd. of Elections*, *supra*, at 683, 86 S.Ct., at 1090. I characterized the test applied in *Carrington* as 'the traditional equal protection standard.' I am now satisfied that this was too generous a reading of the Court's opinion.

9 Analysis is complicated when the statutory classification is grounded upon the exercise of a 'fundamental' right. For then the statute may come within the first branch of the 'compelling interest' doctrine because exercise of the right is deemed a 'suspect' criterion and also within the second because the statute is considered to affect the right by deterring its exercise. *Williams v. Rhodes*, *supra*, is such a case insofar as the statutes involved both inhibited exercise of the right of political association and drew distinctions based upon the way the right was exercised. The present case is another instance, insofar as welfare residence statutes both deter interstate movement and distinguish among welfare applicants on the basis of such movement. Consequently, I have not attempted to specify

Shapiro v. Thompson, 394 U.S. 618 (1969)

89 S.Ct. 1322, 22 L.Ed.2d 600

the branch of the doctrine upon which these decisions rest.

10 See n. 9, *supra*.

11 See, e.g., *Williamson v. Lee Optical Co.*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955); *Kotch v. Board of River Pilot Com'rs*, 330 U.S. 552, 67 S.Ct. 910, 91 L.Ed. 1093 (1947).

12 See, e.g., *Bunting v. Oregon*, 243 U.S. 426, 37 S.Ct. 435, 61 L.Ed. 830 (1917).

13 See, e.g., *Miller v. Wilson*, 236 U.S. 373, 35 S.Ct. 342, 59 L.Ed. 628 (1915).

14 See, e.g., *Ferry v. Spokane, P. & S.R. Co.*, 258 U.S. 314, 42 S.Ct. 358, 66 L.Ed. 635 (1922).

15 See 44 Stat. 758, s 1.

16 The arguments for and against welfare residence requirements, including their impact on indigent migrants, were fully aired in congressional committee hearings. See, e.g., Hearings on H.R. 4120 before the House Committee on Ways and Means, 74th Cong., 1st Sess., 831—832, 861—871 (1935); Hearings on S. 1130 before the Senate Committee on Finance, 74th Cong., 1st Sess., 522—540, 643, 656 (1935).

17 I am not at all persuaded by the Court's argument that Congress' sole purpose was to compel "(l)iberality of residence requirement." See *ante*, at 1334. If that was the only objective, it could have been more effectively accomplished by specifying that to qualify for approval under the Act a state assistance plan must contain no residence requirement.

18 See Act to provide aid to dependent children in the District of Columbia s 3, 58 Stat. 277 (1944). In 1962, this Act was repealed and replaced by D.C. Code s 3—203, the provision now being challenged. See 76 Stat. 914.

19 Cf., *ante*, at 1334—1335 and nn. 24—25.

20 See, e.g., *Edwards v. California*, 314 U.S. 160, 62 S.Ct. 164, 86 L.Ed. 119 (1941); the *Passenger Cases*, 7 How. 283, 12 L.Ed. 702 (1849).

21 See, e.g., *Corfield v. Coryell*, 6 Fed.Cas. p. 546 (No. 3230) (1825) (Mr. Justice Washington).

22 See, e.g., *Edwards v. California*, 314 U.S. 160, 177, 181, 62 S.Ct. 164, 168, 170 (1941) (Douglas and Jackson, JJ., concurring); *Twining v. New Jersey*, 211 U.S. 78, 97, 29 S.Ct. 14, 18, 53 L.Ed. 97 (1908) (*dictum*).

23 See, e.g., *Kent v. Dulles*, 357 U.S. 116, 125—127, 78 S.Ct. 1113, 1118, 2 L.Ed.2d 1204 (1958); *Aptheker v. Secretary of State*, 378 U.S. 500, 505—506, 84 S.Ct. 1659, 1663, 12 L.Ed.2d 992 (1964).

24 See, e.g., *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 423, 66 S.Ct. 1142, 1151, 90 L.Ed. 1342 (1946). See also *Maryland v. Wirtz*, 392 U.S. 183, 193—199, 88 S.Ct. 2017, 2022—2024, 20 L.Ed.2d 1020 (1968).

25 'The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.'

26 See *Slaughter-House Cases*, 16 Wall. 36, 79 (1873); *In re Kemmler*, 136 U.S. 436, 448, 10 S.Ct. 930, 934, 34 L.Ed. 519 (1890); *McPherson v. Blacker*, 146 U.S. 1, 38, 13 S.Ct. 3, 11, 36 L.Ed. 869 (1892); *Giozza v. Tiernan*, 148 U.S. 657, 661, 13 S.Ct. 721, 723, 37 L.Ed. 599 (1893); *Duncan v. Missouri*, 152 U.S. 377, 382, 14 S.Ct. 570, 571, 38 L.Ed. 485 (1894); *Twining v. New Jersey*, 211 U.S. 78, 97—98, 29 S.Ct. 14, 18—19 (1908).

27 See, e.g., *Slaughter-House Cases*, *supra*, at 79; *Twining v. New Jersey*, *supra*, at 97, 29 S.Ct., at 18.

28 The *Crandall* Court stressed the 'right' of a citizen to come to the national capital, to have access to federal officials, and to travel to seaports. See 6 Wall., at 44. Of course, *Crandall* was decided before the enactment of the Fourteenth Amendment.

- 29 Professor Chafee has suggested that the Due Process Clause of the Fourteenth Amendment may similarly protect the right to travel against state interference. See Z. Chafee, *Three Human Rights in the Constitution of 1787*, p. 192 (1956). However, that clause surely provides no greater protection against the States than does the Fifth Amendment clause against the Federal Government; so the decisive question still is whether Congress may enact a residence requirement.
- 30 See Brief for Appellees in No. 33, pp. 49—51 and n. 70; Brief for Appellees in No. 34, p. 24 n. 11; Supplemental Brief for Appellees on Reargument 27—30.
- 31 For Congress, see, e.g., *Problems of Hungry Children in the District of Columbia*, Hearings before the Subcommittee on Public Health, Education, Welfare, and Safety of the Senate Committee on the District of Columbia, 85th Cong., 1st Sess. For Connecticut, see Connecticut General Assembly, 1965 Feb.Spec.Sess., House of Representatives Proceedings, Vol. II, pt. 7, at 3505. For Pennsylvania, see Appendix in No. 34, pp. 96a—98a.
- 32 There is support for the view that enforcement of residence requirements can significantly reduce welfare costs by denying benefits to those who come solely to collect them. For example, in the course of a long article generally critical of residence requirements, and after a detailed discussion of the available information, Professor Harvith has stated:
‘A fair conclusion seems to be that, in at least some states, it is not unreasonable for the legislature to conclude that a useful saving in welfare costs may be obtained by residence tests discouraging those who would enter the state solely because of its welfare programs. In New York, for example, a one per cent saving in welfare costs would amount to several million dollars.’ Harvith, *The Constitutionality of Residence Tests for General and Categorical Assistance Programs*, 54 Calif.L.Rev. 567, 618 (1966). (Footnotes omitted.) See also *Helvering v. Davis*, 301 U.S. 619, 644, 57 S.Ct. 904, 909, 81 L.Ed. 1307 (1937).
For essentially the same reasons, I would uphold the Connecticut welfare regulations which except from the residence requirement persons who come to Connecticut with a bona fide job offer or with resources sufficient to support them for three months. See 1 Conn. Welfare Manual, c. II, ss 219.1—219.2 (1966). Such persons are very unlikely to have entered the State primarily in order to receive welfare benefits.
- 33 For precise prediction to be possible, it would appear that a residence requirement must be combined with a procedure for ascertaining the number of indigent persons who enter the jurisdiction and the proportion of those persons who will remain indigent during the residence period.
- 34 I do not mean to imply that each of the above purposes necessarily was sought by each of the legislatures that adopted durational residence requirements. In Connecticut, for example, the welfare budget is apparently open-ended, suggesting that this State is not seriously concerned with the need for more accurate budgetary estimates.
- 35 That law, N.Y.Soc.Welfare Law, McKinney’s Consol. Laws, c. 55, s 139—a, requires public welfare officials to conduct a detailed investigation in order to ascertain whether a welfare ‘applicant came into the state for the purpose of receiving public assistance or care and accordingly is undeserving of and ineligible for assistance * * *.’
- 36 The figure may be variously calculated. There was testimony before the District Court in the Pennsylvania case that 46 States had some form of residence requirement for welfare assistance. Appendix in No. 34, pp. 92a—93a. It was stipulated in the Connecticut case that in 1965, 40 States had residence requirements for aid to dependent children. Appendix to Appellant’s Brief in No. 9, p. 45a. See also, ante, at 1334 and n. 22.
- 37 Cf. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 670, 675—680, 86 S.Ct. 1079, 1083, 1086—1088, 16 L.Ed.2d 169 (Black, J., dissenting).

672 F.Supp. 81
United States District Court,
E.D. New York.

In the Matter of Alan Paul SHERR, etc., et al.,
Plaintiffs,

v.

NORTHPORT-EAST NORTHPORT UNION
FREE SCHOOL DISTRICT, et al., Defendants.

In the Matter of Louis LEVY, etc., et al.,

v.

NORTHPORT-EAST NORTHPORT UNION
FREE SCHOOL DISTRICT, et al., Defendants.

Nos. CV 87-3116, CV 87-3197.

|
Oct. 21, 1987.

Synopsis

Parents brought actions against school district challenging constitutionality of mandatory inoculation of their children as condition for attending school. The District Court, Wexler, J., held that: (1) limitation of religious exemption to New York mandatory inoculation program of school children to "bona fide members of a recognized religious organization" violated First Amendment; (2) parents' opposition to mandatory inoculation based on their pantheistic views was "religious" in nature so as to invoke protections of First Amendment; but (3) only parents whose opposition was based on sincerely held religious beliefs were entitled to exemption.

Ordered accordingly.

Attorneys and Law Firms

*82 James R. Filenbaum, Spring Valley, N.Y., for plaintiffs.

Ingerman, Smith, Greenberg, Gross & Richmond by Warren Richmond III, Northport, N.Y., for defendants Northport-East Northport Union Free School Dist., Dr. William J. Brosnan, John Scurti and Clifford Bishop.

Robert Abrams, New York State Atty. Gen. by Tarquin Jay Bromley, Asst. Atty. Gen., New York City, for defendants New York State Com'r. of Educ. and New York State Com'r of Health.

WEXLER, District Judge.

I. INTRODUCTION

The Bill of Rights opens with the powerful admonition, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ...," U.S. CONST. amend. I, and, at least during most of the twentieth century, courts throughout the United States have maintained a vigorous watch over possible governmental encroachment upon the fundamental right of individuals to hold fast to the beliefs and practices that stem from their personal and diverse conceptions of the nature of the universe and man's place *83 in it.¹ The Supreme Court, for instance, has held that a state compulsory school attendance statute cannot be constitutionally applied to fourteen and fifteen year old Amish children where compliance with the state law "would gravely endanger if not destroy the free exercise of" the children's religious beliefs. *Wisconsin v. Yoder*, 406 U.S. 205, 219, 92 S.Ct. 1526, 1535, 32 L.Ed.2d 15 (1972), and carved out religiously-based exemptions to generally applicable requirements for the receipt of state unemployment benefits, *Hobbie v. Unemployment Appeals Commission of Florida*, 480 U.S. 136, 107 S.Ct. 1046, 94 L.Ed.2d 190 (1987); *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981); *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963). Other courts have upheld the right of Native Americans to use the hallucinogenic plant peyote in religious rituals, e.g., *State v. Whittington*, 19 Ariz.App. 27, 504 P.2d 950 (1973), cert. denied, 417 U.S. 946, 94 S.Ct. 3071, 41 L.Ed.2d 667 (1974); *People v. Woody*, 61 Cal.2d 716, 394 P.2d 813, 40 Cal.Rptr. 69 (1964); *Whitehorn v. State*, 561 P.2d 539 (Okla.Crim.App.1977); contra *State v. Big Sheep*, 75 Mont. 219, 243 P. 1067 (1926); *State v. Soto*, 21 Or.App. 794, 537 P.2d 142 (1975), cert. denied, 424 U.S. 955, 96 S.Ct. 1431, 47 L.Ed.2d 361 (1976), and that of individuals to refuse even lifesaving treatment on religious grounds, e.g., *In re Osborne*, 294 A.2d 372 (D.C.1972); *In re Estate of Brooks*, 32 Ill.2d 361, 205 N.E.2d 435 (1965).

Even this most essential freedom of religious belief, worship, and practice, however, cannot be absolute in a society continually striving to achieve the proper balance between the liberties of its individual members and the

shared needs of the community at large. In *United States v. Lee*, 455 U.S. 252, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982), for example, the Supreme Court ruled that Amish employers must contribute to the Social Security system even though payment of Social Security taxes or receipt of benefits would assertedly violate their religious beliefs. In *Bob Jones University v. United States*, 461 U.S. 574, 103 S.Ct. 2017, 76 L.Ed.2d 157 (1983), the Court upheld the Internal Revenue Service's denial of tax-exempt status to two schools that, in conformance with the dictates of religious beliefs, maintained racially discriminatory admissions and associational practices.

It has long been settled that one area in which religious freedom must be subordinated to the compelling interests of society involves protection against the spread of disease. In *Jacobson v. Massachusetts*, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643 (1905), the Supreme Court upheld the constitutionality of a Massachusetts law requiring compulsory vaccination and city of Cambridge regulations mandating, under authority of the statute, that all inhabitants be inoculated against smallpox. As one state court declared when confronted with a First Amendment challenge to a vaccination program, the freedom to act according to one's "religious beliefs is subject to a reasonable regulation for the benefit of society as a whole. We affirm that the health regulation in question is a reasonable exercise of police power on a subject of paramount and compelling state interest and, therefore, is valid." *Wright v. DeWitt School District No. 1*, 238 Ark. 906, 913, 385 S.W.2d 644, 648 (1965). See also, e.g., *Board of Education v. Maas*, 56 N.J.Super. 245, 152 A.2d 394 (1959), *affirmed*, 31 N.J. 537, 158 A.2d 330, *cert. denied*, 363 U.S. 843, 80 S.Ct. 1613, 4 L.Ed.2d 1727 (1960).

Certain states, including New York, have determined that, constitutional validity aside, the subjecting of individuals to compulsory vaccination without exception fails to pay sufficient heed to the fact that inoculations offend certain individuals' religious beliefs. N.Y. Pub. Health L. § 2164 sets forth a comprehensive scheme under *84 which every child in New York State must be immunized against poliomyelitis, mumps, measles, diphtheria, and rubella. A child who has not been administered vaccinations against these diseases is not permitted to attend school unless a licensed physician certifies that such immunization may be detrimental to the child's health. Subsection 9 of § 2164, however, creates a religiously-based exemption from the law, stating:

This section shall not apply to children whose parent, parents, or

guardian [s] are bona fide members of a recognized religious organization whose teachings are contrary to the practices herein required, and no certificate [of immunization] shall be required as a prerequisite [sic] to such children being admitted or received into school or attending school.

The consolidated cases now before the Court bring into question the scope of § 2164's religiously-based exclusion from its coverage and the constitutionality of the law and the specific religious exemption it establishes.

II. PROCEDURAL BACKGROUND OF THE CASES

On September 8, 1987, plaintiffs Alan Paul and Claudia Sherr filed a complaint against defendants Northport-East Northport Union Free School District, Dr. William J. Brosnan, the superintendent of the school district, John Scurti, the principal of the Dickinson Avenue Elementary School (collectively "school district defendants"), and the New York State Commissioner of Education on behalf of themselves and their son Jared Ryan Sherr alleging that defendants had violated the Sherr family's constitutionally protected rights of freedom of religion and equal protection of the law by refusing to allow Jared Sherr to forego the vaccinations § 2164 requires as a condition to entrance into school. The Sherrs assert that the inoculations § 2164 requires are contrary to their sincerely held religious beliefs and that, although they are not members of any formal religious group or denomination, they are entitled to benefit of the exemption set forth in § 2164(9). After a hearing on the day the Sherrs filed their complaint, Chief Judge Weinstein granted plaintiff's request for a temporary restraining order allowing Jared to begin school when the school term opened the next day. On September 18, 1987, this Judge, to whom the Sherrs' case had been assigned, held a conference at which counsel for plaintiffs and the school district defendants, as well as Alan Paul Sherr, were present. At this conference, the Court set a September 23, 1987 date for a hearing on plaintiffs' request for a preliminary injunction, directed that a similar case filed by Louis and Valerie Levy on behalf of themselves and their daughter Sandra Jasmine Levy that had originally been assigned to Judge Dearie should be reassigned to this Judge and consolidated with the Sherrs' action,² and ordered that

the New York State Commissioner of Health be joined as an additional party to the litigation.

At the September 23 hearing, the Court first listened to argument from counsel for plaintiffs, the school district defendants, and the Commissioners of Education and Health (collectively "state defendants") pertaining to the constitutional questions these cases raise and established an expedited schedule for the parties to submit papers addressing issues surrounding the construction and constitutionality of § 1264. The Court then took testimony from Alan Paul Sherr and Louis Levy, and from Irene Taylor, the assistant superintendent for instruction of the Northport-East Northport Union Free School District. At the close of the hearing, the Court granted plaintiffs' motions in the two cases for a preliminary injunction, holding that the evidence adduced so far adequately demonstrated irreparable harm, sufficiently serious questions going to the merits of the cases, and a balance of equities favoring plaintiffs.

On September 28, 1987, the Court resumed proceedings on the cases, at which *85 time plaintiffs presented Professor Bennett Ramsey, an assistant professor of religion at Hamilton College, as an expert witness. Each of the parties rested after Professor Ramsey concluded his testimony, and the Court indicated that, after it had received the briefs it had requested from the parties, it would render a decision concerning the ultimate merits of the two cases. The Court will now address itself to the various issues surrounding plaintiffs' request for relief from this Court.

III. ABSTENTION

During oral argument before the Court and again in their papers, the state defendants have taken the position that this Court should not attempt to adjudicate the final merits of plaintiffs' claims but rather should abstain from assuming jurisdiction over the litigation under the principle of abstention that the Supreme Court first espoused in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941). The doctrine of "Pullman-type abstention," as this form of federal court refusal to exercise jurisdiction over cases the court has the power to adjudicate has come to be known, provides that where unsettled questions of state law may, depending on their resolution, make it unnecessary to decide the issues of federal constitutional law the action involves, a federal court should abstain from wielding its jurisdiction over the litigation until a state court has determined the state law

questions in dispute. The state defendants contend that since New York state courts have not ruled on whether plaintiffs' specific situations and religious beliefs fall within the coverage of § 2164(9)'s religious exemption, a federal court should abstain from exercising its jurisdiction over plaintiffs' claims.

A court, however, should not lightly turn its back on cases properly invoking the court's jurisdiction over purported violations of the guarantees of individual liberties made by the United States Constitution. As Justice Brennan noted in *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813, 96 S.Ct. 1236, 1244, 47 L.Ed.2d 483 (1976):

Abstention from the exercise of federal jurisdiction is the exception, not the rule. "The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the State court would clearly serve an important countervailing interest." *County of Allegheny v. Frank Marshuda Co.*, 360 U.S. 185, 188-189 [79 S.Ct. 1060, 1063, 3 L.Ed.2d 1163] (1950).

The Supreme Court has emphasized that "[t]he abstention doctrine is not an automatic rule to be applied whenever a federal court is faced with a doubtful issue of state law" but "rather involves a discretionary exercise of a court's equity powers" on a case-by-case basis. *Baggett v. Bullitt*, 377 U.S. 360, 375, 84 S.Ct. 1316, 1344, 12 L.Ed.2d 377 (1964). The Second Circuit, furthermore, has seen invocation of the *Pullman*-type abstention doctrine to be warranted only if three essential conditions have been met, namely, (1) the state statute involved is unclear or the issue of state law uncertain; (2) resolution of the federal issue depends upon the interpretation to be given to the state law; and (3) the state law is susceptible of an interpretation that would avoid or modify the federal constitutional issue. *McRedmond v. Wilson*, 533 F.2d 757, 761 (2d Cir.1976).

The Court finds that the circumstances the Sherrs and Levys' actions present are not of the "exceptional" nature that the Supreme Court has indicated to be required for a federal court to abstain from its duty fully to adjudicate cases and controversies properly placed before it and that the first of the three necessary conditions for abstention delineated by the Second Circuit is lacking in the situation now before the Court. If § 2164's religious exemption were to be interpreted so as to except from the statute's immunization requirements *86 the children of individuals

whose religious beliefs prohibit vaccinations against disease even if these persons do not belong to a “recognized religious organization,” plaintiffs’ constitutional challenges to the statute and defendants’ application of the law to them might well be mooted. Also, there can be little question that § 2164 can reasonably be interpreted in a manner that would alter the constitutional questions presented or make it unnecessary for the court to reach them: Those state courts that have addressed the scope of § 2164’s religious exemption appear uniformly to have found that the exemption cannot be limited to members of recognized religious groups. *E.g.*, *Brown v. City School District of the City of Corning*, 104 Misc.2d 796, 429 N.Y.S.2d 355 (Sup.Ct. Steuben Co. 1980), *affirmed*, 83 A.D.2d 755, 444 N.Y.S.2d 878 (4th Dep’t 1981); *Matter of Maria R.*, 81 Misc.2d 286, 366 N.Y.S.2d 309 (Fam.Ct.N.Y.Co.1975); *Maier v. Besser*, 73 Misc.2d 241, 341 N.Y.S.2d 411 (Sup.Ct. Onondaga Co. 1972).

Nonetheless, the fact that state courts in diverse regions of the State of New York have fundamentally been at one in their reading and application of § 2164(9) undercuts any claim that the state statute plaintiffs call into question in this litigation is so unclear or the issue of state law so uncertain that this Court should refrain from even considering the merits of plaintiffs’ contentions. The statute, moreover, has been on the books since 1966 and it has remained unchanged in any manner pertinent to plaintiffs’ lawsuits since its enactment. The actions at bar, therefore, offer a situation far different from those presented in cases in which courts have deemed abstention warranted because of the unsettled nature of recently enacted state laws that had never been construed by any state courts. *E.g.*, *Lake Carriers’ Assn. v. MacMullan*, 406 U.S. 498, 92 S.Ct. 1749, 32 L.Ed.2d 257 (1972); *Bellotti v. Baird*, 428 U.S. 132, 96 S.Ct. 2857, 49 L.Ed.2d 844 (1976); *Catlin v. Ambach*, 820 F.2d 588 (2d Cir.1987). Additionally, abstention is especially inappropriate in circumstances where not only is the state law issue not particularly unsettled but the delay that abstention necessarily entails would be highly prejudicial to plaintiffs’ interests in obtaining a judicial determination that they hope will allow them to conduct their affairs in conformance with their purportedly religious beliefs and allow their children to continue their formal education without further obstacles. As the Supreme Court noted in *Baggett*, “abstention operates to require piecemeal adjudication in many courts, thereby delaying ultimate adjudication on the merits for an undue length of time, a result quite costly” where what is at stake is the “exercise of First Amendment freedoms.” 377 U.S. at 378–79, 84 S.Ct. at 1326 (citations omitted). *See also*, *e.g.*, *Procurier v. Martinez*, 416 U.S. 396, 404, 94 S.Ct. 1800, 1807, 40 L.Ed.2d 224 (1974); *Long Island Vietnam Moratorium*

Committee v. Cahn, 437 F.2d 344 (2d Cir.1970), *affirmed*, 418 U.S. 906, 94 S.Ct. 3197, 41 L.Ed.2d 1153 (1974).

Maier v. Good, 325 F.Supp. 1268 (N.D.N.Y.1971), which the state defendants cite in their papers, does not require an opposite conclusion. *Maier v. Good*, like the instant actions, involved a constitutional challenge to the denial of a religious exemption to a family who claimed that inoculation was prohibited by the dictates of their religious beliefs but did not actually belong to any formal religious denomination. A three judge court determined that it should abstain from deciding the constitutional issues the Maier’s case presented. The court premised its ruling on two separate grounds. First, the court noted that the statute was a relatively new one and its application to facts similar to those presented by the Maier’s lawsuit had not yet been ruled upon by the New York state courts. Second, the court rejected the plaintiffs’ argument that an administrative appeal to the New York Commissioner of Education would be futile and that therefore they need not exhaust the state administrative remedy that N.Y.Educ.L. §§ 310, 311 made available to them. Plaintiffs had relied for their position upon the fact that, prior to the enactment of § 2164, the State Department of Education had issued a memorandum opposing the granting of any *87 exemptions to the statute’s mandatory immunization requirements. The Court held that this pre-enactment statement bore little weight upon how the Commissioner of Education would interpret the statute as enacted.

Maier v. Good is easily distinguishable from the situation the cases currently before the Court present. Section 2164 is no longer new and the state courts have had ample time to rule upon the scope and constitutionality of § 2164(9)’s religious exemption. In fact, one of the cases in which a state court has construed § 2164 is the Maier family’s own action in state court after the federal court declined to hear their case. *Maier v. Besser*, 73 Misc.2d 241, 341 N.Y.S.2d 411. Furthermore, since the federal court *Maier* decision was handed down, the Commissioner of Education has ruled on a number of occasions that an administrative appeal to the Commissioner cannot be used as a means of challenging the constitutionality of a statute, and has declared it to be his formal opinion that in order to secure an exemption to § 2164’s vaccination requirements, one must establish membership in a religious organization whose teachings are contrary to immunization rather than simply a personal, religiously mandated opposition to inoculation. *E.g.*, *Matter of Van Druff*, 21 Educ.Dept.Rep. 635 (1982); *Matter of Curtin*, 20 Educ.Dept.Rep. 473 (1981); *Matter of Maier*, 12 Educ.Dept.Rep. 56 (1972).³

Accordingly, the Court holds in its discretion that it should not abstain from assuming jurisdiction over the Sherrs and

Levys' actions.

religious exemption from vaccination. N.Y. Pub. Health L. § 5000 states that:

IV. STANDING

The state defendants also contend that, even if the Court declines to abstain from exercising jurisdiction over the Sherrs and Levys' cases, the Court should dismiss plaintiffs' action for lack of standing. Defendants' position essentially boils down to the following: § 2164 provides for mandatory immunization of schoolchildren against certain diseases and admits of only two exceptions, *i.e.*, if a licensed physician certifies that vaccination may be detrimental to a given child's health or if a child's parents (or guardian) are "bona fide members of a recognized religious organization" whose doctrines prohibit inoculations. Plaintiffs, who have produced no medical certification that compliance with § 2164's vaccination requirement would be physically harmful to their children and who concede that they are not members of any "recognized religious organization" and thus fall outside the literal language of § 2164(9)'s religious exception, seek that the Court declare their children to be entitled to an exemption from immunization on religious grounds and hold the New York statute's limitation of religiously-based exemptions to "bona fide members of a recognized religious organization" violative of the First Amendment's guarantees of religious liberty and the Fourteenth Amendment's promise to all persons of equal protection of the law. If the Court deems plaintiffs' claims to possess merit, defendants argue, the end result will be that § 2164(9) will necessarily be struck down in its entirety. Accordingly, even if plaintiffs were to obtain a favorable ruling by the Court in the form of a declaration of the invalidity of the statutory exemption, the Sherr and Levy children would still be subject to vaccination under a § 2164 that would lack any religious exception to immunization. Thus, the state defendants conclude, any injury plaintiffs allege cannot be redressed by the remedies that they seek from the Court, and they therefore lack any standing to maintain the lawsuits they have brought before the Court.

Defendants' argument misconstrues the nature of the Sherrs and Levys' actions. Plaintiffs do not seek that § 2164(9) be completely invalidated; rather, they question the legitimacy solely of that portion of § 2164(9) which limits religious exemptions to "bona fide members of a recognized religious organization." A judicial decision in plaintiffs' favor would entail an order declaring the limitation contained in *88 the clause of § 2164(9) at issue to be improper and holding plaintiffs to be entitled to a

If any clause, sentence, paragraph, section or part of this chapter shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, section, or part thereof, directly involved in the controversy in which such judgment shall be entered.

See also McCartney v. Austin, 31 A.D.2d 370, 298 N.Y.S.2d 26 (3d Dep't 1969).

Under § 5000, only the specific *clause* of § 2164(9) would be void, not the entire subsection. As plaintiffs point out, acceptance of the state defendants' standing argument would mean that persons who feel that the religious exemption § 2164 provides is structured and being applied in an unconstitutional and discriminatory manner would be completely barred from attempting to vindicate their rights in a federal, and by logical extension, state court, and thus would lack any judicial forum for their efforts to obtain the benefit of the religiously-based exception from immunization that the New York legislature has decided to grant state citizens.

V. CONSTITUTIONALITY

Ordinarily, in an effort to avoid needless rulings on questions of constitutional law, a court should dispose of all the other issues a case presents before turning to a litigant's challenge to the constitutionality of a statute or ordinance. *See Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341, 56 S.Ct. 466, 480, 80 L.Ed. 688 (1936) (Brandeis, J., concurring). In the instant litigation, however, this is not possible. The language of § 2164(9) explicitly limits invocation of the religious exemption the statute provides to persons who are members of a "recognized religious organization." Neither the Sherr nor Levy families are members of any recognized religious organization. Therefore, if § 2164(9) is constitutionally valid as written, neither set of plaintiffs is entitled to the

religious exemption § 2164 provides regardless of any other factors that may be necessary for plaintiffs otherwise to prevail on their claims. Accordingly, the Court will now turn to plaintiffs' constitutionally grounded challenges to the limited applicability of the religious exemption § 2164(9) contains.

As the Court noted earlier in this opinion, *supra* p. 83, it has been settled law for many years that claims of religious freedom must give way in the face of the compelling interest of society in fighting the spread of contagious diseases through mandatory inoculation programs. In enacting § 2164, the New York State legislature apparently determined that subjecting all individuals to compulsory immunizations without exception does not give due deference to the religiously-based opposition to vaccinations that certain persons maintain and therefore provided for the religious exemption set forth in § 2164(9). The legislature's creation of a statutory exception that goes beyond what the Supreme Court has declared the First Amendment to require undoubtedly reflects a highly praiseworthy urge to minimize imposition of the state's inoculation program upon adherents of religious belief systems whose teachings are at odds with the concept and methods of immunization utilized by the state. Nevertheless, the exception New York has created obviously cannot be such that it itself violates the constitutional rights of certain of the state's citizens.

In the period since the Second World War, the Supreme Court has addressed a multitude of challenges brought under the "establishment clause" of the First Amendment dealing with such hotly contested and diverse issues as the reimbursement to parents of the transportation costs of sending their children to parochial schools, *Everson v. Board of Education of Ewing Township*, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947), prayer in the public schools, *Engel v. Vitale*, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962), property and tax exemptions for religious organizations, *Walz v. Tax Commission of the City of New York*, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970), and a law prohibiting the teaching of evolution in public schools unless "creation science" is also taught, *Edwards v. Aguillard*, 482 U.S. 578, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987). No lengthy citation or analysis of case law construing the establishment clause, however, is necessary for one to see that § 2164(9)'s limitation of a religious exemption from vaccination to those who are members of recognized religious organizations is blatantly violative of that First Amendment guarantee.

In *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), the Supreme Court first synthesized the three-pronged test that the Court now consistently

utilizes as the standard by which the constitutionality of laws challenged under the establishment clause must be measured.⁴ First, the legislature must have had a secular purpose for adopting the enactment in question. Second, the primary effect of the law to be scrutinized must be one that neither advances nor inhibits religion. Third, the statute must not result in an excessive entanglement of government with religion.

The clause of § 2164(9) at issue in this litigation runs afoul of at least two of the three elements of the *Lemon* test. Section 2164 as a whole obviously is designed to achieve the purely secular purpose of protecting New York's school children from the outbreak of communicable diseases. Subsection 9 of § 2164, on the other hand, seems to be designed specifically to advance the interests of individuals who oppose vaccination on theological grounds. Such treatment of religious interests can justifiably be seen as a reasonable accommodation of the considerations more directly addressed by the free exercise clause of the First Amendment, *see, e.g., Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15; *Sherbert*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965, but, as the Court will discuss momentarily, it is far more questionable whether free exercise values can legitimate the distinctions between different categories of the religious public that § 2164(9)'s limitation of its coverage to "bona fide members of a recognized religious organization" entails. Defendants assert that the legislature may have had a number of secular purposes for adopting § 2164(9)'s limiting language. The restriction, for instance, may have been intended as a guard against claims of exemption on the basis of personal moral scruples or unsupported fear of vaccinations, as a means of allowing certain exemptions without risking lessened effectiveness of the state's inoculation program due to the granting of a large number of exemptions, or perhaps because of the difficulties inherent in devising a legally workable definition of religion. In any event, given the constitutional infirmity of § 2164(9)'s limitation under the other two prongs of the *Lemon* test, the Court need not definitively resolve whether the portion of § 2164 in dispute possesses a secular purpose sufficient to withstand plaintiffs' attack upon it.

The primary effect of § 2164(9)'s limiting clause is manifestly the inhibiting of the religious practices of those individuals who oppose vaccination of their children on religious grounds but are not actually members of a religious organization that the state recognizes. While bona fide members of such religious groups may maintain a mode of life for their children in accordance with their religious precepts, other persons who oppose inoculations on religious ⁹⁰ grounds confront the dilemma of having to flout the dictates of their beliefs if they wish to educate

their children and conform to the requirements of state law. As the Supreme Court remarked in *Everson*, 330 U.S. at 15, 67 S.Ct. at 511, “The establishment of religion clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.”

Also, § 2164(9)’s restriction of the exception to “recognized religious organizations” clearly requires that the government involve itself in religious matters to an inordinate degree. The Supreme Court has frowned upon the government becoming too involved in matters so seemingly mundane as property disputes if they necessitate that the state delve too deeply into questions of religious dogma. *See, e.g., Jones v. Wolf*, 443 U.S. 595, 99 S.Ct. 3020, 61 L.Ed.2d 775 (1979); *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 89 S.Ct. 601, 21 L.Ed.2d 658 (1969); *Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190, 80 S.Ct. 1037 (1960); *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in North America*, 344 U.S. 94, 73 S.Ct. 143, 97 L.Ed. 120 (1952). Here, New York has conditioned the conferring of a statutorily created exemption on membership in a religious denomination upon which the state, if the attempted witticism can be forgiven, has bestowed a blessing of governmental approval. Subsection 9 of § 2164 makes available to members of certain religious organizations to which the state has given some sort of official recognition a statutory benefit for which other individuals who may belong to either an unrecognized religious group or possess their own personal religious beliefs are not eligible. The establishment clause surely cannot mean much if a preferential restriction such as that contained in § 2164(9) can pass constitutional muster.

Section 2164(9)’s restriction of the religious exception to New York’s compulsory vaccination requirement for schoolchildren also must fall when viewed in light of the commands of the free exercise clause of the First Amendment. The Supreme Court formulated its modern approach to free exercise claims in its 1963 *Sherbert* decision. In holding that South Carolina could not deny unemployment benefits to a Seventh Day Adventist who refused to work on Saturdays because of her religious beliefs, the Court employed what is essentially a four step inquiry in which it must be determined if (1) a religious belief or practice is involved; (2) such a belief or practice is burdened by the governmental action in question; (3) a compelling state interest justifies such an infringement on First Amendment rights; and (4) even if such a compelling state interest is present, is there a less restrictive alternative that might allow the government to achieve its purposes

without intruding upon religious liberty.

A claim by an individual of entitlement to a religiously-based exclusion from § 2164’s inoculation program even though he is not actually a member of a “recognized religious organization” clearly involves a religious belief or practice, and the ability of such a person to structure his family life in a manner that conforms with the religious dictates to which he subscribes are surely burdened by New York’s requirement that his children be vaccinated. Furthermore, while the courts have left no doubt that society’s compelling interest in preventing disease must override any personal opposition to immunization that some citizens may possess, defendants have not advanced, nor can the Court on its own conceive of, any compelling societal interest that might justify the burden placed upon the free religious exercise of certain individuals while other persons remain free to avoid subjecting their children to a religiously objectionable medical technique merely because they may belong to a particular religious organization to which the state has given a stamp of approval. While the state may be quite genuinely concerned with limiting improper evasion of immunization, minimizing the total number of people exempt from the mandatory *91 vaccination program, or devising a legally and logically coherent definition of religion, there surely exist less restrictive alternative means of achieving the state’s aims than the blatantly discriminatory restriction of § 2164(9)’s religious exemption that the state has devised. The Supreme Court has declared, “The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.” *Yoder*, 406 U.S. at 215, 92 S.Ct. at 1533. Defendants can point to no such interest that might legitimate the limitations that § 2164(9) places upon the religious freedom of individuals who are not members of a “recognized religious organization.”

The Court’s holding regarding the constitutionality of § 2164(9)’s limitation of the religious exemption it creates is supported by the conclusions of the New York state courts which have been faced with claims of entitlement to religious exemption from immunization similar to those the Sherrs and Levys now make. *Maier v. Besser* ruled § 2164(9)’s exemption to be applicable to a family which held beliefs that paralleled to a great extent the teachings of the Christian Scientist Church but did not actually belong to that religious denomination. The court stated:

It was obviously not the intent of the Legislature to force individuals to join a religious organization in order to practice their religious tenets freely, but rather to prevent individuals from avoiding this health requirement enacted for the general welfare of society, merely

because they oppose such medical procedures on the basis of personal moral scruples or by reason of unsupported personal fears. No doubt the language of [§ 2164(9)] was drafted to safeguard against the claim of exemption by this latter category of persons.

Clearly, the child of a parent who is a bona fide Christian Scientist may be enrolled and received into school under the statutory exemption. To deny the exemption to a child whose parent conscientiously and honestly believes and practices the teachings and tenets of the Christian Science faith, notwithstanding lack of formal membership in the Church, would require a holding that the exemption provision of the statute is unconstitutional.

341 N.Y.S.2d at 413 (citations omitted). The *Maria R.* court dismissed a child neglect petition against parents who failed to have their child vaccinated because of their religious beliefs, holding that “[f]ormal church membership is not a requirement as long as the family honestly believes and practices the tenets of a religious group.” 366 N.Y.S.2d at 311. *Brown* granted a litigant’s application for a preliminary injunction allowing his daughter to attend school even though the plaintiff did not demonstrate any membership in a recognized religious organization. Additionally, the only relevant federal court decision of which this Court is aware also held the scope of § 2164(9)’s religious exemption to be wider than that which the actual language of the statute seems to establish. In *Allanson v. Clinton Central School District*, No. CV 84–174, slip op. at 5, (N.D.N.Y. May 10, 1984), then-District Judge Roger Miner, citing *Brown*, adopted a construction of the provision that eliminated the requirement of membership in a religious organization.

Accordingly, the Court holds that § 2164(9)’s restriction of a religious exemption from immunization to children whose parents or guardians are “bona fide members of a recognized religious organization” whose doctrines oppose such vaccinations is violative of both the establishment and free exercise clauses of the First Amendment to the United States Constitution. Plaintiffs in the litigation at bar, therefore, may properly claim entitlement to the statutory exception from inoculation of their children so long as they meet the other elements necessary to qualify for *92 such an exemption. It is to these other requisites that the Court will now turn.⁵

VI. “RELIGIOUS” NATURE OF PLAINTIFFS’ BELIEFS

Section 2164(9) provides a religiously-based exception to New York’s program of compulsory vaccination of school children. This exception, obviously, must be restricted to persons whose opposition to immunization stems from *religious* beliefs, not views founded upon, for instance, medical or purely moral considerations. The next step in determining whether the Sherrs or Levys should prevail in their respective actions, therefore, is for the Court to undertake an inquiry into whether the grounds which these plaintiffs have put forth as the bases for their opposition to the inoculation of their children are indeed “religious” in nature.

Defining “religion” for legal purposes is an inherently tricky proposition. For one, the very attempt brings the government exceedingly close to the involvement with ecclesiastical matters against which the First Amendment carefully guards. Additionally, the tremendous diversity of the manners in which human beings may perceive of the universe and their place in it may make the task virtually impossible. Scholars have been deeply perplexed by the problems engendered by the necessity of delineating what constitutes the “religion” which the First Amendment protects, *see, e.g.,* Choper, *Defining “Religion” in the First Amendment*, 1982 U.Ill.L.Rev. 579; Note, *Toward a Constitutional Definition of Religion*, 91 Harv.L.Rev. 1056 (1978), and courts have struggled to formulate workable definitions. The Supreme Court, for example, has held that a religion need not necessarily be founded upon a belief in the fundamental premise of a “God” as commonly understood in Western theology, *Torcaso v. Watkins*, 367 U.S. 488, 81 S.Ct. 1680, 6 L.Ed.2d 982 (1961), and has written that “the test of belief ‘in a relation to a Supreme Being’ is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God.” *United States v. Seeger*, 380 U.S. 163, 165–66, 85 S.Ct. 850, 854, 13 L.Ed.2d 733 (1965). The Supreme Court and Second Circuit have each declared religion to involve the “ultimate concerns” of individuals, *see id.*, 380 U.S. at 187, 85 S.Ct. at 865; *International Society for Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430, 440–41 (2d Cir.1981), and the Second Circuit has stated that one touchstone of a religion is present where a believer will categorically disregard elementary self-interest rather than transgressing religious tenets, *United States v. Allen*, 760 F.2d 447, 450 (2d Cir.1985) (*citing Barber*, 650 F.2d at 440, and *United States v. Kauten*, 133 F.2d 703, 708 (2d Cir.1943)). *See also, e.g., Africa v. Commonwealth of Pennsylvania*, 662 F.2d 1025 (3d Cir.1981), *cert. denied*, 456 U.S. 908, 102 S.Ct. 1756, 72 L.Ed.2d 165 (1982); *Stevens v. Berger*, 428 F.Supp. 896 (E.D.N.Y.1977).

Whatever definition of religion courts should use in adjudicating controversies calling into question governmental actions in the name of liberty of religious belief and practice, there can be little doubt that the beliefs that plaintiffs have espoused in their pleadings, affidavits, and courtroom testimony qualify as “religious”. Paragraph 12 of the Sherrs’ complaint sets forth the Sherr family’s beliefs in a nutshell:

[A]ll persons must live in harmony with the mutual world and its order and must not interfere with the natural order. All things are part of one intimate universe, or whole; there is a definite order to the universe. This universe includes everything good being called God. Health is the unhindered expression of life (God) moving through the body, mind and heart. Therefore, anything that hinders life’s expression is contrary to [the Sherrs’] religious belief. Immunization hinders life (God) and thus is contrary to *93 God. To deviate (immunize) from this natural order would be to sin.

Alan Paul Sherr further expanded on the family’s beliefs in the affidavit he filed with the Court and during the course of his testimony, stating on the stand, for instance, that “I see God as being pervasive everywhere, and God defined, in form, you might say, as life. And I see myself as God in expression or life in expression. So you might say that as a human being I am life in expression,” and that “[a]nything that is ‘contrary’ to the expression of life, hinders one’s health. Immunization in my eyes, in the framework of my religious beliefs and in my wife’s, I might add, interferes with the health of the organism....” (Record at 20, 23–24).

Paragraph 14 of the Levy’s complaint reads:

Plaintiffs’ sincere religio[us] are as follows: The Universe and all things in it are the manifestation of Divine Consciousness or God. God is spirit and all God’s creation is spirit manifesting in infinite variety and form including the physical or material form. Spirit is infinite and indestructible; God is loving and in perfect harmony. Creation is a reflection of that Love and Harmony. Plaintiffs believe that as spiritual beings manifesting physical form in God’s perfect creation,

they are also reflections of that Love and Harmony.

All of Creation is interconnected. Plaintiffs cannot separate themselves from God and the rest of Creation because of the Cosmic Law of Oneness. It is when Plaintiffs believe they are somehow separate from the rest of Creation that disharmony and therefore disease results. This disharmony can cause apparent disturbances in the mental, emotional or physical aspect of the incarnate being, but since it is not caused at the physical level, they believe that to treat it on that level is not really dealing with the problem at its source. Vaccinations, and other forms of medical intervention do not take into account the spiritual nature of disease, and therefore they are a violation of God’s natural and spiritual laws. This is abhor[r]ant to Plaintiffs, as they have made an effort over the years to live in accordance with God’s Universal laws as they understand them and integrate them into their daily lives.

Louis Levy’s affidavit reiterates the family’s beliefs and during his testimony Levy stated, among other things, that, “to us [Louis and Valerie Levy] religion is not part and parcel, religion is not a temple, religion is not something that is outside of ourselves, something that we live and it’s inside of ourselves. It’s something that we feel the world in such a way that is interconnected; that we can’t separate our concept of God with what is inside of us and around us,” and that “[w]e take the same concept about religion into the field of health.... We feel that any introduction into that process of a foreign element outside the normal processes of the body, is going to [a]ffect the body adversely and, therefore, we feel it is a violation in a sense of our nature, physical, spiritual religious nature.” (Record at 56, 59, 60–61).

The beliefs to which the Sherrs and Levys expressed their adherence, which Professor Ramsey categorized in his testimony as “pantheistic,”⁶ surely can be classified as religious for purposes of the Court’s adjudication of plaintiffs’ cases. Plaintiffs’ various descriptions of their beliefs are replete with reference to “God” and reveal that these beliefs are rooted in matters of “ultimate concern” to the Sherrs and Levys, and plaintiffs’ very refusal to have their children immunized and ensuing legal battle with the school district and state defendants manifests a dedication to their principles that may seem to an outsider to fly in the face of the best interests of Alan Paul and Claudia Sherr and Louis and Valerie Levy and their children. The Court therefore finds that the beliefs which each set of plaintiffs has put forth as the basis *94 for their claim of entitlement to the exemption from vaccination § 2164(9) makes available should rightfully be classified as “religious” for purposes of this litigation.

VII. SINCERITY OF PLAINTIFFS' BELIEFS

In order for plaintiffs to be afforded the exemption from immunization that they seek, it is not sufficient merely that the beliefs that they assert as grounds for exemption be religious in nature. It must also be demonstrated that the espoused beliefs are sincerely held and that the stated beliefs, even if accurately reflecting plaintiffs' ultimate conclusions about the advisability of inoculation of their children, do in fact stem from religious convictions and have not merely been framed in terms of religious belief so as to gain the legal remedy desired.⁷

Attempts to ascertain the sincerity of claims of religious belief must be undertaken with extreme caution. The Second Circuit observed in *Barber*:

Sincerity analysis seeks to determine the subjective good faith of an adherent.... The goal, of course, is to protect only those beliefs which are held as a matter of conscience. Human nature being what it is, however, it is frequently difficult to separate this inquiry from a forbidden one involving the verity of the underlying belief.

650 F.2d at 441. Any form of governmental investigation into the "objective truth" of a person's religious beliefs, be it in a judicial form or otherwise, in essence puts the individual on trial for heresy. *See United States v. Ballard*, 322 U.S. 78, 64 S.Ct. 882, 88 L.Ed. 1148 (1944). As the Supreme Court emphasized in *Seeger*, however:

While the "truth" of a belief is not open to question, there remains the significant question whether it is "truly held." This is the threshold question of sincerity which must be resolved in every case. It is, of course, a question of fact....

380 U.S. at 185, 85 S.Ct. at 863. *See also, e.g., Africa*, 662 F.2d 1025; *Stevens*, 428 F.Supp. 896; *Riga, Religious*,

Sincerity, and Free Exercise, 25 Catholic Lawyer 246 (1980).

In the papers the Sherrs have filed with the Court and in Alan Paul Sherr's testimony on his family's behalf, the Sherrs have couched their opposition to vaccination of their son Jared in the language of religion. Upon careful consideration of all the evidence put forward in this litigation concerning the Sherr family, their asserted beliefs, and the actions they have taken over the last several years with regard to their desire to avoid inoculation of their children, however, the Court finds that, although the Sherrs are clearly genuinely opposed to immunization, the heart of their opposition does not in fact lie in theological considerations. The Court is of the opinion, in other words, that although the Sherrs' voiced resistance to vaccination is no doubt sincere, their claims of a sincerely religious basis for their objections to inoculation are not credible.

The evidence presented reveals that when Alan Paul and Claudia Sherr registered their elder son Scott Daniel Sherr for kindergarten in the Northport-East Northport school system in February 1985, they produced an affidavit requesting that Scott be exempted from § 2164's immunization requirements because the Sherrs were members of "The American Natural Hygiene Society, Inc." a "national non-profit, tax-exempt, health-education organization." The affidavit stated that the society "rejects the theory and use of compulsory inoculations under any circumstances, as a matter of science, safety, and conscience," and that members of the society "are opposed to inoculations as violating the natural laws of life and health by introducing *95 pathological toxins into a healthy, human body." Nowhere in the document is there any mention of a religious foundation for the beliefs of the society's members. The school district rejected the Sherrs' claim for an exemption, and Scott entered school after receiving the requisite vaccinations.

In February 1987, plaintiffs registered Jared for kindergarten and submitted documents signed by one Gustave Dubbs, minister of "The Missionary Temple at Large, Universal Religious Brotherhood, Inc." in Sarasota, Florida, indicating that the Sherrs were members of this group and that the temple adheres to, among other things, belief in spiritual healings and opposes compulsory immunization. Investigation by the school district uncovered that the local Sarasota schools were not familiar with the temple, that it had no formal organization or structure, conducted no religious services, and operated out of Dubbs's home. The "temple," in other words, was nothing more than a "mail order church." The school district therefore rejected the Sherrs' request that Jared be granted an exemption from inoculation.

In July 1987, the Sherrs sent a letter to Dr. Brosnan informing him that they had retained counsel, stating that they believed they were entitled to an exemption under § 2164(9), and setting forth in a series of numbered paragraphs their asserted religious beliefs.⁸ The letter made no mention of either The American Natural Hygiene Society or Gustave Dubbs's temple in Florida, and the beliefs the Sherrs claimed in the letter to be their own bore a striking resemblance to those which the plaintiffs in *Allanson* had asserted in their successful suit in front of Judge Miner.⁹ The Sherrs *96 then filed their action against the school district and state defendants, again modifying their description of their supposed beliefs. *See supra* pp. 92–93 for the Sherr family's beliefs as stated in Paragraph 12 of their complaint.

Alan Paul Sherr's testimony also highlights the dubious sincerity of plaintiffs' purported religious basis for their wish that Jared not be vaccinated. Sherr admitted that he had joined Gustave Dubbs's group solely for the purpose of attempting to gain an exemption for Scott and was not even clear as to the temple's name. Sherr also conceded that he had "paraphrased" the statement of the Allansons' beliefs in Judge Miner's opinion. Additionally, in response to the Court's questioning, Sherr testified that, although he opposed any "intrusion" into the body on religious grounds, he had had Jared X-rayed when it was believed that the boy had broken his leg, allowed dentists to remove decay from cavities his children might have, and had his children circumcised. Furthermore, Alan Paul Sherr is a chiropractor, and during the course of his testimony it became clear that his opposition to vaccinations and attitudes toward sickness and health in all likelihood derive for the most part from his medical and philosophical perspective as a chiropractor and chiropractic ethics, not from any religiously inspired source. The Court's conclusion, moreover, is buttressed by its observance of Alan Paul Sherr's demeanor and attitude on the stand.

Since the Court finds that the Sherrs do not sincerely hold the religious beliefs they put forth as the foundation for their assertion of entitlement to an exemption from immunization under § 2164(9), these plaintiffs' claim for relief from the refusal of the exemption they seek must be denied.

The Levys, on the other hand, do manifest a complete sincerity about the religious beliefs they embrace. Louis Levy, for instance, testified that he has studied and done a good deal of reading on religion since his teens and has for many years been very involved in religious and spiritual study and activity. The Levys' conception of human existence and the physical world seems to pervade their

whole way of life, including their eating habits and methods of combatting illness, and Louis Levy stated that his family's religious precepts concerning vaccinations are in adherence with those of the Christian Science Church. Although the Levys, like the Sherrs, joined a religious organization in an attempt to gain an exemption under § 2164(9), namely "The Church of Human Life Science," that organization does not appear to be a sham like Gustave Dubbs's "temple" in Florida, but an actual group whose views are very much in line with that which the Levys *97 hold. It is a fundamental tenet of the group, for instance, that "the integrity of the body be maintained" since "our bodies are the temple of our being." The church, therefore, "reject[s] completely any manner of cutting, puncturing, pollution, intravenous injection of any substance, vaccination, inoculation or any other imposition upon the vital domain" and holds that "all drugs and vaccines are ethically, morally, religiously, mentally and physically wrong, being at variance with our Creator's Mandate." Louis Levy, moreover, greatly impressed the Court with the seriousness with which he has contemplated the foundations of his religious beliefs and their implications for his family's daily life, and with the thoughtfulness with which he considered the theological ramifications of the questions posed to him.

Accordingly, the Court finds that the Levy family holds sincere religious beliefs which would be violated by the mandatory vaccination of Sandra Jasmine Levy as a condition of attending school. The Levys, therefore, are entitled to a religious exemption from inoculation under § 2164(9).

VIII. SCOPE OF INJUNCTIVE RELIEF

The Court has found that one of the sets of plaintiffs in these consolidated cases is entitled to a religiously-based exemption to vaccination of their child under § 2164(9). The Court will now turn to the proper form and scope of the relief it should order in this litigation.

The Court has ruled that the denial to the Levys of a religiously-based exemption from the otherwise compulsory vaccination of Sandra Jasmine Levy violates the family's constitutional rights. Section 2164(9)'s restriction of the availability of such an exemption to "bona fide members of a recognized religious organization" is at odds with the command of the establishment clause and inhibits the free exercise of the Levys' rights to live their lives in accordance with their sincerely held religious

principles. The Court, therefore, holds that the Levys are entitled to the religious exemption from immunization that they seek.

The Court is of the opinion, however, that an order merely granting these individual plaintiffs relief with respect to themselves would be insufficient. In their pleadings, the Levys ask the Court not only that it find them to fall within the scope of § 2164(9)'s exemption, but also that it declare § 2164(9)'s limiting language to be unconstitutional. As the Court has discussed above, *supra* § V, it is in full agreement with plaintiffs' contention that the clause of § 2164(9) at issue in this litigation is blatantly unconstitutional. The Levys' situation is far from unique. The school district defendants have pointed out that schools are regularly confronted with claims of religious exemptions by families who may not actually be members of recognized organized religious groups that oppose vaccination on doctrinal grounds, and the New York State Commissioner of Education has taken the firm position that school districts are to apply § 2164(9) in literal conformance with its restrictive language, *see, e.g., Matter of Van Druff*, 21 Educ.Dept.Rep. 635; *Matter of Curtin*, 20 Educ.Dept.Rep. 473; *Matter of Maier*, 12 Educ.Dept.Rep. 56. The regulations promulgated by the New York State Commissioner of Health, furthermore, recognize as a legitimate basis for a religiously-based exemption from inoculation only "a written and signed statement from the person in parental relation to the child that such person is a bona fide member of a specified recognized religious organization whose teachings are contrary to immunization." The relevant regulation continues, "The principal or person in charge of the school may require supporting documents from the religious organization specified." 10 N.Y.C.R.R. § 66.3(d). Section 2164(9) as presently written, construed, and applied, therefore, creates ongoing problems of constitutional magnitude for individuals throughout New York who maintain religiously grounded opposition to vaccination but do not belong to a religious organization recognized by the state.

***98** The Supreme Court has consistently endorsed the taking of broad judicial steps to rectify the restraints on individual liberties that laws infringing upon First Amendment freedoms impose. Where separate, lengthy adjudications in the context of a multitude of specific factual circumstances may well be the price of a federal court's refusal completely to eradicate patently unconstitutional state or local governmental action by abstaining or restricting its remedy so as to address solely the particular facts before it, the Supreme Court has found the price too high. The Court, for instance, struck down an overly vague loyalty oath where the Court found it "fictional to believe that anything less than extensive

adjudications, under the impact of a variety of factual situations, would bring the oath within the bounds of permissible constitutional certainty." *Baggett*, 377 U.S. at 378, 84 S.Ct. at 1326. More recently, just last term the Court unanimously held facially unconstitutional a resolution banning "all First Amendment activities" within the central terminal area of Los Angeles International Airport, stating, "[I]t is difficult to imagine that the resolution could be limited by anything less than a series of adjudications, and the chilling effect of the resolution on protected speech in the meantime would make such a case-by-case adjudication intolerable." *Board of Airport Commissioners of the City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, —, 107 S.Ct. 2568, 2572, 96 L.Ed.2d 500 (1987).

Section 2164(9)'s limiting clause has been on the books for over twenty years. Despite several state court opinions attempting to apply subsection 9's religious exemption in a manner that would alleviate its unconstitutionality, the state has steadfastly refused to modify either the language of § 2164(9) or its interpretation of the provision. All the while, there has remained in effect a statutory scheme that violates the establishment clause by inhibiting the practice of certain individuals' religion and entangling government with religion by mandating official governmental recognition of certain religious denominations and impedes the free exercise of religion by individuals who oppose inoculations on religious grounds but do not belong to any "state approved" religious group. This cannot be allowed to continue.

The Court, therefore, hereby enjoins each of the defendants from unconstitutionally applying the religious exemption from vaccination that § 2164(9) creates so as to make the exemption available only to "bona fide members of a recognized religious organization." Defendants' restriction of the exception in such a manner violates both religion clauses of the First Amendment. The United States Constitution mandates that, if New York wishes to allow a religiously-based exclusion from its otherwise compulsory program of immunization of school children, it may not limit this exception from the program to members of specific religious groups, but must offer the exemption to all persons who sincerely hold religious beliefs that prohibit the inoculation of their children by the state.

IX. DAMAGES

One final matter need be addressed. In their complaint, the

Levys state that they seek, in addition to a declaration of their entitlement to a religious exemption under § 2164(9) and the unconstitutionality of restricting § 2164(9)'s exemption to "bona fide members of a recognized religious organization," an award of four million dollars as damages, together with the costs and disbursements of their action and attorneys fees pursuant to 42 U.S.C. § 1988. The proceedings held before the Court and the papers the parties have submitted have focused entirely on plaintiffs' claims for non-monetary relief and the legal issues surrounding that aspect of the litigation. The Court, therefore, does not deem it appropriate that it attempt to rule upon plaintiffs' request for monetary compensation at this time. Plaintiffs shall notify the Court as to whether they wish to pursue their damages, costs, and fees claims by no later than Friday, November 6, 1987. The Court will then, if necessary, establish a *99 timetable for any discovery, hearings, and filing of papers that may be required.¹⁰

X. SUMMARY

For the reasons set forth throughout this opinion, the Court hereby holds that:

1. The Court should not abstain from assuming jurisdiction over the Sherrs and Levys' actions.
2. The Sherrs and Levys have standing to pursue their respective actions.
3. Section 2164(9)'s limitation of the availability of a religiously-based exemption from immunization to "bona fide members of a recognized religious organization" whose doctrines oppose such vaccinations violates both the establishment and free exercise clauses of the First Amendment to the United States Constitution.
4. The respective beliefs espoused by the Sherrs and Levys as the bases of their claims of entitlement to

religiously-based exemptions from immunization under § 2164(9) must both be classified as "religious" in nature for purposes of this litigation.

5. Although the Sherrs genuinely oppose vaccination of Jared Ryan Sherr, they do not sincerely hold the religious beliefs that they put forth as the basis for their claim of entitlement to a religious exemption from immunization under § 2164. The Sherrs, therefore, are not entitled to the religious exemption that they seek, and their complaint must be dismissed.

6. The Levys do sincerely hold the religious beliefs that they put forth as the basis for their claim of entitlement to a religious exemption from immunization under § 2164(9). The Levys, therefore, are entitled to the religious exemption from immunization that they seek. Defendants may not require that Sandra Jasmine Levy be vaccinated as a condition of attending school.

7. Defendants are enjoined from unconstitutionally applying the religious exemption that § 2164(9) creates so as to make the exemption available only to "bona fide members of a recognized religious organization," but must offer the exemption to all persons who sincerely hold religious beliefs that prohibit the inoculation of their children by the state.

8. The Court need not rule at this time upon the Levys' request for monetary compensation. Plaintiffs shall notify the Court as to whether they wish to pursue their damages, costs, and attorneys fees claims by no later than Friday, November 6, 1987.

The Clerk of the Court is to enter judgment accordingly.

SO ORDERED.

All Citations

672 F.Supp. 81, 56 USLW 2260, 42 Ed. Law Rep. 1103

Footnotes

- 1 The protections of the First Amendment apply not only to actions taken by the federal government, but by those taken by states and local entities and officials as well. *Torcaso v. Watkins*, 367 U.S. 488, 81 S.Ct. 1680, 6 L.Ed.2d 982 (1961); *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940).
- 2 The Levy action named as defendants the same parties as did the Sherr's case, except that it designated Clifford Bishop, the principal of the Norwood Avenue Elementary School, as a defendant rather than Dickinson Avenue Elementary School principal John Scurti.
- 3 *Matter of Maier* is the administrative appeal to the Commissioner that followed the Maier family's action in federal court and preceded their state court action.

4 In *Edwards*, 482 U.S. at — n. 4, 107 S.Ct. at 2577 n. 4, one of the Supreme Court's establishment clause decisions this past term, Justice Brennan stated for the Court:

The Lemon test has been applied in all cases since its adoption in 1971, except in *Marsh v. Chambers*, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983), where the Court held that the Nebraska legislature's practice of opening a session with a prayer by a chaplain paid by the State did not violate the Establishment Clause. The Court based its conclusion in that case on the historical acceptance of the practice. Such a historical approach is not useful in determining the proper roles of church and state in public schools, since free public education was virtually nonexistent at the time the Constitution was adopted (citation omitted).

State mandated inoculations against disease were similarly not in existence when the First Amendment was drafted.

5 Given the Court's holding that the restriction of the religious exemption § 2164(9) provides to "bona fide members of a recognized religious organization" violates the establishment and free exercise clauses of the First Amendment, the Court need not address plaintiffs' challenges to the limitation under the equal protection clause of the Fourteenth Amendment.

6 Webster's Third New International Dictionary defines "pantheism," in the sense Professor Ramsey is using the term, as "a doctrine that the universe conceived of as a whole is God: the doctrine that there is no God but the combined forces and laws that are manifested in the existing universe."

7 The school district defendants have challenged the sincerity of plaintiffs' assertions of religious beliefs that prohibit the vaccination of their children. Although counsel for the state defendants participated in cross-examination of Alan Paul Sherr and Louis Levy concerning the beliefs they and their families purportedly hold, the state defendants declare in the papers they filed subsequent to the taking of plaintiffs' testimony that they do not now question the sincerity of plaintiffs' avowed adherence to their respective systems of belief.

8 The Sherrs' letter reads, in relevant part:

Our religious beliefs are as follows:

1. To live in harmony with the natural world and its order, and not sep [e]rate from our daily lives.
2. We are inclined to live in a way that will promote love and harmony among all people, animals, plants and the natural world.
3. We are opposed to anything that interferes with this natural order.
4. We are not dogmatic or rigid in our actions or thinking[;] flexibility and constant change are necessary to life itself.
5. We respect people[']s desires to live a long time, to avoid pain and to seek happiness according to their unique needs and desires.
6. We believe that all things are part of one intimate universe or whole. This universe includes everything good being called GOD.
7. We believe in a definite order to the universe, and that everything follows and is a result of this order.
8. We believe that life is not characterized by disease. Another word for life is God and one characteristic of God is health.
9. We believe that life is the end result[] of the truth of love and life therefore has inherent to it design and control.
10. We believe that health is the unhindered expression of life moving through the body, mind and heart. Therefore anything that hinders life's expression is contrary to our beliefs. Immunization, therefore, hinders life and thus is contrary to God.
11. We believe that when the identity is focused on disease, disease is what manifests[;] when it is focused on life, life is what manifests. All medications and pharmaceuticals are defensive, indicating a focus on disease; life is offensive, therefore medications are not required. Life begets life and health begets health. This is God's way[;] to deviate could be sinning. Immunization, therefore, focuses on disease and is contrary to God's way and is therefore sin.
12. We believe thou shall love the lord thy God, ... not thou shalt love disease ... the stance is one of life, not disease or in religious terms the devil.
13. We believe there is one God, one whole. The whole is greater than the sum of its parts not the sum of the parts equal[s] the whole.

9 Judge Miner sets forth Robert and Kathryn Allanson's beliefs at some length in his decision in their case:

As described by plaintiffs in papers earlier submitted to the Court, [plaintiffs'] "beliefs" consist of the following:

"All persons and phenomenon are following a grand natural order, which should not be interfered with. All things are interconnected and operate harmoniously. Man's existence on earth is best served by not disturbing this natural order. Immunization is abhorrent to these beliefs, and plaintiffs vehemently oppose such practices as they are contrary to plaintiffs' beliefs.

"These beliefs and faith in this grand natural order is something to which all is virtually dependent on or subordinate to, and occupies a paramount position in plaintiffs' daily lives, much the same as traditional notions of religion occupied in the lives of its believers."

Affidavit of Robert Allanson, Paragraphs 15 and 16.

Plaintiffs have amplified this description in the following manner:

Our religious beliefs require us to want to live in harmony with the natural world and its order. Our religion is not separate from our daily lives. We are inclined to live in a way that will promote love and harmony among all people, animals, plants and the natural world. We are inclined to avoid, and if necessary, to oppose anything that interferes with this natural order.

However, we try not to be dogmatic or rigid in our actions or thinking—flexibility and constant change are necessary for life itself. We respect people’s desires to live a long time, to avoid pain and to seek happiness according to their unique needs and desires.

We believe that all things are part of one intimate universe, or whole. This universe that includes everything good being called God, although we usually do not use this word because many people think of God as an individual consciousness, much like their own. This Oneness or God is understood in many religions to be the ultimate origin and Creator of everything.

We believe that there is a definite order in the Universe, and that everything follows and is a result of this order, even if we often do not clearly see or understand it.

We believe that in accordance with the universal or natural order, human beings evolved within and are still very much a part of the natural order and what is called “The Natural World.” It has been persuasively demonstrated by a modern science that human beings are one species of animal among many, and that we share with other animals certain limitations. These limitations involve the need for certain definite environmental and dietary conditions in order to be healthy and continue to live. For example, human beings need certain amounts of sunlight, oxygen, and various nutrients which are unique to our species.

When human beings are without the conditions under which their fundamental heartiness and health develop, and/or are exposed to artificial or unusual conditions or substances, there is the probability of weakening stress and the possibility of bodily damage.

Allanson, No. CV 84–174, slip op. at 8–11.

- ¹⁰ The Court assumes that the parties are familiar with the Supreme Court’s decision in *Memphis Community School District v. Stachura*, 477 U.S. 299, 106 S.Ct. 2537, 91 L.Ed.2d 249 (1986), and have considered any possible relevance to this litigation of the Supreme Court’s holding in that case regarding the availability of damages based on the abstract value or importance of constitutional rights.

89 S.Ct. 1243
Supreme Court of the United States

Robert Eli STANLEY, Appellant,
v.
State of GEORGIA.

No. 293.

Argued Jan. 14 and 15, 1969.

Decided April 7, 1969.

Synopsis

Defendant was convicted in the Superior Court, Fulton County, Georgia, of possessing obscene matter and he appealed. The Supreme Court of Georgia, 224 Ga. 259, 161 S.E.2d 309, affirmed. On appeal, the Supreme Court, Mr. Justice Marshall, held that First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime.

Reversed and remanded with directions.

Attorneys and Law Firms

****1244 *558** Wesley R. Asinof, Atlanta, Ga., for appellant.

J. Robert Sparks, Atlanta, Ga., for appellee.

Opinion

Mr. Justice MARSHALL delivered the opinion of the Court.

An investigation of appellant's alleged bookmaking activities led to the issuance of a search warrant for appellant's home. Under authority of this warrant, federal and state agents secured entrance. They found very little evidence of bookmaking activity, but while looking through a desk drawer in an upstairs bedroom, one of the federal agents, accompanied by a state officer, found three reels of eight-millimeter film. Using a projector and screen found in an upstairs living room, they viewed the films. The state officer concluded that they were obscene and seized them. Since a further examination of the bedroom indicated that appellant occupied it, he was charged with possession of obscene matter and placed under arrest. He

was later indicted for 'knowingly hav(ing) possession of * * * obscene matter' in violation of Georgia law.¹ Appellant ***559** was tried before a jury and convicted. The Supreme Court of Georgia affirmed. *Stanley v. State*, 224 Ga. 259, 161 S.E.2d 309 (1968). We noted probable jurisdiction of an appeal brought under 28 U.S.C. s 1257(2), 393 U.S. 819, 89 S.Ct. 124, 21 L.Ed.2d 90 (1968).

Appellant raises several challenges to the validity of his conviction.² We find it necessary to consider only one. ****1245** Appellant argues here, and argued below, that the Georgia obscenity statute, insofar as it punishes mere private possession of obscene matter, violates the First Amendment, as made applicable to the States by the Fourteenth Amendment. For reasons set forth below, we agree that the mere private possession of obscene matter cannot constitutionally be made a crime.

The court below saw no valid constitutional objection to the Georgia statute, even though it extends further than the typical statute forbidding commercial sales of obscene material. It held that '(i)t is not essential to an indictment charging one with possession of obscene matter that it be alleged that such possession was 'with intent to sell, expose or circulate the same. "'' Stanley v. State, supra, 224 Ga., at 261, 161 S.E.2d, at 311. The State and appellant both agree that the question here before us is whether 'a statute imposing criminal sanctions upon the mere (knowing) possession of obscene matter' is constitutional. In this context, Georgia concedes that the present case appears to be one of 'first ***560** impression * * * on this exact point,'³ but contends that since 'obscenity is not within the area of constitutionally protected speech or press,' *Roth v. United States*, 354 U.S. 476, 485, 77 S.Ct. 1304, 1309, 1 L.Ed.2d 1498 (1957), the States are free, subject to the limits of other provisions of the Constitution, see, e.g., *Ginsberg v. New York*, 390 U.S. 629, 637—645, 88 S.Ct. 1274, 1279—1283, 20 L.Ed.2d 195 (1968), to deal with it any way deemed necessary, just as they may deal with possession of other things thought to be detrimental to the welfare of their citizens. If the State can protect the body of a citizen, may it not, argues Georgia, protect his mind? It is true that Roth does declare, seemingly without qualification, that obscenity is not protected by the First Amendment. That statement has been repeated in various forms in subsequent cases. See, e.g., *Smith v. California*, 361 U.S. 147, 152, 80 S.Ct. 215, 218, 4 L.Ed.2d 205 (1959); *Jacobellis v. Ohio*, 378 U.S. 184, 186—187, 84 S.Ct. 1676, 1677—1678, 12 L.Ed.2d 793 (1964) (opinion of Brennan, J.); *Ginsberg v. New York*, supra, 390 U.S., at 635, 88 S.Ct., at 1278. However, neither Roth nor any subsequent decision of this Court dealt with the precise problem involved in the present case. Roth was convicted of mailing

obscene circulars and advertising, and an obscene book, in violation of a federal obscenity statute.⁴ The defendant in a companion case, *Alberts v. California*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957), was convicted of ‘lewdly keeping for sale obscene and indecent books, and (of) writing, composing and publishing an obscene advertisement of them * * *.’ *Id.*, at 481, 77 S.Ct., at 1307. None of the statements cited by the Court in *561 *Roth* for the proposition that ‘this Court has always assumed that obscenity is not protected by the freedoms of speech and press’ were made in the context of a statute punishing mere private possession of obscene material; the cases cited deal for the most part with use of the mails to distribute objectionable material or with some form of public distribution or dissemination.⁵ Moreover, none of this **1246 Court’s decisions subsequent to *Roth* involved prosecution for private possession of obscene materials. Those cases dealt with the power of the State and Federal Governments to prohibit or regulate certain public actions taken or intended to be taken with respect to obscene matter.⁶ Indeed, with one *562 exception, we have been unable to discover any case in which the issue in the present case has been fully considered.⁷

*563 In this context, we do not believe that this case can be decided simply by citing *Roth*. *Roth* and its progeny certainly do mean that the First and Fourteenth Amendments recognize a valid **1247 governmental interest in dealing with the problem of obscenity. But the assertion of that interest cannot, in every context, be insulated from all constitutional protections. Neither *Roth* nor any other decision of this Court reaches that far. As the Court said in *Roth* itself, ‘(c)easeless vigilance is the watchword to prevent * * * erosion (of First Amendment rights) by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests.’ 354 U.S., at 488, 77 S.Ct., at 1311. *Roth* and the cases following it discerned such an ‘important interest’ in the regulation of commercial distribution of *564 obscene material. That holding cannot foreclose an examination of the constitutional implications of a statute forbidding mere private possession of such material.

It is now well established that the Constitution protects the right to receive information and ideas. ‘This freedom (of speech and press) * * * necessarily protects the right to receive * * *.’ *Martin v. City of Struthers*, 319 U.S. 141, 143, 63 S.Ct. 862, 863, 87 L.Ed. 1313 (1943); see *Griswold v. Connecticut*, 381 U.S. 479, 482, 85 S.Ct. 1678, 1680, 14 L.Ed.2d 510 (1965); *Lamont v. Postmaster General*, 381 U.S. 301, 307—308, 85 S.Ct. 1493, 1496—1497, 14 L.Ed.2d 398 (1965) (Brennan, J., concurring); cf. *Pierce v.*

Society of the Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925). This right to receive information and ideas, regardless of their social worth, see *Winters v. New York*, 333 U.S. 507, 510, 68 S.Ct. 665, 667, 92 L.Ed. 840 (1948), is fundamental to our free society. Moreover, in the context of this case—a prosecution for mere possession of printed or filmed matter in the privacy of a person’s own home—that right takes on an added dimension. For also fundamental is the right to be free, except in very limited **1248 circumstances, from unwanted governmental intrusions into one’s privacy.

‘The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man’s spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man.’ *Olmstead v. United States*, 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting).

See *Griswold v. Connecticut*, *supra*; cf. *NAACP v. Alabama*, 357 U.S. 449, 462, 78 S.Ct. 1163, 1171, 2 L.Ed.2d 1488 (1958).

*565 These are the rights that appellant is asserting in the case before us. He is asserting the right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home. He is asserting the right to be free from state inquiry into the contents of his library. Georgia contends that appellant does not have these rights, that there are certain types of materials that the individual may not read or even possess. Georgia justifies this assertion by arguing that the films in the present case are obscene. But we think that mere categorization of these films as ‘obscene’ is insufficient justification for such a drastic invasion of personal liberties guaranteed by the First and Fourteenth Amendments. Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one’s own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men’s minds.

And yet, in the face of these traditional notions of individual liberty, Georgia asserts the right to protect the individual’s mind from the effects of obscenity. We are not certain that this argument amounts to anything more than

the assertion that the State has the right to control the moral content of a person's thoughts.⁸ To *566 some, this may be a noble purpose, but it is wholly inconsistent with the philosophy of the First Amendment. As the Court said in *Kingsley International Pictures Corp. v. Regents*, 360 U.S. 684, 688—689, 79 S.Ct. 1362, 1365, 3 L.Ed.2d 1512 (1959), '(t)his argument misconceives what it is that the Constitution protects. Its guarantee is not confined to the expression of ideas that are conventional or shared by a majority. * * * And in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing.' Cf. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098 (1952). Nor is it relevant that obscene materials in general, or the particular films before the Court, are arguably devoid of any ideological content. The line between the transmission **1249 of ideas and mere entertainment is much too elusive for this Court to draw, if indeed such a line can be drawn at all. See *Winters v. New York*, supra, 333 U.S., at 510, 68 S.Ct., at 667. Whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts.

Perhaps recognizing this, Georgia asserts that exposure to obscene materials may lead to deviant sexual behavior or crimes of sexual violence. There appears to be little empirical basis for that assertion.⁹ But more important, if the State is only concerned about printed or filmed materials inducing antisocial conduct, we believe that in the context of private consumption of ideas and information we should adhere to the view that '(a)mong free men, the deterrents ordinarily to be *567 applied to prevent crime are education and punishment for violations of the law * * *.' *Whitney v. California*, 274 U.S. 357, 378, 47 S.Ct. 641, 649, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring). See Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L.J. 877, 938 (1963). Given the present state of knowledge, the State may no more prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits.

It is true that in *Roth* this Court rejected the necessity of proving that exposure to obscene material would create a clear and present danger of antisocial conduct or would probably induce its recipients to such conduct. 354 U.S., at 486—487, 77 S.Ct., at 1309—1310. But that case dealt with public distribution of obscene materials and such distribution is subject to different objections. For example, there is always the danger that obscene material might fall into the hands of children, see *Ginsberg v. New York*, supra, or that it might intrude upon the sensibilities or privacy of

the general public.¹⁰ See *Redrup v. New York*, 386 U.S. 767, 769, 87 S.Ct. 1414, 1415, 18 L.Ed.2d 515 (1967). No such dangers are present in this case.

Finally, we are faced with the argument that prohibition of possession of obscene materials is a necessary incident to statutory schemes prohibiting distribution. That argument is based on alleged difficulties of proving an intent to distribute or in producing evidence of actual distribution. We are not convinced that such difficulties *568 exist, but even if they did we do not think that they would justify infringement of the individual's right to read or observe what he pleases. Because that right is so fundamental to our scheme of individual liberty, its restriction may not be justified by the need to ease the administration of otherwise valid criminal laws. See *Smith v. California*, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959).

We hold that the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime.¹¹ *Roth* and the cases **1250 following that decision are not impaired by today's holding. As we have said, the States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home. Accordingly, the judgment of the court below is reversed and the case is remanded for proceedings not inconsistent with this opinion.

It is so ordered.

Judgment reversed and case remanded.

Mr. Justice BLACK, concurring.

I agree with the Court that the mere possession of reading matter or movie films, whether labeled obscene or not, cannot be made a crime by a State without violating *569 the First Amendment, made applicable to the States by the Fourteenth. My reasons for this belief have been set out in many of my prior opinions, as for example, *Smith v. California*, 361 U.S. 147, 155, 80 S.Ct. 215, 219, 4 L.Ed.2d 205 (concurring opinion), and *Ginzburg v. United States*, 383 U.S. 463, 476, 86 S.Ct. 942, 950, 16 L.Ed.2d 31 (dissenting opinion).

Mr. Justice STEWART, with whom Mr. Justice BRENNAN and Mr. Justice WHITE join, concurring in the result.

Before the commencement of the trial in this case, the appellant filed a motion to suppress the films as evidence upon the ground that they had been seized in violation of the Fourth and Fourteenth Amendments. The motion was denied, and the films were admitted in evidence at the trial. In affirming the appellant's conviction, the Georgia Supreme Court specifically determined that the films had been lawfully seized. The appellant correctly contends that this determination was clearly wrong under established principles of constitutional law. But the Court today disregards this preliminary issue in its hurry to move on to newer constitutional frontiers. I cannot so readily overlook the serious inroads upon Fourth Amendment guarantees countenanced in this case by the Georgia courts.

The Fourth Amendment provides that 'no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.' The purpose of these clear and precise words was to guarantee to the people of this Nation that they should forever be secure from the general searches and unrestrained seizures that had been a hated hallmark of colonial rule under the notorious writs of assistance of the British Crown. See *Stanford v. Texas*, 379 U.S. 476, 481, 85 S.Ct. 506, 509, 13 L.Ed.2d 431. This most basic of Fourth Amendment guarantees was frustrated *570 in the present case, I think, in a manner made the more pernicious by its very subtlety. For what happened here was that a search that began as perfectly lawful became the occasion for an unwarranted and unconstitutional seizure of the films.

The state and federal officers gained admission to the appellant's house under the authority of a search warrant issued by a United States Commissioner. The warrant described 'the place to be searched' with particularity.¹ With like **1251 particularity, it described the 'things to be seized'—equipment, records, and other material used in or derived from an illegal wagering business.² And the warrant was issued only after the Commissioner had been apprised of more than adequate probable cause to issue it.³

There can be no doubt, therefore, that the agents were lawfully present in the appellant's house, lawfully authorized to search for any and all of the items specified in the warrant, and lawfully empowered to seize and such *571 items they might find.⁴ It follows, therefore, that the agents were acting within the authority of the warrant when they proceeded to the appellant's upstairs bedroom and pulled open the drawers of his desk. But when they found in one of those drawers not gambling material but moving

picture films, the warrant gave them no authority to seize the films.

The controlling constitutional principle was stated in two sentences by this Court more than 40 years ago:

'The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.' *Marron v. United States*, 275 U.S. 192, 196, 48 S.Ct. 74, 76, 72 L.Ed. 231.

This is not a case where agents in the course of a lawful search came upon contraband, criminal activity, or criminal evidence⁵ in plain view. For the record makes clear that the contents of the films could not be determined by mere inspection. And this is not a case that presents any questions as to the permissible scope of a search made incident to a lawful arrest. For the appellant had not been arrested when the agents found the films. After finding them, the agents spent some 50 minutes exhibiting them by means of the appellant's projector in another upstairs room. Only then did the agents return downstairs and arrest the appellant.

Even in the much-criticized case of *United States v. Rabinowitz*, 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653, the Court emphasized that 'exploratory *572 searches * * * cannot be undertaken by officers with or without a warrant.' *Id.*, at 62, 70 S.Ct., at 434. This record presents a bald violation of that basic constitutional rule. To condone what happened here is to invite a government official to use a seemingly precise and legal warrant only as a ticket to get into a man's home, and, once inside, to launch forth upon unconfined searches and indiscriminate seizures as if armed with all the **1252 unbridled and illegal power of a general warrant.

Because the films were seized in violation of the Fourth and Fourteenth Amendments, they were inadmissible in evidence at the appellant's trial. *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081. Accordingly, the judgment of conviction must be reversed.

All Citations

394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542

Footnotes

¹ 'Any person who shall knowingly bring or cause to be brought into this State for sale or exhibition, or who shall knowingly sell or offer to sell, or who shall knowingly lend or give away or offer to lend or give away, or who shall knowingly have possession of, or

who shall knowingly exhibit or transmit to another, any obscene matter, or who shall knowingly advertise for sale by any form of notice, printed, written, or verbal, any obscene matter, or who shall knowingly manufacture, draw, duplicate or print any obscene matter with intent to sell, expose or circulate the same, shall, if such person has knowledge or reasonably should know of the obscene nature of such matter, be guilty of a felony, and, upon conviction thereof, shall be punished by confinement in the penitentiary for not less than one year nor more than five years: Provided, however, in the event the jury so recommends, such person may be punished as for a misdemeanor. As used herein, a matter is obscene if, considered as a whole, applying contemporary community standards, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex or excretion.' Ga.Code Ann. s 26—6301 (Supp.1968).

2 Appellant does not argue that the films are not obscene. For the purpose of this opinion, we assume that they are obscene under any of the tests advanced by members of this Court. See *Redrup v. New York*, 386 U.S. 767, 87 S.Ct. 1414, 18 L.Ed.2d 515 (1967).

3 The issue was before the Court in *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), but that case was decided on other grounds. Mr. Justice Stewart, although disagreeing with the majority opinion in *Mapp*, would have reversed the judgment in that case on the ground that the Ohio statute proscribing mere possession of obscene material was 'not 'consistent with the rights of free thought and expression assured against state action by the Fourteenth Amendment. '"" Id., at 672, 81 S.Ct., at 1701.

4 18 U.S.C. s 1461.

5 Ex parte Jackson, 96 U.S. 727, 736—737, 24 L.Ed. 877 (1878) (use of the mails); *United States v. Chase*, 135 U.S. 255, 261, 10 S.Ct. 756, 758, 34 L.Ed. 117 (1890) (use of the mails); *Robertson v. Baldwin*, 165 U.S. 275, 281, 17 S.Ct. 326, 329, 41 L.Ed. 715 (1897) (publication); *Public Clearing House v. Coyne*, 194 U.S. 497, 508, 24 S.Ct. 789, 793, 48 L.Ed. 1092 (1904) (use of the mails); *Hoke v. United States*, 227 U.S. 308, 322, 33 S.Ct. 281, 284, 57 L.Ed. 523 (1913) (use of interstate facilities); *Near v. Minnesota*, 283 U.S. 697, 716, 51 S.Ct. 625, 631, 75 L.Ed. 1357 (1931) (publication); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571—572, 62 S.Ct. 766, 768—769, 86 L.Ed. 1031 (1942) (utterances); *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 158, 66 S.Ct. 456, 462, 90 L.Ed. 586 (1946) (use of the mails); *Winters v. New York*, 333 U.S. 507, 510, 68 S.Ct. 665, 667, 92 L.Ed. 840 (1948) (possession with intent to sell); *Beauharnais v. Illinois*, 343 U.S. 250, 266, 72 S.Ct. 725, 735, 96 L.Ed. 919 (1952) (libel).

6 Many of the cases involved prosecutions for sale or distribution of obscene materials or possession with intent to sell or distribute. See *Redrup v. New York*, 386 U.S. 767, 87 S.Ct. 1414, 18 L.Ed.2d 515 (1967); *Mishkin v. New York*, 383 U.S. 502, 86 S.Ct. 958, 16 L.Ed.2d 56 (1966); *Ginzburg v. United States*, 383 U.S. 463, 86 S.Ct. 942, 16 L.Ed.2d 31 (1966); *Jacobellis v. Ohio*, 378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed.2d 793 (1964); *Smith v. California*, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959). Our most recent decision involved a prosecution for sale of obscene material to children. *Ginsberg v. New York*, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968); cf. *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 88 S.Ct. 1298, 20 L.Ed.2d 225 (1968). Other cases involved federal or state statutory procedures for preventing the distribution or mailing of obscene material, or procedures for predistribution approval. See *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963); *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 82 S.Ct. 1432, 8 L.Ed.2d 639 (1962). Still another case dealt with an attempt to seize obscene material 'kept for the purpose of being sold, published, exhibited * * * or otherwise distributed or circulated * * *.' *Marcus v. Search Warrant*, 367 U.S. 717, 719, 81 S.Ct. 1708, 1709, 6 L.Ed.2d 1127 (1961); see also *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205, 84 S.Ct. 1723, 12 L.Ed.2d 809 (1964). A Book named 'John Cleland's Memoirs of a Woman of Pleasure' v. Massachusetts, 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1 (1966), was a proceeding in equity against a book. However, possession of a book determined to be obscene in such a proceeding was made criminal only when 'for the purpose of sale, loan or distribution.' Id., at 422, 86 S.Ct., at 979.

7 The Supreme Court of Ohio considered the issue in *State v. Mapp*, 170 Ohio St. 427, 166 N.E.2d 387 (1960). Four of the seven judges of that court felt that criminal prosecution for mere private possession of obscene materials was prohibited by the Constitution. However, Ohio law required the concurrence of 'all but one of the judges' to declare a state law unconstitutional. The view of the 'dissenting' judges was expressed by Judge Herbert:

'I cannot agree that mere private possession of * * * (obscene) literature by an adult should constitute a crime. The right of the individual to read, to believe or disbelieve, and to think without governmental supervision is one of our basic liberties, but to dictate to the mature adult what books he may have in his own private library seems to the writer to be a clear infringement of his constitutional rights as an individual.' 170 Ohio St., at 437, 166 N.E.2d, at 393.

Shortly thereafter, the Supreme Court of Ohio interpreted the Ohio statute to require proof of 'possession and control for the purpose of circulation or exhibition.' *State v. Jacobellis*, 173 Ohio St. 22, 27—28, 179 N.E.2d 777, 781 (1962), rev'd on other grounds, 378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed.2d 793 (1964). The interpretation was designed to avoid the constitutional problem posed by the 'dissenters' in *Mapp*. See *State v. Ross*, 12 Ohio St.2d 37, 231 N.E.2d 299 (1967).

Other cases dealing with nonpublic distribution of obscene material or with legitimate uses of obscene material have expressed similar reluctance to make such activity criminal, albeit largely on statutory grounds. In *United States v. Chase*, 135 U.S. 255, 10 S.Ct. 756, 34 L.Ed. 117 (1890), the Court held that federal law did not make criminal the mailing of a private sealed obscene letter on the ground that the law's purpose was to purge the mails of obscene matter 'as far as was consistent with the rights reserved to

the people, and with a due regard to the security of private correspondence * * *,' 135 U.S., at 261, 10 S.Ct., at 758. The law was later amended to include letters and was sustained in that form. *Andrews v. United States*, 162 U.S. 420, 16 S.Ct. 798, 40 L.Ed. 1023 (1896). In *United States v. 31 Photographs*, 156 F.Supp. 350 (D.C.S.D.N.Y.1957), the court denied an attempt by the Government to confiscate certain materials sought to be imported into the United States by the Institute for Sex Research, Inc., at Indiana University. The court found, applying the Roth formulation, that the materials would not appeal to the 'prurient interest' of those seeking to import and utilize the materials. Thus, the statute permitting seizure of 'obscene' materials was not applicable. The court found it unnecessary to reach the constitutional questions presented by the claimant, but did note its belief that 'the statement * * * (in Roth) concerning the rejection of obscenity must be interpreted in the light of the widespread distribution of the material in Roth.' 156 F.Supp., at 360, n. 40. See also *Redmond v. United States*, 384 U.S. 264, 86 S.Ct. 1415, 16 L.Ed. 521 (1966), where this Court granted the Solicitor General's motion to vacate and remand with instructions to dismiss an information charging a violation of a federal obscenity statute in a case where a husband and wife mailed undeveloped films of each other posing in the nude to an out-of-state firm for developing. But see *Ackerman v. United States*, 293 F.2d 449 (C.A.9th Cir. 1961).

8 'Communities believe, and act on the belief, that obscenity is immoral, is wrong for the individual, and has no place in a decent society. They believe, too, that adults as well as children are corruptible in morals and character, and that obscenity is a source of corruption that should be eliminated. Obscenity is not suppressed primarily for the protection of others. Much of it is suppressed for the purity of the community and for the salvation and welfare of the 'consumer.' Obscenity, at bottom, is not crime. Obscenity is sin.' Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 Col.L.Rev. 391, 395 (1963).

9 See, e.g., Cairns, Paul, & Wishner, *Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence*, 46 Minn.L.Rev. 1009 (1962); see also M. Jahoda, *The Impact of Literature: A Psychological Discussion of Some Assumptions in the Censorship Debate* (1954), summarized in the concurring opinion of Judge Frank in *United States v. Roth*, 237 F.2d 796, 814—816 (C.A.2d Cir. 1956).

10 The Model Penal Code provisions dealing with obscene materials are limited to cases of commercial dissemination. Model Penal Code s 251.4 (Prop. Official Draft 1962); see also Model Penal Code s 207.10 and comment 4 (Tent. Draft No. 6, 1957); H. Packer, *The Limits of the Criminal Sanction* 316—328 (1968); Schwartz, *Morals Offenses and the Model Penal Code*, 63 Col.L.Rev. 669 (1963).

11 What we have said in no way infringes upon the power of the State or Federal Government to make possession of other items, such as narcotics, firearms, or stolen goods, a crime. Our holding in the present case turns upon the Georgia statute's infringement of fundamental liberties protected by the First and Fourteenth Amendments. No First Amendment rights are involved in most statutes making mere possession criminal.

Nor do we mean to express any opinion on statutes making criminal possession of other types of printed, filmed, or recorded materials. See, e.g., 18 U.S.C. s 793(d), which makes criminal the otherwise lawful possession of materials which 'the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation * * *.' In such cases, compelling reasons may exist for overriding the right of the individual to possess those materials.

1 '(T)he premises known as 280 Springside Drive, S.E., two story residence with an annex on the main floor constructed of brick and frame, in Atlanta, Fulton County, Georgia, in the Northern District of Georgia * * *.'

2 '(B)ookmaking records, wagering paraphernalia consisting of bet slips, account sheets, recap sheets, collection sheets, adding machines, money used in or derived from the wagering business, records of purchases, records of real estate and bank transactions, the money for which was derived from the wagering business, and any other property used in the wagering business, which are being used and/or have been used in the operation of a bookmaking business or represent the fruits of a bookmaking business being operated in violation of Sections 4411, 4412 and 7203 IRC of 1954.'

3 Before the Commissioner were no less than four lengthy and detailed affidavits, setting out the grounds for the affiants' reasonable belief that the appellant was engaged in an illegal gambling enterprise, and that the paraphernalia of his trade were concealed in his house.

4 The fact that almost no gambling material was actually found has no bearing, of course, upon the validity of the search. The constitutionality of a search depends in no measure upon what it brings to light. *Byars v. United States*, 273 U.S. 28, 29, 47 S.Ct. 248, 71 L.Ed. 520.

5 See *Warden Md. Penitentiary v. Hayden*, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782.

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166 Misc.2d 524
Supreme Court, Suffolk County, New York,
Trial Term, Part 28.

STATE of New York, Thomas C. Jorling as
Commissioner of Environmental Conservation,
County of Suffolk and David Harris, M.D., as
Commissioner of the Department of Health
Services of Suffolk County, Suffolk County Water
Authority, Plaintiffs,

v.

FERMENTA ASC CORPORATION and SDS
Biotech Corporation, Defendants.

July 6, 1995.

Synopsis

State, county and county water authority brought action against manufacturers and distributors of herbicide which degraded into tetrachloroterephthalic acid (TCPA), alleging claims of public and private nuisance and trespass. The Supreme Court, Suffolk County, Oshrin, J., held that: (1) plaintiffs failed to establish that TCPA in water supply in excess of 50 parts per billion (PPB) was harmful or potentially harmful to health, safety and comfort of considerable number of persons, as required to establish claim of public nuisance; (2) plaintiffs failed to establish that invasion of TCPA into groundwater and of interest in authority's private use and enjoyment of land resulted from defendants' engaging in abnormally dangerous condition or activity, or as result of negligent or unreasonable conduct, as required to support claim of private nuisance; but (3) plaintiffs established claim of trespass.

Ordered accordingly.

Attorneys and Law Firms

*525 Dennis C. Vacco, Attorney-General, Norman Spiegel, Elizabeth A. Grisaru, and Nancy Stearns, Attorney General's Office, New York City, for the State of N.Y. and another, plaintiffs.

Robert Cimino, County Attorney and Derrick Robinson, County Attorney's Office, Hauppauge, for County of Suffolk and another, plaintiffs.

John S. Guttman, Christopher W. Mahoney and Kathryn B. Fuller, Beveridge & Diamond, P.C., New York City, for defendants.

Albert A. Natoli, New York City, for plaintiff, Suffolk Cty. Water Authority.

ALAN D. OSHRIN, Justice.

FACTS

The defendants and their predecessors have been and are *526 the manufacturers and distributors of a herbicide known as Dachtal. Dachtal had been sold in Suffolk County for more than twenty years until 1989. The active ingredient found in Dachtal is dimethyl tetrachloroterephthalate (DCPA). Since 1958 DCPA has been registered for use as a herbicide with the United States Department of Agriculture (later the United States Environmental Protection Agency). Although not now used in Suffolk County, DCPA is registered for use in New York State by the New York State Department of Environmental Conservation. DCPA is no longer registered for use in Suffolk County.

DCPA acts at the soil surface to inhibit or prohibit the growth of plants which would interfere with the growth of the crops. After DCPA is placed on the soil surface it does not enter the subsurface. It changes or degrades into monomethyl tetrachloroterephthalic acid (MCPA). MCPA has a very short half life and in turn changes or degrades into tetrachloroterephthalic acid (TCPA). TCPA does enter the subsoil and has been found in the water supply of Suffolk County. Since 1977 ISK Biosciences Corporation (hereinafter "ISK") (an earlier corporate form of the defendants) has engaged in a ground water monitoring program. As a result of the program, ISK became aware that TCPA was found in the Suffolk County ground water and so informed the New York State Department of Health and the Suffolk County Department of Health Services in 1982. At that time representatives of the State requested toxicology data relating to TCPA.

Suffolk County's water supply is contained in its aquifers. An aquifer is an area beneath ground surface. Water enters the aquifer from the ground and moves generally down through the aquifer and also in a northerly or southerly direction dependent upon the location in relation to the center of the island. While moving to the north, the water

moves to the Long Island Sound, or while moving to the south to the Atlantic Ocean. The aquifer is composed of sand through which the water moves. There are layers of clay separating the aquifers. The water does not pass through the clay. As the water moves from the surface to the subsurface, and then through the subsurface, it carries with it certain substances. Among these substances is TCPA.

Prior to 1982, the New York State Department of Health had developed and applied guidelines with respect to classification of substances known as unspecified organic contaminants (UOC) which may be found in the water supply. Rather than *527 fix guidelines which would set forth the amount of a particular substance which might be found in the water supply, and also found not to be harmful on a chemical by chemical basis, the department applied guidelines to all substances known as unspecified organic contaminants and provided that no such single substance should be found in the water supply in excess of 50 ppb. In November 1988, effective January 1989, the guidelines became regulations within the State Sanitary **888 Code (10 NYCRR 5-1.52 Table 3). Anticipating this regulation in June of 1988, the defendants had petitioned the Environmental Protection Agency to permit an amendment to the Dachtal label prohibiting the use of the product in Suffolk County. The request was approved in October of 1988, and the Dachtal labels were immediately modified.

After being advised that TCPA had been detected in the Suffolk County ground water, the Health Department requested toxicology data with respect to TCPA because no such data had been reviewed in developing the drinking water guidelines referred to above. A Ninety Day TCPA Study conducted in 1977 was supplied by the defendant's representatives. Concomitantly, the defendants sought an increase in the 50 ppb guideline as it pertained to TCPA. That request was denied. Dr. Kim, on behalf of the State Health Department, after reviewing the data, stated that it did not support an increase in the 50 ppb guideline, and said the data "appeared inadequate for characterizing chronic toxicity".

With respect to the public nuisance causes of action, the State, County and SCWA needed to establish that TCPA in the water supply in excess of 50 ppb was harmful or potentially harmful to the health, safety and comfort of a considerable number of persons. The plaintiffs attempted to do so primarily by use of the Ninety Day TCPA Study in Rats conducted in 1977, and a comparison of the nature and properties of TCPA and DCPA. At the outset the Court makes the following observations. At no time did the State, County or SCWA conduct an independent toxicity study. Four other studies of TCPA were conducted (a battery of

mutagenicity studies to determine whether TCPA could be cancerous by reacting with DNA; a teratology test to determine whether TCPA would induce birth defects and a 30 day gavage study to determine the toxicity of TCPA) but were not viewed as significant by the plaintiffs' experts.

Doctors Kim, Blanck, Bradlow, Nisbet and Luttinger testified on behalf of the plaintiffs. The Ninety Day Study involved *528 feeding rats TCPA at dosage levels of 50, 500, 1000 and 10,000 parts per million (ppm). Fifteen male and fifteen female rats were used at each dosage level and also in a control group. The study report is comprised of a] the summary, b] analysis of the clinical studies, c] a results section, d] a pathological studies section, and e] a section containing the raw data. The summary of the study concluded that no changes were found in general behavior, appearance, body weight, food consumption, ophthalmoscopic examinations and hematological, biological and urine analysis studies. Further the summary of the report noted no microscopic lesions and no compound related gross pathological lesions or organ weight variations observed in any rats.

Dr. Kim is the Director of the Division of Environmental Health Assessment for the New York State Department of Health. It is Dr. Kim's function to assess the risk to humans from exposure to chemicals. Dr. Kim who had reviewed the report in the 1980's in connection with the defendants' request for an increase in the 50 ppb standard had found, as noted previously, that the data contained in the study "appeared inadequate for characterizing chronic toxicity". During the trial Dr. Kim testified when asked whether TCPA is not carcinogenic: "correct, I don't know that it is not a carcinogen. There are no data elucidating whether it is a carcinogen right now". Dr. Kim also testified that she did not assume TCPA to be a cancer causing agent. Dr. Kim later testified "the way I would phrase that is that it is above a level that we have calculated using scientific and regulatory procedures that it is thought to be without appreciable risk" and "the most I feel comfortable saying, would I feel comfortable saying is that above a level that is thought to be without appreciable risk", continuing "it doesn't necessarily mean that something is going to happen". In response to the Court's inquiry "is there an appreciable risk?", Dr. Kim stated, "one could [say] that's the inference, yes". Dr. Kim also testified that she has low confidence in the reference dose of TCPA insofar as the amount which she believes would cause harm, conceding there are significant data gaps in her knowledge of TCPA and states that "if I can't say that you will have an adverse effect, I can say they are at risk of **889 having an adverse effect". Prior to her testimony at trial, Dr. Kim had opined that TCPA was not toxic.

Dr. Kim concludes that the standard of 50 ppb should be lowered to 18 ppb as a result of her analysis of the Ninety Day Study and because of her conclusion that DCPA is structurally *529 very similar to TCPA. In analyzing the Ninety Day Study, Dr. Kim bases her conclusion upon the fact that the organ weights of some of the rats which were the subject of the study decreased in size as a result of the administering of the TCPA.

While the number of rats tested is small, Dr. Kim seeks to buttress her conclusion by stating that there is a statistically significant change in various organs, including the thyroid, pituitary and adrenal glands. When asked whether ingesting TCPA in excess of the State regulations would cause harm to the individual, Dr. Kim stated that “it doesn’t necessarily mean something is going to happen ...”.

Drs. Nisbet and Luttinger upon their initial review of the Ninety Day Study concluded that TCPA was not harmful. Drs. Nisbet and Luttinger changed their respective opinions upon the trial after being provided with a complete legible copy of the Ninety Day Study. Each witness’s initial conclusion was based upon a “review” of a copy of the study report with illegible backup material. Experts who offer an opinion based upon only the summary of a report or upon part of a report without the opportunity to examine the backup material offer opinions which are suspect. Further, Dr. Nisbet initially characterized the Ninety Day Study as “not very useful” because it did not show toxic effects and the sample size was too small. While he later found toxic effects he failed to explain why the small sample size was no longer significant.

These witnesses concluded that because the organ weights of some organs, such as the adrenal, the pituitary, the thyroid and the testes/ovaries of some rats who ingested TCPA were lower and because of increased SGOT levels of some rats receiving TCPA, TCPA is harmful to humans. These witnesses also found support for their position by the comparison of TCPA with DCPA, suggesting that both substances are structurally similar and both affect the thyroid and thus, since DCPA is known to be harmful, TCPA should be found to be harmful.

The testimony of Dr. Bradlow, the Endocrinologist called by the State as a rebuttal witness, is not helpful to the State’s position because of his failure to assert the point at which TCPA would be harmful. While Dr. Bradlow notes the shrinkage of certain organs, such as the pituitary, the ovary, the thyroid, or the adrenal glands, he fails to observe the dose levels of TCPA at which the shrinkage occurs. The rats which were subject to the Ninety Day Study received dose levels as high as 10,000 ppm, which is far in excess

of the prohibited concentration level of 50 ppb for drinking water. Additionally, Dr. Bradlow *530 acknowledged that he could not quantitate the amount of change.

The defendants offered testimony from Drs. Lucas, Lamb, Harbison and Hartung, all board certified toxicologists as to the significance of the Ninety–Day study. The unanimous conclusion was that no TCPA related effects were observed with respect to rats administered up to 10,000 ppm of TCPA in the diet. (It is necessary to note that an amount of TCPA in the water measured in ppb must be translated into an amount of TCPA in the diet measured in ppm. Explanation of that formula is not germane to resolution of this matter).

The defendants established that adverse effects generally relate to organ weight increases, not decreases, as observed in a few rats in the Ninety Day Study. The defendants also established the absence of histopathological findings, that is an absence of observable cell changes supporting their position that whatever changes were noted in the Ninety Day Study were not biologically significant. Another finding consistent with the foregoing is the absence of noted changes as to the animals’ behavior. Finally, the absence of a dose response pattern is compelling in support of the finding that TCPA is not harmful. Dose response pattern means when a dose of the tested substance is changed there is a measurable defined **890 pattern of change observed in the test subject.

With respect to the comparison between TCPA and DCPA Dr. Kim testified that the two are structurally similar and suggests therefrom that because DCPA is harmful TCPA is harmful. Dr. Kim’s position is not supported by the evidence. While the two substances are structurally similar, they are dissimilar in that DCPA is lipid soluble, that is soluble in fats, and therefore more likely to spend more time in the body being absorbed by fats as it passes through the body as opposed to TCPA which is water soluble and to a larger extent moves through the body and then is excreted or expelled. Because the DCPA remains in the body for a much longer period of time than does the TCPA, the DCPA will affect different organs differently than will TCPA. TCPA is also less reactive than is DCPA. Additionally, the physio-chemical properties of the two substances are different making a toxicological correlation difficult if not impossible.

After considering the testimony of the plaintiffs’ experts and the defendants’ experts with regard to the Ninety–Day study including the testimony from the statisticians and after considering the comparison of the properties DCPA and TCPA, *531 the Court finds that the plaintiffs have failed to establish by a fair preponderance of the credible

evidence (and therefore have failed to establish by the higher clear evidence standard for public nuisance) that TCPA in excess of 50 ppb in the Suffolk County water system is harmful to the population, or that TCPA in excess of 50 ppb creates a threatened harm. The testimony of the defendants' witnesses is found to be more credible, and that of the plaintiffs' witness not to be persuasive.

SUBSTANTIVE ISSUES PUBLIC NUISANCE

"A public nuisance, or as sometimes termed a common nuisance, is an offense against the State and is subject to abatement or prosecution on application of the proper governmental agency.... It consists of conduct or omissions which offend, interfere with or cause damage to the public in the exercise of rights common to all ... in a manner such as to offend public morals, interfere with use by the public of a public place or endanger or injure the property, health, safety or comfort of a considerable number of persons" (*Copart Indus. Inc. v. Consolidated Edison Co. of New York, Inc.*, 41 N.Y.2d 564, 568, 394 N.Y.S.2d 169, 362 N.E.2d 968, discussing Restatement, Torts notes preceding § 822; *New York Trap Rock Corp. v. Town of Clarkstown*, 299 N.Y. 77, 85 N.E.2d 873, and *Melker v. City of New York* 190 N.Y. 481, 83 N.E. 565 [1908]; see also *State of New York v. Schenectady Chems. Inc.*, 117 Misc.2d 960, 459 N.Y.S.2d 971; *State of New York v. Shore Realty Corp.*, 759 F.2d 1032 [2nd Cir.1985]; *United States v. Hooker Chems. & Plastics Corp.*, 722 F.Supp. 960 [W.D.N.Y.1989]; *New York State Natl. Org. for Women v. Terry*, 704 F.Supp. 1247 [S.D.N.Y.1989] mod. 886 F.2d 1339 [2nd Cir.1989] cert. den. 495 U.S. 947, 110 S.Ct. 2206, 109 L.Ed.2d 532 [1990]). To establish a public nuisance the annoyance, discomfort or interference experienced by a considerable number of persons must be substantial (see *Burns Jackson Miller Summit & Spitzer v. Lindner*, 59 N.Y.2d 314, 464 N.Y.S.2d 712, 451 N.E.2d 459 [1983]; *Town of Mt. Pleasant v. Van Tassell*, 7 Misc.2d 643, 166 N.Y.S.2d 458 [1957] aff'd 6 A.D.2d 880, 177 N.Y.S.2d 1010 [1958]; see also *McCarty v. Natural Carbonic Gas Co.*, 189 N.Y. 40, 81 N.E. 549; *Stoneburner v. O Gas Co. Sales Corp.*, 135 Misc. 216, 237 N.Y.S. 339 [1929]).

Although there is no requirement that the State prove actual, as opposed to threatened harm, from the nuisance in order to obtain abatement (see *State of New York v. Shore Realty Corp.*, 759 F.2d 1032, 1051, supra, citing *Southern Leasing Co. v. Ludwig*, 217 N.Y. 100, 111 N.E. 470 [1916]; *United States v. Hooker Chems. & Plastics Corp.*, 722

F.Supp. 960, supra), in order to recover for apprehended consequences not presently manifest, the State must establish a degree of probability of occurrence *532 as to amount to a reasonable certainty that they will result (see *Askey v. Occidental Chem. Corp.*, 102 A.D.2d 130, 477 N.Y.S.2d 242 [1984]; see also *Strohm v. New York Lake Erie & Western RR Co.*, 96 N.Y. 305 [1884]). Damages for the prospective consequences of a tortious injury are recoverable only if the prospective injury may with reasonable probability be expected to flow from the past harm. Consequences **891 which are contingent, speculative or merely possible are not properly considered in ascertaining injury, damages and appropriate remedy (see *Askey v. Occidental Chem. Corp.*, 102 A.D.2d 130, 477 N.Y.S.2d 242, supra; *Strohm v. New York Lake Erie & Western RR Co.*, 96 N.Y. 304, supra). Similarly, it has been said that a court of equity will lend its aid to enjoin a threatened public nuisance wherever it clearly appears that the act sought to be restrained will necessarily result in the creation or maintenance of a nuisance (*Altschul v. Ludwig*, 216 N.Y. 459, 111 N.E. 216 [1916]; *Durand v. Board of Coop. Educ. Servs.*, 70 Misc.2d 429, 334 N.Y.S.2d 670 [1972] aff'd 41 A.D.2d 803, 341 N.Y.S.2d 884 [1973]). When a harm feared does not yet exist the State must show a menace of imminent and substantial import to the public welfare to obtain the equitable relief (see *Southern Leasing Co. v. Ludwig*, 217 N.Y. 100, 111 N.E. 470, supra; *City of Yonkers v. Dyl & Dyl Devel. Corp.*, 67 Misc.2d 704, 325 N.Y.S.2d 206 [1971] aff'd 38 A.D.2d 691, 328 N.Y.S.2d 1023 [1971]).

While ordinarily nuisance is an action pursued against the owner of land for some wrongful activity conducted thereon, everyone who creates a nuisance or participates in the creation or maintenance of a nuisance are liable for the wrong and injury done thereby (see *State of New York v. Schenectady Chems. Inc.*, 117 Misc.2d 960, 459 N.Y.S.2d 971, supra; *Suffolk County Water Auth. v. Union Carbide Corp.*, NYLJ 5/2/91, P. 28, Col 1.; *United States v. Hooker Chems. & Plastics Corp.*, 722 F.Supp. 960, supra; 17 Carmody Wait 2d, § 107.59). A non-landowner can be liable for taking part in the creation of a nuisance upon the property of another (see *State of New York v. Schenectady Chems. Inc.*, 117 Misc.2d 960, 459 N.Y.S.2d 971, supra). Whether the claim of nuisance is based upon affirmative acts of negligence in the creation of a nuisance or dangerous condition or on liability for an abnormally dangerous activity or condition, ownership or possession of the property upon which the condition was found is not a prerequisite to responsibility for the injury or damage resulting therefrom (see *Suffolk County Water Auth. v. Union Carbide Corp.*, NYLJ 5/2/91, supra citing *Merrick v. Murphy*, 83 Misc.2d 39, 371 N.Y.S.2d 97 [1975]). Control over the product which caused the dangerous

condition, therefore, is not a material element of a cause of action in nuisance (see *Suffolk County Water Auth. v. Union Carbide Corp.*, NYLJ 5/2/91, supra).

***533** The burden is on the plaintiffs to establish a public nuisance by clear evidence before the preventive remedy of abatement will be granted (see *Yonkers Bd. of Health v. Copcutt*, 140 N.Y. 12, 35 N.E. 443 [1893]; *Hoover v. Durkee*, 212 A.D.2d 839, 622 N.Y.S.2d 348 [1995]; *State of New York v. Waterloo Stock Car Raceway Inc.*, 96 Misc.2d 350, 409 N.Y.S.2d 40 [1978]; *County of Sullivan v. Filippo*, 64 Misc.2d 533, 315 N.Y.S.2d 519 [1970]). Upon the facts fully discussed above, the Court finds that the plaintiffs have failed to establish actual harm to humans, and that the plaintiffs have failed to establish the requisite probability of apprehended harm to humans. Inasmuch as the burden of proof is upon the plaintiffs to establish that the ingestion of TCPA at a concentration in excess of 50 ppb is harmful to humans, or potentially harmful as previously noted, and not as the plaintiffs have suggested that it is for the defendants to establish that the ingestion of TCPA at a concentration in excess of 50 ppb is not harmful to humans, and that having failed to do so the public nuisance is not established, the public nuisance causes of action must be dismissed.

PRIVATE NUISANCE

A private nuisance has been defined as one which violates only private rights and produces damages to or threatens but one or a few persons (see *McFarlane v. City of Niagara Falls*, 247 N.Y. 340, 160 N.E. 391 [1928]). Although a private nuisance traditionally has been defined as anything done to the hurt or annoyance of the lands of another (see *Heeg v. Licht*, 80 N.Y. 579 [1880], *Swords v. Edgar*, 59 N.Y. 28 [1874]) and although an essential feature of a private nuisance has been said to be interference with the use and enjoyment of land (see ****892** *Copart Indus. Inc. v. Consolidated Edison of New York, Inc.*, 41 N.Y.2d 564, 568, 394 N.Y.S.2d 169, 362 N.E.2d 968, supra citing *Blessington v. McCrory Stores Corp.*, 198 Misc. 291, 95 N.Y.S.2d 414 [1950] aff'd 279 App.Div. 806, 807, 110 N.Y.S.2d 456 [1952] aff'd 305 N.Y. 140, 111 N.E.2d 421 [1953]; *Queens County Business Alliance, Inc. v. New York Racing Assn. Inc.*, 98 A.D.2d 743, 469 N.Y.S.2d 448 [1983]), a private nuisance embraces not a mere physical injury to the realty, but any injury to the rights of the owner or possessor as to his dealing with, possessing, or enjoying such realty (see *Kavanagh v. Barber*, 131 N.Y. 211, 30 N.E. 235 [1892]; *DeMoll v. New York*, 163 App.Div. 676, 148

N.Y.S. 966 [1914]; *Turner v. Coppola*, 102 Misc.2d 1043, 424 N.Y.S.2d 864 [1980]). Liability for private nuisance extends to injury to the person, as well as the lands of another (see *Swords v. Edgar*, 59 N.Y. 28, supra; *Walkowicz v. Whitney's Inc.*, 178 Misc. 331, 34 N.Y.S.2d 175 [1942]). A private nuisance is only a tort, and the remedy for it lies exclusively with the individual whose rights have been disturbed (see *United States v. Hooker Chems. & Plastics, Corp.*, 722 F.Supp. 960, supra).

***534** As noted above, SCWA had the opportunity to establish its cause of action for private nuisance either by proof of an invasion of the interest in SCWA's private use and enjoyment of land by an invasion which is an abnormally dangerous condition or activity or negligent or unreasonable conduct. The burden is on SCWA to establish the private nuisance by a fair preponderance of the credible evidence (see *Mairs v. Manhattan Real Estate Assn.*, 89 N.Y. 498 [1882]; *Hay v. Cohoes Co.*, 2 N.Y. 159 [1848]; *Deutsch v. National Props. Inc.*, 37 Misc.2d 860, 236 N.Y.S.2d 177 [1961] aff'd 37 Misc.2d 863, 238 N.Y.S.2d 882 [1963] mod. 19 A.D.2d 823, 243 N.Y.S.2d 658 [1963]). As discussed previously with respect to the public nuisance cause of action, the Court has found that the plaintiffs have failed to establish that a concentration of TCPA in the drinking water in excess of 50 ppb poses an actual harm or a threatened harm to humans. Having so found SCWA cannot establish a private nuisance by abnormally dangerous condition or activity (see *Doundoulakis v. Town of Hempstead*, 42 N.Y.2d 440, 398 N.Y.S.2d 401, 368 N.E.2d 24 [1977]; Restatement of Torts, Second, § 520).

With respect to negligence or unreasonable conduct, the Court observes that SCWA introduced no evidence to support its allegations that the defendants inadequately tested and formulated Dachtal and improperly marketed Dachtal for use in Suffolk County. Additionally, SCWA introduced no evidence as to any industry standard and the defendants' failure to comply with such industry standard. Moreover, the defendants had changed their label and discontinued distribution of Dachtal in Suffolk County prior to the 50 ppb regulation going into effect and two and one half years before the first acknowledged 50 ppb exceedance in an SCWA well.

As early as 1982 the defendants wrote to Dr. Kim setting forth their position regarding TCPA and requesting a meeting to discuss DCPA and its metabolites. In December 1983, the defendants wrote to Dr. Kim setting forth their position regarding what they believed to be the no observed effect level (NOEL) of DCPA, and confirming their cooperation with the Suffolk County Department of Health regarding testing of "allegedly contaminated wells". In

1987 the defendants again wrote to Dr. Kim regarding amounts of DCPA and TCPA which would be permissible if found in the water supply.

In a letter dated March 6, 1987, the defendants analyze the Ninety Day Study previously discussed pointing out the absence of toxicological effects of TCPA. At no time during this period (early to mid 1980's) did the plaintiffs urge the defendants to stop using DCPA or provide documentation contradicting *535 the defendants' interpretation of the data. In fact, up to almost the day of trial two of the plaintiffs' experts, relying upon only part of the Ninety Day Toxicity Study, did not find TCPA harmful. Based on the foregoing, the defendants' conduct cannot be considered negligent or unreasonable.

Accordingly, SCWA having failed to establish that the invasion of TCPA into the groundwater and of the interest in SCWA's private use and enjoyment of land was as the result of the defendants' engaging in an abnormally dangerous condition or activity or **893 as the result of the defendants' negligent or unreasonable conduct SCWA's second cause of action is dismissed.

TRESPASS

SCWA asserts one cause of action for trespass. SCWA alleges that the defendants by their acts or omissions created a situation where the contaminants contained in the product Dachtal when applied to the soil by the users of the product were permitted to invade the property of the plaintiff, contaminating the water used for Shorewood's Wells numbered 1, 2, 4, 6, and 7, imperiling the plaintiffs' business and its use and enjoyment of its land and the water thereunder which supplies Wells numbered 1, 2, 4, 6 and 7. SCWA further alleges that as a result of the contamination of the ground water SCWA has had to cease operations at Wells numbered 1, 2 and 7, install treatment to be able to use Well number 6 and will likely be forced to stop operations at Well number 4 in the future.

The plaintiffs offered testimony as to the levels of contamination of public and private wells located in Suffolk County. The Court is satisfied with the accuracy of the testing conducted by the plaintiffs and accept such testimony establishing the levels of TCPA in Suffolk County ground water during the period in question (1979-1994).

The term trespass in its broadest sense has been held to

mean any misfeasance, transgression or offense which damages another's person, health, reputation or property (see *Serota v. M & M Utilities Inc.*, 55 Misc.2d 286, 285 N.Y.S.2d 121 [1967]). A trespass is any infringement of a property right of another (see *Suffolk County Water Auth. v. Union Carbide Corp.*, NYLJ 5/2/91, supra) and it has been said that the right to have one's property in its original condition, not changed by the well-meaning, but wrongful, conduct of others, is a property right, the invasion of which gives the right to damages (see *Serota v. M & M Utilities Inc.*, 55 Misc.2d 286, 285 N.Y.S.2d 121, supra; *Bomptin Realty Co., Inc. v. *536 City of New York*, 196 Misc. 218, 91 N.Y.S.2d 780 [1949] rev'd oth. grnds. 276 App.Div. 1094, 96 N.Y.S.2d 414 [1950]).

It has been held that

Trespass is an intentional harm at least to this extent: while the trespasser, to be liable, need not intend or expect the damaging consequence of his intrusion, he must intend the act which amounts to or produces the unlawful invasion, and the intrusion must at least be the immediate or inevitable consequence of what he willfully does, or which he does so negligently as to amount to willfulness.

(*Phillips v. Sun Oil Co.*, 307 N.Y. 328, 331, 121 N.E.2d 249; see *Ivancic v. Olmstead*, 66 N.Y.2d 349, 497 N.Y.S.2d 326, 488 N.E.2d 72 [1985] mot. rearg. den. 66 N.Y.2d 1036, 499 N.Y.S.2d 1031, 489 N.E.2d 1304 [1985] mot. rearg. den. 67 N.Y.2d 754, 500 N.Y.S.2d 103, 490 N.E.2d 1229 [1986]). A trespass is actionable, therefore, when there is an intent to do the very act which results in the immediate damage (see *Wood v. United Air Lines, Inc.*, 32 Misc.2d 955, 223 N.Y.S.2d 692 [1961] aff'd 16 A.D.2d 659, 226 N.Y.S.2d 1022 [1962] app. dsm'd 11 N.Y.2d 1053, 230 N.Y.S.2d 207, 184 N.E.2d 180 [1962]; *Socony-Vacuum Oil Co. v. Bailey*, 202 Misc. 364, 109 N.Y.S.2d 799) notwithstanding that the act was done because of mistake or inadvertence (see *Phillips v. Sun Oil Co.*, 307 N.Y. 328, 121 N.E.2d 249, supra; *Nance v. Town of Oyster Bay*, 41 Misc.2d 446, 244 N.Y.S.2d 916 [1963] mod. oth. grnds. 23 A.D.2d 9, 258 N.Y.S.2d 156 [1965]); notwithstanding that the resulting damage is neither intended nor expected (see *Phillips v. Sun Oil Co.*, 307 N.Y. 328, 121 N.E.2d 249, supra; *Van Alstyne v. Rochester Tele. Corp.*, 163 Misc. 258, 296 N.Y.S. 726 [1937]) and

notwithstanding that the trespassing conduct was not unlawful (see *Rager v. McCloskey*, 305 N.Y. 75, 111 N.E.2d 214 [1953] rearg. den. 305 N.Y. 924, 114 N.E.2d 476 [1953]). It is not the directness of the damage but the directness of the invasion which is the test of liability for trespass and recovery for damages (see *Van Alstyne v. Rochester Tele Corp.*, 163 Misc. 258, 296 N.Y.S. 726, supra citing *Huffmire v. City of Brooklyn*, 162 N.Y. 584, 57 N.E. 176 [1900]; *Atwater v. Trustees of Village of Canandaigua*, 124 N.Y. 602, 27 N.E. 385 [1891]).

****894** As in the case of an act constituting a nuisance, control over the offending product or property is not a requisite element. Where a trespass is committed upon the rights or property of another, one who advised or directed the act to be committed may be held equally liable with the actual perpetrator of the trespass (see *Ketcham v. Newman*, 141 N.Y. 205, 36 N.E. 197 [1894]; *Goswami v. H & D Constr. Co.*, 78 Misc.2d 99, 355 N.Y.S.2d 922 [1974]; *Suffolk County Water Auth. v. Union Carbide Corp.*, NYLJ 5/2/91, supra). Similarly, one who incited, promoted, aided or abetted the commission of a trespass may be held equally liable with the actual perpetrator of the trespass (see *Oatka Cemetery Assn. v. Cazeau*, 242 App.Div. 415, 275 N.Y.S. 355 [1934]; *Goswami v. H&D Constr. Co.*, 78 Misc.2d 99, 355 N.Y.S.2d 922, supra).

The burden is upon SCWA to establish the trespass by a fair preponderance of the credible evidence (see *Mairs v. Manhattan* ***537** *Real Estate Assn.*, 89 N.Y. 498, supra; *Hay v. Cohoes Co.*, 2 N.Y. 159, supra; *Deutsch v. National Props., Inc.*, 37 Misc.2d 860, 236 N.Y.S.2d 177, supra). SCWA has established that the defendants manufactured and distributed Dachtal which until 1989 was sold in Suffolk County; that the defendants advised consumers that it be applied to the soil; that Dachtal contains DCPA; that DCPA ultimately breaks down to TCPA and, therefore, that the unlawful invasion of TCPA to the ground water was direct and intentional. Additionally, for the reasons discussed below, SCWA has established that it has been tangibly and appreciably damaged by the invasion of TCPA in the ground water, in that wells have been removed from service and granular activated carbon filtration systems installed.

The State Sanitary Code for Drinking Water Supplies, Public Water Systems provides at Table 3 (10 NYCRR § 5-1.52) that the maximum contaminant level for an Unspecified Organic Contaminant (UOC), of which TCPA is one, is .05 milligrams per liter (or 50 ppb). With respect to determining a maximum contaminant level (MCL) violation, the Sanitary Code provides:

If the results of a monitoring sample analysis exceed the MCL, the supplier of water shall collect one to three more samples from the same sampling point, as soon as practical, but within 30 days. An MCL violation occurs when at least one of the confirming samples is positive and the average of the initial sample and all confirming samples exceeds the MCL. (10 NYCRR 5-1.52, table 3.)

The practice of SCWA was to take one additional sample and if that sample exceeded the MCL then the well would be taken out of service until remediated. Inasmuch as the regulatory language provides that one to three more samples be collected and inasmuch as, of necessity, if the one additional sample exceeds the MCL, the average of the initial sample and the confirming sample must exceed the MCL, SCWA's sampling practice is consistent with the regulatory scheme, and an MCL violation within the meaning of the regulation had occurred.

The State Sanitary Code provides "[i]n the case where the MCL is exceeded ... the supplier of water will take the necessary steps to comply with [the maximum contaminant levels] to ensure the protection of the public health, including the undertaking of remedial feasibility studies and the installation of a suitable treatment process" (10 NYCRR 5-1.51[a]). The State Sanitary Code also provides that "[t]he supplier of water and the person or persons operating the public water system shall exercise due care and diligence in the maintenance and supervision of all sources of the public water system to prevent, ***538** so far as possible, their pollution and depletion" (10 NYCRR 5-1.71[a]). Similarly, the State Sanitary Code provides that "[t]he supplier of water and the person or persons operating a water treatment plant or distribution system shall exercise due care and diligence in the operation and maintenance of these facilities and their appurtenances to ensure continued compliance with the provisions of [10 NYCRR Subpart 5-1]" (10 NYCRR 5-1.72[b]). A violation of the Sanitary Code, by exceedance of an MCL, would expose SCWA to the risk of fine, imprisonment or both (see Public Health Law §§ 12, 12-b, 229, 1103) as well as permit suspension or closure (see 10 NYCRR 76.8[8]).

****895** In light of the obligations imposed upon a supplier of public water by regulation to provide water in continued compliance with the maximum contaminant levels set forth in the regulations and in the absence of such compliance to

undertake a remedial feasibility study or to install a suitable treatment process; and, in light of the Court's finding above that an MCL violation may be established by an exceedance and a single sample exceeding the MCL, the Court concludes that SCWA's taking a well out of service until remediated by the installation of a granular activated carbon filtration system, upon the second TCPA sample in excess of 50 ppb, is consistent with the regulatory scheme and its obligations thereunder. The Court also concludes that the taking of a well out of service and the installation of a granular activated carbon filtration system so as to be able to restore such well to service, as the result of TCPA concentration in excess of 50 ppb constitutes a tangible and appreciable injury to the property of SCWA. There being a

direct and intentional invasion of SCWA land by the chemical TCPA which the defendants advised consumers to be applied to the soil and permitted to be released into the ground water to SCWA's tangible and appreciable injury, the Court concludes that SCWA has established a trespass by a fair preponderance of the credible evidence.

[Portions of opinion omitted for purposes of publication.]

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96 Misc.2d 350
Supreme Court, Seneca County, New York.

STATE of New York, Plaintiff,
v.
WATERLOO STOCK CAR RACEWAY, INC. and
Seneca County Agricultural Society, Defendants.

Feb. 2, 1978.

Synopsis

Action was brought by the State to enjoin permanently the use of village fairgrounds for stock car racing. The Supreme Court, Seneca County, John J. Conway, J., held that where everyone in vicinity of racetrack had their eardrums hammered away at during night stock races took place, they expect an aftermath of dust accumulation on their property, and they lived in fear for their continued safety, operation of racetrack constituted a public nuisance and should be discontinued.

Injunction issued.

Attorneys and Law Firms

***351 **41** Louis J. Lefkowitz, Atty. Gen. of N. Y. (James A. Sevinsky, Senior Atty., Albany, Grenville W. Harrop, Jr., Buffalo, of counsel), for plaintiff.

David N. Cohen, Geneva, for defendants.

DECISION

JOHN J. CONWAY, Justice.

STATEMENT OF FACTS

This is an action brought by the State of New York, for ***352** itself and as parens patriae on behalf of the citizens of New York, seeking to enjoin permanently the use of

certain property in the Village of Waterloo for stock cars. The named defendants are the Seneca County Agricultural Society, owner of the Seneca County Fairgrounds where the races take place and Waterloo Stock Car Raceway, Inc., lessors of the Fairgrounds and promoters of the stock car races. Regular weekly stock car racing was a feature at the Fairgrounds from 1954 until 1971. From 1971 until late 1976 this use was abandoned, not to be recommended until defendant, Waterloo Raceway, in September 1976, reinstated weekly racing at the grounds. The racing continued into the 1977 season with the schedule beginning in April and ending the 1st of October. The hours of operation are such that the cars begin to warm up before the scheduled 7:00 P. M. starting time and the last race does not end until approximately midnight. With the exception of one date in June when operation was enjoined by a temporary restraining order, the races continued to be held. It should be noted that some auto racing had taken place at the Fairgrounds between the years 1939-1954, but only incident to the County Fair, which lasted at most one week.

At trial the Plaintiff produced sixteen lay witnesses, residents of the Village of Waterloo, who, in general, testified to the disturbance created in the neighborhood by the stock car racing. In addition, the Plaintiff produced two expert witnesses. The first, William Burnett, Director of Engineering Research and Development for the New York State Department of Transportation, testified as to the inadequacy of the guiderail surrounding the race track. Dr. Fred G. Haag, Principal Acoustical Engineer for the Department of Environmental Conservation, followed, and testified as to the noise levels created on race night by the operation of the raceway. The Court found the technical evidence presented by Dr. Haag, as well as his opinion as to the injurious effect the loud noise can have on the populous of the community, to be highly persuasive.

The evidence introduced by Dr. Haag consisted of scientific sound level data, collected at seven residential locations in the Village of Waterloo while racing was in progress. For purposes of comparison Dr. Haag also recorded sound level readings during ambient or normal activity periods at six of these same locations. The Court was impressed by the precautions Dr. Haag took to assure himself that the readings were scientifically ***353** and fairly taken and not variant, extreme noise levels. The record reflects his effort in this regard.

What he found was, on the average, during the approximately 3 1/2 hours of racing while he tested, noise levels were from two to eight times as loud as normal. This by itself is meaningless, unless it is further noted that the noise levels during the race were of such magnitude as to exceed the EPA maximum acceptable day-night sound

****42** level by a wide margin. In fact, the intensity was so great that normal conversation at the seven locations was found to be impossible at a distance greater than four feet, and at four of those locations, beyond two feet.

The standard previously mentioned as being set by the U. S. Environmental Protection Agency is 55 DBA's. Such a level is expected to protect the public with an adequate margin of safety and to prevent annoyance and excessive community complaints. The average level of decibels that Dr. Haag arrived at for the seven locations were far in excess of an acceptable range. In his opinion, Dr. Haag testified that he would expect widespread annoyance and significant community reaction in response to the noise levels.

Dr. Haag's data represents a wide sampling of readings taken both while cars were actually racing and while there was a lull in the actual racing. As such they are a representative average of noise levels that one would hear during the duration of the racing, from four to five hours or more. Loud noises of such a long duration have a more severe impact in terms of causing annoyance than do louder outbursts of shorter duration.

The sixteen lay witnesses who testified at trial were neighbors in the vicinity of the racetrack. The majority of them live within a few hundred feet of the racetrack. Others were from 2 1/2 blocks to 3/5 mile distant from the track. The main complaint of all of these residents concerning the operation of the racetrack is the loudness of the noise and the disturbing effect it has on them. The nearly universal description of the noise is that of a constant roar. As a consequence of this audio intrusion upon their lives, the witnesses testified to a serious alteration of their lifestyles in a futile attempt to adapt. Some keep their windows closed regardless of the heat, others make it a point to absent themselves from their homesteads on race nights, and most of them have been forced to cease using their out of doors property ***354** for entertainment of guests and for recreation on these nights. Conversation, whether in the homes or outside, has become exceedingly difficult due to the loud noise. A common complaint was that sleep both for the adults and their children, has been inhibited. As a consequence of this lack of rest plus the constant roar, nervous tension and wracked nerves have resulted.

The noise is not the only suffering for the residents of the area. They also testified to clouds of dust being produced by the races which accumulated on their property. Apparently the range of the falling dust is as great as that of the noise. For those upon whom it comes to rest it necessitates washing of items of personal property after the day of the race.

Also of concern to the residents is that there is a definite danger of safety in the vicinity of the raceway from launched projectiles. Undisputed testimony was had at trial that at one time a racing tire flew across the street and hit a witness's garage, that on other occasions steel guiderails have fallen apart upon impact from the autos and have been projected as far as the public street, and that on May 30, 1977 at one of the races a car was forced off the track and landed on three parked cars, not far from a residential property. There was also testimony as to serious accidents at the track that endangered spectators and neighboring residents in years previous to Waterloo Raceway, Inc. operation. Although Defendant cannot be held responsible for these past incidents, they are noteworthy in light of expert witness Burnett's testimony that there still exists a decided danger of cars breaking the guiderails. This was not the end to the testimony of Plaintiff's witnesses as to the intrusions and hazards accompanying the operation of the raceway. No doubt some would view the testimony as a litany of sufferings, but there is no question but that they add up to a severe alteration of an otherwise tranquil neighborhood. They take a toll on public endurance and tolerance. The witnesses, as can be expected, displayed a variety of temperaments, faculties and sensitivities, in part depending on the location of their home. But all were ****43** marked by intelligence, character and honesty which was apparent and impressive.

The Court has not ignored the testimony presented by the Defendants witnesses. However, out of the fourteen witnesses, ten have an interest in seeing the races continue, due either to a monetary stake or because they themselves or members of ***355** their families are race enthusiasts. It is to be expected that those who frequent the races are more prone to tolerate whatever disturbance it creates. The four witnesses who have no apparent interest in seeing the races continue, yet testified that they were not bothered by the din it created are to be congratulated as being extremely tolerant. All admitted being aware of the noise, but none found it to be uncomfortable or disturbing. The Court is not convinced that these are the residents of the Village of Waterloo who are possessed of average sensibilities (People v. Rubinfeld, 254 N.Y. 245, 172 N.E. 485; City of Rochester v. Charlotte Docks Co., Sup., 114 N.Y.S. 37), particularly in light of the testimony from the sixteen local residents for Plaintiff, the expert witnesses and the proposed forty-eight additional witnesses whose testimony would have corroborated that of Plaintiff's witnesses who had gone before them.

The foremost issue facing this Court is whether the cumulative effect of the noise, dust and danger to safety from the operation of the raceway constitutes a public nuisance. Although numerous cases in New York have been devoted to a discussion of what conditions constitute a nuisance, no case, brought to this Court's attention deals

with the exact subject matter of the operation of an auto racetrack as a nuisance. Courts in other states have declared raceways or dragstrips to be a nuisance upon a showing of facts much the same as Plaintiff presented here. (Kohr v. Weber, 402 Pa. 63, 166 A.2d 871 (1960); Township of Bedminster v. Vargo Dragway, 434 Pa. 100, 253 A.2d 659 (1969); Sakler v. Huls, Ohio Com.Pl., 20 O.O. 283, 183 N.E.2d 152 and see 41 A.L.R.3d 1273, Nuisance Automobile Racetrack). But these cases fail to elucidate the New York law on this matter and furthermore each nuisance case must be addressed on its own facts to determine whether, under all the circumstances, such as location, surroundings, nature of the use, extent and frequency of the injury, and the effect on the enjoyment of life, health and property, the use of the property by Defendant is unreasonable. (McCarty v. Natural Carbonic Gas Co., 189 N.Y. 40, 81 N.E. 549; Campbell v. Seaman, 63 N.Y. 568; Town of Preble v. Song Mt., Inc., 62 Misc.2d 353, 308 N.Y.S.2d 1001, and Shearing v. City of Rochester, 51 Misc.2d 436, 273 N.Y.S.2d 464).

As the term "public nuisance" has been employed by New York courts, it is incapable of any exact or comprehensive definition. (Melker v. City of New York, 190 N.Y. 481, 83 N.E. 565, see also Prosser, Torts 4th ed., p. 571). Judge Cardozo, in People v. Rubinfeld, supra, perhaps came the closest *356 to indicating what exactly a public nuisance is. "Public is the nuisance whereby 'a public right or privilege common to every person in the community is interrupted or interfered with,' Public also is the nuisance committed in such place and in such manner that the aggregation of private injuries becomes so great and extensive as to constitute a public annoyance and inconvenience, and a wrong against the community, which may be properly the subject of a public prosecution." (People v. Rubinfeld, 254 N.Y. 245, 247, 172 N.E. 485, 486; also see Copart Ind. v. Con. Ed. Co., 41 N.Y.2d 564, 394 N.Y.S.2d 169, 362 N.E.2d 968; N.Y. Trap Rock Corp. v. Town of Clarkstown, 299 N.Y. 77, 85 N.E.2d 873; and Town of Preble v. Song Mt., Inc., supra.)

It should be clear that while almost any form of amusement or recreation can constitute a nuisance, as long as it is lawfully conducted it is not a nuisance per se. (3 N.Y.Jur., Amusements, s 27) Therefore, it must be established by clear evidence before the preventive remedy will be granted. (County of Sullivan v. Filippo, 64 Misc.2d 533, 315 N.Y.S.2d 519).

As has been stated again and again, a public nuisance is an offense to the public **44 of a neighborhood or community in the enjoyment of its common rights, as distinguished from activity which results merely in injury even to large numbers of persons in the enjoyment of private rights, not

shared by members of the community or neighborhood at large. (State v. Wright Hepburn Webster Gallery, Limited, 64 Misc.2d 423, 314 N.Y.S.2d 661, aff'd. 37 A.D.2d 698, 323 N.Y.S.2d 389; Copart, supra; Rubinfeld, supra; N.Y. Trap Rock Corp., supra and 42 N.Y.Jur., Nuisances s 5 p. 449).

" . . . (T)he number of persons affected need not be shown to be "very great. " Enough that so many are touched by the offense and in ways so indiscriminate and general that the multiplied annoyance may not unreasonably be classified as a wrong to the community." (Rubinfeld, supra, 254 N.Y. at 247, 172 N.E. at 486) "It is a public nuisance where the location at which and the manner in which the particular operation is conducted is such that substantial annoyance and discomfort are caused indiscriminately to many and divers persons who are continually or may from time to time be in the vicinity." (Town of Mt. Pleasant v. VanTassell, 7 Misc.2d 643, 645, 166 N.Y.S.2d 458, aff'd. 6 A.D.2d 880, 177 N.Y.S.2d 1010; People v. HST Meth, Inc., 74 Misc.2d 920, 346 N.Y.S.2d 146).

The complaints generated and the facts established in this case by the operation of the racetrack are not of a private nature; rather they expose an assault on the community as a *357 whole. The common right involved is that of the neighborhood to its normal peace and quiet, which is one of its essential characteristics. Practically all the witnesses at trial agreed that this is a tranquil community. Were it not for the existence of the racetrack operations it would continue as such. As it is, everyone in the vicinity of the track has found their ear drums to be hammered away at during the nights the races take place, to expect an aftermath of dust accumulation on their property, and to live in fear for their continued safety. Anyone visiting these people in their homes or passing by on the public streets are subjected to the same onslaught of the senses and fear for safety. To be free of these conditions is a right which the neighborhood possesses at large, and not one which one man or a few men covet to themselves. It is an affront to and invasion of the community in the enjoyment of its common rights.

This is not a case where the populous is grumbling about mere trifles and slight indecencies. If it were, the Court would turn a deaf ear. (see McCarty, supra, and Prosser, Torts (4th ed.), p. 577). Instead this is a completely unreasonable use of Defendant's premises to the material injury of his neighbor's premises and his person, and need not be suffered any longer. (McCarty, supra, Campbell, supra, Pritchard v. Edison El. Ill. Co., 179 N.Y. 364, 72 N.E. 243)

The community has been assailed on a weekly basis. The residents fear for their own bodily safety and for that of their property because of the danger from flying guiderails,

racing tires, wood and errant cars. Although accidents are a fairly commonplace occurrence in the sport of auto racing, the danger of falling debris from these collisions is not a fear which the community at large should be subjected to. As conditions at the track stand now, it is only a matter of time before a resident of the neighborhood or innocent passerby is injured. Until now this fortunately has not happened, although there have been reports of damage to property. This Court sees no reason why this community should be subjected to this danger any longer.

Defendants have countered that the operation of the racetrack is being lawfully conducted and is not in violation of zoning ordinances, being a prior existing use in a residentially zoned area, and therefore is not subject to attack as a nuisance. *358 As recently as in the case of *Little Joseph Realty, Inc. v. Town of Babylon*, 41 N.Y.2d 738, 395 N.Y.S.2d 428, 363 N.E.2d 1163 (May 12, 1977) the Court of Appeals stated that the use may be in full compliance with zoning ordinances but that it may still be enjoined as a nuisance. Every business has a duty to conduct its operations in a reasonable **45 manner such that it does not materially interfere with the general well-being, health or property rights of neighbors or of people generally. (Town of Mt. Pleasant, supra.)

Defendant asserts its alleged priority of occupation in the neighborhood as a defense to this action. The basis for this contention is the fact that racing took place on a regular, weekly basis between the years 1954-1971 and that most of those who moved to the area since 1954 were aware of the situation and therefore were guilty of coming to a nuisance and should not be heard to complain. Defendant's contention is not well founded because, to begin with, it is established in New York that priority of occupation is not conclusive, but is to be considered in connection with all the evidence, and the inference drawn from all the facts proved whether the controlling fact exists that the use is unreasonable. (*Charlotte Docks Co.*, supra; *McCarty*, supra; *Graceland Corp. v. Consolidated Laundries Corp.*, 7 A.D.2d 89, 180 N.Y.S.2d 644, aff'd, 6 N.Y.2d 900, 190 N.Y.S.2d 708, 160 N.E.2d 926). Also, in determining whether one who "came to the nuisance" may obtain relief therefrom, it is proper to consider the nature of the area where the alleged nuisance and complainant property are located. (*McCarty*, supra.) Therefore, there is no absolute defense of priority of occupation and one cannot acquire by prescription the right to maintain a public nuisance.

The facts of the case, as they relate to priority of occupation are these: that many of the complainants moved to this area before the fairgrounds were ever used as a racetrack for autos or during the period 1971-1976 when regular use for racing had been discontinued. Furthermore, this area is unquestionably residential and has been zoned

as such since 1949. Persons coming into the area and established residents had come to believe by 1976 that the days of regular, weekly stock car racing at the fairgrounds were over. The fact of the previous intermittent use, which Defendant has not shown to have generated the same disturbance as the present use, does not now operate to estop this action.

*359 The country fair itself stands in a different position. It is the type of operation which is but a minor, passing inconvenience at most, and which people who collect in cities and towns are expected to tolerate. As Plaintiff's witnesses testified, the noise is not nearly as oppressive as that of stock car races. For those who do find it unbearable it is not too much to ask of them that they suffer silently or use the occasion to occupy themselves away from their homes.

This Court concludes that while there is nothing unlawful about the operation of a stock car raceway under proper circumstances, its use at its present location in the Village of Waterloo, under all the circumstances, constitutes a public nuisance and should be discontinued. "A nuisance may be merely a right thing in the wrong place." (*Euclid v. Amber Co.*, 272 U.S. 365, 388, 47 S.Ct. 114, 118, 71 L.Ed. 303.)

As the Court of Appeals indicated in *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 309 N.Y.S.2d 312, 257 N.E.2d 870, an injunction is a drastic remedy which a court must carefully consider before issuing. This Court has been most circumspect in pondering on its issuance but has concluded that it is the only appropriate remedy under the circumstances. Unlike *Boomer*, there is no vast disparity in economic consequence between the use of an injunction and the injury caused by the nuisance. In *Boomer*, the Defendant corporation had a \$45 million investment in the plant and it provided jobs for three hundred people. This essentially recreational operation employs a few people and, as Defendant's own affidavit details, the capital investment at most amounts to \$15,000. No sound reason mitigates against the issuance of an injunction in this instance. The injury to the public is serious and permanent and no adequate remedy exists at law.

Accordingly, it is ORDERED that Defendant Waterloo Raceway, Inc. and any successor in interest is permanently enjoined from operating a stock car racetrack or any related activity involving motorized **46 vehicles on the premises of the Seneca County Fairgrounds in the Village of Waterloo. Defendant Seneca County Agricultural Society is likewise permanently enjoined from conducting or leasing for purposes of allowing another to conduct stock car races or any related activity involving racing motorized vehicles. The foregoing injunction is subject to the

following exception, that the Defendant Society may allow or conduct such events as a motorcycle race, demolition derby or stock car race, but such exception is limited to the period during the year when it holds its annual *360 Seneca County Fair. Such period of racing and other auto events may not exceed three separately scheduled days in total.

All Citations

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139 S.Ct. 682
Supreme Court of the United States.

Tyson TIMBS, Petitioner

v.

INDIANA

No. 17-1091

Argued November 28, 2018

Decided February 20, 2019

Synopsis

Background: The State of Indiana brought a civil in rem forfeiture action, seeking to obtain the vehicle owned by a criminal defendant who had pleaded guilty to dealing in a controlled substance and felony theft. The Superior Court, Grant County, No. 27D01-1308-MI-92, Jeffrey D. Todd, J., denied the requested forfeiture, and the State appealed. The Court of Appeals of Indiana, Mathias, J., 62 N.E.3d 472, affirmed. After granting transfer, the Supreme Court of Indiana, Slaughter, J., 84 N.E.3d 1179, reversed and remanded. Certiorari was granted.

Holdings: The Supreme Court, Justice Ginsburg, held that:

Eighth Amendment's Excessive Fines Clause is an incorporated protection applicable to the States, and

issue of whether *Austin v. U.S.*, 509 U. S. 602, 113 S.Ct. 2801, 125 L.Ed.2d 488, should be overruled was not properly before the Court.

Vacated and remanded.

Justice Gorsuch filed a concurring opinion.

Justice Thomas filed an opinion concurring in the judgment.

Syllabus*

Tyson Timbs pleaded guilty in Indiana state court to dealing in a controlled substance and conspiracy to commit theft. At the time of Timbs's arrest, the police seized a Land Rover SUV Timbs had purchased for \$ 42,000 with money

he received from an insurance policy when his father died. The State sought civil forfeiture of Timbs's vehicle, charging that the SUV had been used to transport heroin. Observing that Timbs had recently purchased the vehicle for more than four times the maximum \$ 10,000 monetary fine assessable against him for his drug conviction, the trial court denied the State's request. The vehicle's forfeiture, the court determined, would be grossly disproportionate to the gravity of Timbs's offense, and therefore unconstitutional under the Eighth Amendment's Excessive Fines Clause. The Court of Appeals of Indiana affirmed, but the Indiana Supreme Court reversed, holding that the Excessive Fines Clause constrains only federal action and is inapplicable to state impositions.

Held: The Eighth Amendment's Excessive Fines Clause is an incorporated protection applicable to the States under the Fourteenth Amendment's Due Process Clause. Pp. 686 – 691.

(a) The Fourteenth Amendment's Due Process Clause incorporates and renders applicable to the States Bill of Rights protections "fundamental to our scheme of ordered liberty," or "deeply rooted in this Nation's history and tradition." *McDonald v. Chicago*, 561 U.S. 742, 767, 130 S.Ct. 3020, 177 L.Ed.2d 894 (alterations omitted). If a Bill of Rights protection is incorporated, there is no daylight between the federal and state conduct it prohibits or requires. Pp. 686 – 687.

(b) The prohibition embodied in the Excessive Fines Clause carries forward protections found in sources from Magna Carta to the English Bill of Rights to state constitutions from the colonial era to the present day. Protection against excessive fines has been a constant shield throughout Anglo-American history for good reason: Such fines undermine other liberties. They can be used, e.g., to retaliate against or chill the speech of political enemies. They can also be employed, not in service of penal purposes, but as a source of revenue. The historical and logical case for concluding that the Fourteenth Amendment incorporates the Excessive Fines Clause is indeed overwhelming. Pp. 687 – 690.

(c) Indiana argues that the Clause does not apply to its use of civil *in rem* forfeitures, but this Court held in *Austin v. United States*, 509 U.S. 602, 113 S.Ct. 2801, 125 L.Ed.2d 488, that such forfeitures fall within the Clause's protection when they are at least partially punitive. Indiana cannot prevail unless the Court overrules *Austin* or holds that, in light of *Austin*, the Excessive Fines Clause is not incorporated because its application to civil *in rem* forfeitures is neither fundamental nor deeply rooted.

The first argument, overturning *Austin*, is not properly before this Court. The Indiana Supreme Court held only that the Excessive Fines Clause did not apply to the States. The court did not address the Clause's application to civil *in rem* forfeitures, nor did the State ask it to do so. Timbs thus sought this Court's review only of the question whether the Excessive Fines Clause is incorporated by the Fourteenth Amendment. Indiana attempted to reformulate the question to ask whether the Clause restricted States' use of civil *in rem* forfeitures and argued on the merits that *Austin* was wrongly decided. Respondents' "right, ... to restate the questions presented," however, "does not give them the power to expand [those] questions," *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 279, n. 10, 113 S.Ct. 753, 122 L.Ed.2d 34 (emphasis deleted), particularly where the proposed reformulation would lead the Court to address a question neither pressed nor passed upon below, cf. *Cutter v. Wilkinson*, 544 U.S. 709, 718, n. 7, 125 S.Ct. 2113, 161 L.Ed.2d 1020.

The second argument, that the Excessive Fines Clause cannot be incorporated if it applies to civil *in rem* forfeitures, misapprehends the nature of the incorporation inquiry. In considering whether the Fourteenth Amendment incorporates a Bill of Rights protection, this Court asks whether the right guaranteed—not each and every particular application of that right—is fundamental or deeply rooted. To suggest otherwise is inconsistent with the approach taken in cases concerning novel applications of rights already deemed incorporated. See, e.g., *Packingham v. North Carolina*, 382 U.S. —, —, 137 S.Ct. 1730, 1733, 198 L.Ed.2d 273. The Excessive Fines Clause is thus incorporated regardless of whether application of the Clause to civil *in rem* forfeitures is itself fundamental or deeply rooted. Pp. 689 – 691.

84 N.E.3d 1179, vacated and remanded.

GINSBURG, J., delivered the opinion of the Court, in which ROBERTS, C.J., and BREYER, ALITO, SOTOMAYOR, KAGAN, GORSUCH, and KAVANAUGH, JJ., joined. GORSUCH, J., filed a concurring opinion. THOMAS, J., filed an opinion concurring in the judgment.

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Opinion

Justice GINSBURG delivered the opinion of the Court.

*686 Tyson Timbs pleaded guilty in Indiana state court to dealing in a controlled substance and conspiracy to commit theft. The trial court sentenced him to one year of home detention and five years of probation, which included a court-supervised addiction-treatment program. The sentence also required Timbs to pay fees and costs totaling \$ 1,203. At the time of Timbs's arrest, the police seized his vehicle, a Land Rover SUV Timbs had purchased for about \$ 42,000. Timbs paid for the vehicle with money he received from an insurance policy when his father died.

The State engaged a private law firm to bring a civil suit for forfeiture of Timbs's Land Rover, charging that the vehicle had been used to transport heroin. After Timbs's guilty plea in the criminal case, the trial court held a hearing on the forfeiture demand. Although finding that Timbs's vehicle had been used to facilitate violation of a criminal statute, the court denied the requested forfeiture, observing that Timbs had recently purchased the vehicle for \$ 42,000, more than four times the maximum \$ 10,000 monetary fine assessable against him for his drug conviction. Forfeiture of the Land Rover, the court determined, would be grossly disproportionate to the gravity of Timbs's offense, hence unconstitutional under the Eighth Amendment's Excessive Fines Clause. The Court of Appeals of Indiana affirmed that determination, but the Indiana Supreme Court reversed. 84 N.E.3d 1179 (2017). The Indiana Supreme Court did not decide whether the forfeiture would be excessive. Instead, it held that the Excessive Fines Clause constrains only federal action and is inapplicable to state impositions. We granted certiorari. 585 U.S. —, 138 S.Ct. 2650, 201 L.Ed.2d 1049 (2018).

The question presented: Is the Eighth Amendment's Excessive Fines Clause an "incorporated" protection applicable to the States under the Fourteenth Amendment's Due Process Clause? Like the Eighth Amendment's proscriptions of "cruel and unusual punishment" and "[e]xcessive bail," the protection against excessive fines guards against abuses of government's punitive or criminal-law-enforcement authority. This safeguard, we

hold, is “fundamental to our scheme of ordered liberty,” with “dee[p] root[s] in *687 [our] history and tradition.” *McDonald v. Chicago*, 561 U.S. 742, 767, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010) (internal quotation marks omitted; emphasis deleted). The Excessive Fines Clause is therefore incorporated by the Due Process Clause of the Fourteenth Amendment.

I

A

When ratified in 1791, the Bill of Rights applied only to the Federal Government. *Barron ex rel. Tiernan v. Mayor of Baltimore*, 7 Pet. 243, 8 L.Ed. 672 (1833). “The constitutional Amendments adopted in the aftermath of the Civil War,” however, “fundamentally altered our country’s federal system.” *McDonald*, 561 U.S., at 754, 130 S.Ct. 3020. With only “a handful” of exceptions, this Court has held that the Fourteenth Amendment’s Due Process Clause incorporates the protections contained in the Bill of Rights, rendering them applicable to the States. *Id.*, at 764–765, and nn. 12–13, 130 S.Ct. 3020. A Bill of Rights protection is incorporated, we have explained, if it is “fundamental to our scheme of ordered liberty,” or “deeply rooted in this Nation’s history and tradition.” *Id.*, at 767, 130 S.Ct. 3020 (internal quotation marks omitted; emphasis deleted).

Incorporated Bill of Rights guarantees are “enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.” *Id.*, at 765, 130 S.Ct. 3020 (internal quotation marks omitted). Thus, if a Bill of Rights protection is incorporated, there is no daylight between the federal and state conduct it prohibits or requires.¹

B

Under the Eighth Amendment, “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” Taken together, these

Clauses place “parallel limitations” on “the power of those entrusted with the criminal-law function of government.” *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 263, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989) (quoting *Ingraham v. Wright*, 430 U.S. 651, 664, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977)). Directly at issue here is the phrase “nor excessive fines imposed,” which “limits the government’s power to extract payments, whether in cash or in kind, ‘as punishment for some offense.’” *United States v. Bajakajian*, 524 U.S. 321, 327–328, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998) (quoting *Austin v. United States*, 509 U.S. 602, 609–610, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993)). The Fourteenth Amendment, we hold, incorporates this protection.

The Excessive Fines Clause traces its venerable lineage back to at least 1215, when Magna Carta guaranteed that “[a] Free-man shall not be amerced for a small fault, but after the manner of the fault; and for a great fault after the greatness thereof, saving to him his contenment” § 20, 9 Hen. III, ch. 14, in 1 Eng. *688 Stat. at Large 5 (1225).² As relevant here, Magna Carta required that economic sanctions “be proportioned to the wrong” and “not be so large as to deprive [an offender] of his livelihood.” *Browning-Ferris*, 492 U.S., at 271, 109 S.Ct. 2909. See also 4 W. Blackstone, Commentaries on the Laws of England 372 (1769) (“[N]o man shall have a larger amercement imposed upon him, than his circumstances or personal estate will bear”). But cf. *Bajakajian*, 524 U.S., at 340, n. 15, 118 S.Ct. 2028 (taking no position on the question whether a person’s income and wealth are relevant considerations in judging the excessiveness of a fine).

Despite Magna Carta, imposition of excessive fines persisted. The 17th century Stuart kings, in particular, were criticized for using large fines to raise revenue, harass their political foes, and indefinitely detain those unable to pay. E.g., The Grand Remonstrance ¶¶17, 34 (1641), in The Constitutional Documents of the Puritan Revolution 1625–1660, pp. 210, 212 (S. Gardiner ed., 3d ed. rev. 1906); *Browning-Ferris*, 492 U.S., at 267, 109 S.Ct. 2909. When James II was overthrown in the Glorious Revolution, the attendant English Bill of Rights reaffirmed Magna Carta’s guarantee by providing that “excessive Bail ought not to be required, nor excessive Fines imposed; nor cruel and unusual Punishments inflicted.” 1 Wm. & Mary, ch. 2, § 10, in 3 Eng. Stat. at Large 441 (1689).

Across the Atlantic, this familiar language was adopted almost verbatim, first in the Virginia Declaration of Rights, then in the Eighth Amendment, which states: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

Adoption of the Excessive Fines Clause was in tune not only with English law; the Clause resonated as well with similar colonial-era provisions. See, e.g., Pa. Frame of Govt., Laws Agreed Upon in England, Art. XVIII (1682), in 5 Federal and State Constitutions 3061 (F. Thorpe ed. 1909) (“[A]ll fines shall be moderate, and saving men’s contentments, merchandize, or wainage.”). In 1787, the constitutions of eight States—accounting for 70% of the U.S. population—forbade excessive fines. Calabresi, Agudo, & Dore, State Bills of Rights in 1787 and 1791, 85 S. Cal. L. Rev. 1451, 1517 (2012).

An even broader consensus obtained in 1868 upon ratification of the Fourteenth Amendment. By then, the constitutions of 35 of the 37 States—accounting for over 90% of the U.S. population—expressly prohibited excessive fines. Calabresi & Agudo, Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868, 87 Texas L. Rev. 7, 82 (2008).

Notwithstanding the States’ apparent agreement that the right guaranteed by the Excessive Fines Clause was fundamental, abuses continued. Following the Civil War, Southern States enacted Black Codes to subjugate newly freed slaves and maintain the prewar racial hierarchy. Among these laws’ provisions were draconian fines for violating broad proscriptions on “vagrancy” and other dubious offenses. See, e.g., Mississippi Vagrant Law, Laws of Miss. § 2 (1865), in 1 W. Fleming, Documentary *689 History of Reconstruction 283–285 (1950). When newly freed slaves were unable to pay imposed fines, States often demanded involuntary labor instead. *E.g.*, *id.* § 5; see Finkelman, John Bingham and the Background to the Fourteenth Amendment, 36 Akron L. Rev. 671, 681–685 (2003) (describing Black Codes’ use of fines and other methods to “replicate, as much as possible, a system of involuntary servitude”). Congressional debates over the Civil Rights Act of 1866, the joint resolution that became the Fourteenth Amendment, and similar measures repeatedly mentioned the use of fines to coerce involuntary labor. See, e.g., Cong. Globe, 39th Cong., 1st Sess., 443 (1866); *id.*, at 1123–1124.

Today, acknowledgment of the right’s fundamental nature remains widespread. As Indiana itself reports, all 50 States have a constitutional provision prohibiting the imposition of excessive fines either directly or by requiring proportionality. Brief in Opposition 8–9. Indeed, Indiana explains that its own Supreme Court has held that the Indiana Constitution should be interpreted to impose the same restrictions as the Eighth Amendment. *Id.*, at 9 (citing *Norris v. State*, 271 Ind. 568, 576, 394 N.E.2d 144, 150

(1979)).

For good reason, the protection against excessive fines has been a constant shield throughout Anglo-American history: Exorbitant tolls undermine other constitutional liberties. Excessive fines can be used, for example, to retaliate against or chill the speech of political enemies, as the Stuarts’ critics learned several centuries ago. See *Browning-Ferris*, 492 U.S., at 267, 109 S.Ct. 2909. Even absent a political motive, fines may be employed “in a measure out of accord with the penal goals of retribution and deterrence,” for “fines are a source of revenue,” while other forms of punishment “cost a State money.” *Harmelin v. Michigan*, 501 U.S. 957, 979, n. 9, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) (opinion of Scalia, J.) (“it makes sense to scrutinize governmental action more closely when the State stands to benefit”). This concern is scarcely hypothetical. See Brief for American Civil Liberties Union et al. as *Amici Curiae* 7 (“Perhaps because they are politically easier to impose than generally applicable taxes, state and local governments nationwide increasingly depend heavily on fines and fees as a source of general revenue.”).

In short, the historical and logical case for concluding that the Fourteenth Amendment incorporates the Excessive Fines Clause is overwhelming. Protection against excessive punitive economic sanctions secured by the Clause is, to repeat, both “fundamental to our scheme of ordered liberty” and “deeply rooted in this Nation’s history and tradition.” *McDonald*, 561 U.S., at 767, 130 S.Ct. 3020 (internal quotation marks omitted; emphasis deleted).

II

The State of Indiana does not meaningfully challenge the case for incorporating the Excessive Fines Clause as a general matter. Instead, the State argues that the Clause does not apply to its use of civil *in rem* forfeitures because, the State says, the Clause’s specific application to such forfeitures is neither fundamental nor deeply rooted.

In *Austin v. United States*, 509 U.S. 602, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993), however, this Court held that civil *in rem* forfeitures fall within the Clause’s protection when they are at least partially punitive. *Austin* arose in the federal context. But when a Bill of Rights protection is incorporated, the protection applies “identically to both the Federal Government and the States.” *690 *McDonald*, 561 U.S., at 766, n. 14, 130 S.Ct. 3020. Accordingly, to prevail,

Indiana must persuade us either to overrule our decision in *Austin* or to hold that, in light of *Austin*, the Excessive Fines Clause is not incorporated because the Clause's application to civil *in rem* forfeitures is neither fundamental nor deeply rooted. The first argument is not properly before us, and the second misapprehends the nature of our incorporation inquiry.

A

In the Indiana Supreme Court, the State argued that forfeiture of Timbs's SUV would not be excessive. See Brief in Opposition 5. It never argued, however, that civil *in rem* forfeitures were categorically beyond the reach of the Excessive Fines Clause. The Indiana Supreme Court, for its part, held that the Clause did not apply to the States at all, and it nowhere addressed the Clause's application to civil *in rem* forfeitures. See 84 N.E.3d 1179. Accordingly, Timbs sought our review of the question "[w]hether the Eighth Amendment's Excessive Fines Clause is incorporated against the States under the Fourteenth Amendment." Pet. for Cert. i. In opposing review, Indiana attempted to reformulate the question to ask "[w]hether the Eighth Amendment's Excessive Fines Clause restricts States' use of civil asset forfeitures." Brief in Opposition i. And on the merits, Indiana has argued not only that the Clause is not incorporated, but also that *Austin* was wrongly decided. Respondents' "right, in their brief in opposition, to restate the questions presented," however, "does not give them the power to expand [those] questions." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 279, n. 10, 113 S.Ct. 753, 122 L.Ed.2d 34 (1993) (emphasis deleted). That is particularly the case where, as here, a respondent's reformulation would lead us to address a question neither pressed nor passed upon below. Cf. *Cutter v. Wilkinson*, 544 U.S. 709, 718, n. 7, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005) ("[W]e are a court of review, not of first view"). We thus decline the State's invitation to reconsider our unanimous judgment in *Austin* that civil *in rem* forfeitures are fines for purposes of the Eighth Amendment when they are at least partially punitive.

B

As a fallback, Indiana argues that the Excessive Fines Clause cannot be incorporated if it applies to civil *in rem*

forfeitures. We disagree. In considering whether the Fourteenth Amendment incorporates a protection contained in the Bill of Rights, we ask whether the right guaranteed—not each and every particular application of that right—is fundamental or deeply rooted.

Indiana's suggestion to the contrary is inconsistent with the approach we have taken in cases concerning novel applications of rights already deemed incorporated. For example, in *Packingham v. North Carolina*, 582 U.S. —, 137 S.Ct. 1730, 198 L.Ed.2d 273 (2017), we held that a North Carolina statute prohibiting registered sex offenders from accessing certain commonplace social media websites violated the First Amendment right to freedom of speech. In reaching this conclusion, we noted that the First Amendment's Free Speech Clause was "applicable to the States under the Due Process Clause of the Fourteenth Amendment." *Id.*, at —, 137 S.Ct., at 1733. We did not, however, inquire whether the Free Speech Clause's application specifically to social media websites was fundamental or deeply rooted. See also, e.g., *Riley v. California*, 573 U.S. 373, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014) (holding, without separately considering incorporation, that States' warrantless *691 search of digital information stored on cell phones ordinarily violates the Fourth Amendment). Similarly here, regardless of whether application of the Excessive Fines Clause to civil *in rem* forfeitures is itself fundamental or deeply rooted, our conclusion that the Clause is incorporated remains unchanged.

* * *

For the reasons stated, the judgment of the Indiana Supreme Court is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice GORSUCH, concurring.

The majority faithfully applies our precedent and, based on a wealth of historical evidence, concludes that the Fourteenth Amendment incorporates the Eighth Amendment's Excessive Fines Clause against the States. I agree with that conclusion. As an original matter, I acknowledge, the appropriate vehicle for incorporation may well be the Fourteenth Amendment's Privileges or Immunities Clause, rather than, as this Court has long assumed, the Due Process Clause. See, e.g., *post*, at 691 – 692 (THOMAS, J., concurring in judgment); *McDonald v.*

Chicago, 561 U.S. 742, 805–858, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010) (THOMAS, J., concurring in part and concurring in judgment) (documenting evidence that the “privileges or immunities of citizens of the United States” include, at minimum, the individual rights enumerated in the Bill of Rights); Wildenthal, *Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866–67*, 68 Ohio St. L.J. 1509 (2007); A. Amar, *The Bill of Rights: Creation and Reconstruction* 163–214 (1998); M. Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* (1986). But nothing in this case turns on that question, and, regardless of the precise vehicle, there can be no serious doubt that the Fourteenth Amendment requires the States to respect the freedom from excessive fines enshrined in the Eighth Amendment.

Justice THOMAS, concurring in the judgment.

I agree with the Court that the Fourteenth Amendment makes the Eighth Amendment’s prohibition on excessive fines fully applicable to the States. But I cannot agree with the route the Court takes to reach this conclusion. Instead of reading the Fourteenth Amendment’s Due Process Clause to encompass a substantive right that has nothing to do with “process,” I would hold that the right to be free from excessive fines is one of the “privileges or immunities of citizens of the United States” protected by the Fourteenth Amendment.

I

The Fourteenth Amendment provides that “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” “On its face, this appears to grant ... United States citizens a certain collection of rights—*i.e.*, privileges or immunities—attributable to that status.” *McDonald v. Chicago*, 561 U.S. 742, 808, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010) (THOMAS, J., concurring in part and concurring in judgment). But as I have previously explained, this Court “marginaliz[ed]” the Privileges or Immunities Clause in the late 19th century by defining the collection of rights covered by the Clause “quite narrowly.” *Id.*, at 808–809, 130 S.Ct. 3020. Litigants seeking federal protection of substantive rights against the States thus needed “an

alternative fount of such rights,” and this Court “found one in a *692 most curious place,” *id.*, at 809, 130 S.Ct. 3020—the Fourteenth Amendment’s Due Process Clause, which prohibits “any State” from “depriv[ing] any person of life, liberty, or property, without due process of law.”

Because this Clause speaks only to “process,” the Court has “long struggled to define” what substantive rights it protects. *McDonald*, *supra*, at 810, 130 S.Ct. 3020 (opinion of THOMAS, J.). The Court ordinarily says, as it does today, that the Clause protects rights that are “fundamental.” *Ante*, at 686 – 687, 687 – 688, 689 – 690, 690 – 691. Sometimes that means rights that are “‘deeply rooted in this Nation’s history and tradition.’” *Ante*, at 687 – 688, 690 – 691 (quoting *McDonald*, *supra*, at 767, 130 S.Ct. 3020 (majority opinion)). Other times, when that formulation proves too restrictive, the Court defines the universe of “fundamental” rights so broadly as to border on meaningless. See, *e.g.*, *Obergefell v. Hodges*, 576 U.S. —, —, —, 135 S.Ct. 2584, 2593, 192 L.Ed.2d 609 (2015) (“rights that allow persons, within a lawful realm, to define and express their identity”); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) (“At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life”). Because the oxymoronic “substantive” “due process” doctrine has no basis in the Constitution, it is unsurprising that the Court has been unable to adhere to any “guiding principle to distinguish ‘fundamental’ rights that warrant protection from nonfundamental rights that do not.” *McDonald*, *supra*, at 811, 130 S.Ct. 3020 (opinion of THOMAS, J.). And because the Court’s substantive due process precedents allow the Court to fashion fundamental rights without any textual constraints, it is equally unsurprising that among these precedents are some of the Court’s most notoriously incorrect decisions. *E.g.*, *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); *Dred Scott v. Sandford*, 19 How. 393, 450, 15 L.Ed. 691 (1857).

The present case illustrates the incongruity of the Court’s due process approach to incorporating fundamental rights against the States. Petitioner argues that the forfeiture of his vehicle is an excessive punishment. He does not argue that the Indiana courts failed to “‘proceed according to the ‘law of the land’—that is, according to written constitutional and statutory provisions,’” or that the State failed to provide “some baseline procedures.” *Nelson v. Colorado*, 581 U.S. —, —, n. 1, 137 S.Ct. 1249, 1264, n. 1, 197 L.Ed.2d 611 (2017) (THOMAS, J., dissenting). His claim has nothing to do with any “process” “due” him. I therefore decline to apply the “legal fiction” of substantive due process. *McDonald*, 561 U.S., at 811, 130

S.Ct. 3020 (opinion of THOMAS, J.).

II

When the Fourteenth Amendment was ratified, “the terms ‘privileges’ and ‘immunities’ had an established meaning as synonyms for ‘rights.’ ” *Id.*, at 813, 130 S.Ct. 3020. Those “rights” were the “inalienable rights” of citizens that had been “long recognized,” and “the ratifying public understood the Privileges or Immunities Clause to protect constitutionally enumerated rights” against interference by the States. *Id.*, at 822, 837, 130 S.Ct. 3020. Many of these rights had been adopted from English law into colonial charters, then state constitutions and bills of rights, and finally the Constitution. “Consistent with their English heritage, the founding generation generally did not consider many of the rights identified in [the Bill of Rights] as new entitlements, but as inalienable rights of all men, given legal *693 effect by their codification in the Constitution’s text.” *Id.*, at 818, 130 S.Ct. 3020.

The question here is whether the Eighth Amendment’s prohibition on excessive fines was considered such a right. The historical record overwhelmingly demonstrates that it was.

A

The Excessive Fines Clause “was taken verbatim from the English Bill of Rights of 1689,” *United States v. Bajakajian*, 524 U.S. 321, 335, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998), which itself formalized a longstanding English prohibition on disproportionate fines. The Charter of Liberties of Henry I, issued in 1101, stated that “[i]f any of my barons or men shall have committed an offence he shall not give security to the extent of forfeiture of his money, as he did in the time of my father, or of my brother, but according to the measure of the offence so shall he pay” Sources of English Legal and Constitutional History ¶8, p. 50 (M. Evans & R. Jack eds. 1984) (emphasis added). Expanding this principle, Magna Carta required that “amercements (the medieval predecessors of fines) should be proportioned to the offense and that they should not deprive a wrongdoer of his livelihood,” *Bajakajian*,

supra, at 335, 118 S.Ct. 2028:

“A free man shall be amerced for a small fault only according to the measure thereof, and for a great crime according to its magnitude, saving his position; and in like manner, a merchant saving his trade, and a villein saving his tillage, if they should fall under Our mercy.” Magna Carta, ch. 20 (1215), in A. Howard, Magna Carta: Text & Commentary 42 (rev. ed. 1998).

Similar clauses levying amercements “only in proportion to the measure of the offense” applied to earls, barons, and clergymen. Chs. 21–22, *ibid.* One historian posits that, due to the prevalence of amercements and their use in increasing the English treasury, “[v]ery likely there was no clause in Magna Carta more grateful to the mass of the people than that about amercements.” Pleas of the Crown for the County of Gloucester xxxiv (F. Maitland ed. 1884). The principle was reiterated in the First Statute of Westminster, which provided that no man should “be amerced, without reasonable cause, and according to the quantity of his Trespass.” 3 Edw. I, ch. 6 (1275). The English courts have long enforced this principle. In one early case, for example, the King commanded the bailiff “to take a moderate amercement proper to the magnitude and manner of th[e] offense, according to the tenour of the Great Charter of the Liberties of England,” and the bailiff was sued for extorting “a heavier ransom.” *Le Gras v. Bailiff of Bishop of Winchester*, Y.B. Mich. 10 Edw. II, pl. 4 (1316), reprinted in 52 Selden Society 3, 5 (1934); see also *Richard Godfrey’s Case*, 11 Co. Rep. 42a, 44a, 77 Eng. Rep. 1199, 1202 (1615) (excessive fines are “against law”).

During the reign of the Stuarts in the period leading up to the Glorious Revolution of 1688–1689, fines were a flashpoint “in the constitutional and political struggles between the king and his parliamentary critics.” L. Schworer, The Declaration of Rights, 1689, p. 91 (1981) (Schworer). From 1629 to 1640, Charles I attempted to govern without convening Parliament, but “in the absence of parliamentary grants,” he needed other ways of raising revenue. 4 H. Walter, A History of England 135 (1834); see 1 T. Macaulay, History of England 85 (1899). He thus turned “to exactions, some odious and obsolete, some of very questionable legality, and others clearly against law.” 1 H. Hallam, Constitutional History of England: From the Accession of Henry VII to the Death of *694 George II 462 (1827) (Hallam); see 4 Walter, *supra*, at 135.

The Court of Star Chamber, for instance, “imposed heavy fines on the king’s enemies,” Schworer 91, in disregard “of the provision of the Great Charter, that no man shall be amerced even to the full extent of his means....” 2 Hallam 46–47. “[T]he strong interest of th[is] court in these fines ... had a tendency to aggravate the punishment....” 1 *id.*, at 490.

“The statute abolishing” the Star Chamber in 1641 “specifically prohibited any court thereafter from ... levying ... excessive fines.” Schwoerer 91.

“But towards the end of Charles II’s reign” in the 1670s and early 1680s, courts again “imposed ruinous fines on the critics of the crown.” *Ibid.* In 1680, a committee of the House of Commons “examined the transcripts of all the fines imposed in King’s Bench since 1677” and found that “the Court of King’s Bench, in the Imposition of Fines on Offenders of late Years, hath acted arbitrarily, illegally, and partially; favouring Papists and Persons popishly affected; and excessively oppressing his Majesty’s Protestant Subjects.” *Ibid.*; 9 Journals of the House of Commons 692 (Dec. 23, 1680). The House of Commons determined that the actions of the judges of the King’s Bench, particularly the actions of Chief Justice William Scroggs, had been so contrary to law that it prepared articles of impeachment against him. The articles alleged that Scroggs had “most notoriously departed from all Rules of Justice and Equality, in the Imposition of Fines upon Persons convicted of Misdemeanors” without “any Regard to the Nature of the Offences, or the Ability of the Persons.” *Id.*, at 698.

Yet “[o]ver the next few years fines became even more excessive and partisan.” Schwoerer 91. The King’s Bench, presided over by the infamous Chief Justice Jeffreys, fined Anglican cleric Titus Oates 2,000 marks (among other punishments) for perjury. *Id.*, at 93. For speaking against the Duke of York, the sheriff of London was fined £ 100,000 in 1682, which corresponds to well over \$ 10 million in present-day dollars¹—“an amount, which, as it extended to the ruin of the criminal, was directly contrary to the spirit of [English] law.” The History of England Under the House of Stuart, pt. 2, p. 801 (1840). The King’s Bench fined Sir Samuel Barnadiston £ 10,000 for allegedly seditious letters, a fine that was overturned by the House of Lords as “exorbitant and excessive.” 14 Journals of the House of Lords 210 (May 14, 1689). Several members of the committees that would draft the Declaration of Rights—which included the prohibition on excessive fines that was enacted into the English Bill of Rights of 1689—had themselves “suffered heavy fines.” Schwoerer 91–92. And in 1684, judges in the case of John Hampden held that Magna Carta did not limit “fines for great offences” against the King, and imposed a £ 40,000 fine. *Trial of Hampden*, 9 State Trials 1054, 1125 (K. B. 1684); 1 J. Stephen, A History of the Criminal Law of England 490 (1883).

“Freedom from excessive fines” was considered “indisputably an ancient right of the subject,” and the Declaration of Rights’ indictment against James II “charged that during his reign judges had imposed

excessive fines, thereby subverting the laws and liberties of the kingdom.” Schwoerer 90. Article 10 of the Declaration declared “[t]hat excessive Bayle ought not *695 to be required nor excessive fynes imposed nor cruel and unusuall Punishments inflicted.” *Id.*, at 297.

Shortly after the English Bill of Rights was enacted, Parliament addressed several excessive fines imposed before the Glorious Revolution. For example, the House of Lords overturned a £ 30,000 fine against the Earl of Devonshire as “excessive and exorbitant, against Magna Charta, the common right of the subject, and against the law of the land.” *Case of Earl of Devonshire*, 11 State Trials 1354, 1372 (K. B. 1687). Although the House of Lords refused to reverse the judgments against Titus Oates, a minority argued that his punishments were “contrary to Law and ancient Practice” and violated the prohibition on “excessive Fines.” *Harmelin v. Michigan*, 501 U.S. 957, 971, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991); *Trial of Oates*, 10 State Trials 1080, 1325 (K. B. 1685). The House of Commons passed a bill to overturn Oates’s conviction, and eventually, after a request from Parliament, the King pardoned Oates. *Id.*, at 1329–1330.

Writing a few years before our Constitution was adopted, Blackstone—“whose works constituted the preeminent authority on English law for the founding generation,” *Alden v. Maine*, 527 U.S. 706, 715, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999)—explained that the prohibition on excessive fines contained in the English Bill of Rights “had a retrospect to some unprecedented proceedings in the court of king’s bench.” 4 W. Blackstone, Commentaries 372 (1769). Blackstone confirmed that this prohibition was “only declaratory ... of the old constitutional law of the land,” which had long “regulated” the “discretion” of the courts in imposing fines. *Ibid.*

In sum, at the time of the founding, the prohibition on excessive fines was a longstanding right of Englishmen.

B

“As English subjects, the colonists considered themselves to be vested with the same fundamental rights as other Englishmen,” *McDonald*, 561 U.S., at 816, 130 S.Ct. 3020 (opinion of THOMAS, J.), including the prohibition on excessive fines. *E.g.*, J. Dummer, A Defence of the New-England Charters 16–17 (1721) (“The Subjects Abroad claim the Privilege of *Magna Charta*, which says that no

Man shall be fin'd above the Nature of his Offence, and whatever his Miscarriage be, a *Salvo Contenemento suo* is to be observ'd by the Judge"). Thus, the text of the Eighth Amendment was " 'based directly on ... the Virginia Declaration of Rights,' which 'adopted verbatim the language of the English Bill of Rights.' " *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 266, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989) (quoting *Solem v. Helm*, 463 U.S. 277, 285, n. 10, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983)); see *Jones v. Commonwealth*, 5 Va. 555, 557 (1799) (opinion of Carrington, J.) (explaining that the clause in the Virginia Declaration of Rights embodied the traditional legal understanding that any "fine or amercement ought to be according to the degree of the fault and the estate of the defendant").

When the States were considering whether to ratify the Constitution, advocates for a separate bill of rights emphasized the need for an explicit prohibition on excessive fines mirroring the English prohibition. In colonial times, fines were "the drudge-horse of criminal justice," "probably the most common form of punishment." L. Friedman, *Crime and Punishment in American History* 38 (1993). To some, this fact made a constitutional prohibition on excessive fines all the more important. As the well-known Anti-Federalist Brutus argued in an essay, a prohibition *696 on excessive fines was essential to "the security of liberty" and was "as necessary under the general government as under that of the individual states; for the power of the former is as complete to the purpose of requiring bail, imposing fines, inflicting punishments, ... and seizing ... property ... as the other." Brutus II (Nov. 1, 1787), in *The Complete Bill of Rights* 621 (N. Cogan ed. 1997). Similarly, during Virginia's ratifying convention, Patrick Henry pointed to Virginia's own prohibition on excessive fines and said that it would "depart from the genius of your country" for the Federal Constitution to omit a similar prohibition. Debate on Virginia Convention (June 14, 1788), in 3 *Debates on the Federal Constitution* 447 (J. Elliot 2d ed. 1854). Henry continued: "[W]hen we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives" to "define punishments without this control." *Ibid.*

Governor Edmund Randolph responded to Henry, arguing that Virginia's charter was "nothing more than an investiture, in the hands of the Virginia citizens, of those rights which belonged to British subjects." *Id.*, at 466. According to Randolph, "the exclusion of excessive bail and fines ... would follow of itself without a bill of rights," for such fines would never be imposed absent "corruption in the House of Representatives, Senate, and President," or judges acting "contrary to justice." *Id.*, at 467–468.

For all the debate about whether an explicit prohibition on excessive fines was necessary in the Federal Constitution, all agreed that the prohibition on excessive fines was a well-established and fundamental right of citizenship. When the Excessive Fines Clause was eventually considered by Congress, it received hardly any discussion before "it was agreed to by a considerable majority." 1 *Annals of Cong.* 754 (1789). And when the Bill of Rights was ratified, most of the States had a prohibition on excessive fines in their constitutions.²

Early commentary on the Clause confirms the widespread agreement about the fundamental nature of the prohibition on excessive fines. Justice Story, writing a few decades before the ratification of the Fourteenth Amendment, explained that the Eighth Amendment was "adopted, as an admonition to all departments of the national government, to warn them against such violent proceedings, as had taken place in England in the arbitrary reigns of some of the Stuarts," when "[e]normous fines and amercements were ... sometimes imposed." 3 J. Story, *Commentaries on the Constitution of the United States* § 1896, pp. 750–751 (1833). Story included the prohibition on excessive fines as a right, along with the "right to bear arms" and others protected by the Bill of Rights, that "operates, as a qualification upon powers, actually granted by the people to the government"; without such a "restrict[ion]," the government's "exercise or *697 abuse" of its power could be "dangerous to the people." *Id.*, § 1858, at 718–719.

Chancellor Kent likewise described the Eighth Amendment as part of the "right of personal security ... guarded by provisions which have been transcribed into the constitutions in this country from *magna carta*, and other fundamental acts of the English Parliament." 2 J. Kent, *Commentaries on American Law* 9 (1827). He understood the Eighth Amendment to "guard against abuse and oppression," and emphasized that "the constitutions of almost every state in the Unio[n] contain the same declarations in substance, and nearly in the same language." *Ibid.* Accordingly, "they must be regarded as fundamental doctrines in every state, for all the colonies were parties to the national declaration of rights in 1774, in which the ... rights and liberties of English subjects were peremptorily claimed as their undoubted inheritance and birthright." *Ibid.*; accord, W. Rawle, *A View of the Constitution of the United States of America* 125 (1825) (describing the prohibition on excessive fines as "founded on the plainest principles of justice").

C

The prohibition on excessive fines remained fundamental at the time of the Fourteenth Amendment. In 1868, 35 of 37 state constitutions “expressly prohibited excessive fines.” *Ante*, at 688. Nonetheless, as the Court notes, abuses of fines continued, especially through the Black Codes adopted in several States. *Ante*, at 688 – 689. The “centerpiece” of the Codes was their “attempt to stabilize the black work force and limit its economic options apart from plantation labor.” E. Foner, *Reconstruction: America’s Unfinished Revolution 1863–1877*, p. 199 (1988). Under the Codes, “the state would enforce labor agreements and plantation discipline, punish those who refused to contract, and prevent whites from competing among themselves for black workers.” *Ibid*. The Codes also included “ ‘antienticement’ measures punishing anyone offering higher wages to an employee already under contract.” *Id.*, at 200.

The 39th Congress focused on these abuses during its debates over the Fourteenth Amendment, the Civil Rights Act of 1866, and the Freedmen’s Bureau Act. During those well-publicized debates, Members of Congress consistently highlighted and lamented the “severe penalties” inflicted by the Black Codes and similar measures, Cong. Globe, 39th Cong., 1st Sess., 474 (1866) (Sen. Trumbull), suggesting that the prohibition on excessive fines was understood to be a basic right of citizenship.

For example, under Mississippi law, adult “freedmen, free negroes and mulattoes” “without lawful employment” faced \$ 50 in fines and 10 days’ imprisonment for vagrancy. Reports of Assistant Commissioners of Freedmen, and Synopsis of Laws on Persons of Color in Late Slave States, S. Exec. Doc. No. 6, 39th Cong., 2d Sess., § 2, p. 192 (1867). Those convicted had five days to pay or they would be arrested and leased to “any person who will, for the shortest period of service, pay said fine and forfeiture and all costs.” § 5, *ibid*. Members of Congress criticized such laws “for selling [black] men into slavery in punishment of crimes of the slightest magnitude.” Cong. Globe, 39th Cong., 1st Sess., 1123 (1866) (Rep. Cook); see *id.*, at 1124 (“It is idle to say these men will be protected by the States”).

Similar examples abound. One congressman noted that Alabama’s “aristocratic and anti-republican laws, almost reenacting slavery, among other harsh inflictions impose ...

a fine of fifty dollars and six months’ imprisonment on any servant or *698 laborer (white or black) who loiters away his time or is stubborn or refractory.” *Id.*, at 1621 (Rep. Myers). He also noted that Florida punished vagrants with “a fine not exceeding \$ 500 and imprison[ment] for a term not exceeding twelve months, or by being sold for a term not exceeding twelve months, at the discretion of the court.” *Ibid*. At the time, such fines would have been ruinous for laborers. Cf. *id.*, at 443 (Sen. Howe) (“A thousand dollars! That sells a negro for his life”).

These and other examples of excessive fines from the historical record informed the Nation’s consideration of the Fourteenth Amendment. Even those opposed to civil-rights legislation understood the Privileges or Immunities Clause to guarantee those “fundamental principles” “fixed” by the Constitution, including “immunity from ... excessive fines.” 2 Cong. Rec. 384–385 (1874) (Rep. Mills); see also *id.*, at App. 241 (Sen. Norwood). And every post-1855 state constitution banned excessive fines. S. Calabresi & S. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868*, 87 Texas L. Rev. 7, 82 (2008). The attention given to abusive fines at the time of the Fourteenth Amendment, along with the ubiquity of state excessive-fines provisions, demonstrates that the public continued to understand the prohibition on excessive fines to be a fundamental right of American citizenship.

* * *

The right against excessive fines traces its lineage back in English law nearly a millennium, and from the founding of our country, it has been consistently recognized as a core right worthy of constitutional protection. As a constitutionally enumerated right understood to be a privilege of American citizenship, the Eighth Amendment’s prohibition on excessive fines applies in full to the States.

All Citations

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Footnotes

- * The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

- 1 The sole exception is our holding that the Sixth Amendment requires jury unanimity in federal, but not state, criminal proceedings. *Apodaca v. Oregon*, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972). As we have explained, that “exception to th[e] general rule ... was the result of an unusual division among the Justices,” and it “does not undermine the well-established rule that incorporated Bill of Rights protections apply identically to the States and the Federal Government.” *McDonald*, 561 U.S., at 766, n. 14, 130 S.Ct. 3020.
- 2 “Amercements were payments to the Crown, and were required of individuals who were ‘in the King’s mercy,’ because of some act offensive to the Crown.” *Browning-Ferris*, 492 U.S., at 269, 109 S.Ct. 2909. “[T]hough fines and amercements had distinct historical antecedents, they served fundamentally similar purposes—and, by the seventeenth and eighteenth centuries, the terms were often used interchangeably.” Brief for Eighth Amendment Scholars as *Amici Curiae* 12.
- 1 See Currency Converter: 1270–2017 (estimating the 2017 equivalent of £ 100,000 in 1680), <http://nationalarchives.gov.uk/currency-converter> (as last visited Feb. 8, 2019)
- 2 Del. Const., Art. I, § 11 (1792), in 1 Federal and State Constitutions 569 (F. Thorpe ed. 1909); Md. Const., Decl. of Rights, Art. XXII (1776), in 3 *id.*, at 1688; Mass. Const., pt. 1, Art. XXVI (1780), in *id.*, at 1892; N.H. Const., pt. 1, Art. 1, § XXXIII (1784), in 4 *id.*, at 2457; N.C. Const., Decl. of Rights, Art. X (1776), in 5 *id.*, at 2788; Pa. Const., Art. IX, § 13 (1790), in *id.*, at 3101; S.C. Const., Art. IX, § 4 (1790), in 6 *id.*, at 3264; Va. Const., Bill of Rights, § 9 (1776), in 7 *id.*, at 3813. Vermont had a clause specifying that “all fines shall be proportionate to the offences.” Vt. Const., ch. II, § XXIX (1786), in *id.*, at 3759. Georgia’s 1777 Constitution had an excessive fines clause, Art. LIX, but its 1789 Constitution did not. And the Northwest Ordinance provided that “[a]ll fines shall be moderate; and no cruel or unusual punishments inflicted.” § 14, Art. 2 (1787)

Code of Federal Regulations
Title 42. Public Health
Chapter I. Public Health Service, Department of Health and Human Services (Refs & Annos)
Subchapter J. Vaccines
Part 100. Vaccine Injury Compensation (Refs & Annos)

42 C.F.R. § 100.3

§ 100.3 Vaccine injury table.

Effective: March 21, 2017

Currentness

(a) In accordance with section 312(b) of the National Childhood Vaccine Injury Act of 1986, title III of Public Law 99–660, 100 Stat. 3779 (42 U.S.C. 300aa–1 note) and section 2114(c) of the Public Health Service Act, as amended (PHS Act) (42 U.S.C. 300aa–14(c)), the following is a table of vaccines, the injuries, disabilities, illnesses, conditions, and deaths resulting from the administration of such vaccines, and the time period in which the first symptom or manifestation of onset or of the significant aggravation of such injuries, disabilities, illnesses, conditions, and deaths is to occur after vaccine administration for purposes of receiving compensation under the Program. Paragraph (b) of this section sets forth additional provisions that are not separately listed in this Table but that constitute part of it. Paragraph (c) of this section sets forth the qualifications and aids to interpretation for the terms used in the Table. Conditions and injuries that do not meet the terms of the qualifications and aids to interpretation are not within the Table. Paragraph (d) of this section sets forth a glossary of terms used in paragraph (c).

Vaccine Injury Table

Vaccine	Illness, disability, injury or condition covered	Time period for first symptom or manifestation of onset or of significant aggravation after vaccine administration
I. Vaccines containing tetanus toxoid (e.g., DTaP, DTP, DT, Td, or TT)	A. Anaphylaxis	≤4 hours.
	B. Brachial Neuritis	2-28 days (not less than 2 days and not more than 28 days).
	C. Shoulder Injury Related to Vaccine Administration	≤48 hours.
	D. Vasovagal syncope	≤1 hour.

II. Vaccines containing whole cell pertussis bacteria, extracted or partial cell pertussis bacteria, or specific pertussis antigen(s) (e.g., DTP, DTaP, P, DTP-Hib)

A. Anaphylaxis ≤4 hours.

B. Encephalopathy or encephalitis..... ≤72 hours.

C. Shoulder Injury Related to Vaccine Administration ≤48 hours.

D. Vasovagal syncope ≤1 hour.

III. Vaccines containing measles, mumps, and rubella virus or any of its components (e.g., MMR, MM, MMRV)

A. Anaphylaxis ≤4 hours.

B. Encephalopathy or encephalitis..... 5-15 days (not less than 5 days and not more than 15 days).

C. Shoulder Injury Related to Vaccine Administration ≤48 hours.

D. Vasovagal syncope ≤1 hour.

IV. Vaccines containing rubella virus (e.g., MMR, MMRV)

A. Chronic arthritis..... 7-42 days (not less than 7 days and not more than 42 days).

V. Vaccines containing measles virus (e.g., MMR, MM, MMRV)

A. Thrombocytopenic purpura 7-30 days (not less than 7 days and not more than 30 days).

B. Vaccine-Strain Measles Viral Disease in an immunodeficient recipient

—Vaccine-strain virus identified Not applicable.

—If strain determination is not done or if laboratory testing is inconclusive ≤12 months.

VI. Vaccines containing polio live virus A. Paralytic Polio (OPV)

- in a non-immunodeficient recipient..... ≤30 days.
- in an immunodeficient recipient.. ≤6 months.
- in a vaccine associated community case..... Not applicable.

B. Vaccine-Strain Polio Viral Infection

- in a non-immunodeficient recipient..... ≤30 days.
- in an immunodeficient recipient.. ≤6 months.
- in a vaccine associated community case..... Not applicable.

VII. Vaccines containing polio inactivated virus (e.g., IPV)

- A. Anaphylaxis ≤4 hours.
- B. Shoulder Injury Related to Vaccine Administration ≤48 hours.
- C. Vasovagal syncope ≤1 hour.

VIII. Hepatitis B vaccines

- A. Anaphylaxis ≤4 hours.
- B. Shoulder Injury Related to Vaccine Administration ≤48 hours.
- C. Vasovagal syncope ≤1 hour.

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IX. Haemophilus influenzae type b (Hib) vaccines	A. Shoulder Injury Related to Vaccine Administration	≤48 hours.
	B. Vasovagal syncope	≤1 hour.
X. Varicella vaccines	A. Anaphylaxis	≤4 hours.
	B. Disseminated varicella vaccine-strain viral disease	
	—Vaccine-strain virus identified	Not applicable.
	—If strain determination is not done or if laboratory testing is inconclusive	7-42 days (not less than 7 days and not more than 42 days).
	C. Varicella vaccine-strain viral reactivation	Not applicable.
	D. Shoulder Injury Related to Vaccine Administration	≤48 hours.
	E. Vasovagal syncope	≤1 hour.
XI. Rotavirus vaccines	A. Intussusception	1-21 days (not less than 1 day and not more than 21 days).
XII. Pneumococcal conjugate vaccines	A. Shoulder Injury Related to Vaccine Administration	≤48 hours.
	B. Vasovagal syncope	≤1 hour.
XIII. Hepatitis A vaccines	A. Shoulder Injury Related to Vaccine Administration	≤48 hours.
	B. Vasovagal syncope	≤1 hour.
XIV. Seasonal influenza vaccines	A. Anaphylaxis	≤4 hours.

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	B. Shoulder Injury Related to Vaccine Administration	≤48 hours.
	C. Vasovagal syncope	≤1 hour.
	D. Guillain-Barré Syndrome	3-42 days (not less than 3 days and not more than 42 days).
XV. Meningococcal vaccines	A. Anaphylaxis	≤4 hours.
	B. Shoulder Injury Related to Vaccine Administration	≤48 hours.
	C. Vasovagal syncope	≤1 hour.
XVI. Human papillomavirus (HPV) vaccines	A. Anaphylaxis	≤4 hours.
	B. Shoulder Injury Related to Vaccine Administration	≤48 hours.
	C. Vasovagal syncope	≤1 hour.
XVII. Any new vaccine recommended by the Centers for Disease Control and Prevention for routine administration to children, after publication by the Secretary of a notice of coverage	A. Shoulder Injury Related to Vaccine Administration	≤48 hours.
	B. Vasovagal syncope	≤1hour.

(b) Provisions that apply to all conditions listed.

(1) Any acute complication or sequela, including death, of the illness, disability, injury, or condition listed in paragraph (a) of this section (and defined in paragraphs (c) and (d) of this section) qualifies as a Table injury under paragraph (a) except when the definition in paragraph (c) requires exclusion.

(2) In determining whether or not an injury is a condition set forth in paragraph (a) of this section, the Court shall consider the entire medical record.

(3) An idiopathic condition that meets the definition of an illness, disability, injury, or condition set forth in paragraph (c) of this section shall be considered to be a condition set forth in paragraph (a) of this section.

(c) Qualifications and aids to interpretation. The following qualifications and aids to interpretation shall apply to, define and describe the scope of, and be read in conjunction with paragraphs (a), (b), and (d) of this section:

(1) Anaphylaxis. Anaphylaxis is an acute, severe, and potentially lethal systemic reaction that occurs as a single discrete event with simultaneous involvement of two or more organ systems. Most cases resolve without sequela. Signs and symptoms begin minutes to a few hours after exposure. Death, if it occurs, usually results from airway obstruction caused by laryngeal edema or bronchospasm and may be associated with cardiovascular collapse. Other significant clinical signs and symptoms may include the following: Cyanosis, hypotension, bradycardia, tachycardia, arrhythmia, edema of the pharynx and/or trachea and/or larynx with stridor and dyspnea. There are no specific pathological findings to confirm a diagnosis of anaphylaxis.

(2) Encephalopathy. A vaccine recipient shall be considered to have suffered an encephalopathy if an injury meeting the description below of an acute encephalopathy occurs within the applicable time period and results in a chronic encephalopathy, as described in paragraph (d) of this section.

(i) Acute encephalopathy.

(A) For children less than 18 months of age who present:

(1) Without a seizure, an acute encephalopathy is indicated by a significantly decreased level of consciousness that lasts at least 24 hours.

(2) Following a seizure, an acute encephalopathy is demonstrated by a significantly decreased level of consciousness that lasts at least 24 hours and cannot be attributed to a postictal state—from a seizure or a medication.

(B) For adults and children 18 months of age or older, an acute encephalopathy is one that persists at least 24 hours and is characterized by at least two of the following:

(1) A significant change in mental status that is not medication related (such as a confusional state, delirium, or psychosis);

(2) A significantly decreased level of consciousness which is independent of a seizure and cannot be attributed to the effects of medication; and

(3) A seizure associated with loss of consciousness.

(C) The following clinical features in themselves do not demonstrate an acute encephalopathy or a significant change in either mental status or level of consciousness: Sleepiness, irritability (fussiness), high-pitched and unusual screaming, poor feeding, persistent inconsolable crying, bulging fontanelle, or symptoms of dementia.

(D) Seizures in themselves are not sufficient to constitute a diagnosis of encephalopathy and in the absence of other evidence of an acute encephalopathy seizures shall not be viewed as the first symptom or manifestation of an acute encephalopathy.

(ii) Exclusionary criteria for encephalopathy. Regardless of whether or not the specific cause of the underlying condition, systemic disease, or acute event (including an infectious organism) is known, an encephalopathy shall not be considered to be a condition set forth in the Table if it is shown that the encephalopathy was caused by:

(A) An underlying condition or systemic disease shown to be unrelated to the vaccine (such as malignancy, structural lesion, psychiatric illness, dementia, genetic disorder, prenatal or perinatal central nervous system (CNS) injury); or

(B) An acute event shown to be unrelated to the vaccine such as a head trauma, stroke, transient ischemic attack, complicated migraine, drug use (illicit or prescribed) or an infectious disease.

(3) Encephalitis. A vaccine recipient shall be considered to have suffered encephalitis if an injury meeting the description below of acute encephalitis occurs within the applicable time period and results in a chronic encephalopathy, as described in paragraph (d) of this section.

(i) Acute encephalitis. Encephalitis is indicated by evidence of neurologic dysfunction, as described in paragraph (c)(3)(i)(A) of this section, plus evidence of an inflammatory process in the brain, as described in paragraph (c)(3)(i)(B) of this section.

(A) Evidence of neurologic dysfunction consists of either:

(1) One of the following neurologic findings referable to the CNS: Focal cortical signs (such as aphasia, alexia, agraphia, cortical blindness); cranial nerve abnormalities; visual field defects; abnormal presence of primitive reflexes (such as Babinski's sign or sucking reflex); or cerebellar dysfunction (such as ataxia, dysmetria, or nystagmus); or

(2) An acute encephalopathy as set forth in paragraph (c)(2)(i) of this section.

(B) Evidence of an inflammatory process in the brain (central nervous system or CNS inflammation) must include cerebrospinal fluid (CSF) pleocytosis (>5 white blood cells (WBC)/mm³ in children >2 months of age and adults; >15 WBC/mm³ in children <2 months of age); or at least two of the following:

(1) Fever (temperature ≥ 100.4 ° Fahrenheit);

(2) Electroencephalogram findings consistent with encephalitis, such as diffuse or multifocal nonspecific background slowing and periodic discharges; or

(3) Neuroimaging findings consistent with encephalitis, which include, but are not limited to brain/spine magnetic resonance imaging (MRI) displaying diffuse or multifocal areas of hyperintense signal on T2-weighted, diffusion-weighted image, or fluid-attenuation inversion recovery sequences.

(ii) Exclusionary criteria for encephalitis. Regardless of whether or not the specific cause of the underlying condition, systemic disease, or acute event (including an infectious organism) is known, encephalitis shall not be considered to be a condition set forth in the Table if it is shown that the encephalitis was caused by:

(A) An underlying malignancy that led to a paraneoplastic encephalitis;

(B) An infectious disease associated with encephalitis, including a bacterial, parasitic, fungal or viral illness (such as herpes viruses, adenovirus, enterovirus, West Nile Virus, or human immunodeficiency virus), which may be demonstrated by clinical signs and symptoms and need not be confirmed by culture or serologic testing; or

(C) Acute disseminated encephalomyelitis (ADEM). Although early ADEM may have laboratory and clinical characteristics similar to acute encephalitis, findings on MRI are distinct with ADEM displaying evidence of acute demyelination (scattered, focal, or multifocal areas of inflammation and demyelination within cerebral subcortical and deep cortical white matter; gray matter involvement may also be seen but is a minor component); or

(D) Other conditions or abnormalities that would explain the vaccine recipient's symptoms.

(4) Intussusception.

(i) For purposes of paragraph (a) of this section, intussusception means the invagination of a segment of intestine into the next segment of intestine, resulting in bowel obstruction, diminished arterial blood supply, and blockage of the venous blood flow. This is characterized by a sudden onset of abdominal pain that may be manifested by anguished crying, irritability, vomiting, abdominal swelling, and/or passing of stools mixed with blood and mucus.

(ii) For purposes of paragraph (a) of this section, the following shall not be considered to be a Table intussusception:

(A) Onset that occurs with or after the third dose of a vaccine containing rotavirus;

(B) Onset within 14 days after an infectious disease associated with intussusception, including viral disease (such as those secondary to non-enteric or enteric adenovirus, or other enteric viruses such as Enterovirus), enteric bacteria (such as *Campylobacter jejuni*), or enteric parasites (such as *Ascaris lumbricoides*), which may be demonstrated by clinical signs and symptoms and need not be confirmed by culture or serologic testing;

(C) Onset in a person with a preexisting condition identified as the lead point for intussusception such as intestinal masses and cystic structures (such as polyps, tumors, Meckel's diverticulum, lymphoma, or duplication cysts);

(D) Onset in a person with abnormalities of the bowel, including congenital anatomic abnormalities, anatomic changes after abdominal surgery, and other anatomic bowel abnormalities caused by mucosal hemorrhage, trauma, or abnormal intestinal blood vessels (such as Henoch Schölein purpura, hematoma, or hemangioma); or

(E) Onset in a person with underlying conditions or systemic diseases associated with intussusception (such as cystic fibrosis, celiac disease, or Kawasaki disease).

(5) Chronic arthritis. Chronic arthritis is defined as persistent joint swelling with at least two additional manifestations of warmth, tenderness, pain with movement, or limited range of motion, lasting for at least 6 months.

(i) Chronic arthritis may be found in a person with no history in the 3 years prior to vaccination of arthropathy (joint disease) on the basis of:

(A) Medical documentation recorded within 30 days after the onset of objective signs of acute arthritis (joint swelling) that occurred between 7 and 42 days after a rubella vaccination; and

(B) Medical documentation (recorded within 3 years after the onset of acute arthritis) of the persistence of objective signs of intermittent or continuous arthritis for more than 6 months following vaccination; and

(C) Medical documentation of an antibody response to the rubella virus.

(ii) The following shall not be considered as chronic arthritis: Musculoskeletal disorders such as diffuse connective tissue diseases (including but not limited to rheumatoid arthritis, juvenile idiopathic arthritis, systemic lupus erythematosus, systemic sclerosis, mixed connective tissue disease, polymyositis/dermatomyositis, fibromyalgia, necrotizing vasculitis and vasculopathies and Sjogren's Syndrome), degenerative joint disease, infectious agents other than rubella (whether by direct invasion or as an immune reaction), metabolic and endocrine diseases, trauma, neoplasms, neuropathic disorders, bone and cartilage disorders, and arthritis associated with ankylosing spondylitis, psoriasis, inflammatory bowel disease, Reiter's Syndrome, blood disorders, or arthralgia (joint pain), or joint stiffness without swelling.

(6) Brachial neuritis. This term is defined as dysfunction limited to the upper extremity nerve plexus (i.e., its trunks, divisions, or cords). A deep, steady, often severe aching pain in the shoulder and upper arm usually heralds onset of the condition. The pain is typically followed in days or weeks by weakness in the affected upper extremity muscle groups. Sensory loss may accompany the motor deficits, but is generally a less notable clinical feature. Atrophy of the affected muscles may occur. The neuritis, or plexopathy, may be present on the same side or on the side opposite the injection. It is sometimes bilateral, affecting both upper extremities. A vaccine recipient shall be considered to have suffered brachial neuritis as a Table injury if such recipient manifests all of the following:

(i) Pain in the affected arm and shoulder is a presenting symptom and occurs within the specified time-frame;

(ii) Weakness;

(A) Clinical diagnosis in the absence of nerve conduction and electromyographic studies requires weakness in muscles supplied by more than one peripheral nerve.

(B) Nerve conduction studies (NCS) and electromyographic (EMG) studies localizing the injury to the brachial plexus are required before the diagnosis can be made if weakness is limited to muscles supplied by a single peripheral nerve.

(iii) Motor, sensory, and reflex findings on physical examination and the results of NCS and EMG studies, if performed, must be consistent in confirming that dysfunction is attributable to the brachial plexus; and

(iv) No other condition or abnormality is present that would explain the vaccine recipient's symptoms.

(7) Thrombocytopenic purpura. This term is defined by the presence of clinical manifestations, such as petechiae, significant bruising, or spontaneous bleeding, and by a serum platelet count less than 50,000/mm³ with normal red and white blood cell indices. Thrombocytopenic purpura does not include cases of thrombocytopenia associated with other causes such as hypersplenism, autoimmune disorders (including alloantibodies from previous transfusions) myelodysplasias, lymphoproliferative disorders, congenital thrombocytopenia or hemolytic uremic syndrome. Thrombocytopenic purpura does not include cases of immune (formerly called idiopathic) thrombocytopenic purpura that are mediated, for example, by viral or fungal infections, toxins or drugs. Thrombocytopenic purpura does not include cases of thrombocytopenia associated with disseminated intravascular coagulation, as observed with bacterial and viral infections. Viral infections include, for example, those infections secondary to Epstein Barr virus, cytomegalovirus, hepatitis A and B, human immunodeficiency virus, adenovirus, and dengue virus. An antecedent viral infection may be demonstrated by clinical signs and symptoms and need not be confirmed by culture or serologic testing. However, if culture or serologic testing is performed, and the viral illness is attributed to the vaccine-strain measles virus, the presumption of causation will remain in effect. Bone marrow examination, if performed, must reveal a normal or an increased number of megakaryocytes in an otherwise normal marrow.

(8) Vaccine-strain measles viral disease. This term is defined as a measles illness that involves the skin and/or another organ (such as the brain or lungs). Measles virus must be isolated from the affected organ or histopathologic findings characteristic for the disease must be present. Measles viral strain determination may be performed by methods such as polymerase chain reaction test and vaccine-specific monoclonal antibody. If strain determination reveals wild-type measles virus or another, non-vaccine-strain virus, the disease shall not be considered to be a condition set forth in the Table. If strain determination is not done or if the strain cannot be identified, onset of illness in any organ must occur within 12 months after vaccination.

(9) Vaccine-strain polio viral infection. This term is defined as a disease caused by poliovirus that is isolated from the affected tissue and should be determined to be the vaccine-strain by oligonucleotide or polymerase chain reaction. Isolation of poliovirus from the stool is not sufficient to establish a tissue specific infection or disease caused by vaccine-strain poliovirus.

(10) Shoulder injury related to vaccine administration (SIRVA). SIRVA manifests as shoulder pain and limited range of motion occurring after the administration of a vaccine intended for intramuscular administration in the upper arm. These symptoms are thought to occur as a result of unintended injection of vaccine antigen or trauma from the needle into and around the underlying bursa of the shoulder resulting in an inflammatory reaction. SIRVA is caused by an injury to the musculoskeletal structures of the shoulder (e.g. tendons, ligaments, bursae, etc.). SIRVA is not a neurological injury and abnormalities on neurological examination or nerve conduction studies (NCS) and/or electromyographic (EMG) studies would not support SIRVA as a diagnosis (even if the condition causing the neurological abnormality is not known). A vaccine recipient shall be considered to have suffered SIRVA if such recipient manifests all of the following:

(i) No history of pain, inflammation or dysfunction of the affected shoulder prior to intramuscular vaccine administration that would explain the alleged signs, symptoms, examination findings, and/or diagnostic studies occurring after vaccine injection;

(ii) Pain occurs within the specified time-frame;

(iii) Pain and reduced range of motion are limited to the shoulder in which the intramuscular vaccine was administered; and

(iv) No other condition or abnormality is present that would explain the patient's symptoms (e.g. NCS/EMG or clinical evidence of radiculopathy, brachial neuritis, mononeuropathies, or any other neuropathy).

(11) Disseminated varicella vaccine-strain viral disease. Disseminated varicella vaccine-strain viral disease is defined as a varicella illness that involves the skin beyond the dermatome in which the vaccination was given and/or disease caused by vaccine-strain varicella in another organ. For organs other than the skin, the disease must be demonstrated in the involved organ and not just through mildly abnormal laboratory values. If there is involvement of an organ beyond the skin, and no virus was identified in that organ, the involvement of all organs must occur as part of the same, discrete illness. If strain determination reveals wild-type varicella virus or another, non-vaccine-strain virus, the viral disease shall not be considered to be a condition set forth in the Table. If strain determination is not done or if the strain cannot be identified, onset of illness in any organ must occur 7- 42 days after vaccination.

(12) Varicella vaccine-strain viral reactivation disease. Varicella vaccine-strain viral reactivation disease is defined as the presence of the rash of herpes zoster with or without concurrent disease in an organ other than the skin. Zoster, or shingles, is a painful, unilateral, pruritic rash appearing in one or more sensory dermatomes. For organs other than the skin, the disease must be demonstrated in the involved organ and not just through mildly abnormal laboratory values. There must be laboratory confirmation that the vaccine-strain of the varicella virus is present in the skin or in any other involved organ, for example by oligonucleotide or polymerase chain reaction. If strain determination reveals wild-type varicella virus or another, non-vaccine-strain virus, the viral disease shall not be considered to be a condition set forth in the Table.

(13) Vasovagal syncope. Vasovagal syncope (also sometimes called neurocardiogenic syncope) means loss of consciousness (fainting) and postural tone caused by a transient decrease in blood flow to the brain occurring after the administration of an injected vaccine. Vasovagal syncope is usually a benign condition but may result in falling and injury with significant sequela. Vasovagal syncope may be preceded by symptoms such as nausea, lightheadedness, diaphoresis, and/or pallor. Vasovagal syncope may be associated with transient seizure-like activity, but recovery of orientation and consciousness generally occurs simultaneously with vasovagal syncope. Loss of consciousness resulting from the following conditions will not be considered vasovagal syncope: organic heart disease, cardiac arrhythmias, transient ischemic attacks, hyperventilation, metabolic conditions, neurological conditions, and seizures. Episodes of recurrent syncope occurring after the applicable time period are not considered to be sequela of an episode of syncope meeting the Table requirements.

(14) Immunodeficient recipient. Immunodeficient recipient is defined as an individual with an identified defect in the immunological system which impairs the body's ability to fight infections. The identified defect may be due to an inherited disorder (such as severe combined immunodeficiency resulting in absent T lymphocytes), or an acquired disorder (such as acquired immunodeficiency syndrome resulting from decreased CD4 cell counts). The identified defect must be demonstrated in the medical records, either preceding or postdating vaccination.

(15) Guillain–Barré Syndrome (GBS).

(i) GBS is an acute monophasic peripheral neuropathy that encompasses a spectrum of four clinicopathological subtypes described below. For each subtype of GBS, the interval between the first appearance of symptoms and the nadir of weakness is between 12 hours and 28 days. This is followed in all subtypes by a clinical plateau with stabilization at the nadir of symptoms, or subsequent improvement without significant relapse. Death may occur without a clinical plateau. Treatment related fluctuations in all subtypes of GBS can occur within 9 weeks of GBS symptom onset and recurrence of symptoms after this time-frame would not be consistent with GBS.

(ii) The most common subtype in North America and Europe, comprising more than 90 percent of cases, is acute inflammatory demyelinating polyneuropathy (AIDP), which has the pathologic and electrodiagnostic features of focal demyelination of motor and sensory peripheral nerves and nerve roots. Another subtype called acute motor axonal neuropathy (AMAN) is generally seen in other parts of the world and is predominated by axonal damage that primarily affects motor nerves. AMAN lacks features of demyelination. Another less common subtype of GBS includes acute motor and sensory neuropathy (AMSAN), which is an axonal form of GBS that is similar to AMAN, but also affects the sensory nerves and roots. AIDP, AMAN, and AMSAN are typically characterized by symmetric motor flaccid weakness, sensory abnormalities, and/or autonomic dysfunction caused by autoimmune damage to peripheral nerves and nerve roots. The diagnosis of AIDP, AMAN, and AMSAN requires:

(A) Bilateral flaccid limb weakness and decreased or absent deep tendon reflexes in weak limbs;

(B) A monophasic illness pattern;

(C) An interval between onset and nadir of weakness between 12 hours and 28 days;

(D) Subsequent clinical plateau (the clinical plateau leads to either stabilization at the nadir of symptoms, or subsequent improvement without significant relapse; however, death may occur without a clinical plateau); and,

(E) The absence of an identified more likely alternative diagnosis.

(iii) Fisher Syndrome (FS), also known as Miller Fisher Syndrome, is a subtype of GBS characterized by ataxia, areflexia, and ophthalmoplegia, and overlap between FS and AIDP may be seen with limb weakness. The diagnosis of FS requires:

(A) Bilateral ophthalmoparesis;

(B) Bilateral reduced or absent tendon reflexes;

(C) Ataxia;

(D) The absence of limb weakness (the presence of limb weakness suggests a diagnosis of AIDP, AMAN, or AMSAN);

(E) A monophasic illness pattern;

(F) An interval between onset and nadir of weakness between 12 hours and 28 days;

(G) Subsequent clinical plateau (the clinical plateau leads to either

stabilization at the nadir of symptoms, or subsequent improvement without significant relapse; however, death may occur without a clinical plateau);

(H) No alteration in consciousness;

(I) No corticospinal track signs; and

(J) The absence of an identified more likely alternative diagnosis.

(iv) Evidence that is supportive, but not required, of a diagnosis of all subtypes of GBS includes electrophysiologic findings consistent with GBS or an elevation of cerebral spinal fluid (CSF) protein with a total CSF white blood cell count below 50 cells per microliter. Both CSF and electrophysiologic studies are frequently normal in the first week of illness in otherwise typical cases of GBS.

(v) To qualify as any subtype of GBS, there must not be a more likely alternative diagnosis for the weakness.

(vi) Exclusionary criteria for the diagnosis of all subtypes of GBS include the ultimate diagnosis of any of the following conditions: chronic immune demyelinating polyradiculopathy (CIDP), carcinomatous meningitis, brain stem encephalitis

(other than Bickerstaff brainstem encephalitis), myelitis, spinal cord infarct, spinal cord compression, anterior horn cell diseases such as polio or West Nile virus infection, subacute inflammatory demyelinating polyradiculoneuropathy, multiple sclerosis, cauda equina compression, metabolic conditions such as hypermagnesemia or hypophosphatemia, tick paralysis, heavy metal toxicity (such as arsenic, gold, or thallium), drug-induced neuropathy (such as vincristine, platinum compounds, or nitrofurantoin), porphyria, critical illness neuropathy, vasculitis, diphtheria, myasthenia gravis, organophosphate poisoning, botulism, critical illness myopathy, polymyositis, dermatomyositis, hypokalemia, or hyperkalemia. The above list is not exhaustive.

(d) Glossary for purposes of paragraph (c) of this section—

(1) Chronic encephalopathy.

(i) A chronic encephalopathy occurs when a change in mental or neurologic status, first manifested during the applicable Table time period as an acute encephalopathy or encephalitis, persists for at least 6 months from the first symptom or manifestation of onset or of significant aggravation of an acute encephalopathy or encephalitis.

(ii) Individuals who return to their baseline neurologic state, as confirmed by clinical findings, within less than 6 months from the first symptom or manifestation of onset or of significant aggravation of an acute encephalopathy or encephalitis shall not be presumed to have suffered residual neurologic damage from that event; any subsequent chronic encephalopathy shall not be presumed to be a sequela of the acute encephalopathy or encephalitis.

(2) Injected refers to the intramuscular, intradermal, or subcutaneous needle administration of a vaccine.

(3) Sequela means a condition or event which was actually caused by a condition listed in the Vaccine Injury Table.

(4) Significantly decreased level of consciousness is indicated by the presence of one or more of the following clinical signs:

(i) Decreased or absent response to environment (responds, if at all, only to loud voice or painful stimuli);

(ii) Decreased or absent eye contact (does not fix gaze upon family members or other individuals); or

(iii) Inconsistent or absent responses to external stimuli (does not recognize familiar people or things).

(5) Seizure includes myoclonic, generalized tonic-clonic (grand mal), and simple and complex partial seizures, but not absence (petit mal), or pseudo seizures. Jerking movements or staring episodes alone are not necessarily an indication of seizure activity.

(e) Coverage provisions.

(1) Except as provided in paragraph (e)(2), (3), (4), (5), (6), (7), or (8) of this section, this section applies only to petitions for compensation under the program filed with the United States Court of Federal Claims on or after February 21, 2017.

(2) Hepatitis B, Hib, and varicella vaccines (Items VIII, IX, and X of the Table) are included in the Table as of August 6, 1997.

(3) Rotavirus vaccines (Item XI of the Table) are included in the Table as of October 22, 1998.

(4) Pneumococcal conjugate vaccines (Item XII of the Table) are included in the Table as of December 18, 1999.

(5) Hepatitis A vaccines (Item XIII of the Table) are included on the Table as of December 1, 2004.

(6) Trivalent influenza vaccines (Included in item XIV of the Table) are included on the Table as of July 1, 2005. All other seasonal influenza vaccines (Item XIV of the Table) are included on the Table as of November 12, 2013.

(7) Meningococcal vaccines and human papillomavirus vaccines (Items XV and XVI of the Table) are included on the Table as of February 1, 2007.

(8) Other new vaccines (Item XVII of the Table) will be included in the Table as of the effective date of a tax enacted to provide funds for compensation paid with respect to such vaccines. An amendment to this section will be published in the Federal Register to announce the effective date of such a tax.

Credits

[60 FR 7694, Feb. 8, 1995; 62 FR 7688, Feb. 20, 1997; 62 FR 10626, March 7, 1997; 63 FR 25778, May 11, 1998; 64 FR 40518, July 27, 1999; 67 FR 48559, July 25, 2002; 73 FR 59530, Oct. 9, 2008; 76 FR 36368, June 22, 2011; 80 FR 35850, June 23, 2015; 82 FR 6299, Jan. 19, 2017; 82 FR 11321, Feb. 22, 2017]

AUTHORITY: Secs. 312 and 313 of Public Law 99–660 (42 U.S.C. 300aa–1 note); 42 U.S.C. 300aa–10 to 300aa–34; 26 U.S.C.

§ 100.3 Vaccine injury table., 42 C.F.R. § 100.3

4132(a); and sec. 13632(a)(3) of Public Law 103–66.

Notes of Decisions (22)

Current through October 17, 2019; 84 FR 55509.

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United States Code Annotated

Title 42. The Public Health and Welfare

Chapter 6A. Public Health Service (Refs & Annos)

Subchapter XIX. Vaccines (Refs & Annos)

Part 2. National Vaccine Injury Compensation Program (Refs & Annos)

Subpart A. Program Requirements (Refs & Annos)

42 U.S.C.A. § 300aa-10

§ 300aa-10. Establishment of program

Currentness

(a) Program established

There is established the National Vaccine Injury Compensation Program to be administered by the Secretary under which compensation may be paid for a vaccine-related injury or death.

(b) Attorney's obligation

It shall be the ethical obligation of any attorney who is consulted by an individual with respect to a vaccine-related injury or death to advise such individual that compensation may be available under the program¹ for such injury or death.

(c) Publicity

The Secretary shall undertake reasonable efforts to inform the public of the availability of the Program.

CREDIT(S)

(July 1, 1944, c. 373, Title XXI, § 2110, as added Pub.L. 99-660, Title III, § 311(a), Nov. 14, 1986, 100 Stat. 3758; amended Pub.L. 101-239, Title VI, § 6601(b), Dec. 19, 1989, 103 Stat. 2285.)

Notes of Decisions (7)

Footnotes

¹

So in original. Probably should be capitalized.

42 U.S.C.A. § 300aa-10, 42 USCA § 300aa-10
Current through P.L. 116-65.

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United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 6A. Public Health Service (Refs & Annos)
Subchapter XIX. Vaccines (Refs & Annos)
Part 2. National Vaccine Injury Compensation Program (Refs & Annos)
Subpart A. Program Requirements (Refs & Annos)

42 U.S.C.A. § 300aa-14

§ 300aa-14. Vaccine Injury Table

Effective: December 13, 2016

Currentness

(a) Initial table

The following is a table of vaccines, the injuries, disabilities, illnesses, conditions, and deaths resulting from the administration of such vaccines, and the time period in which the first symptom or manifestation of onset or of the significant aggravation of such injuries, disabilities, illnesses, conditions, and deaths is to occur after vaccine administration for purposes of receiving compensation under the Program:

VACCINE INJURY TABLE

- I. DTP; P; DTP/Polio Combination; or Any Other Vaccine
Containing Whole Cell Pertussis Bacteria, Extracted or
Partial Cell Bacteria, or Specific Pertussis Antigen(s).

Illness, disability, injury, or condition covered:

Time period for first symptom or manifestation of
onset or of significant aggravation after vaccine
administration:

A. Anaphylaxis or anaphylactic shock 24 hours

B. Encephalopathy (or encephalitis) 3 days

C. Shock-collapse or hypotonic-

hyporesponsive collapse 3 days

D. Residual seizure disorder in

accordance with subsection (b)(2) 3 days

E. Any acute complication or sequela (including death) of an illness, disability, injury, or condition referred to above which illness, disability, injury, or condition arose

within the time period prescribed Not applicable

II. Measles, mumps, rubella, or any vaccine containing any of the foregoing as a component; DT; Td; or Tetanus Toxoid.

A. Anaphylaxis or anaphylactic shock 24 hours

B. Encephalopathy (or encephalitis) 15 days (for mumps, rubella, measles, or any vaccine containing any of the foregoing as a component). 3 days (for DT, Td, or tetanus toxoid).

C. Residual seizure disorder in accor-

dance with subsection (b)(2) 15 days (for mumps, rubella, measles, or any vaccine containing any of the foregoing as a component). 3 days (for DT, Td, or tetanus toxoid).

D. Any acute complication or sequela (including death) of an illness, disability, injury, or condition referred to above which illness, disability, injury, or condition arose

within the time period prescribed Not applicable

III. Polio Vaccines (other than Inactivated Polio Vaccine).

A. Paralytic polio

--in a non-immunodeficient recipient 30 days

--in an immunodeficient recipient..... 6 months

--in a vaccine-associated commu-

nity case..... Not applicable

- B. Any acute complication or sequela (including death) of an illness, disability, injury, or condition referred to above which illness, disability, injury, or condition arose

within the time period prescribed..... Not applicable

IV. Inactivated Polio Vaccine

- A. Anaphylaxis or anaphylactic shock 24 hours

- B. Any acute complication or sequela (including death) of an illness, disability, injury, or condition referred to above which illness, disability, injury, or condition arose

within the time period prescribed..... Not applicable

(b) Qualifications and aids to interpretation

The following qualifications and aids to interpretation shall apply to the Vaccine Injury Table in subsection (a):

(1) A shock-collapse or a hypotonic-hyporesponsive collapse may be evidenced by indicia or symptoms such as decrease or loss of muscle tone, paralysis (partial or complete), hemiplegia or hemiparesis, loss of color or turning pale white or blue, unresponsiveness to environmental stimuli, depression of consciousness, loss of consciousness, prolonged sleeping with difficulty arousing, or cardiovascular or respiratory arrest.

(2) A petitioner may be considered to have suffered a residual seizure disorder if the petitioner did not suffer a seizure or convulsion unaccompanied by fever or accompanied by a fever of less than 102 degrees Fahrenheit before the first seizure or convulsion after the administration of the vaccine involved and if--

(A) in the case of a measles, mumps, or rubella vaccine or any combination of such vaccines, the first seizure or convulsion occurred within 15 days after administration of the vaccine and 2 or more seizures or convulsions occurred within 1 year after the administration of the vaccine which were unaccompanied by fever or accompanied by a fever of less than 102 degrees Fahrenheit, and

(B) in the case of any other vaccine, the first seizure or convulsion occurred within 3 days after administration of the vaccine and 2 or more seizures or convulsions occurred within 1 year after the administration of the vaccine which were unaccompanied by fever or accompanied by a fever of less than 102 degrees Fahrenheit.

(3)(A) The term “encephalopathy” means any significant acquired abnormality of, or injury to, or impairment of function of the brain. Among the frequent manifestations of encephalopathy are focal and diffuse neurologic signs, increased intracranial pressure, or changes lasting at least 6 hours in level of consciousness, with or without convulsions. The neurological signs and symptoms of encephalopathy may be temporary with complete recovery, or may result in various degrees of permanent impairment. Signs and symptoms such as high pitched and unusual screaming, persistent unconsolable crying, and bulging fontanel are compatible with an encephalopathy, but in and of themselves are not conclusive evidence of encephalopathy. Encephalopathy usually can be documented by slow wave activity on an electroencephalogram.

(B) If in a proceeding on a petition it is shown by a preponderance of the evidence that an encephalopathy was caused by infection, toxins, trauma, or metabolic disturbances the encephalopathy shall not be considered to be a condition set forth in the table. If at the time a judgment is entered on a petition filed under section 300aa-11 of this title for a vaccine-related injury or death it is not possible to determine the cause, by a preponderance of the evidence, of an encephalopathy, the encephalopathy shall be considered to be a condition set forth in the table. In determining whether or not an encephalopathy is a condition set forth in the table, the court shall consider the entire medical record.

(4) For purposes of paragraphs (2) and (3), the terms “seizure” and “convulsion” include grand mal, petit mal, absence, myoclonic, tonic-clonic, and focal motor seizures and signs. If a provision of the table to which paragraph (1), (2), (3), or (4) applies is revised under subsection (c) or (d), such paragraph shall not apply to such provision after the effective date of the revision unless the revision specifies that such paragraph is to continue to apply.

(c) Administrative revision of table

(1) The Secretary may promulgate regulations to modify in accordance with paragraph (3) the Vaccine Injury Table. In promulgating such regulations, the Secretary shall provide for notice and opportunity for a public hearing and at least 180 days of public comment.

(2) Any person (including the Advisory Commission on Childhood Vaccines) may petition the Secretary to propose regulations to amend the Vaccine Injury Table. Unless clearly frivolous, or initiated by the Commission, any such petition shall be referred to the Commission for its recommendations. Following--

(A) receipt of any recommendation of the Commission, or

(B) 180 days after the date of the referral to the Commission,

whichever occurs first, the Secretary shall conduct a rulemaking proceeding on the matters proposed in the petition or publish in the Federal Register a statement of reasons for not conducting such proceeding.

(3) A modification of the Vaccine Injury Table under paragraph (1) may add to, or delete from, the list of injuries, disabilities, illnesses, conditions, and deaths for which compensation may be provided or may change the time periods for the first symptom or manifestation of the onset or the significant aggravation of any such injury, disability, illness, condition, or death.

(4) Any modification under paragraph (1) of the Vaccine Injury Table shall apply only with respect to petitions for compensation under the Program which are filed after the effective date of such regulation.

(d) Role of Commission

Except with respect to a regulation recommended by the Advisory Commission on Childhood Vaccines, the Secretary may not propose a regulation under subsection (c) or any revision thereof, unless the Secretary has first provided to the Commission a copy of the proposed regulation or revision, requested recommendations and comments by the Commission, and afforded the Commission at least 90 days to make such recommendations.

(e) Additional vaccines

(1) Vaccines recommended before August 1, 1993

By August 1, 1995, the Secretary shall revise the Vaccine Injury Table included in subsection (a) to include--

(A) vaccines which are recommended to the Secretary by the Centers for Disease Control and Prevention before August 1, 1993, for routine administration to children,

(B) the injuries, disabilities, illnesses, conditions, and deaths associated with such vaccines, and

(C) the time period in which the first symptoms or manifestations of onset or other significant aggravation of such injuries, disabilities, illnesses, conditions, and deaths associated with such vaccines may occur.

(2) Vaccines recommended after August 1, 1993

When after August 1, 1993, the Centers for Disease Control and Prevention recommends a vaccine to the Secretary for routine administration to children, the Secretary shall, within 2 years of such recommendation, amend the Vaccine Injury Table included in subsection (a) to include--

(A) vaccines which were recommended for routine administration to children,

(B) the injuries, disabilities, illnesses, conditions, and deaths associated with such vaccines, and

(C) the time period in which the first symptoms or manifestations of onset or other significant aggravation of such injuries, disabilities, illnesses, conditions, and deaths associated with such vaccines may occur.

(3) Vaccines recommended for use in pregnant women

The Secretary shall revise the Vaccine Injury Table included in subsection (a), through the process described in subsection (c), to include vaccines recommended by the Centers for Disease Control and Prevention for routine administration in pregnant women and the information described in subparagraphs (B) and (C) of paragraph (2) with respect to such vaccines.

CREDIT(S)

(July 1, 1944, c. 373, Title XXI, § 2114, as added Pub.L. 99-660, Title III, § 311(a), Nov. 14, 1986, 100 Stat. 3764; amended Pub.L. 101-239, Title VI, § 6601(k), Dec. 19, 1989, 103 Stat. 2290; Pub.L. 103-66, Title XIII, § 13632(a)(2), Aug. 10, 1993, 107 Stat. 645; Pub.L. 114-255, Div. A, Title III, § 3093(c)(1), Dec. 13, 2016, 130 Stat. 1152.)

Notes of Decisions (36)

42 U.S.C.A. § 300aa-14, 42 USCA § 300aa-14
Current through P.L. 116-65.

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51 S.Ct. 570
Supreme Court of the United States.

UNITED STATES

v.

MACINTOSH.

No. 504.

Argued April 27, 1931.

Decided May 25, 1931.

Synopsis

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

Proceedings by Douglas Clyde Macintosh for naturalization, opposed by the United States. A decree of the District Court denying the application for citizenship was reversed by the Circuit Court of Appeals (42 F.(2d) 845), and the government brings certiorari.

Decree of Circuit Court of Appeals reversed, and that of District Court affirmed.

Attorneys and Law Firms

***571 *607** The Attorney General and Mrs. Thomas D. Thacher, Sol. Gen., of Washington, D. C., for the United States.

***610** Mr. John W. Davis, of New York City, for respondent.

***627** Mr. Chief Justice HUGHES, Mr. Justice HOLMES, Mr. Justice BRANDEIS, and Mr. Justice STONE, dissenting.

Opinion

Mr. Justice SUTHERLAND delivered the opinion of the Court.

The respondent was born in the Dominion of Canada. He came to the United States in 1916, and in 1925 declared his intention to become a citizen. His petition for naturalization was presented to the federal District Court for Connecticut, and that court, after hearing and consideration, denied the application upon the ground that,

since petitioner would not promise in advance to bear arms in defense of the United States unless he believed the war to be morally justified, he was not attached to the principles of the Constitution. The Circuit Court of Appeals reversed the decree and directed the District Court to admit respondent to citizenship. 42 F.(2d) 845.

The Naturalization Act, s 4, c. 3592, 34 Stat. 596 (U. S. C. title 8, s 372 et seq. (8 USCA s 372 et seq.)), provides that an alien may be admitted to citizenship in the manner therein provided and not otherwise. By section 3 of the same act, jurisdiction to naturalize aliens is conferred upon the District Courts of the United States and other enumerated courts of record. U. S. C. title 8, s 357 (8 USCA s 357). The applicant is required to make ***614** and file a preliminary declaration in writing setting forth, among other things, his intention to become a citizen of the United States and to renounce all allegiance to any foreign prince, etc. Section 4 of the act (U. S. C. title 8, ss 381, 382 (8 USCA ss 381, 382)) provides:

‘Third. He shall, before he is admitted to citizenship, declare on oath in open court that he will support the Constitution of the United States, and that he absolutely and entirely renounces and abjures all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly by name to the prince, potentate, state or sovereignty of which he was before a citizen or subject; that he will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same.

‘Fourth. It shall be made to appear to the satisfaction of the court admitting any alien to citizenship that immediately preceding the date of his application he has resided continuously within the United States, five years at least, and within the State or Territory where such court is at the time held one year at least, and that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same. In addition to the oath of the applicant, the testimony of at least two witnesses, citizens of the United States, as to the facts of residence, moral character, and attachment to the principles of the Constitution shall be required. * * *

Section 9 of the act, 34 Stat. 599 (U. S. C. title 8, s 398 (8 USCA s 398)), requires that every final hearing upon a petition for naturalization shall be had in open court; that every final order upon the petition shall be under the hand of the court; and that ‘upon such final hearing of such petition the applicant and witnesses shall be examined under ***615** oath before the court and in the presence of the

court.’ By section 11, 34 Stat. 599 (U. S. C. title 8, s 399 (8 USCA s 399), it is provided that the United States shall have the right to appear in the proceeding for the purpose of cross-examining the petitioner and witnesses produced in support of the petition ‘concerning any matter touching or in any way affecting his right to admission to citizenship, and shall have the right to call ****572** witnesses, produce evidence, and be heard in opposition to the granting of any petition in naturalization proceedings.’

By the petition for naturalization, a case is presented for the exercise of the judicial power under the Constitution, to which the United States is a proper, and always a possible, adverse party. *Tutum v. United States*, 270 U. S. 568, 576, 577, 46 S. Ct. 425, 70 L. Ed. 738.

Naturalization is a privilege, to be given, qualified, or withheld as Congress may determine, and which the alien may claim as of right only upon compliance with the terms which Congress imposes. That Congress regarded the admission to citizenship as a serious matter is apparent from the conditions and precautions with which it carefully surrounded the subject. Thus, among other provisions, it is required that the applicant not only shall reside continuously within the United States for a period of at least five years immediately preceding his application, but shall make a preliminary declaration of his intention to become a citizen at least two years prior to his admission. He must produce the testimony of witnesses as to the facts of residence, moral character, and attachment to the principles of the Constitution, and in open court take an oath renouncing his former allegiance and pleading future allegiance to the United States. At the final hearing in open court, he and his witnesses must be examined under oath, and the government may appear for the purpose of cross-examining in respect of ‘any matter touching or in any way affecting his right to ***616** admission,’ introduce countervailing evidence, and be heard in opposition.

In specifically requiring that the court shall be satisfied that the applicant, during his residence in the United States, has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, etc., it is obvious that Congress regarded the fact of good character and the fact of attachment to the principles of the Constitution as matters of the first importance. The applicant’s behavior is significant to the extent that it tends to establish or negative these facts.

But proof of good behavior does not close the inquiry. Why does the statute require examination of the applicant and witnesses in open court and under oath, and for what purpose is the government authorized to cross-examine concerning any matter touching or in any way affecting the right of naturalization? Clearly, it would seem, in order that

the court and the government, whose power and duty in that respect these provisions take for granted, may discover whether the applicant is fitted for citizenship-and to that end, by actual inquiry, ascertain, among other things, whether he has intelligence and good character; whether his oath to support and defend the Constitution and laws of the United States, and to bear true faith and allegiance to the same, will be taken without mental reservation or purpose inconsistent therewith; whether his views are compatible with the obligations and duties of American citizenship; whether he will upon his own part observe the laws of the land; whether he is willing to support the government in time of war, as well as in time of peace, and to assist in the defense of the country, not to the extent or in the manner that he may choose, but to such extent and in such manner as he lawfully may be required to do. These, at least, are matters which are of the essence of the statutory requirements, and in respect of which the mind and conscience of the applicant ***617** may be probed by pertinent inquiries, as fully as the court, in the exercise of a sound discretion, may conclude is necessary.

The settled practice of the courts having jurisdiction in naturalization proceedings has, from the beginning, been in accordance with this view. *In re Bodek* (C. C.) 63 F. 813; *In re Meakins* (D. C.) 164 F. 334; *In re Mudarri* (C. C.) 176 F. 465, 466; *In re Ross* (C. C.) 188 F. 685; *United States v. Bressi* (D. C.) 208 F. 369, 372; *Schurmann v. United States* (C. C. A.) 264 F. 917, 920, 18 A. L. R. 1182; *In re Sigelman* (D. C.) 268 F. 217. And it finds support in the decisions of this court. As early as 1830, in *Spratt v. Spratt*, 4 Pet. 393, 407, 7 L. Ed. 897, Chief Justice Marshall, speaking for the court, said:

‘The various acts upon the subject submit the decision on the right of aliens to admission as citizens to courts of record. They are to receive testimony, to compare it with the law, and to judge on both law and fact.’ *United States v. Schwimmer*, 279 U. S. 644, 649, 49 S. Ct. 448, 73 L. Ed. 889.

With the foregoing statutory provisions and the scope of the powers and duties of the courts of first instance in respect thereof in mind, we come to a consideration of the case now before us. The applicant had complied with all the formal requirements of the law, and his personal character and conduct were shown to be good in all respects. His right to naturalization turns altogether upon the effect to be given to certain answers and qualifying statements made in response to interrogatories propounded to him.

Upon the preliminary form for petition for naturalization, the following questions, among others, appear: ‘20. Have you read the following oath of allegiance? (which is then

quoted). Are you willing to take this oath in becoming a citizen?' '22. If necessary, **573 are you willing to take up arms in defense of this country?' In response to the questions designated 20, he answered 'Yes.' In response to the question designated 22, he answered, 'Yes; but I should want to be free to judge of the necessity.' *618 By a written memorandum subsequently filed, he amplified these answers as follows:

'20 and 22. I am willing to do what I judge to be in the best interests of my country, but only in so far as I can believe that this is not going to be against the best interests of humanity in the long run. I do not undertake to support 'my country, right or wrong' in any dispute which may arise, and I am not willing to promise beforehand, and without knowing the cause for which my country may go to war, either that I will or that I will not 'take up arms in defense of this country,' however 'necessary' the war may seem to be to the Government of the day.

'It is only in a sense consistent with these statements that I am willing to promise to 'support and defend' the Government of the United States 'against all enemies, foreign and domestic.' But, just because I am not certain that the language of questions 20 and 22 will bear the construction I should have to put upon it in order to be able to answer them in the affirmative, I have to say that I do not know that I can say 'Yes' in answer to these two questions.'

Upon the hearing before the District Court on the petition, he explained his position more in detail. He said that he was not a pacifist; that, if allowed to interpret the oath for himself, he would interpret it as not inconsistent with his position and would take it. He then proceeded to say that he would answer question 22 in the affirmative only on the understanding that he would have to believe that the war was morally justified before he would take up arms in it or give it his moral support. He was ready to give to the United States all the allegiance he ever had given or ever could give to any country, but he could not put allegiance to the government of any country before allegiance to the will of God. He did not anticipate engaging in any propaganda against the prosecution of a war which the *619 government had already declared and which it considered to be justified; but he preferred not to make any absolute promise at the time of the hearing, because of his ignorance of all the circumstances which might affect his judgment with reference to such a war. He did not question that the government under certain conditions could regulate and restrain the conduct of the individual citizen, even to the extent of imprisonment. He recognized the principle of the submission of the individual citizen to the opinion of the majority in a democratic country; but he did not believe in having his own moral problems solved for

him by the majority. The position thus taken was the only one he could take consistently with his moral principles and with what he understood to be the moral principles of Christianity. He recognized, in short, the right of the government to restrain the freedom of the individual for the good of the social whole; but was convinced, on the other hand, that the individual citizen should have the right respectfully to withhold from the government military services (involving, as they probably would, the taking of human life), when his best moral judgment would compel him to do so. He was willing to support his country, even to the extent of bearing arms, if asked to do so by the government, in any war which he could regard as morally justified.

There is more to the same effect, but the foregoing is sufficient to make plain his position.

These statements of the applicant fairly disclose that he is unwilling to take the oath of allegiance, except with these important qualifications: That he will do what he judges to be in the best interests of the country only in so far as he believes it will not be against the best interests of humanity in the long run; that he will not assist in the defense of the country by force of arms or give any war his moral support unless he believes it to be morally justified, however necessary the war might *620 seem to the government of the day; that he will hold himself free to judge of the morality and necessity of the war, and, while he does not anticipate engaging in propaganda against the prosecution of a war declared and considered justified by the government, he prefers to make no promise even as to that; and that he is convinced that the individual citizen should have the right to withhold his military services when his best moral judgment impels him to do so.

Thus stated, the case is ruled in principle by United States v. Schwimmer, supra. In that case the applicant, a woman, testified that she would not take up arms in defense of the country. She was willing to be treated on the basis of a conscientious objector who refused to take up arms in the recent war, and seemed to regard herself as belonging in that class. She was an uncompromising pacifist, with no sense of nationalism, and only a cosmic sense of belonging to the human family. Her objection to military service, we concluded, rested upon reasons other than her inability to bear arms because of sex or age; and we held that her application for naturalization should be denied upon the ground, primarily, that she failed to sustain the burden of showing that she did not oppose the principle making it a duty of citizens, by force of arms when necessary, to defend their country **574 against its enemies. At page 650 of 279 U. S., 49 S. Ct. 448, 450, we said:

'That it is the duty of citizens by force of arms to defend our government against all enemies whenever necessity

arises is a fundamental principle of the Constitution.

‘The common defense was one of the purposes for which the people ordained and established the Constitution. * * * We need not refer to the numerous statutes that contemplate defense of the United States, its Constitution and laws, by armed citizens. This court, in the Selective Draft Law Cases, 245 U. S. 366, page 378, 38 S. Ct. 159, 161, 62 L. Ed. 349, L. R. A. 1918C, 361, Ann. Cas. 1918B, 856, speaking through Chief Justice White, said that ‘the very conception *621 of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need. * * *

‘Whatever tends to lessen the willingness of citizens to discharge their duty to bear arms in the country’s defense detracts from the strength and safety of the government. And their opinions and beliefs as well as their behavior indicating a disposition to hinder in the performance of that duty are subjects of inquiry under the statutory provisions governing naturalization and are of vital importance, for if all or a large number of citizens oppose such defense the ‘good order and happiness’ of the United States cannot long endure. And it is evident that the views of applicants for naturalization in respect of such matters may not be disregarded. The influence of conscientious objectors against the use of military force in defense of the principles of our government is apt to be more detrimental than their mere refusal to bear arms. The fact that, by reason of sex, age or other cause, they may be unfit to serve does not lessen their purpose or power to influence others. It is clear from her own statements that the declared opinions of respondent as to armed defense by citizens against enemies of the country were directly pertinent to the investigation of her application.’

And see *In re Roeper* (D. C.) 274 F. 490; *Clarke’s Case*, 301 Pa. 321, 152 A. 92.

There are few finer or more exalted sentiments than that which finds expression in opposition to war. Peace is a sweet and holy thing, and war is a hateful and an abominable thing, to be avoided by any sacrifice or concession that a free people can make. But thus far mankind has been unable to devise any method of indefinitely prolonging the one or of entirely abolishing the other; and, unfortunately, there is nothing which seems to afford *622 positive ground for thinking that the near future will witness the beginning of the reign of perpetual peace for which good men and women everywhere never cease to pray. The Constitution, therefore, wisely contemplating the ever-present possibility of war, declares that one of its purposes is to ‘provide for the common defense.’ In express terms Congress is empowered ‘to declare war,’ which necessarily connotes the plenary

power to wage war with all the force necessary to make it effective; and ‘to raise * * * armies’ (Const. art. 1, s 8, subds. 11, 12), which necessarily connotes the like power to say who shall serve in them and in what way.

From its very nature the war power, when necessity calls for its exercise, tolerates no qualifications or limitations, unless found in the Constitution or in applicable principles of international law. In the words of John Quincy Adams, ‘This power is tremendous; it is strictly constitutional; but it breaks down every barrier so anxiously erected for the protection of liberty, property and of life.’ To the end that war may not result in defeat, freedom of speech may, by act of Congress, be curtailed or denied so that the morale of the people and the spirit of the army may not be broken by seditious utterances; freedom of the press curtailed to preserve our military plans and movements from the knowledge of the enemy; deserters and spies put to death without indictment or trial by jury; ships and supplies requisitioned; property of alien enemies, theretofore under the protection of the Constitution, seized without process and converted to the public use without compensation and without due process of law in the ordinary sense of that term; prices of food and other necessities of life fixed or regulated; railways taken over and operated by the government; and other drastic powers, wholly inadmissible in time of peace, exercised to meet the emergencies of war.

*623 These are but illustrations of the breadth of the power; and it necessarily results from their consideration that whether any citizen shall be exempt from serving in the armed forces of the nation in time of war is dependent upon the will of Congress and not upon the scruples of the individual, except as Congress provides. That body, thus far, has seen fit, by express enactment, to relieve from the obligation of armed service those persons who belong to the class known as conscientious objectors; and this policy is of such long standing that it is thought by some to be beyond the possibility of alteration. Indeed, it seems to be assumed in this case that the privilege is one that Congress itself is powerless to take away. Thus it is said in the carefully prepared brief of respondent:

‘To demand from an alien who desires to be naturalized an unqualified promise to bear arms in every war that may be declared, despite the fact that he may have conscientious religious scruples against doing so in some hypothetical future war, would mean **575 that such an alien would come into our citizenry on an unequal footing with the native born, and that

he would be forced, as the price of citizenship, to forego a privilege enjoyed by others. That is the manifest result of the fixed principle of our Constitution, zealously guarded by our laws, that a citizen cannot be forced and need not bear arms in a war if he has conscientious religious scruples against doing so.'

This, if it means what it seems to say, is an astonishing statement. Of course, there is no such principle of the Constitution, fixed or otherwise. The conscientious objector is relieved from the obligation to bear arms in obedience to no constitutional provision, express or implied; but because, and only because, it has accorded with the policy of Congress thus to relieve him. The *624 alien, when he becomes a naturalized citizen, acquires, with one exception, every right possessed under the Constitution by those citizens who are native-born (*Luria v. United States*, 231 U. S. 9, 22, 34 S. Ct. 10, 58 L. Ed. 101); but he acquires no more. The privilege of the native-born conscientious objector to avoid bearing arms comes, not from the Constitution, but from the acts of Congress. That body may grant or withhold the exemption as in its wisdom it sees fit; and, if it be withheld, the native-born conscientious objector cannot successfully assert the privilege. No other conclusion is compatible with the well-nigh limitless extent of the war powers as above illustrated, which include, by necessary implication, the power, in the last extremity, to compel the armed service of any citizen in the land, without regard to his objections or his views in respect of the justice or morality of the particular war or of war in general. In *Jacobson v. Massachusetts*, 197 U. S. 11, 29, 25 S. Ct. 358, 362, 49 L. Ed. 643, 3 Ann. Cas. 765, this court, speaking of the liberties guaranteed to the individual by the Fourteenth Amendment, said:

'* * * And yet he may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, or even his religious or political convictions, to take his place in the ranks of the army of his country, and risk the chance of being shot down in its defense.'

The applicant for naturalization here is unwilling to become a citizen with this understanding. He is unwilling

to leave the question of his future military service to the wisdom of Congress, where it belongs, and where every native-born or admitted citizen is obliged to leave it. In effect, he offers to take the oath of allegiance only with the qualification that the question whether the war is necessary or morally justified must, so far as his support is concerned, be conclusively determined by reference to his opinion.

*625 When he speaks of putting his allegiance to the will of God above his allegiance to the government, it is evident, in the light of his entire statement, that he means to make his own interpretation of the will of God the decisive test which shall conclude the government and stay its hand. We are a Christian people (*Holy Trinity Church v. United States*, 143 U. S. 457, 470, 471, 12 S. Ct. 511, 36 L. Ed. 226), according to one another the equal right of religious freedom, and acknowledging with reverence the duty of obedience to the will of God. But, also, we are a nation with the duty to survive; a nation whose Constitution contemplates war as well as peace; whose government must go forward upon the assumption, and safely can proceed upon no other, that unqualified allegiance to the nation and submission and obedience to the laws of the land, as well those made for war as those made for peace, are not inconsistent with the will of God.

The applicant here rejects that view. He is unwilling to rely, as every native-born citizen is obliged to do, upon the probable continuance by Congress of the long-established and approved practice of exempting the honest conscientious objector, while at the same time asserting his willingness to conform to whatever the future law constitutionally shall require of him; but discloses a present and fixed purpose to refuse to give his moral or armed support to any future war in which the country may be actually engaged, if, in his opinion, the war is not morally justified. the opinion of the nation as expressed by Congress to the contrary notwithstanding.

If the attitude of this claimant, as shown by his statements and the inferences properly to be deduced from them, be held immaterial to the question of his fitness for admission to citizenship, where shall the line be drawn? Upon what ground of distinction may be hereafter reject another applicant who shall express his willingness to respect *626 any particular principle of the Constitution or obey any future statute only upon the condition that he shall entertain the opinion that it is morally justified? The applicant's attitude, in effect, is a refusal to take the oath of allegiance except in an altered form. The qualifications upon which he insists, it is true, are made by parol and not by way of written amendment to the oath; but the substance is the same.

It is not within the province of the courts to make bargains with those who seek naturalization. They must accept the grant and take the oath in accordance with the terms fixed by the law, or forego the privilege of citizenship. There is no middle choice. If one qualification of the oath be allowed, the door is opened for others, with utter confusion as the probable final result. As this **576 Court said in *United States v. Manzi*, 276 U. S. 463, 467, 48 S. Ct. 328, 329, 72 L. Ed. 654:

‘Citizenship is a high privilege, and when doubts exist concerning a grant of it, generally at least, they should be resolved in favor of the United States and against the claimant.’

The Naturalization Act is to be construed ‘with definite purpose to favor and support the government,’ and the United States is entitled to the benefit of any doubt which remains in the mind of the court as to any essential matter of fact. The burden was upon the applicant to show that his views were not opposed to ‘the principle that it is a duty of citizenship by force of arms when necessary to defend the country against all enemies, and that (his) opinions and beliefs would not prevent or impair the true faith and allegiance required by the act.’ *United States v. Schwimmer*, supra, 279 U. S. 649, 650, 653, 49 S. Ct. 448, 449, 73 L. Ed. 889. We are of opinion that he did not meet this requirement. The examiner and the court of first instance who heard and weighed the evidence and saw the applicant and witnesses so concluded. That conclusion, if we were in doubt, would not be rejected except for good and persuasive reasons, which we are unable to find.

The decree of the Court of Appeals is reversed and that of the District Court is affirmed.

Mr. Chief Justice HUGHES, dissenting.

I am unable to agree with the judgment in this case. It is important to note the precise question to be determined. It is solely one of law, as there is no controversy as to the facts. The question is not whether naturalization is a privilege to be granted or withheld. That it is such a privilege is undisputed. Nor, whether the Congress has the power to fix the conditions upon which the privilege is granted. That power is assumed. Nor, whether the Congress may in its discretion compel service in the army

in time of war or punish the refusal to serve. That power is not here in dispute. Nor is the question one of the authority of Congress to exact a promise to bear arms as a condition of its grant of naturalization. That authority, for the present purpose, may also be assumed.

The question before the Court is the narrower one whether the Congress has exacted such a promise. That the Congress has not made such an express requirement is apparent. The question is whether that exaction is to be implied from certain general words which do not, as it seems to me, either literally or historically, demand the implication. I think that the requirement should not be implied, because such a construction is directly opposed to the spirit of our institutions and to the historic practice of the Congress. It must be conceded that departmental zeal may not be permitted to outrun the authority conferred by statute. If such a promise is to be demanded, contrary to principles which have been respected as fundamental, the Congress should exact it in unequivocal *628 terms, and we should not, by judicial decision, attempt to perform what, as I see it, is a legislative function.

In examining the requirements for naturalization, we find that the Congress has expressly laid down certain rules which concern the opinions and conduct of the applicant. Thus it is provided that no person shall be naturalized ‘who disbelieves in or who is opposed to organized government, or who is a member of or affiliated with any organization entertaining and teaching such disbelief in or opposition to organized government, or who advocates or teaches the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers, either of specific individuals or of officers generally, of the Government of the United States, or of any other organized government, because of his or their official character, or who is a polygamist.’ Act of June 29, 1906, c. 3592, s 7, 34 Stat. 596, 598, U. S. C., tit. 8, s 364 (8 USCA s 364). The respondent, Douglas Clyde Macintosh, entertained none of these disqualifying opinions and had none of the associations or relations disapproved. Among the specific requirements as to beliefs, we find none to the effect that one shall not be naturalized if by reason of his religious convictions he is opposed to war or is unwilling to promise to bear arms. In view of the questions which have repeatedly been brought to the attention of the Congress in relation to such beliefs, and having regard to the action of the Congress when its decision was of immediate importance in the raising of armies, the omission of such an express requirement from the naturalization statute is highly significant.

Putting aside these specific requirements as fully satisfied, we come to the general conditions imposed by the statute. We find one as to good behavior during the specified

period of residence preceding application. No applicant could appear to be more exemplary than Macintosh. A Canadian by birth, he first came to the United *629 States as a graduate student at the University of Chicago, and in 1907 he was ordained as a Baptist minister. In 1909 he began to teach in Yale University and is now a member of the faculty of the Divinity School, Chaplain of the Yale Graduate School, and Dwight Professor of Theology. After the outbreak of the Great War, he voluntarily sought appointment as a chaplain with the Canadian Army and as such saw service at the front. Returning to this country, he made public addresses in 1917 in support of the Allies. In 1918, he went again to France, where he had charge of an American **577 Y. M. C. A. hut at the front until the armistice, when he resumed his duties at Yale University. It seems to me that the applicant has shown himself in his behavior and character to be highly desirable as a citizen, and, if such a man is to be excluded from naturalization, I think the disqualification should be found in unambiguous terms and not in an implication which shuts him out and gives admission to a host far less worthy.

The principal ground for exclusion appears to relate to the terms of the oath which the applicant must take. It should be observed that the respondent was willing to take the oath, and he so stated in his petition. But, in response to further inquiries, he explained that he was not willing 'to promise beforehand' to take up arms, 'without knowing the cause for which my country may go to war,' and that 'he would have to believe that the war was morally justified.' He declared that 'his first allegiance was to the will of God'; that he was ready to give to the United States 'all the allegiance he ever had given or ever could give to any country, but that he could not put allegiance to the government of any country before allegiance to the will of God.' The question then is whether the terms of the oath are to be taken as necessarily implying an assurance of willingness to bear arms, so that one whose conscientious convictions or belief of supreme *630 allegiance to the will of God will not permit him to make such an absolute promise cannot take the oath and hence is disqualified for admission to citizenship.

The statutory provision as to the oath which is said to require this promise is this: 'That he will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same.' Act of June 29, 1906, c. 3592, s 4, 34 Stat. 596, 598; U. S. C. tit. 8, s 381 (8 USCA s 381). That these general words have not been regarded as implying a promise to bear arms notwithstanding religious or conscientious scruples, or as requiring one to promise to put allegiance to temporal power above what is sincerely believed to be one's duty of obedience to God, is apparent, I think, from a consideration of their history. This oath does

not stand alone. It is the same oath in substance that is required by act of Congress of Civil officers generally (except the President, whose oath is prescribed by the Constitution). The Congress, in prescribing such an oath for civil officers, acts under article 6, s 3, of the Constitution, which provides: 'The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.' The general oath of office, in the form which has been prescribed by the Congress for over sixty years, contains the provision 'that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion.' Rev. St. s 1757 (U. S. C. tit. 5, s 16 (5 USCA s 16)). It goes without *631 saying that it was not the intention of the Congress in framing the oath to impose any religious test. When we consider the history of the struggle for religious liberty, the large number of citizens of our country from the very beginning who have been unwilling to sacrifice their religious convictions, and, in particular, those who have been conscientiously opposed to war and who would not yield what they sincerely believed to be their allegiance to the will of God, I find it impossible to conclude that such persons are to be deemed disqualified for public office in this country because of the requirement of the oath which must be taken before they enter upon their duties. The terms of the promise 'to support and defend the Constitution of the United States against all enemies, foreign and domestic,' are not, I think, to be read as demanding any such result. There are other and most important methods of defense, even in time of war, apart from the personal bearing of arms. We have but to consider the defense given to our country in the late war, both in industry and in the field, by workers of all sorts, by engineers, nurses, doctors and chaplains, to realize that there is opportunity even at such a time for essential service in the activities of defense which do not require the overriding of such religious scruples. I think that the requirement of the oath of office should be read in the light of our regard from the beginning for freedom of conscience. While it has always been recognized that the supreme power of government may be exerted and disobedience to its commands may be punished, we know that with many of our worthy citizens it would be a most heart-searching question if they were asked whether they would promise to obey a law believed to be in conflict with religious duty. Many of their most honored exemplars in the past have been willing to suffer imprisonment or even death rather

than to make such a promise. And we also know, in particular, that a promise to engage *632 in war by bearing arms, or thus to engage in a war believed to be unjust, would be contrary to the tenets of religious groups among our citizens who are of patriotic purpose and exemplary conduct. To conclude that the general oath of **578 office is to be interpreted as disregarding the religious scruples of these citizens and as disqualifying them for office because they could not take the oath with such an interpretation would, I believe, be generally regarded as contrary not only to the specific intent of the Congress but as repugnant to the fundamental principle of representative government.

But the naturalization oath is in substantially the same terms as the oath of office to which I have referred. I find no ground for saying that these words are to be interpreted differently in the two cases. On the contrary, when the Congress reproduced the historic words of the oath of office in the naturalization oath, I should suppose that, according to familiar rules of interpretation, they should be deemed to carry the same significance.

The question of the proper interpretation of the oath is, as I have said, distinct from that of legislative policy in exacting military service. The latter is not dependent upon the former. But the long-established practice of excusing from military service those whose religious convictions oppose it confirms the view that the Congress in the terms of the oath did not intend to require a promise to give such service. The policy of granting exemptions in such cases has been followed from colonial times and is abundantly shown by the provisions of colonial and state statutes, of state Constitutions, and of acts of Congress. See citations in the opinion of the Circuit Court of Appeals in the present case. 42 F.(2d) 845, 847, 848. The first Constitution of New York, adopted in 1777, in providing for the state militia, while strongly emphasizing the duty of defense, added: 'That all such of the inhabitants of this State being of the people called Quakers *633 as, from scruples of conscience, may be averse to the bearing of arms, be therefrom excused by the legislature; and to pay to the State such sums of money, in lieu of their personal service, as the same may, in the judgment of the legislature, be worth.' Article 40. A large number of similar provisions are found in other states. The importance of giving immunity to those having conscientious scruples against bearing arms has been emphasized in debates in Congress repeatedly from the very beginning of our government, and religious scruples have been recognized in draft acts. Annals of Congress (Gales), 1st Congress, vol. I, pp. 434, 436, 729, 731; vol. II, pp. 1818-1827; Acts of February 24, 1864, 13 Stat. 6, 9; January 21, 1903, 32 Stat. 775; June 3, 1916, 39 Stat. 166, 197; May 18, 1917, 40 Stat. 76, 78. I agree with the statement in the opinion of the Circuit Court of Appeals in the present case that: 'This federal legislation is

indicative of the actual operation of the principles of the Constitution, that a person with conscientious or religious scruples need not bear arms, although, as a member of society, he may be obliged to render services of a noncombatant nature.'

Much has been said of the paramount duty to the state, a duty to be recognized, it is urged, even though it conflicts with convictions of duty to God. Undoubtedly that duty to the state exists within the domain of power, for government may enforce obedience to laws regardless of scruples. When one's belief collides with the power of the state, the latter is supreme within its sphere and submission or punishment follows. But, in the forum of conscience, duty to a moral power higher than the state has always been maintained. The reservation of that supreme obligation, as a matter of principle, would unquestionably be made by many of our conscientious and law-abiding citizens. The essence of religion is belief in a relation to God involving duties superior to those *634 arising from any human relation. As was stated by Mr. Justice Field, in *Davis v. Beason*, 133 U. S. 333, 342, 10 S. Ct. 299, 300, 33 L. Ed. 637: 'The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will.' One cannot speak of religious liberty, with proper appreciation of its essential and historic significance, without assuming the existence of a belief in supreme allegiance to the will of God. Professor Macintosh, when pressed by the inquiries put to him, stated what is axiomatic in religious doctrine. And, putting aside dogmas with their particular conceptions of deity, freedom of conscience itself implies respect for an innate conviction of paramount duty. The battle for religious liberty has been fought and won with respect to religious beliefs and practices, which are not in conflict with good order, upon the very ground of the supremacy of conscience within its proper field. What that field is, under our system of government, presents in part a question of constitutional law, and also, in part, one of legislative policy in avoiding unnecessary clashes with the dictates of conscience. There is abundant room for enforcing the requisite authority of law as it is enacted and requires obedience, and for maintaining the conception of the supremacy of law as essential to orderly government, without demanding that either citizens or applicants for citizenship shall assume by oath an obligation to regard allegiance to God as subordinate to allegiance to civil power. The attempt to exact such a promise, and thus to bind one's conscience by the taking of oaths or the submission to tests, has been the cause of many deplorable conflicts. The Congress has sought to avoid such conflicts in this country by respecting our happy tradition. In no sphere of legislation has the intention to prevent **579 such clashes been more conspicuous than in relation to the bearing of arms. It

would require strong evidence *635 that the Congress intended a reversal of its policy in prescribing the general terms of the naturalization oath. I find no such evidence.

Nor is there ground, in my opinion, for the exclusion of Professor Macintosh because his conscientious scruples have particular reference to wars believed to be unjust. There is nothing new in such an attitude. Among the most eminent statesmen here and abroad have been those who condemned the action of their country in entering into wars they thought to be unjustified. Agreements for the renunciation of war presuppose a preponderant public sentiment against wars of aggression. If, while recognizing the power of Congress, the mere holding of religious or conscientious scruples against all wars should not disqualify a citizen from holding office in this country, or an applicant otherwise qualified from being admitted to citizenship, there would seem to be no reason why a reservation of religious or conscientious objection to participation in wars believed to be unjust should constitute such a disqualification.

Apart from the terms of the oath, it is said that the

respondent has failed to meet the requirement of 'attachment to the principles of the Constitution.' Here, again, is a general phrase which should be construed, not in opposition to, but in accord with, the theory and practice of our government in relation to freedom of conscience. What I have said as to the provisions of the oath I think applies equally to this phase of the case.

The judgment in *United States v. Schwimmer*, 279 U. S. 644, 49 S. Ct. 448, 73 L. Ed. 889, stands upon the special facts of that case, but I do not regard it as requiring a reversal of the judgment here. I think that the judgment below should be affirmed.

Mr. Justice HOLMES, Mr. Justice BRANDEIS, and Mr. Justice STONE concur in this opinion.

All Citations

283 U.S. 605, 51 S.Ct. 570, 75 L.Ed. 1302

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85 S.Ct. 850
Supreme Court of the United States

UNITED STATES, Petitioner,

v.

Daniel Andrew SEEGER.
UNITED STATES, Petitioner,

v.

Arno Sascha JAKOBSON.
Forest Britt PETER, Petitioner,

v.

UNITED STATES.

Nos. 50, 51, 29.

|
Argued Nov. 16 and 17, 1964.

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Decided March 8, 1965.

Synopsis

Prosecutions for refusal to submit to induction into the armed services. Certiorari, No. 50, was granted to review a decision of the United States Court of Appeals for the Second Circuit, 326 F.2d 846, which reversed a conviction by the United States District Court for the Southern District of New York, 216 F.Supp. 516. Certiorari, No. 51, was granted to review a decision of the United States Court of Appeals for the Second Circuit, 325 F.2d 409, which reversed a conviction by the United States District Court for the Southern District of New York. Certiorari, No. 29, was granted to review a decision of the United States Court of Appeals for the Ninth Circuit, 324 F.2d 173, which affirmed a conviction by the United States District Court for the Northern District of California, Southern Division. The cases were consolidated for argument. Mr. Justice Clark held that the test of belief 'in a relation to a Supreme Being' within statute relating to exemption of conscientious objectors from combatant training and service in armed forces in whether a given belief that is sincere and meaningful occupies a place in life of its possessor parallel to that filled by orthodox belief in God of one who clearly qualifies for the exemption.

Judgment in No. 29 reversed and judgments in Nos. 50 and 51 affirmed.

Attorneys and Law Firms

****853 *164** Sol. Gen. Archibald Cox, for petitioner in No. 50, respondent in No. 29 and petitioner in No. 51.

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Herman Adlerstein, New York City, for respondent in No. 51.

Opinion

Mr. Justice CLARK delivered the opinion of the Court.

These cases involve claims of conscientious objectors under s 6(j) of the Universal Military Training and Service Act, 50 U.S.C.App. s 456(j) (1958 ed.), which exempts from combatant training and service in the armed forces of the United States those persons who by ***165** reason of their religious training and belief are conscientiously opposed to participation in war in any form. The cases were consolidated for argument and we consider them together although each involves different facts and circumstances. The parties raise the basic question of the constitutionality of the section which defines the term 'religious training and belief,' as used in the Act, as 'an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but (not including) essentially political, ****854** sociological, or philosophical views or a merely personal moral code.' The constitutional attack is launched under the First Amendment's Establishment and Free Exercise Clauses and is twofold: (1) The section does not exempt nonreligious conscientious objectors; and (2) it discriminates between different forms of religious expression in violation of the Due Process Clause of the Fifth Amendment. Jakobson (No. 51) and Peter (No. 29) also claim that their beliefs come within the meaning of the section. Jakobson claims that he meets the standards of s 6(j) because his opposition to war is based on belief in a Supreme Reality and is therefore an obligation superior to one resulting from man's relationship to his fellow man. Peter contends that his opposition to war derives from his acceptance of the existence of a universal power beyond that of man and that this acceptance in fact constitutes belief in a Supreme Being, qualifying him for exemption. We granted certiorari in each of the cases because of their importance in the administration of the Act. 377 U.S. 922, 84 S.Ct. 1219, 12 L.Ed.2d 214.

We have concluded that Congress, in using the expression 'Supreme Being' rather than the designation 'God,' was

merely clarifying the meaning of religious training and belief so as to embrace all religions and to exclude essentially political, sociological, or philosophical views. We believe that under this construction, the test of belief *166 'in a relation to a Supreme Being' is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption. Where such beliefs have parallel positions in the lives of their respective holders we cannot say that one is 'in a relation to a Supreme Being' and the other is not. We have concluded that the beliefs of the objectors in these cases meet these criteria, and, accordingly, we affirm the judgments in Nos. 50 and 51 and reverse the judgment in No. 29.

THE FACTS IN THE CASES.

No. 50: Seeger was convicted in the District Court for the Southern District of New York of having refused to submit to induction in the armed forces. He was originally classified 1—A in 1953 by his local board, but this classification was changed in 1955 to 2—S (student) and he remained in this status until 1958 when he was reclassified 1—A. He first claimed exemption as a conscientious objector in 1957 after successive annual renewals of his student classification. Although he did not adopt verbatim the printed Selective Service System form, he declared that he was conscientiously opposed to participation in war in any form by reason of his 'religious' belief; that he preferred to leave the question as to his belief in a Supreme Being open, 'rather than answer 'yes' or 'no'; that his 'skepticism or disbelief in the existence of God' did 'not necessarily mean lack of faith in anything whatsoever'; that his was a 'belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed.' R. 69—70, 73. He cited such personages as Plato, Aristotle and Spinoza for support of his ethical belief in intellectual and moral integrity 'without belief in God, except in the remotest sense.' R. 73. His belief was found to be sincere, honest, *167 and made in good faith; and his conscientious objection to be based upon individual training and belief, both of which included research in religious and cultural fields. Seeger's claim, however, was denied solely because it was not based upon a 'belief in a relation to a Supreme Being' as required by s 6(j) of the Act. At trial Seeger's counsel admitted that Seeger's belief was not in relation to a Supreme Being as commonly understood, but contended that he was entitled to the exemption because 'under the present law Mr. **855

Seeger's position would also include definitions of religion which have been stated more recently,' R. 49, and could be 'accommodated' under the definition of religious training and belief in the Act, R. 53. He was convicted and the Court of Appeals reversed, holding that the Supreme Being requirement of the section distinguished 'between internally derived and externally compelled beliefs' and was, therefore, an 'impermissible classification' under the Due Process Clause of the Fifth Amendment. 326 F.2d 846.

No. 51: Jakobson was also convicted in the Southern District of New York on a charge of refusing to submit to induction. On his appeal the Court of Appeals reversed on the ground that rejection of his claim may have rested on the factual finding, erroneously made, that he did not believe in a Supreme Being as required by s 6(j). 325 F.2d 409.

Jakobson was originally classified 1—A in 1953 and intermittently enjoyed a student classification until 1956. It was not until April 1958 that he made claim to noncombatant classification (1—A—O) as a conscientious objector. He stated on the Selective Service System form that he believed in a 'Supreme Being' who was 'Creator of Man' in the sense of being 'ultimately responsible for the existence of' man and who was 'the Supreme Reality' of which 'the existence of man is the result.' R. 44. (Emphasis in the original.) He explained that his religious *168 and social thinking had developed after much meditation and thought. He had concluded that man must be 'partly spiritual' and, therefore, 'partly akin to the Supreme Reality'; and that his 'most important religious law' was that 'no man ought ever to wilfully sacrifice another man's life as a means to any other end * * *.' R. 45—46. In December 1958 he requested a 1—O classification since he felt that participation in any form of military service would involve him in 'too many situations and relationships that would be a strain on (his) conscience that (he felt he) must avoid.' R. 70. He submitted a long memorandum of 'notes on religion' in which he defined religion as the 'sum and essence of one's basic attitudes to the fundamental problems of human existence,' R. 72 (emphasis in the original); he said that he believed in 'Godness' which was 'the Ultimate Cause for the fact of the Being of the Universe'; that to deny its existence would but deny the existence of the universe because 'anything that is, has an Ultimate Cause for its Being.' R. 73. There was a relationship to Godness, he stated, in two directions, i.e., 'vertically, towards Godness directly,' and 'horizontally, towards Godness through Mankind and the World.' R. 74. He accepted the latter one. The Board classified him 1—A—O and Jakobson appealed. The hearing officer found that the claim was based upon a personal moral code and that he was not sincere in his claim. The Appeal Board classified him 1—A. It did not indicate upon what ground

it based its decision, i.e., insincerity or a conclusion that his belief was only a personal moral code. The Court of Appeals reversed, finding that his claim came within the requirements of s 6(j). Because it could not determine whether the Appeal Board had found that Jakobson's beliefs failed to come within the statutory definition, or whether it had concluded that he lacked sincerity, it directed dismissal of the indictment.

169** No. 29: Forest Britt Peter was convicted in the Northern District of California on a charge of refusing to submit to induction. In his Selective Service System form he stated that he was not a member of a religious sect or organization; he failed to execute section VII of the questionnaire but attached to it a quotation expressing opposition to war, in which he stated that he concurred. In a later form he hedged the question as to his belief in a Supreme Being by saying that it depended on the definition *856** and he appended a statement that he felt it a violation of his moral code to take human life and that he considered this belief superior to his obligation to the state. As to whether his conviction was religious, he quoted with approval Reverend John Haynes Holmes' definition of religion as 'the consciousness of some power manifest in nature which helps man in the ordering of his life in harmony with its demands * * * (; it) is the supreme expression of human nature; it is man thinking his highest, feeling his deepest, and living his best.' R. 27. The source of his conviction he attributed to reading and meditation 'in our democratic American culture, with its values derived from the western religious and philosophical tradition.' Ibid. As to his belief in a Supreme Being, Peter stated that he supposed 'you could call that a belief in the Supreme Being or God. These just do not happen to be the words I use.' R. 11. In 1959 he was classified 1—A, although there was no evidence in the record that he was not sincere in his beliefs. After his conviction for failure to report for induction the Court of Appeals, assuming *arguendo* that he was sincere, affirmed, 324 F.2d 173.

BACKGROUND OF S 6(J).

Chief Justice Hughes, in his opinion in *United States v. Macintosh*, 283 U.S. 605, 51 S.Ct. 570, 75 L.Ed. 1302 (1931), enunciated the rationale behind the long recognition of conscientious objection ***170** to participation in war accorded by Congress in our various conscription laws when he declared that 'in the forum of conscience, duty to a moral power higher than the state has always been maintained.' At 633, 51 S.Ct. at 578 (dissenting opinion). In a similar vein Harlan Fiske Stone,

later Chief Justice, drew from the Nation's past when he declared that

'both morals and sound policy require that the state should not violate the conscience of the individual. All our history gives confirmation to the view that liberty of conscience has a moral and social value which makes it worthy of preservation at the hands of the state. So deep in its significance and vital, indeed, is it to the integrity of man's moral and spiritual nature that nothing short of the self-preservation of the state should warrant its violation; and it may well be questioned whether the state which preserves its life by a settled policy of violation of the conscience of the individual will not in fact ultimately lose it by the process.' Stone, *The Conscientious Objector*, 21 Col.Univ.Q. 253, 269 (1919).

Governmental recognition of the moral dilemma posed for persons of certain religious faiths by the call to arms came early in the history of this country. Various methods of ameliorating their difficulty were adopted by the Colonies, and were later perpetuated in state statutes and constitutions. Thus by the time of the Civil War there existed a state pattern of exempting conscientious objectors on religious grounds. In the Federal Militia Act of 1862 control of conscription was left primarily in the States. However, General Order No. 99, issued by the Adjutant General pursuant to that Act, provided for striking from the conscription list those who were exempted by the States; it also established a commutation or substitution system fashioned from earlier state enactments. With the Federal Conscription Act of 1863, ***171** which enacted the commutation and substitution provisions of General Order No. 99, the Federal Government occupied the field entirely and in the 1864 Draft Act, 13 Stat. 9, it extended exemptions to those conscientious objectors who were members of religious denominations opposed to the bearing of arms and who were prohibited from doing so by the articles of faith of their denominations. Selective Service System Monograph No. 11, *Conscientious Objection* 40—41 ****857** (1950). In that same year the Confederacy exempted certain pacifist sects from military duty. *Id.*, at 46.

The need for conscription did not again arise until World War I. The Draft Act of 1917, 40 Stat. 76, 78, afforded exemptions to conscientious objectors who were affiliated with a 'well-recognized religious sect or organization (then) organized and existing and whose existing creed or principles (forbade) its members to participate in war in any form * * *.' The Act required that all persons be inducted into the armed services, but allowed the conscientious objectors to perform noncombatant service in capacities designated by the President of the United States. Although the 1917 Act excused religious objectors

only, in December 1917, the Secretary of War instructed that ‘personal scruples against war’ be considered as constituting ‘conscientious objection.’ Selective Service System Monograph No. 11, Conscientious Objection at 54—55 (1950). This Act, including its conscientious objector provisions, was upheld against constitutional attack in the Selective Draft Law Cases, (*Arver v. United States*) 245 U.S. 366, 389—390, 38 S.Ct. 159, 62 L.Ed. 349 (1918).

In adopting the 1940 Selective Training and Service Act Congress broadened the exemption afforded in the 1917 Act by making it unnecessary to belong to a pacifist religious sect if the claimant’s own opposition to war was based on ‘religious training and belief.’ 54 Stat. 889. Those found to be within the exemption were *172 not inducted into the armed services but were assigned to noncombatant service under the supervision of the Selective Service System. The Congress recognized that one might be religious without belonging to an organized church just as surely as minority members of a faith not opposed to war might through religious reading reach a conviction against participation in war. Congress Looks at the Conscientious Objector (National Service Board for Religious Objectors, 1943) 71, 79, 83, 87, 88, 89. Indeed, the consensus of the witnesses appearing before the congressional committees was that individual belief—rather than membership in a church or sect—determined the duties that God imposed upon a person in his everyday conduct; and that ‘there is a higher loyalty than loyalty to this country, loyalty to God.’ *Id.*, at 29—31. See also the proposals which were made to the House Military Affairs Committee but rejected. *Id.*, at 21—23, 82—83, 85. Thus, while shifting the test from membership in such a church to one’s individual belief the Congress nevertheless continued its historic practice of excusing from armed service those who believed that they owed an obligation, superior to that due the state, of not participating in war in any form.

Between 1940 and 1948 two courts of appeals¹ held that the phrase ‘religious training and belief’ did not include philosophical, social or political policy. Then in 1948 the Congress amended the language of the statute and declared that ‘religious training and belief’ was to be defined as ‘an individual’s belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but (not including) essentially political, sociological, or philosophical views or a merely personal moral code.’ The only significant mention of *173 this change in the provision appears in the report of the Senate Armed Services Committee recommending adoption. It said simply this: ‘This section reenacts substantially the same provisions as were found in subsection 5(g) of the 1940 act. Exemption extends to anyone who, because of religious training and belief in his relation to a Supreme

Being, is conscientiously opposed to combatant military service or to both combatant and non-combatant military service. (See *United States v. Berman* (sic), 156 F.2d 377, certiorari denied, 329 U.S. 795 (67 S.Ct. 480, 91 L.Ed. 680).)’ S.Rep.No. **858 1268, 80th Cong., 2d Sess., 14; U.S.Code Cong. Service 1948, p. 2002.

INTERPRETATION OF S 6(J).

1. The crux of the problem lies in the phrase ‘religious training and belief’ which Congress has defined as ‘belief in a relation to a Supreme Being involving duties superior to those arising from any human relation.’ In assigning meaning to this statutory language we may narrow the inquiry by noting briefly those scruples expressly excepted from the definition. The section excludes those persons who, disavowing religious belief, decide on the basis of essentially political, sociological or economic considerations that war is wrong and that they will have no part of it. These judgments have historically been reserved for the Government, and in matters which can be said to fall within these areas the conviction of the individual has never been permitted to override that of the state. *United States v. Macintosh*, *supra* (dissenting opinion). The statute further excludes those whose opposition to war stems from a ‘merely personal moral code,’ a phrase to which we shall have occasion to turn later in discussing the application of s 6(j) to these cases. We also pause to take note of what is not involved in this litigation. No party claims to be an atheist or attacks the statute on this ground. The question is not, therefore, one between theistic and atheistic beliefs. We do not deal with *174 or intimate any decision on that situation in these cases. Nor do the parties claim the monotheistic belief that there is but one God; what they claim (with the possible exception of Seeger who bases his position here not on factual but on purely constitutional grounds) is that they adhere to theism, which is the ‘Belief in the existence of a god or gods; * * * Belief in superhuman powers or spiritual agencies in one or many gods,’ as opposed to atheism.² Our question, therefore, is the narrow one: Does the term ‘Supreme Being’ as used in s 6(j) mean the orthodox God or the broader concept of a power or being, or a faith, ‘to which all else is subordinate or upon which all else is ultimately dependent’? Webster’s New International Dictionary (Second Edition). In considering this question we resolve it solely in relation to the language of s 6(j) and not otherwise.

2. Few would quarrel, we think, with the proposition that in no field of human endeavor has the tool of language

proved so inadequate in the communication of ideas as it has in dealing with the fundamental questions of man's predicament in life, in death or in final judgment and retribution. This fact makes the task of discerning the intent of Congress in using the phrase 'Supreme Being' a complex one. Nor is it made the easier by the richness and variety of spiritual life in our country. Over 250 sects inhabit our land. Some believe in a purely personal God, some in a supernatural deity; others think of religion as a way of life envisioning as its ultimate goal the day when all men can live together in perfect understanding and peace. There are those who think of God as the depth of our being; others, such as the Buddhists, strive for a state of lasting rest through self-denial and inner purification; in Hindu philosophy, the Supreme Being is *175 the transcendental reality which is truth, knowledge and bliss. Even those religious groups which have traditionally opposed war in every form have splintered into various denominations: from 1940 to 1947 there were four denominations using the name 'Friends,' Selective Service System Monograph No. 11, Conscientious Objection 13 (1950); the 'Church of the Brethren' was the official name of the oldest and largest church body of four denominations composed of those commonly called Brethren, id., at 11; and the 'Mennonite Church' was the largest of 17 denominations, including the Amish and Hutterites, grouped as **859 'Mennonite bodies' in the 1936 report on the Census of Religious Bodies, id., at 9. This vast panoply of beliefs reveals the magnitude of the problem which faced the Congress when it set about providing an exemption from armed service. It also emphasizes the care that Congress realized was necessary in the fashioning of an exemption which would be in keeping with its long-established policy of not picking and choosing among religious beliefs.

In spite of the elusive nature of the inquiry, we are not without certain guidelines. In amending the 1940 Act, Congress adopted almost intact the language of Chief Justice Hughes in *United States v. Macintosh*, supra: 'The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation.' At 633—634 of 283 U.S., 51 S.Ct. at 578. (Emphasis supplied.)

By comparing the statutory definition with those words, however, it becomes readily apparent that the Congress deliberately broaden them by substituting the phrase 'Supreme Being' for the appellation 'God.' And in so doing it is also significant that Congress did not elaborate on the form or nature of this higher authority which it chose to designate as 'Supreme Being.' By so refraining it must have had in mind the admonitions of the Chief *176 Justice when he said in the same opinion that even the word 'God'

had myriad meanings for men of faith:

'(P)utting aside dogmas with their particular conceptions of deity, freedom of conscience itself implies respect for an innate conviction of paramount duty. The battle for religious liberty has been fought and won with respect to religious beliefs and practices, which are not in conflict with good order, upon the very ground of the supremacy of conscience within its proper field.' At 634, 51 S.Ct. at 578.

Moreover, the Senate Report on the bill specifically states that s 6(j) was intended to re-enact 'substantially the same provisions as were found' in the 1940 Act. That statute, of course, refers to 'religious training and belief' without more. Admittedly, all of the parties here purport to base their objection on religious belief. It appears, therefore, that we need only look to this clear statement of congressional intent as set out in the report. Under the 1940 Act it was necessary only to have a conviction based upon religious training and belief; we believe that is all that is required here. Within that phrase would come all sincere religious beliefs which are based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent. The test might be stated in these words: A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition. This construction avoids imputing to Congress an intent to classify different religious beliefs, exempting some and excluding others, and is in accord with the well-established congressional policy of equal treatment for those whose opposition to service is grounded in their religious tenets.

*177 3. The Government takes the position that since *Berman v. United States*, supra, was cited in the Senate Report on the 1948 Act, Congress must have desired to adopt the *Berman* interpretation of what constitutes 'religious belief.' Such a claim, however, will not bear scrutiny. First, we think it clear that an explicit statement of congressional intent deserves more weight than the parenthetical citation of a case which might stand for a number of things. Congress specifically stated that it intended to re-enact substantially the same provisions as were **860 found in the 1940 Act. Moreover, the history of that Act reveals no evidence of a desire to restrict the concept of religious belief. On the contrary the Chairman of the House Military Affairs Committee which reported out the 1940 exemption provisions stated:

'We heard the conscientious objectors and all of their representatives that we could possibly hear, and, summing it all up, their whole objection to the bill, aside from their objection to compulsory military training, was based upon the right of conscientious objection and in most instances to the right of the ministerial students to continue in their

studies, and we have provided ample protection for those classes and those groups.’ 86 Cong.Rec. 11368 (1940).

During the House debate on the bill, Mr. Faddis of Pennsylvania made the following statement:

‘We have made provision to take care of conscientious objectors. I am sure the committee has had all the sympathy in the world with those who appeared claiming to have religious scruples against rendering military service in its various degrees. Some appeared who had conscientious scruples against handling lethal weapons, but who had no *178 scruples against performing other duties which did not actually bring them into combat. Others appeared who claimed to have conscientious scruples against participating in any of the activities that would go along with the Army. The committee took all of these into consideration and has written a bill which, I believe, will take care of all the reasonable objections of this class of people.’ 86 Cong.Rec. 11418 (1940).

Thus the history of the Act belies the notion that it was to be restrictive in application and available only to those believing in a traditional God.

As for the citation to Berman, it might mean a number of things. But we think that Congress’ action in citing it must be construed in such a way as to make it consistent with its express statement that it meant substantially to re-enact the 1940 provision. As far as we can find, there is not one word to indicate congressional concern over any conflict between Kauten and Berman. Surely, if it thought that two clashing interpretations as to what amounted to ‘religious belief’ had to be resolved, it would have said so somewhere in its deliberations. Thus, we think that rather than citing Berman for what it said ‘religious belief’ was, Congress cited it for what it said ‘religious belief’ was not. For both Kauten and Berman hold in common the conclusion that exemption must be denied to those whose beliefs are political, social or philosophical in nature, rather than religious. Both, in fact, denied exemption on that very ground. It seems more likely, therefore, that it was this point which led Congress to cite Berman. The first part of the s 6(j) definition—belief in a relation to a Supreme Being—was indeed set out in Berman, with the exception that the court used the word ‘God’ rather than ‘Supreme Being.’ However, as the Government recognizes, Berman took that language word for word from Macintosh. Far from *179 requiring a conclusion contrary to the one we reach here, Chief Justice Hughes’ opinion, as we have pointed out, supports our interpretation.

Admittedly, the second half of the statutory definition—the rejection of sociological and moral views—was taken

directly from Berman. But, as we have noted, this same view was adhered to in *United States v. Kauten*, supra. Indeed the Selective Service System has stated its view of the cases’ significance in these terms: ‘The *United States v. Kauten* and *Herman Berman v. United States* cases ruled that a valid conscientious objector claim to exemption must be based solely on ‘religious training and belief’ and not *1861 on philosophical, political, social, or other grounds * * *.’ Selective Service System Monograph No. 11, Conscientious Objection 337 (1950). See *id.*, at 278. That the conclusions of the Selective Service System are not to be taken lightly is evidenced in this statement by Senator Gurney, Chairman of the Senate Armed Services Committee and sponsor of the Senate bill containing the present version of s 6(j):

‘The bill which is now pending follows the 1940 act, with very few technical amendments, worked out by those in Selective Service who had charge of the conscientious-objector problem during the war.’ 94 Cong.Rec. 7305 (1948).

Thus we conclude that in enacting s 6(j) Congress simply made explicit what the courts of appeals had correctly found implicit in the 1940 Act. Moreover, it is perfectly reasonable that Congress should have selected Berman for its citation, since this Court denied certiorari in that case, a circumstance not present in *Kauten*.

Section 6(j), then, is no more than a clarification of the 1940 provision involving only certain ‘technical amendments,’ to use the words of Senator Gurney. As such it continues the congressional policy of providing exemption from military service for those whose opposition *180 is based on grounds that can fairly be said to be ‘religious.’³³ To hold otherwise would not only fly in the face of Congress’ entire action in the past; it would ignore the historic position of our country on this issue since its founding.

4. Moreover, we believe this construction embraces the ever-broadening understanding of the modern religious community. The eminent Protestant theologian, Dr. Paul Tillich, whose views the Government concedes would come within the statute, identifies God not as a projection ‘out there’ or beyond the skies but as the ground of our very being. The Court of Appeals stated in No. 51 that Jakobson’s views ‘parallel (those of) this eminent theologian rather strikingly.’ 325 F.2d, at 415—416. In his book, *Systematic Theology*, Dr. Tillich says:

‘I have written of the God above the God of theism. * * * In such a state (of self-affirmation) the God of both religious and theological language disappears. But something remains, namely, the seriousness of that doubt in which meaning within meaninglessness is affirmed. The

source of this affirmation of meaning within meaninglessness, of certitude within doubt, is not the God of traditional theism but the 'God above God.' the power of being, which works through those who have no name for it, not even the name God.' II Systematic Theology 12 (1957).

***181** Another eminent cleric, the Bishop of Woolwich, John A. T. Robinson, in his book, *Honest To God* (1963), states:

'The Bible speaks of a God 'up there.' No doubt its picture of a three-decker universe, of 'the heaven above, the earth beneath and the waters under the earth,' was once taken quite literally. * * * At 11.

'(Later) in place of a God who is literally or physically 'up there' we have accepted, as part of our mental ****862** furniture, a God who is spiritually or metaphysically 'out there.' * * * But now it seems there is no room for him, not merely in the inn, but in the entire universe: for there are no vacant places left. In reality, of course, our new view of the universe had made not the slightest difference. * * * At 13—14.

'But the idea of a God spiritually or metaphysically 'out there' dies very much harder. Indeed, most people would be seriously disturbed by the thought that it should need to die at all. For it is their God, and they have nothing to put in its place. * * * Every one of us lives with some mental picture of a God 'out there,' a God who 'exists' above and beyond the world he made, a God 'to' whom we pray and to whom we 'go' when we die.' At 14. 'But the signs are that we are reaching the point at which the whole conception of a God 'out there,' which has served us so well since the collapse of the three-decker universe, is itself becoming more of a hindrance than a help.' At 15—16 (Emphasis in original.)

The Schema of the recent Ecumenical Council included a most significant declaration on religion:⁴

***182** 'The community of all peoples is one. One is their origin, for God made the entire human race live on all the face of the earth. One, too, is their ultimate end, God. Men expect from the various religions answers to the riddles of the human condition: What is man? What is the meaning and purpose of our lives? What is the moral good and what is sin? What are death, judgment, and retribution after death?

'Ever since primordial days, numerous peoples have had a certain perception of that hidden power which hovers over the course of things and over the events that make up the lives of men; some have even come to know of a Supreme Being and Father. Religions in an advanced culture have been able to use more refined concepts and a more

developed language in their struggle for an answer to man's religious questions.

'Nothing that is true and holy in these religions is scorned by the Catholic Church. Ceaselessly the Church proclaims Christ, 'the Way, the Truth, and the Life,' in whom God reconciled all things to Himself. The Church regards with sincere reverence those ways of action and of life, precepts and teachings which, although they differ from the ones she sets forth, reflect nonetheless a ray of that Truth which enlightens all men.'

Dr. David Saville Muzzey, a leader in the Ethical Culture Movement, states in his book, *Ethics As a Religion* (1951), that '(e)verybody except the avowed atheists (and they are comparatively few) believes in some kind of God,' and that 'The proper question to ask, therefore, is ***183** not the futile one, Do you believe in God? but rather, What kind of God do you believe in?' Id., at 86—87. Dr. Muzzey attempts to answer that question:

'Instead of positing a personal God, whose existence man can neither prove nor disprove, the ethical concept is founded on human experience. It is anthropocentric, not theocentric. Religion, for all the various definitions that have been given of it, must surely mean the devotion of man to the highest ideal that he can conceive. And that ideal is a community of spirits in which the latent moral potentialities of men shall have been elicited by their reciprocal endeavors to cultivate the ****863** best in their fellow men. What ultimate reality is we do not know; but we have the faith that it expresses itself in the human world as the power which inspires in men moral purpose.' At 95.

'Thus the 'God' that we love is not the figure on the great white throne, but the perfect pattern, envisioned by faith, of humanity as it should be, purged of the evil elements which retard its progress toward 'the knowledge, love and practice of the right.' At 98.

These are but a few of the views that comprise the broad spectrum of religious beliefs found among us. But they demonstrate very clearly the diverse manners in which beliefs, equally paramount in the lives of their possessors, may be articulated. They further reveal the difficulties inherent in placing too narrow a construction on the provisions of s 6(j) and thereby lend conclusive support to the construction which we today find that Congress intended.

5. We recognize the difficulties that have always faced the trier of fact in these cases. We hope that the test that we lay down proves less onerous. The examiner is furnished ***184** a standard that permits consideration of criteria with which

he has had considerable experience. While the applicant's words may differ, the test is simple of application. It is essentially an objective one, namely, does the claimed belief occupy the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for exemption?

Moreover, it must be remembered that in resolving these exemption problems one deals with the beliefs of different individuals who will articulate them in a multitude of ways. In such an intensely personal area, of course, the claim of the registrant that his belief is an essential part of a religious faith must be given great weight. Recognition of this was implicit in this language, cited by the Berman court from *State v. Amana Society*, 132 Iowa 304, 109 N.W. 894, 8 L.R.A.,N.S., 909 (1906):

"Surely a scheme of life designed to obviate (man's inhumanity to man), and by removing temptations, and all the allurements of ambition and avarice, to nurture the virtues of unselfishness, patience, love, and service, ought not to be denounced as not pertaining to religion when its devotees regard it as an essential tenet of their religious faith." 132 Iowa, at 315, 109 N.W., at 898, cited in *Berman v. United States*, 156 F.2d 377, 381. (Emphasis by the Court of Appeals.)

The validity of what he believes cannot be questioned. Some theologians, and indeed some examiners, might be tempted to question the existence of the registrant's 'Supreme Being' or the truth of his concepts. But these are inquiries foreclosed to Government. As Mr. Justice Douglas stated in *United States v. Ballard*, 322 U.S. 78, 86, 64 S.Ct. 882, 886, 88 L.Ed. 1148 (1944): 'Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others.' Local *185 boards and courts in this sense are not free to reject beliefs because they consider them 'incomprehensible.' Their task is to decide whether the beliefs professed by a registrant are sincerely held and whether they are, in his own scheme of things, religious.

But we hasten to emphasize that while the 'truth' of a belief is not open to question, there remains the significant question whether it is 'truly held.' This is the threshold question of sincerity which must be resolved in every case. It is, of course, a question of fact—a prime consideration to the validity of every claim for exemption as a conscientious objector. The Act provides a comprehensive scheme for assisting the **864 Appeal Boards in making this determination, placing at their service the facilities of the Department of Justice, including the Federal Bureau of Investigation and hearing officers. Finally, we would point

out that in *Estep v. United States*, 327 U.S. 114, 66 S.Ct. 423, 90 L.Ed. 567 (1946), this Court held that:

'The provision making the decisions of the local boards 'final' means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant.' At 122—123, 66 S.Ct. at 427.

APPLICATION OF S 6(J) TO THE INSTANT CASES.

As we noted earlier, the statutory definition excepts those registrants whose beliefs are based on a 'merely personal moral code.' The records in these cases, however, *186 show that at no time did any one of the applicants suggest that his objection was based on a 'merely personal moral code.' Indeed at the outset each of them claimed in his application that his objection was based on a religious belief. We have construed the statutory definition broadly and it follows that any exception to it must be interpreted narrowly. The use by Congress of the words 'merely personal' seems to us to restrict the exception to a moral code which is not only personal but which is the sole basis for the registrant's belief and is in no way related to a Supreme Being. It follows, therefore, that if the claimed religious beliefs of the respective registrants in these cases meet the test that we lay down then their objections cannot be based on a 'merely personal' moral code.

In *Seeger*, No. 50, the Court of Appeals failed to find sufficient 'externally compelled beliefs.' However, it did find that 'it would seem impossible to say with assurance that (Seeger) is not bowing to 'external commands' in virtually the same sense as is the objector who defers to the will of a supernatural power.' 326 F.2d, at 853. It found little distinction between Jakobson's devotion to a mystical force of 'Godness' and Seeger's compulsion to 'goodness.' Of course, as we have said, the statute does not distinguish between externally and internally derived beliefs. Such a determination would, as the Court of Appeals observed, prove impossible as a practical matter, and we have found that Congress intended no such distinction.

The Court of Appeals also found that there was no question of the applicant's sincerity. He was a product of a devout Roman Catholic home; he was a close student of Quaker beliefs from which he said 'much of (his) thought is derived'; he approved of their opposition to war in any form; he devoted his spare hours to the American *187 Friends Service Committee and was assigned to hospital duty.

In summary, Seeger professed 'religious belief' and 'religious faith.' He did not disavow any belief 'in a relation to a Supreme Being'; indeed he stated that 'the cosmic order does, perhaps, suggest a creative intelligence.' He decried the tremendous 'spiritual' price man must pay for his willingness to destroy human life. In light of his beliefs and the unquestioned sincerity with which he held them, we think the Board, had it applied the test we propose today, would have granted him the exemption. We think it clear **865 that the beliefs which prompted his objection occupy the same place in his life as the belief in a traditional deity holds in the lives of his friends, the Quakers. We are reminded once more of Dr. Tillich's thoughts:

'And if that word (God) has not much meaning for you, translate it, and speak of the depths of your life, of the source of your being, or your ultimate concern, of what you take seriously without any reservation. Perhaps, in order to do so, you must forget everything traditional that you have learned about God * * *. Tillich, *The Shaking of the Foundations*. 57 (1948). (Emphasis supplied.)

It may be that Seeger did not clearly demonstrate what his beliefs were with regard to the usual understanding of the term 'Supreme Being.' But as we have said Congress did not intend that to be the test. We therefore affirm the judgment in No. 50.

In Jakobson, No. 51, the Court of Appeals found that the registrant demonstrated that his belief as to opposition to war was related to a Supreme Being. We agree and affirm that judgment.

We reach a like conclusion in No. 29. It will be remembered that Peter acknowledged 'some power manifest in *188 nature * * * the supreme expression' that helps man in ordering his life. As to whether he would call that belief in a Supreme Being, he replied, 'you could call that a belief in the Supreme Being or God. These just do not happen to be the words I use.' We think that under the test we establish here the Board would grant the exemption to Peter and we therefore reverse the judgment in No. 29. It is so ordered.

Judgment in Nos. 50 and 51 affirmed; judgment in No. 29

reversed.

Mr. Justice DOUGLAS, concurring.

If I read the statute differently from the Court, I would have difficulties. For then those who embraced one religious faith rather than another would be subject to penalties; and that kind of discrimination, as we held in *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965, would violate the Free Exercise Clause of the First Amendment. It would also result in a denial of equal protection by preferring some religions over others—an invidious discrimination that would run afoul of the Due Process Clause of the Fifth Amendment. See *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884.

The legislative history of this Act leaves much in the dark. But it is, in my opinion, not a tour de force if we construe the words 'Supreme Being' to include the cosmos, as well as an anthropomorphic entity. If it is a tour de force so to hold, it is no more so than other instances where we have gone to extremes to construe an Act of Congress to save it from demise on constitutional grounds. In a more extreme case than the present one we said that the words of a statute may be strained 'in the candid service of avoiding a serious constitutional doubt.' *United States v. Rumely*, 345 U.S. 41, 47, 73 S.Ct. 543, 546, 97 L.Ed. 770.¹

*189 The words 'a Supreme Being' have no narrow technical meaning in the field of religion. Long before the birth of our Judeo-Christian civilization the idea of God had taken hold in many forms. Mention of only two—Hinduism and Buddhism—illustrates the fluidity and evanescent scope of the concept. In the Hindu religion the Supreme Being is **866 conceived in the forms of several cult Deities. The chief of these, which stand for the Hindu Triad, are Brahma, Vishnu and Siva. Another Deity, and the one most widely worshipped, is Sakti, the Mother Goddess, conceived as power, both destructive and creative. Though Hindu religion encompasses the worship of many Deities, it believes in only one single God, the eternally existent One Being with his manifold attributes and manifestations. This idea is expressed in *Digveda*, the earliest sacred text of the Hindus, in verse 46 of a hymn attributed to the mythical seer Dirghatamas (*Rigveda*, I, 164):

'They call it Indra, Mitra, Varuna and Agni

And also heavenly beautiful Garutman:

The Real is One, though sages name it variously—

They call it Agni, Yama, Matarisvan.'

See Smart, *Reasons and Faiths* p. 35, n. 1 (1958); 32 *Harvard Oriental Series* pp. 434—435. (Lanman, ed. 1925). See generally 31 and 32 *id.*; Editors of *Life Magazine*, *The World's Great Religions* Vol. 1, pp. 17—48 (1963).

Indian philosophy, which comprises several schools of thought, has advanced different theories of the nature of the Supreme Being. According to the Upanisads, Hindu sacred texts, the Supreme Being is described as the power which creates and sustains everything, and to which the created things return upon dissolution. The word which is commonly used in the Upanisads to indicate the Supreme Being is Brahman. Philosophically, the *190 Supreme Being is the transcendental Reality which is Truth, Knowledge, and Bliss. It is the source of the entire universe. In this aspect Brahman is Isvara, a personal Lord and Creator of the universe, an object of worship. But, in the view of one school of thought, that of Sankara, even this is an imperfect and limited conception of Brahman which must be transcended: to think of Brahman as the Creator of the material world is necessarily to form a concept infected with illusion, or maya—which is what the world really is, in highest truth. Ultimately, mystically, Brahman must be understood as without attributes, as *neti neti* (not this, not that). See Smart, *op. cit.*, *supra*, p. 133.

Buddhism—whose advent marked the reform of Hinduism—continued somewhat the same concept. As stated by Nancy Wilson Ross, ‘God—if I may borrow that word for a moment—the universe, and man are one indissoluble existence, one total whole. Only THIS—capital THIS—is. Anything and everything that appears to use as an individual entity or phenomenon, whether it be a planet or an atom, a mouse or a man, is but a temporary manifestation of THIS in form; every activity that takes place, whether it be birth or death, loving or eating breakfast, is but a temporary manifestation of THIS in activity. When we look at things this way, naturally we cannot believe that each individual person has been endowed with a special and individual soul or self. Each one of us is but a cell, as it were, in the body of the Great Self, a cell that comes into being, performs its functions, and passes away, transformed into another manifestation. Though we have temporary individuality, that temporary, limited individuality is not either a true self or our true self. Our true self is the Great Self; our true body is the Body of Reality, or the Dharmakaya, to give it its technical Buddhist name.’ *The World of Zen*, p. 18 (1960).

*191 Does a Buddhist believe in ‘God’ or a ‘Supreme Being’? That, of course, depends on how one defines ‘God,’ as one eminent student of Buddhism has explained: ‘It has often been suggested that Buddhism is an atheistic

system of thought, and this assumption has **867 given rise to quite a number of discussions. Some have claimed that since Buddhism knew no God, it could not be a religion; others that since Buddhism obviously was a religion which knew no God, the belief in God was not essential to religion. These discussions assume that God is an unambiguous term, which is by no means the case.’ Conze, *Buddhism*, pp. 38—39 (1959).

Dr. Conze then says that if ‘God’ is taken to mean a personal Creator of the universe, then the Buddhist has no interest in the concept. *Id.*, p. 39. But if ‘God’ means something like the state of oneness with God as described by some Christian mystics, then the Buddhist surely believes in ‘God,’ since this state is almost indistinguishable from the Buddhist concept of Nirvana, ‘the supreme Reality; * * * the eternal, hidden and incomprehensible Peace.’ *Id.*, pp. 39—40. And finally, if ‘God’ means one of the many Deities in an at least superficially polytheistic religion like Hinduism, then Buddhism tolerates a belief in many Gods: ‘the Buddhists believe that a Faith can be kept alive only if it can be adapted to the mental habits of the average person. In consequence, we find that, in the earlier Scriptures, the deities of Brahmanism are taken for granted and that, later on, the Buddhists adopted the local Gods of any district to which they came.’ *Id.*, p. 42.

When the present Act was adopted in 1948 we were a nation of Buddhists, Confucianists, and Taoists, as well as Christians. Hawaii, then a Territory, was indeed filled with Buddhists, Buddhism being ‘probably the major *192 faith, if Protestantism and Roman Catholicism are deemed different faiths.’ Stokes and Pfeffer, *Church and State in the United States*, p. 560 (1964). Organized Buddhism first came to Hawaii in 1887 when Japanese laborers were brought to work on the plantations. There are now numerous Buddhist sects in Hawaii, and the temple of the Shin sect in Honolulu is said to have the largest congregation of any religious organization in the city. See Mulholland, *Religion in Hawaii* pp. 44—50 (1961).

In the continental United States Buddhism is found ‘in real strength’ in Utah, Arizona, Washington, Oregon, and California. ‘Most of the Buddhists in the United States are Japanese or Japanese-Americans; however, there are ‘English’ departments in San Francisco, Los Angeles, and Tacoma.’ Mead, *Handbook of Denominations*, p. 61 (1961). The Buddhist Churches of North America, organized in 1914 as the Buddhist Mission of North America and incorporated under the present name in 1942, represent the Jodo Shinshu Sect of Buddhism in this country. This sect is the only Buddhist group reporting information to the annual *Yearbook of American Churches*.

In 1961, the latest year for which figures are available, this group alone had 55 churches and an inclusive membership of 60,000; it maintained 89 church schools with a total enrollment of 11,150. Yearbook of American Churches, p. 30 (1965). According to one source, the total number of Buddhists of all sects in North America is 171,000. See World Almanac, p. 636 (1965).

When the Congress spoke in the vague general terms of a Supreme Being I cannot, therefore, assume that it was so parochial as to use the words in the narrow sense urged on us. I would attribute tolerance and sophistication to the Congress, commensurate with the religious complexion of our communities. In sum, I agree with the Court that any person opposed to war on the basis of a sincere belief,

which in his life fills the same place as a belief *193 in God fills in the life of an orthodox religionist, is entitled to exemption under the statute. None comes to us an avowedly irreligious person or as an atheist;² one, as a sincere **868 believer in 'goodness and virtue for their own sakes.' His questions and doubts on theological issues, and his wonder, are no more alien to the statutory standard than are the awe-inspired questions of a devout Buddhist.

All Citations

380 U.S. 163, 85 S.Ct. 850, 13 L.Ed.2d 733

Footnotes

- 1 See United States v. Kauten, 133 F.2d 703 (C.A.2d Cir. 1943); Berman v. United States, 156 F.2d 377 (C.A.9th Cir. 1946).
- 2 See Webster's New International Dictionary (Second Edition); Webster's New Collegiate Dictionary (1949).
- 3 A definition of 'religious training and belief' identical to that in s 6(j) is found in s 337 of the Immigration and Nationality Act, 66 Stat. 258, 8 U.S.C. s 1448(a) (1958 ed.). It is noteworthy that in connection with this Act, the Senate Special Subcommittee to Investigate Immigration and Naturalization stated: 'The subcommittee realizes and respects the fact that the question of whether or not a person must bear arms in defense of his country may be one which invades the province of religion and personal conscience.' Thus, it recommended that an alien not be required to vow to bear arms when he asserted 'his opposition to participation in war in any form because of his personal religious training and belief.' S.Rep. No. 1515, 81st Cong., 2d Sess., 742, 746.
- 4 Draft declaration on the Church's relations with non-Christians, Council Daybook, Vatican II, 3d Sess., p. 282, N.C.W.C., Washington, D.C., 1965.
- 1 And see Crowell v. Benson, 285 U.S. 22, 62, 52 S.Ct. 285, 76 L.Ed. 598; Ullmann v. United States, 350 U.S. 422, 433, 76 S.Ct. 497, 100 L.Ed. 511; Ashwander v. TVA, 397 U.S. 288, 341, 348, 56 S.Ct. 466, 80 L.Ed. 688 (concurring opinion).
- 2 If he was an atheist, quite different problems would be presented. Cf. Torcaso v. Watkins, 367 U.S. 488, 81 S.Ct. 1680, 6 L.Ed.2d 982.

1 N.Y. Ann. Cas. 334
Court of Appeals of New York.

VIEMEISTER

v.

WHITE, President of Board of Education, et al.

Oct. 18, 1904.

Synopsis

Appeal from Supreme Court, Appellate Division, Second Department.

Application of Edmund C. Viemeister for writ of mandamus to Patrick J. White, president of the board of education of the borough of Queens, and others. From a judgment of the Appellate Division (84 N. Y. Supp. 712), affirming an order of the Special Term denying the writ, relator appeals. Affirmed.

Attorneys and Law Firms

****97 *236** John Leary and Edmund C. Viemeister, for appellant.

John J. Delany, Corp. Counsel (James D. Bell, of counsel), for respondents.

Opinion

VANN, J.

The relator moved for a writ of mandamus to compel the officers having control of a public school in ***237** the county of Queens to readmit his child, a lad 10 years of age, to said school without requiring him to be vaccinated. It appeared from the moving papers that the boy had been in regular attendance at the school, and that the principal thereof, pursuant to the instructions of the board of education, had excluded him therefrom, because he refused to be vaccinated. It appeared from the papers read in opposition to the motion that when the relator's son was excluded from the school there was a regulation of the board of education in full force which provided that 'no pupil shall be allowed to attend any school, nor shall any teacher be employed in the same, unless such pupil or teacher has been vaccinated.' It further appeared that the lad had never been vaccinated, and that he refused to

submit to vaccination; but it was not alleged that at the time of such exclusion smallpox was prevalent in ****98** the neighborhood, or that there was any special danger, from recent exposure or other causes, of an immediate spread of the disease.

The Constitution requires the Legislature to 'provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.' Const. art. 9, § 1. The public health law provides that 'no child or person not vaccinated shall be admitted or received into any of the public schools of the state, and the trustees or other officers having the charge, management or control of such schools shall cause this provision of law to be enforced. They may adopt a resolution excluding such children and persons not vaccinated from such school until vaccinated. * * *' Public Health Law, Laws 1893, p. 1495, c. 661, § 200, renumbered section 210 by Laws of 1900, p. 1484, c. 667, § 2. The same law provides for the free vaccination of children of suitable age who wish to attend the public schools, provided their parents or guardians are unable to procure vaccination for them. This is a re-enactment of a statute containing the same provisions in substance, passed in 1860, which remained in force until the passage of the public health law in 1893. Laws 1860, p. 761, c. 438.

***238** The question presented is whether the Legislature is prohibited by the Constitution from enacting that such children as have not been vaccinated shall be excluded from the public schools. The appellant claims that the public health law places an unreasonable restriction upon the right of his child to attend school, and that it violates the section of the Constitution already quoted, as well as the general guaranties for the protection of the rights, privileges, and liberties of the citizen. Const. art. 1, §§ 1, 6. The respondents claim that the object and effect of such legislation is the protection of the public health, and hence that it is a valid exercise of the police power. The police power, which belongs to every sovereign state, may be exerted by the Legislature, subject to the limitations of the Constitution, whenever the exercise thereof will promote the public health, safety, or welfare. The power of the Legislature to decide what laws are necessary to secure these objects is subject to the power of the courts to decide whether an act purporting to promote the public health or safety has such a reasonable connection therewith as to appear upon inspection to be adapted to that end. A statute entitled a health law must be a health law in fact as well as in name, and must not attempt in the name of the police power to effect a purpose having no adequate connection with the common good. As we have recently said, it 'must tend in a degree that is perceptible and clear towards the preservation of the * * * health * * * or welfare of the

community, as those words have been used and construed in the many cases heretofore decided.' Health Dept. of N. Y. v. Rector, etc., 145 N. Y. 32, 39, 39 N. E. 833, 45 Am. St. Rep. 579. When the sole object and general tendency of legislation is to promote the public health, there is no invasion of the Constitution, even if the enforcement of the law interferes to some extent with liberty or property. These principles are so well established as to require no discussion, and we cite but a few out of many authorities relating to the subject. Matter of Jacobs, 98 N. Y. 98, 108, 50 Am. Rep. 636; People v. Marx, 99 N. Y. 377, 2 N. E. 29, 52 Am. Rep. 34; People v. Arensberg, 105 N. Y. 123, 11 N. E. 277, 59 Am. Rep. 483; *239 People v. Gillson, 109 N. Y. 389, 17 N. E. 343, 4 Am. St. Rep. 465; People v. Ewer, 141 N. Y. 129, 36 N. E. 4, 25 L. R. A. 794, 38 Am. St. Rep. 788; People ex rel. Nechamcus v. Warden, etc., 144 N. Y. 529, 39 N. E. 686, 27 L. R. A. 718; People v. Havnor, 149 N. Y. 195, 43 N. E. 541, 31 L. R. A. 689, 52 Am. St. Rep. 707; People v. Adirondack Ry. Co., 160 N. Y. 225, 236, 54 N. E. 689; People v. Lochner, 177 N. Y. 145, 69 N. E. 373.

The right to attend the public schools of the state is necessarily subject to some restrictions and limitations in the interest of the public health. A child afflicted with leprosy, smallpox, scarlet fever, or any other disease which is both dangerous and contagious, may be lawfully excluded from attendance so long as the danger of contagion continues. Public health, as well as the interest of the school, requires this, as otherwise the school might be broken up and a pestilence spread abroad in the community. So a child recently exposed to such a disease may be denied the privilege of our schools until all danger shall have passed. Smallpox is known of all to be a dangerous and contagious disease. If vaccination strongly tends to prevent the transmission or spread of this disease, it logically follows that children may be refused admission to the public schools until they have been vaccinated. The appellant claims that vaccination does not tend to prevent smallpox, but tends to bring about other diseases, and that it does much harm, with no good.

It must be conceded that some laymen, both learned and unlearned, and some physicians of great skill and repute, do not believe that vaccination is a preventive of smallpox. The common belief, however, is that it has a decided tendency to prevent the spread of this fearful disease and to render it less dangerous to those who contract it. While not accepted by all, it is accepted by the mass of the people, as well as by most members of the medical profession. It has been general in our state and in most civilized nations for generations. It is generally accepted in theory and generally applied in practice, both by the voluntary action of the people and in obedience to the ***99 command of law. Nearly every state of the Union has statutes to encourage

or directly or indirectly to require vaccination, and this is *240 true of most nations of Europe. It is required in nearly all the armies and navies of the world. Vaccination has been compulsory in England since 1854, and the last act upon the subject, passed in 1898, requires every child born in England to be vaccinated within six months of its birth. It became compulsory in Bavaria in 1807; Denmark, 1810; Sweden, 1814; Würtemberg, Hesse, and other German states, 1818; Prussia, 1835; Roumania, 1874; Hungary, 1876; and Servia, 1881. It is aided, encouraged, and to some extent compelled, in the other European nations. 24 Enc. Brit. 30. It is compulsory in but few states and cities in this country, but it is countenanced or promoted in substantially all, and statutes requiring children to be vaccinated in order to attend the public schools have generally been sustained by the courts. Abeel v. Clark, 84 Cal. 226, 24 Pac. 383; Bissell v. Davison, 65 Conn. 183, 32 Atl. 348, 29 L. R. A. 251; Blue v. Beach, 155 Ind. 121, 56 N. E. 89, 80 Am. St. Rep. 195, 50 L. R. A. 64; Morris v. City of Columbus, 102 Ga. 792, 30 S. E. 850, 42 L. R. A. 175, 66 Am. St. Rep. 243; State v. Hay, 126 N. C. 999, 35 S. E. 459, 49 L. R. A. 588, 78 Am. St. Rep. 691; Hazen v. Strong, 2 Vt. 427; In re Rebenack, 62 Mo. App. 8; Duffield v. Williamsport School District, 162 Pa. 476, 29 Atl. 742, 25 L. R. A. 152; Cooley's Cons. Lim. (7th Ed.) 880; Prentice on Police Powers, 39, 132; 1 Dillon's Mun. Corp. § 355; Parker & Worthington's Public Health and Safety, § 123.

A common belief, like common knowledge, does not require evidence to establish its existence, but may be acted upon without proof by the Legislature and the courts. While the power to take judicial notice is to be exercised with caution, and due care taken to see that the subject comes within the limits of common knowledge, still, when according to the memory and conscience of the judge, instructed by recourse to such sources of information as he deems trustworthy, the matter is clearly within those limits, the power may be exercised by treating the fact as proved without allegation or proof. Jones v. U. S., 137 U. S. 202, 216, 11 Sup. Ct. 80, 34 L. Ed. 691; Hunter v. N. Y., O. & W. R. R. Co., 116 N. Y. 615, 623, 23 N. E. 9, 6 L. R. A. 246; Porter v. Waring, 69 N. Y. 250, 253; Geist v. Detroit City R. R. Co., 91 Mich. 446, 51 N. W. 1112; Greenleaf's Ev. (14th Ed.) § 5; 1 Wharton's Ev. (3d Ed.) § 282; 1 Starkie's Ev. 211; 17 Am. & Eng. Encyc. *241 (2d Ed.) 894. Common belief, in order to become such common knowledge as to be judicially noticed by us, must be common in this state, although in a matter pertaining to science it may be strengthened somewhat by the general acceptance of mankind. As was said by Mr. Justice Swayne in Brown v. Piper, 91 U. S. 37, 42, 23 L. Ed. 200: 'Courts will take notice of whatever is generally known within the limits of their jurisdiction, and, if the judge's memory is at fault, he may refresh it by resorting to any means for that

purpose which he deems safe and proper. This extends to such matters of science as are involved in the cases brought before him.' See, also, *People v. Lochner*, 177 N. Y. 169, 69 N. E. 373.

The fact that the belief is not universal is not controlling, for there is scarcely any belief that is accepted by every one. The possibility that the belief may be wrong, and that science may yet show it to be wrong, is not conclusive; for the Legislature has the right to pass laws which, according to the common belief of the people, are adapted to prevent the spread of contagious diseases. In a free country, where the government is by the people through their chosen representatives, practical legislation admits of no other standard of action; for what the people believe is for the common welfare must be accepted as tending to promote the common welfare, whether it does in fact or not. Any other basis would conflict with the spirit of the Constitution, and would sanction measures opposed to a republican form of government. While we do not decide and cannot decide that vaccination is a preventive of smallpox, we take judicial notice of the fact that this is the common belief of the people of the state, and with this fact as a foundation we hold that the statute in question is a health law, enacted in a reasonable and proper exercise of the police power. It operates impartially upon all children in the public schools,

and is designed, not only for their protection, but for the protection of all the people of the state. The relator's son is excluded from school only until he complies with the law passed to protect the health of all, himself and his family included. No right conferred or secured *242 by the Constitution was violated by that law, or by the action of the school authorities based thereon. In view of the opinions below, we regard further discussion as unnecessary, and we affirm the order appealed from, with costs.

CULLEN, C. J., and O'BRIEN, HAIGHT, MARTIN, and WERNER, JJ., concur. GRAY, J., absent.

Order affirmed.

All Citations

1 N.Y. Ann. Cas. 334, 17 Bedell 235, 179 N.Y. 235, 72 N.E. 97, 70 L.R.A. 796, 103 Am.St.Rep. 859

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52 N.Y.2d 496
Court of Appeals of New York.

W. T. GRANT COMPANY, Appellant-Respondent,
v.

Robert Z. SROGI, as Commissioner of Assessment
of the City of Syracuse, Respondent-Appellant.
(Proceeding No. 1.)

ED GUTH REALTY, INC., Appellant-Respondent,
v.

Robert Z. SROGI, as Commissioner of Assessment
of the City of Syracuse, Respondent-Appellant.
FRANCHISE REALTY INTERSTATE
CORPORATION, Appellant-Respondent,
v.

Robert Z. SROGI, as Commissioner of Assessment
of the City of Syracuse, Respondent-Appellant.
(Proceeding No. 2.)

W. T. GRANT COMPANY, Respondent,
v.

Robert Z. SROGI, as Commissioner of Assessment
of the City of Syracuse, Appellant. (Proceeding No.
3.)

April 9, 1981.

Synopsis

Proceedings were brought by taxpayers seeking review of tax assessments of two downtown Syracuse commercial properties for 1971–1976. The Supreme Court, Onondaga County, Richard Aronson, J., determined fair market value of properties, awarded additional allowances to taxpayers, and enjoined city and its agents from transferring title to premises, and taxpayers and city cross-appealed. The Supreme Court, Appellate Division, 71 A.D.2d 457, 423 N.Y.S.2d 324, modified and affirmed, and cross appeals were taken. The Court of Appeals, Jasen, J., held that: (1) under the circumstances, sales price established in arm's length transaction was best evidence of value of one property during years in question; (2) Appellate Division's determination of market value of other property was more realistic than that of trial court and more in line with weight of evidence; (3) where evidence establishes value lower than that alleged in petition, court can reform petition to conform with proof and order appropriate reduction in tax assessment; (4) taxpayers, who were successful in reducing their assessments by more than one half of reductions claimed, were entitled to costs and disbursements as of right; (5) court has power to enjoin municipality from transferring title to property acquired for nonpayment of taxes during pendency of assessment review proceeding; but (6) while original taxpayer may have been entitled to

injunction against city, present taxpayer lacked equitable standing to assert aggravated pattern of tax abuse to which its predecessor in interest was subject as basis for injunctive relief.

Affirmed in part and reversed in part.

Gabrielli, J., filed a dissenting opinion in which Cooke, C. J., joined.

Attorneys and Law Firms

***502 ***764 **956** Franklin J. Schwarzer, Syracuse, for appellants-respondents.

***501** David M. Garber, Corp. Counsel, Syracuse (Harold L. Fisher, Donald A. Marshall, Andrew S. Fisher and Gerald Gorinsky, Brooklyn, of counsel), for respondents-appellants.

***504** OPINION OF THE COURT

JASEN, Judge.

These appeals raise a number of issues concerning tax assessment review proceedings under article 7 of the Real Property Tax Law. The primary question presented is whether a court may grant a preliminary injunction restraining a municipality from transferring title to real property acquired by the municipality by virtue of nonpayment of taxes during the pendency and final determination of proceedings to reduce the tax assessment on that property.

***505** These consolidated tax review proceedings involve two parcels of commercial property located in the downtown Syracuse business district. This area has been and continues to be a hotbed of tax litigation. Cases involving the properties involved herein, as well as other parcels of real estate in this district, have been in our courts on a number of occasions already (see *Matter of Rice v. Srogi*, 70 A.D.2d 764, 417 N.Y.S.2d 537; *McCrary Corp. v. Gingold*, 52 A.D.2d 23, 382 N.Y.S.2d 407; *Guth Realty v. Gingold*, 41 A.D.2d 479, 344 N.Y.S.2d 270, affd. 34 N.Y.2d 440, 358 N.Y.S.2d 367, 315 N.E.2d 441; *Matter of Guth Realty v. Gingold*, 16 A.D.2d 372, 228 N.Y.S.2d 120),

and there presently are pending over 150 applications seeking review of other assessments imposed by the City of Syracuse.

The instant proceedings were brought to review assessments for the years 1971–1976 on two separately owned parcels. The first of the two properties is located at 323 South Salina Street in Syracuse and will be referred to as the “Guth” property. The second property is located at 425–427 South Salina Street and will be referred to as the “Grant” property.

The Guth property is located in the 300 block of South Salina Street. It is improved by a five-story building which is approximately 80 years old. The prior owner, Ed Guth, purchased the property in 1955 and used the building to house a hobby shop and toy store until 1974 when he sold the property to Franchise Realty Interstate Corp., the real estate division of the McDonald’s Corporation.

Mr. Guth previously had offered this property for sale from as early as 1962, but apparently had received no purchase offer worth considering until that of Franchise Realty. The original offer by Franchise Realty was for \$130,000, but the price was negotiated upward to \$150,000 when the property was finally sold. At the time of this sale, Mr. Guth had no connection with Franchise Realty. Moreover, Mr. Guth was in sound financial condition at the time, but had decided to give up his business because of declining sales and the high cost of operation.

After Franchise Realty purchased the Guth property, an arrangement with a prospective ***765 McDonald’s licensee who was to occupy the building fell through. As a result, the property remained vacant and Franchise Realty offered it *506 for sale. Franchise Realty, however, has been unsuccessful in obtaining a purchaser for the Guth property.

Despite two prior proceedings which resulted in substantial reductions in tax assessment (*Guth Realty v. Gingold*, 41 A.D.2d 479, 344 N.Y.S.2d 270, *affd.* 34 N.Y.2d 440, 358 N.Y.S.2d 367, 315 N.E.2d 441, *supra*; *Matter of Guth Realty v. Gingold*, 16 A.D.2d 372, 228 N.Y.S.2d 120 *supra*), the city continually assessed the Guth property at \$212,200 each year from 1964–1974. In 1975 and 1976, the city assessed the property at \$180,200.

The Grant property is located in the easterly half of the 400 block of South Salina Street. The property originally was owned by the University of Rochester and was **957 leased to the W. T. Grant Company in 1944 for a 30-year term which was later extended to 1982 with an option to renew until 2043. Aside from the annual base rent of \$77,322.32, Grant was to pay all taxes, utilities, insurance

and building maintenance. Grant constructed a five-story building on the property which it sold to and then leased back from the University of Rochester. Each year since 1964, the city has assessed the property at \$1,135,700.

Because of declining sales volume, Grant decided in 1974 to close its store. Shortly thereafter, Grant was persuaded to remain open by an agreement with the University of Rochester and the City of Syracuse under which the university deferred the annual rent and the city settled the 1964–1970 tax litigation then on appeal. (See *McCrary Corp. v. Gingold*, 52 A.D.2d 23, 25, 382 N.Y.S.2d 407, *supra*.) In 1976, however, the tenancy ended when the Grant chain went bankrupt and vacated the premises.

The University of Rochester sold the Grant property in late 1976 to South Salina Street, Inc., for the sum of \$25,000. South Salina Street, Inc., agreed to assume liability for the unpaid 1976 taxes, penalties and interest on the property, thereby making the total consideration for the transfer \$175,744.32. South Salina Street, Inc., however, failed to pay the 1976 taxes and has since failed to pay taxes for the years 1977–1979. Pursuant to the city’s tax act (L.1906, ch. 75, §§ 21, 22, as *amd.* by Local Law, 1944, No. 1 of City of Syracuse), tax sales were conducted with respect to the *507 1976–1978 tax delinquencies. South Salina Street, Inc., did not redeem the premises for the 1976 delinquency (see Real Property Tax Law, § 1010) and on April 9, 1979, the city acquired title to the Grant property pursuant to a tax deed.

In the meantime, tax proceedings were instituted to review assessments on the Grant property for the years 1977–1979. These proceedings are still pending and are not presently before us on these appeals. However, in the context of these proceedings, South Salina Street, Inc., in May of 1979, sought and obtained a preliminary injunction from Special Term restraining the city from transferring title to the Grant property until final determination of the tax assessment review proceedings for the years 1976–1979. It is the issuance of this injunction which is presently before our court on one of these appeals.

As mentioned earlier, these proceedings were commenced to review assessments on the Guth and Grant properties for the years 1971–1976. These proceedings were tried jointly with three others which also involved properties in the downtown Syracuse business district. The parties stipulated to the applicable equalization rates and, therefore, trial was held solely to determine the full values of the properties in question.

At trial, testimony was taken from appraisers for the various petitioners and from the city’s appraiser. In regard

to the Guth property, petitioner's appraiser valued ***766 the property for the years 1971–1976, at prices ranging between \$180,000 to \$140,000. The city's appraiser testified that the full value of the property was a low of \$460,100 in 1970 and a high of \$487,800 in 1976.

The trial court, acknowledging the general decline of property values in the downtown Syracuse area, found the value to be between those set forth by the parties' appraisers. Full value for the years 1971–1972 was found to be \$300,000, for 1973–1974 to be \$275,000, and for 1975–1976 to be \$250,000 and the assessments were ordered reduced accordingly. The trial court did not consider the 1974 price of \$150,000 at which the Guth property was sold to Franchise Realty to be controlling because, although it was an *508 arm's length transaction, the court was of the view that the sale was "occasioned by the willingness of the owner to sell at a sacrifice." This conclusion was based upon Mr. Guth's desire "to discontinue business at that location due to the fact that he considered the expense of operation did not justify continuing business there."

There was also much disagreement at trial as to the value of the Grant property. The petitioner's appraiser testified that the property had a full value of \$1,200,000 in **958 1971 which declined annually to \$625,000 in 1976. On the other hand, the city's appraiser stated that the value of the property ranged between \$3,028,200 to \$3,150,700 during the years in question. This discrepancy in valuation apparently was caused by the different appraisal methods utilized. The city's appraiser adopted a method whereby estimated rental income, which was ascertained from comparable leases in the area, was capitalized at 9% and then added to the land values to determine the full value of the property. The petitioner's appraiser postulated that reasonable rental income could be determined by multiplying gross sales by a factor of 3%, representing the rent which a national chain store would agree to pay on a percentage lease, and capitalizing the result at 9.25% to 12.2%, the expected rate of return on such an investment during the years in question.

The trial court again found that full value was between those alleged by the parties. Full value for the years 1971–1972 was found to be \$1,830,000, for 1973–1974 to be \$1,670,000, and for 1975–1976 to be \$1,510,000, and the assessments were ordered reduced accordingly. Although indicating approval of the petitioner's gross sales valuation method, the trial court did not expressly accept these figures in arriving at its valuations, stating generally that the petitioner's method failed to take into consideration long-term market conditions as a determining factor of property value.

On cross appeals the Appellate Division, 71 A.D.2d 457, 423 N.Y.S.2d 324, unanimously modified by further reducing the assessments below that set by the trial court. As to the Guth property, the Appellate Division held that the trial court erred in not giving the 1974 sales price paid by Franchise Realty controlling *509 weight for purposes of determining full value. The Appellate Division viewed the 1974 sale neither as being made under any compulsion nor occasioned by any abnormal impetus for selling. As such, the Appellate Division stated that the \$150,000 sales price was entitled to full weight in determining value for purposes of the tax assessment on the Guth property.

The Appellate Division also further reduced the Grant assessment. Noting that the trial court did not set forth the computations it used in determining value, the Appellate Division adopted the petitioner's valuation method which used a capitalized percentage of gross sales "because that is the method normally used by national tenants and also because of the difficulty that the city appraiser had in finding credible comparables to support his square-foot rental formula." The Appellate Division, however, declined to accept the petitioner's figures for 1974–1976 because of Grant's failing financial condition and, therefore, ***767 projected the 1973 valuation over these years.¹

The Appellate Division also affirmed Special Term's grant of the preliminary injunction restraining the city from disposing of title to the Grant property pending final determination of the 1976–1979 assessment review proceedings. The court held that **959 such a remedy should only be available in instances where a taxpayer can demonstrate "a long and aggravated pattern of conduct by the city from which the taxpayer cannot reasonably protect itself or its property without injunctive relief." The Appellate Division was of the view that the continuous overvaluation of the Grant property in the face of court rulings that the assessments *510 were illegal, coupled with the excessive delays caused by the city in the course of the assessment review proceedings, was such conduct as justified the grant of a preliminary injunction to prevent the loss of title to the Grant property pending final determination of the taxes owed.

On cross appeals to this court, both parties assert that the awards of costs and allowances to petitioners, as modified by the Appellate Division, are in error. The commissioner also contends that the Appellate Division erred in further reducing the assessments on the Guth and Grant properties. Finally, the commissioner maintains that Special Term was without legal authority to issue the preliminary injunction against the City of Syracuse in the context of a tax

assessment review proceeding. Alternatively, the commissioner argues that if the court had the power to issue the injunction, Special Term abused its discretion by issuing the injunction under the facts of this case.

We first dispose of the valuation issue. In assessment review proceedings, the value at which real property may be taxed has been equated with market value. (*Matter of Great Atlantic & Pacific Tea Co. v. Kiernan*, 42 N.Y.2d 236, 239, 397 N.Y.S.2d 718, 366 N.E.2d 808; *Matter of Hellerstein v. Assessor of Town of Islip*, 37 N.Y.2d 1, 371 N.Y.S.2d 388, 332 N.E.2d 279, mod. 39 N.Y.2d 920, 386 N.Y.S.2d 406, 352 N.E.2d 593; *People ex rel. Parklin Operating Corp. v. Miller*, 287 N.Y. 126, 129, 38 N.E.2d 465; *Matter of Board of Water Supply of City of N. Y.*, 277 N.Y. 452, 456–457, 14 N.E.2d 789; *Matter of Lane Bryant, Inc. v. Tax Comm. of City of N. Y.*, 21 A.D.2d 669, 249 N.Y.S.2d 994, affd. 19 N.Y.2d 715, 279 N.Y.S.2d 175, 225 N.E.2d 882.) The “market value of real property is the amount which one desiring but not compelled to purchase will pay under ordinary conditions to a seller who desires but is not compelled to sell.” (*Heiman v. Bishop*, 272 N.Y. 83, 86, 4 N.E.2d 944; see also, *Sparkill Realty Corp. v. State of New York*, 254 App.Div. 78, 82, 4 N.Y.S.2d 679 affd. 279 N.Y. 656, 18 N.E.2d 301.)

The determination of market value essentially is a question of fact. As such, the Appellate Division is empowered to make new findings of value where the trial court “has failed to give to conflicting evidence the relative weight which it should have”. (*People ex rel. MacCracken v. Miller*, 291 N.Y. 55, 61, 50 N.E.2d 542, citing ***768 *Matter of City of New York [Newton Creek]*, 284 N.Y. 493, 497, 31 N.E.2d 916; see Real Property Tax Law, § 724.) Furthermore, where the Appellate Division *511 reverses the findings of value made by the trial court and makes new findings of fact, the Court of Appeals is empowered to choose between the findings of the trial court and the new findings of the Appellate Division by ascertaining which valuation is in accord with the weight of the evidence. (*People ex rel. MacCracken v. Miller*, *supra*; *People ex rel. Hilton v. Fahrenkopf*, 279 N.Y. 49, 53, 17 N.E.2d 765; 24 Carmody-Wait 2d, N.Y.Prac., §§ 146:126, 146:127, pp. 352–354.) We affirm the Appellate Division’s reduced valuations of both the Guth and Grant properties.

The reason for the Appellate Division further reducing the valuation of the Guth property was the 1974 sale to Franchise Realty. The general rule as to such sales is “that the purchase price set in the course of an arm’s length transaction of recent vintage, if not explained away as abnormal in any fashion, is evidence of the ‘highest rank’ to determine the true value of the property at that time”. (*Plaza Hotel Assoc. v. Wellington Assoc.*, 37 N.Y.2d 273,

277, 372 N.Y.S.2d 35, 333 N.E.2d 346; *Matter of Woolworth Co. v. Tax Comm. of City of N. Y.*, 20 N.Y.2d 561, 565, 285 N.Y.S.2d 604, 232 N.E.2d 638; cf. *Matter of Great Atlantic & Pacific Tea Co. v. Kiernan*, 42 **960 N.Y.2d 236, 397 N.Y.S.2d 718, 366 N.E.2d 808, *supra*.) The Appellate Division correctly concluded that the 1974 sale to Franchise Realty fit within this general rule.

Mr. Guth had offered the property for sale without success for 12 years. When finally sold, negotiations took place which resulted in a \$20,000 increase in the purchase price. At the time of the sale, Mr. Guth was financially secure and his business was doing moderately well. Moreover, as mentioned earlier, Mr. Guth had no interest in or connection with the purchaser, Franchise Realty. After the sale, Franchise Realty unsuccessfully offered the property for sale at a price identical to that at which it was purchased. Under these circumstances, the sales price established in this arm’s length transaction was the best evidence of the value of the Guth property during the years in question and, therefore, the Appellate Division’s further reduction based on this price was justified.

We also agree with the Appellate Division’s reduced valuation of the Grant property. As mentioned earlier, the use of different methods of appraisal for this property *512 reaching, as they did, such broadly disparate results, apparently prompted the trial court to accept neither approach. However, the trial court failed to state how it arrived at its computations of value.

The Appellate Division, on the other hand, chose to accept petitioner’s appraisal method because it produced figures which more closely reflected the value of the property to a national tenant. The Appellate Division was also cognizant of Grant’s deteriorating financial condition during the years in question and appropriately rejected petitioner’s figures based upon gross sales for the years immediately prior to Grant’s bankruptcy. Finally, as noted by the court below, the city’s appraiser was hard pressed to justify the comparable leases he used in computing the estimated net income of the Grant property. Under these circumstances, we are of the view that the Appellate Division’s determination of the market value of the Grant property was more realistic than that of the trial court and more in line with the weight of the evidence.

The commissioner asserts, however, that even if the Appellate Division was correct in further reducing the assessments on the Guth and Grant properties, the court erred by granting the taxpayers relief in excess of what was requested in their various petitions. In support of his position, the commissioner relies primarily on the case of *People ex rel. Interstate Land Holding Co. v. Purdy*, 206

App.Div. 606, 198 N.Y.S. 940, affd. 236 N.Y. 609, 142 N.E. 303. In *Purdy*, a closely divided court affirmed a decision in which the Appellate Division held that relief in a tax review proceeding is limited to the amount requested in the petition. (Accord *People ex rel. Universal Business Corp. v. Lewis*, 242 App.Div. 888, 275 N.Y.S. 393, affd. 267 N.Y. 617, 196 N.E. 607; but ***769 see *People ex rel. Empire Mtge. Co. v. Cantor*, 198 App.Div. 317, 190 N.Y.S. 298; *People ex rel. Congress Hall v. Ouderkirk*, 120 App.Div. 650, 105 N.Y.S. 134.) We believe that the time has come to overrule the *Purdy* decision.

In New York, both by statute (Real Property Tax Law, § 306) and under our Constitution (N.Y.Const., Art. XVI, § 2), real property may not be assessed in excess of its full value. Indeed, it is the very purpose of a tax review proceeding “to arrive at a fair and realistic value of the property *513 involved.” (*Matter of Great Atlantic & Pacific Tea Co. v. Kiernan*, 42 N.Y.2d 236, 242, 397 N.Y.S.2d 718, 366 N.E.2d 808, *supra*; see, also, *Matter of Merrick v. Board of Assessors of Nassau County*, 45 N.Y.2d 538, 410 N.Y.S.2d 565, 382 N.E.2d 1341.) Moreover, because the Real Property Tax Law relating to assessment review proceedings is remedial in character, it should be construed in such a way that the taxpayer’s right to have his assessment reviewed and the appropriate relief granted should not be defeated by a pleading technicality. (*Matter of Great Eastern Mall v. Condon*, 36 N.Y.2d 544, 369 N.Y.S.2d 672, 330 N.E.2d 628; *People ex rel. New York City Omnibus Corp. v. Miller*, 282 N.Y. 5, 9, 24 N.E.2d 722.)

***961 It has long been the rule that the primary purpose of the tax petition is to give notice to the taxing authority so that it may take such steps as may be advisable to defend the claim. (*Stuyvesant v. Weil*, 167 N.Y. 421, 425, 60 N.E. 738; *Foley v. D’Agostino*, 21 A.D.2d 60, 62–63, 248 N.Y.S.2d 121.) That being the case, where adequate notice has been given, we see no good reason to adhere blindly to a rule which precludes a court from granting the relief justified by the proof. Aside from being prevented from collecting a tax which has been found to be excessive, the commissioner has not alleged, let alone proven, any prejudice suffered by the city as a result of the assessments being reduced below the amounts requested in the petitions. It is consistent with the general purpose of these proceedings and with the legislative mandate that property not be assessed in excess of full value that relief not be limited to the reduction claimed in the petition. Thus, we hold that where the evidence establishes a value lower than that alleged in the petition, a court can reform the petition to conform with the proof and order the appropriate reduction.²

*514 Having affirmed the Appellate Division’s reduced valuation, we now address the propriety of awarding petitioners costs and allowances. The trial court granted costs and allowances to the Guth and Grant petitioners under subdivisions 1 and 2 of section 722 of the Real Property Tax Law. The trial court also awarded petitioners an additional allowance pursuant to CPLR 8303 (subd. [a], par. 2). On appeal, the Appellate Division affirmed the award of costs and disbursements under subdivision 1 of section 722 of the Real Property Tax Law and modified the additional allowance award by reducing it to the \$2,500 maximum authorized by subdivision 2 of section 722 of the Real Property Tax Law. The Appellate Division, however, struck out the additional allowance awarded under CPLR 8303 on the ground that petitioners could only recover costs and allowances as permitted by the Real Property Tax Law. We agree with the Appellate Division’s disposition of costs and allowances.

Contrary to the commissioner’s assertions, there is no basis upon which to upset the awards under section 722 of the ***770 Real Property Tax Law. The petitioners were successful in reducing their assessments by more than one half of the reductions they claimed and, therefore, they were entitled to costs and disbursements for the proceedings as of right. (Real Property Tax Law, § 722, subd. 1.) Similarly, the record supports the findings that the assessments were “increased without adequate cause” subsequent to court orders of reduction in the case of the Guth property and after stipulation in the case of the Grant property. Therefore, the petitioners qualified for additional allowances under subdivision 2 of section 722 of the Real Property Tax Law.

We also agree with the Appellate Division that petitioners were not entitled to the discretionary allowance authorized by CPLR 8303 (subd. [a], par. 2). As a general rule, there should be no resort to the provisions of the CPLR in instances where the Real Property Tax Law expressly covers the point in issue. (CPLR 103, subd. [b]; *Matter of Trustees of Sailors’ Snug Harbor v. Tax Comm. of City of N. Y.*, 26 N.Y.2d 444, 450, 311 N.Y.S.2d 486, 259 N.E.2d 910; *People ex rel. American *515 Sugar Refining Co. v. Sexton*, 274 N.Y. 304, 8 N.E.2d 869; *Matter of Stevens Med. Arts Bldg. v. City of Mount Vernon*, 72 A.D.2d 177, 182, 424 N.Y.S.2d 230.) In this regard, ***962 it is interesting to note that the predecessor statute to CPLR 8303 expressly provided that it was inapplicable to tax assessment review proceedings. (L.1934, ch. 361; Civ.Prac. Act, § 1513.) However, when this section was carried over into its present form in the CPLR, reference to the Real Property Tax Law inexplicably was deleted.

Notwithstanding the apparent ambiguity created by this omission in CPLR 8303, we agree that section 722 of the

Real Property Tax Law provides the exclusive additional allowance in assessment review proceedings. Indeed, subdivision 2 of section 722 of the Real Property Tax Law states that “the court shall award to the petitioner an additional allowance, *not exceeding the amounts hereinafter specified*”. (Emphasis supplied.) This language, in our view, indicates that the Legislature intended that the allowance provision in section 722 of the Real Property Tax Law would supersede the additional allowance authorized by CPLR 8303 (subd. [a], par. 2). Thus, we affirm the holding below that an additional allowance pursuant to CPLR 8303 (subd. [a], par. 2) may not be granted in an assessment review proceeding. (Accord *Matter of Jacobs v. Board of Assessors of Town of Elma*, 73 A.D.2d 810, 423 N.Y.S.2d 737; *Matter of Rice v. Srogi*, 70 A.D.2d 764, 417 N.Y.S.2d 537 *supra*; see 24 Carmody-Wait 2d, N.Y. Prac., §§ 146:17, 146:20.)

We conclude by addressing the propriety of granting the preliminary injunction against the City of Syracuse. As mentioned earlier, this injunction was obtained by South Salina Street, Inc., and restrained the city from transferring title to the Grant property until the 1976–1979 assessment review proceedings were completed. We hold that while a court has the power to enjoin a municipality from transferring title to property acquired for nonpayment of taxes during the pendency of an assessment review proceeding, it was error under the circumstances present in this case for Special Term to do so.

It is well established that one challenging a tax assessment must continue to pay his taxes and that the *516 commencement of an assessment review proceeding does not stay the collection of taxes or enforcement procedures instituted by the taxing authority. (Real Property Tax Law, § 704, subd. 3; see *People ex rel. Manhattan Ry. Co. v. Coleman*, 48 Hun. 602, 1 N.Y.S. 112; *People ex rel. New York El. Ry. Co. v. Coleman*, 48 Hun. 620, 1 N.Y.S. 551.) The reason for this rule is readily apparent. A government must function and to that end it must have funds. Restraints on the exercise of the taxing power would impede the progress of government and deprive it of the moneys it needs to provide essential services to the public. Thus, a municipality ordinarily should not be denied or delayed in the enforcement of its right to collect the revenues upon which its very existence and ***771 the general welfare depends. To state these basic principles, however, does not end the analysis.

There is no statute in New York which either expressly authorizes or prohibits preliminary injunctions in the context of tax review proceedings. The CPLR provisions relating to injunctions, therefore, should, at least by implication, be available in these situations. (See CPLR

103, subd. [b]; art. 63.) However, aside from the Appellate Division’s decision presently under review, research has revealed no other authority in this State which affords guidance in answering the question presented. (Cf. *Weber v. City of New York*, 18 Misc.2d 543, 195 N.Y.S.2d 269.)

Other jurisdictions which have addressed analogous situations have, for the most part, concluded that a court does have the equitable power to enjoin the collection of a tax under certain circumstances. (See, e. g., *Kent v. Murphey*, 207 Ga. 707, 64 S.E.2d 49; *Clarendon Assoc. v. Korzen*, 56 Ill.2d 101, 306 N.E.2d 299; *Harshberger v. Board of County Comrs.*, 201 Kan. 592, 442 P.2d 5; *Fitzpatrick v. Patrick*, 410 S.W.2d 143 [Ky.]; *Bettigole v. Assessors of Springfield*, 343 Mass. 223, 178 N.E.2d 10; *Twenty-Two Charlotte v. City of Detroit*, 294 Mich. 275, 293 N.W. 647.) These cases have usually involved situations in which there has been a clear showing of intentional overassessment **963 of property tantamount to fraud on the part of the tax authority and the taxpayer was without relief from the imminent deprivation of his property while he attempted to challenge the unauthorized tax. Absent such intentional misconduct, however, *517 these courts have been quick to note that an injunction is not available to avoid an excessive assessment which is the product of inadvertence or mistake and the taxpayer in such instances is left solely to his administrative remedies. See, e. g., *Hodge v. Glaze*, 22 Ill.2d 294, 174 N.E.2d 873; *Harshberger v. Board of County Comrs.*, *supra*; *Bettigole v. Assessors of Springfield*, *supra*; see, generally, 84 C.J.S. Taxation, §§ 716–772.)

We would agree that a court has the power to issue a preliminary injunction restraining the enforcement of a tax, but that power should be exercised in only the most unusual circumstances. Where there has been a deliberate misuse of the taxing power, a court should be able to intervene to prevent the threatened loss of the taxpayer’s property occasioned by the imposition of an intentionally excessive tax. Indeed, to adopt a contrary view would relegate the taxpayer to a truly pyrrhic victory. After successfully challenging the assessment levied against him, the taxpayer would be rewarded with a refund at 3% interest (General Municipal Law, § 3–a), but in the meantime the taxpayer’s property would have been sold because of an inability to pay a tax which improperly was imposed in the first instance. Such a temporary restraint does little harm to the taxing authority and at the same time preserves the *status quo* pending a determination of the amount owed.

Of course, beyond showing an intentional misuse of the taxing power, the taxpayer would have to meet the usual requirements to be entitled to temporary injunctive relief, to wit: (1) the likelihood of success on the merits; (2)

irreparable injury absent granting the preliminary injunction; and (3) a balancing of the equities. (See, e. g., *Nassau Roofing & Sheet Metal Co. v. Facilities Dev. Corp.*, 70 A.D.2d 1021, 418 N.Y.S.2d 216; *Tucker v. Toia*, 54 A.D.2d 322, 388 N.Y.S.2d 475; *Albini v. Solork Assoc.*, 37 A.D.2d 835, 326 N.Y.S.2d 150.) Moreover, the court could require the taxpayer to post an undertaking (CPLR 6312, subd. [b]) in order to protect the municipality from loss should the assessment proceedings prove that the preliminary injunction was granted improperly.

The facts in the present case are quite compelling. As noted by the Appellate Division, taxpayers have been paying excessive taxes on the Grant property for over *518 12 years despite court rulings that the assessments were unlawful by reason of overvaluation. Substantial refunds were ordered on two occasions, but the city to ***772 date has repaid only a small portion of the taxes it has unlawfully collected. Such an aggravated pattern of misuse of the taxing power might have been sufficient to justify restraining the city from transferring title to the Grant property pending the final determination of the assessment proceedings. Nevertheless, the simple fact of the matter is that the party who obtained the injunction, South Salina Street, Inc., was not the one subjected to this unlawful conduct.

It is well settled that a “plaintiff should be denied an injunction where it lacks equitable standing to obtain affirmative equitable relief”. (*Fischel & Co. v. Macy & Co.*, 20 N.Y.2d 180, 187, 282 N.Y.S.2d 234, 229 N.E.2d 26.) However, in this case, South Salina Street, Inc., acquired the Grant property in late 1976 with full awareness of its tax history. Indeed, South Salina Street, Inc., purchased the property at the low price of \$25,000 with the understanding that it would assume all tax liability then owing. These taxes were never paid, nor did South Salina Street, Inc., pay taxes on the property for the next three years. Under these circumstances, while Grant may have been entitled to an injunction against the city, South Salina Street, Inc., lacks equitable standing to assert the aggravated pattern of tax abuse to which its predecessor in interest was subject as the basis for injunctive relief. Therefore, we conclude **964 that it was error to issue the injunction in this case.

Accordingly, the orders of the Appellate Division in *Grant Co. v. Srogi* and *Guth Realty v. Srogi* should be affirmed, without costs. The separate order of the Appellate Division in a proceeding also entitled *Grant Co. v. Srogi* affirming the grant of a preliminary injunction should be reversed, with costs, and the motion for preliminary injunction denied. We construe the question certified by the Appellate Division as asking whether a preliminary injunction was properly granted in this case and, as so construed, the

question should be answered in the negative.

GABRIELLI, Judge (dissenting in part).

It has long been the *519 law in this State that a court in a tax certiorari proceeding cannot grant relief in excess of the relief demanded in the taxpayer’s petition (*People ex rel. Universal Business Corp. v. Lewis*, 242 App.Div. 888, 275 N.Y.S. 393, affd. 267 N.Y. 617, 196 N.E. 607; *Matter of Wright v. Commissioner of Assessment & Taxation*, 242 App.Div. 886, 275 N.Y.S. 389, affd. 267 N.Y. 615, 196 N.E. 607; *People ex rel. Interstate Land Holding Co. v. Purdy*, 206 App.Div. 606, 198 N.Y.S. 940, affd. 236 N.Y. 609, 142 N.E. 303). By its decision today, however, the the majority has determined to abandon that rule and to adopt in its stead one which would permit a court, on its own motion, to reduce an assessment below the assessed valuation alleged by the taxpayer throughout the entire proceeding. Because I conclude that this new rule is contrary both to public policy and to the established practice of our courts in civil litigation, I must respectfully cast my vote in dissent, although I do not disagree with majority’s disposition of the other issues in this appeal.

There is little doubt that in an ordinary civil action the plaintiff cannot recover more than the amount specified in the *ad damnum* clause of his complaint (*Michalowski v. Ey*, 7 N.Y.2d 71, 75, 195 N.Y.S.2d 633, 163 N.E.2d 863; *Corning v. Corning*, 6 N.Y. [2 Seld.] 97, 105; *Silbert v. Silbert*, 22 A.D.2d 893, 895, 255 N.Y.S.2d 272, affd. 16 N.Y.2d 564, 260 N.Y.S.2d 838, 208 N.E.2d 783; see 3 Weinstein-Korn-Miller, N.Y.Civ.Prac., par. 3017.06, p. 30–366). Indeed, the lower courts generally will not even permit a party to amend his *ad damnum* to increase the amount demanded after a case has been calendared if there is any danger at all that his opponent’s position will be prejudiced (see, e. g., *Ryan v. Collins*, 33 A.D.2d 966, 306 N.Y.S.2d 777; see, generally, Siegel, Practice Commentaries, McKinney’s Cons.Laws of N.Y., Book 7B, C3025:14, p. 484).

Yet in this case, which involves a municipal respondent, the majority has brushed aside this well-settled principle as a mere ***773 “pleading technicality” and has permitted recovery in excess of the relief demanded in the pleadings despite the manifest presence of prejudice. Had the city been given fair warning through the pleadings that a greater reduction in assessment would be sought, it might have been able to meet the taxpayers’ claims at trial by introducing proof to demonstrate the inaccuracy of the figure which was ultimately determined to be the correct

valuation of the taxpayers' property. The city had no *520 opportunity to do so, however, because in this case no mention was made of the lower assessment figures until the Appellate Division handed down its decision reducing the assessments below the figures alleged in the taxpayers' petitions. I can envision no clearer example of prejudice than is suggested by the facts in this case, where the respondent received no notice of the extent of the claim it would be required to disprove until after the case was briefed and argued on appeal.

The majority reasons that there is no unfairness in the instant proceeding because "it is the very purpose of a tax review proceeding 'to arrive at a fair and realistic value of the property involved.' " (At pp. 512–513, p. 768 of 438 N.Y.S.2d, p. 960 of 420 N.E.2d.) This rationale appears to be based upon the assumption that there exists some absolute figure which represents the true full market value of a parcel of realty and that this figure may be ascertained in the abstract without direct reference to the **965 various claims of the parties. As our experience with tax certiorari proceedings demonstrates, however, the assessment of real property is an area fraught with uncertainty. There is no guaranteed method for arriving at an accurate valuation figure, and the most that can be expected from our judicial system is a fair approximation based upon an objective effort to reconcile of the parties' conflicting claims. Inasmuch as the courts' estimates as to the proper valuation figure for a particular property are no more likely to be accurate than are the estimates which the parties have made through their pleadings, it seems somewhat unrealistic to suggest that the abandonment of the *Purdy* rule will somehow advance the quest for "fair and realistic" valuations in tax certiorari proceedings.*

*521 Of even greater concern in this case is the impact that the majority's holding will have upon the ability of municipal governments to make intelligent budgetary decisions. In order to determine how much money they may appropriate or spend in any given year for essential services and debt service, municipalities must be able to estimate with a fair degree of accuracy the amount of revenue that they will be able to raise through the system of local real property taxation. To be sure, a degree of uncertainty will always be present, since there may always ***774 be challenges to individual assessments that will have to be resolved in the courts. The extent of potential revenue loss resulting from such challenges, however, has always been limited by the amount of the tax reductions

claimed by the taxpayers in their certiorari petitions. Since these petitions are generally served within a short time after the assessment roll is completed and filed (see Real Property Tax Law, § 702, subd. 2), the municipality is ordinarily given early notice of the amount of tax revenues that will remain in jeopardy pending judicial review. Under the rule announced by the majority today, however, the pleadings are no longer controlling. As a consequence, municipalities will be left in doubt about the extent of their potential liability for tax refunds until all of the assessment challenges have been finally resolved by the last appellate court. While this uncertainty may not be of serious import in cases involving individual taxpayers with small land holdings, it could well pose a severe problem when a single large corporate landowner *522 which controls a substantial portion of the tax base challenges its assessment. For all of the foregoing reasons, I would hold that the relief awarded to the taxpayer cannot exceed the relief demanded in the pleadings and that the amount of reduction **966 awarded by the Appellate Division in the first two above-entitled cases should be modified to conform to the amounts claimed in the petitions.

In *Grant Co. v. Srogi* and *Guth Realty v. Srogi*. Order affirmed, without costs.

JONES, WACHTLER, FUCHSBERG and MEYER, JJ., concur with JASEN, J.

GABRIELLI, J., dissents in part and votes to modify in a separate opinion in which COOKE, C. J., concurs.

JONES, WACHTLER, FUCHSBERG and MEYER, JJ., concur with JASEN, J.

GABRIELLI, J., concurs in a separate opinion in which COOKE, C. J., concurs.

In *Grant Co. v. Srogi*. Order reversed, with costs, motion for preliminary injunction denied, and question certified answered in the negative.

All Citations

52 N.Y.2d 496, 420 N.E.2d 953, 438 N.Y.S.2d 761

Footnotes

¹ As modified by the Appellate Division, the assessment computations are as follows:

	Full Value	Rate	Assessment
Grant Property:			
1971-1972	\$1,200,000	45%	540,000
1973-1974	950,000	43%	408,500
1975-1976	950,000	40%	380,000
Guth Property:			
1971-1972	180,000	45%	\$81,000
1973-1974	150,000	43%	64,500
1975-1976	150,000	40%	60,000

2 In response to the dissent, a few comments are in order. Inasmuch as the present appeals involve assessment review proceedings pursuant to article 7 of the Real Property Tax Law, we do not reach and, therefore, need not consider the rule in ordinary civil cases which prohibits recovery in excess of the *ad damnum* clause of the complaint. Nor do we suggest that in a tax review proceeding the values alleged in the petition are meaningless or that relief is to be granted regardless of the prejudice suffered by the respondent taxing authority. Rather, we merely hold that, under the facts of this case, reformation of the petitions to conform with the proof was a remedy which was within the court's power to grant and which was not affected by any error of law.

* I fear that the holding in this case is representative of a disturbing tendency to brush aside well-settled rules of law when application of the rules would not produce the desired result (see, e. g., *Matter of Dudley v. Kerwick*, 52 N.Y.2d 542, 439 N.Y.S.2d 305, 421 N.E.2d 797). There can be no doubt that ancient legal principles may become outdated necessitating a careful re-examination of existing precedent. But such re-examination should be undertaken only with the greatest caution, since "there is potential for jurisprudential scandal in a court which decides one way one day and another way the next" (*People v. Hobson*, 39 N.Y.2d 479, 488, 384 N.Y.S.2d 419, 348 N.E.2d 894; compare *Greschler v. Greschler*, 51 N.Y.2d 368, 434 N.Y.S.2d 194, 414 N.E.2d 694 [declaratory judgment action in which complaint fails to state cause of action requires declaration of rights rather than dismissal], with *Combustion Eng. v. Travelers Ind. Co.*, 53 N.Y.2d 875, 440 N.Y.S.2d 617, 423 N.E.2d 40 [declaratory judgment action in which complaint fails to state cause of action dismissed]). To be sure, our natural sympathies in a given case may lead us to become impatient with the constraints imposed by precedent. We may not, however, permit our sympathies and empty generalizations about "fairness" and "justice" to obscure our fundamental responsibility to apply our own reason as well as the reason of the past to the difficult problems that are placed before us.

In this case, the majority has chosen to overrule a well-established rule of law solely on the basis of its view that "because the Real Property Tax Law relating to assessment review is remedial in character, it should be construed in such a way that the taxpayer's right to have his assessment reviewed * * * [is] not * * * defeated by a pleading technicality." (At p. 513, at p. 768 of 438 N.Y.S.2d, at p. 960 of 420 N.E.2d.) Because I cannot accept such generalizations as a substitute for reasoned analysis, I prefer, in accordance with the principle of *stare decisis*, to adhere to the rule established in our prior decisions.

1 E.H. Smith 657
Court of Appeals of New York.

WAKEMAN
v.
WILBUR et al.

Dec. 10, 1895.

Synopsis

Appeal from supreme court, general term, Fourth department.

Action by Abijah S. Wakeman against Sylvia A. Wilbur and others to compel defendants to remove an obstruction from a highway. From a judgment of the general term (4 N. Y. Supp. 938) reversing a judgment in favor of plaintiff, he appeals. Reversed.

Attorneys and Law Firms

*658 Isaac H. Maynard, for appellant.

*659 Alexander Neish, for respondents.

Opinion

*660 O'BRIEN, J.

The court below has reversed a judgment recovered by the plaintiff on the report of a referee. It does not appear from the order that the reversal was upon the facts, and we must, therefore, assume that it was upon some question *661 of law. The action was brought to compel the defendants to remove obstructions from a public highway, and for damages which it was alleged that the plaintiff had sustained in consequence of the unlawful obstruction. It was claimed that the invasion of the highway by the defendants amounted to a public nuisance, and that the plaintiff, by reason thereof, had suffered such special and particular damage and injury as enabled him to bring and maintain the action in his own name. The facts found by the referee sustain the judgment, and the only question for this court to consider is whether any of them are without any sufficient basis in the proofs, and whether any of the exceptions taken were of such a character as to require a reversal of the judgment. The important facts found are: First, that the defendants did place obstructions in a public highway; and, secondly, that this unlawful act resulted in

damages to the plaintiff, special and peculiar to him, and not of a character common to the whole public. It appeared that on the 27th day of June, 1851, the commissioners of highways of the town laid out the road in question by an order, signed by two of them, in which the center line of the road, to be three rods in width, is described by courses, distances, and monuments. This order was duly recorded as required by law, and recites the fact that it was made at a meeting of all the commissioners called for that purpose, and after full deliberation, and with the consent of the property owners **342 through whose lands the road passed. It further appeared that the road was thereafter included by the public authorities in one of the road districts of the town. The road at the point in question was laid out through a forest, and for some years afterwards it was opened and used only for the purpose of drawing loads upon sleds in the winter, or the passage of sleighs. The road, as opened at the point in question, did not follow the survey indicated in the order in all respects, but there were deviations therefrom. The limited use of the place as a highway for some years thereafter was sufficient to give to it the character of a public road. It was a place over which the public had the right to pass and repass, *662 and the fact that it was not sufficiently improved for some time to permit the passage of wagons or carriages upon wheels did not affect the public right. About 10 years afterwards, however, the road was so opened, widened, and improved that thereafter it was used and traveled by the public generally with wagons and carriages, still following the old line of the sled road as originally cut out and opened through the woods on the premises now owned by the defendants. About 1869, this road, at the point in question, was changed for a distance of 10 or 12 rods through the lands now owned by the defendants, the new or substituted road being located or placed a few rods easterly of the old road. The then owner of the land, one of the defendants' grantors, consented to this change, and thereupon the road was located where it now is by the public authorities and the persons then owning the defendants' farm. It must, of course, be assumed to be the same width as the original road, namely, three rods. The referee was, therefore, warranted in finding that the locus in quo was a public highway three rods wide. He has also found that for the past 26 years this highway had been included in one of the road districts of the town, and has been in charge of overseers duly appointed; and that the inhabitants, including the defendants, have been assessed for its maintenance and repair. The evidence certainly warranted these findings. It is quite true that he has also found that at the time this action was commenced the boundaries of this road as traveled, used, and worked, had not been ascertained or determined by the commissioners of highways of the town. But the place was still a highway, although its exterior lines

had not been marked out or delineated. The recording of the order, the opening of the road for use in winter, the act of the authorities in including it in one of the road districts, and the agreement between them and the defendants' predecessors in title changing the location and establishing the road as now used, were all acts which could be considered in determining the fact as to the existence at the place in question of a public highway. There was also evidence from *663 which the referee could have found that the defendants obstructed this highway, and he did find that, on several occasions prior to the commencement of this action, the defendants placed fences within a foot and a half or two feet of the wagon track, and so near to the same as to obstruct the highway, and to hinder and prevent the free use of the same; that in the winter season these fences, so placed, caused the snow to drift in upon the track, and fill the same, rendering it difficult, and sometimes impossible, to travel thereon. It was not important that the exterior lines of this road, three rods in width, had not been ascertained or designated with accuracy by the public authorities. The finding that the defendants obstructed the highway necessarily implies that the fence was placed within the limits of the road. The existence of the road as such, and the obstruction of it by the defendants, presented to the referee a mixed question of law and fact, and, while the proofs upon which the findings of the referee were based were open to review in the court below, it cannot be said that these conclusions were erroneous as matter of law. *Doughty v. Hope*, 1 N. Y. 79; *Chapman v. Gates*, 54 N. Y. 132; *Downing v. Rugar*, 21 Wend. 178; *In re James*, 43 Hun, 67; *Potter v. Bank*, 28 N. Y. 641; *Van Steenberg v. Bigelow*, 3 Wend. 43; *Barber v. Winslow*, 12 Wend. 102; *Vandermark v. Porter*, 40 Hun, 397.

The obstruction of a public highway is an act which, in law, amounts to a public nuisance, and a person who sustains a private and peculiar injury from such an act may maintain an action to abate the nuisance, and to recover the special damages by him sustained. *People v. Kerr*, 27 N. Y. 193; *Davis v. Mayor, etc.*, 14 N. Y. 506; *Adams v. Popham*, 76 N. Y. 410; *Chipman v. Palmer*, 77 N. Y. 51. The extent of the injury is not generally considered very important. It should be substantial, of course, and not merely nominal; and the fact that numerous other persons have been injured by the act is no ground for a denial of the relief. When the damage or injury is common to the public, and special to no *664 one, then redress must be obtained by some proceeding in behalf of the public, and not by a private

action. *Francis v. Schoellkopf*, 53 N. Y. 152; *Doolittle v. Supervisors*, 18 N. Y. 155; *Lansing v. Smith*, 4 Wend. 9; *Callanan v. Gilman*, 107 N. Y. 360, 14 N. E. 264. The referee found from evidence entirely sufficient that the plaintiff was obliged to use the road in the winter for the purpose of drawing logs, but on account of the obstruction he was for several days compelled to take another, and much longer, route, to his pecuniary damage; that at other times he was obliged to clear the road from the drifts of snow that had accumulated in consequence of the fence, which required time and labor; and that in some other respects he was put to expense in the use of the road for his lawful business, by reason of the defendants' acts. The total damage peculiar to the plaintiff the referee found upon the proofs to be \$35. **343 These findings bring the case within the principle which permits a private person to maintain an action to abate a public nuisance, and to recover the damages which he sustained, and which were special and peculiar to himself, growing out of the necessity on his part to use the road at the time of the obstruction more frequently, perhaps, than his neighbors. The obstruction was, no doubt, an offense against the public, but it was none the less, in a special and peculiar sense, an injury to the plaintiff.

The defendants urge that the plaintiff had an adequate remedy at law under the statute for the removal of such obstructions in public highways. Without inquiring whether this be so or not, it is quite sufficient to say that no such defense was interposed by answer or raised at the trial; and such an objection, raised for the first time after judgment, is not good ground for reversing a judgment. *Lough v. Outerbridge*, 143 N. Y. 271, 38 N. E. 282. There are some exceptions in the record, taken by the defendants at and after the trial to rulings of the referee. None of them were considered in the opinion of the court below. We have examined them all, and are of opinion that none of them are sufficient to support the judgment of reversal. *665 For these reasons we think that the order of the general term should be reversed, and the judgment entered on the report of the referee affirmed, with costs. All concur. Ordered accordingly.

All Citations

1 E.H. Smith 657, 147 N.Y. 657, 42 N.E. 341

90 S.Ct. 1792
Supreme Court of the United States

Elliott Ashton WELSH, II, Petitioner,
v.
UNITED STATES.

No. 76.

|
Argued Jan. 20, 1970.

|
Decided June 15, 1970.

Synopsis

Petitioner was convicted in the United States District Court for the Central District of California for refusing to submit to induction into Armed Forces. The Court of Appeals, Ninth Circuit, affirmed, 404 F.2d 1078, and certiorari was granted. The Supreme Court, Mr. Justice Black, held that if individual deeply and sincerely holds beliefs which are purely ethical or moral in source and content but which nevertheless impose upon him duty of conscience to refrain from participating in any war at any time, such individual is entitled to conscientious objector exemption. The Court further held that statements by registrant, including statement that he believed the taking of life 'to be morally wrong', together with conclusion of Court of Appeals that beliefs were held 'with strength of more traditional religious convictions' established registrant's entitlement to conscientious objector exemption.

Reversed.

Mr. Justice Harlan concurred in result and filed opinion; Mr. Justice White dissented and filed opinion in which Mr. Chief Justice Burger and Mr. Justice Stewart joined.

Attorneys and Law Firms

****1794 *334** J. B. Tietz, Los Angeles, Cal., for petitioner.

Solicitor Gen. Erwin N. Griswold for respondent.

Opinion

***335** Mr. Justice BLACK announced the judgment of the Court and delivered an opinion in which Mr. Justice DOUGLAS, Mr. Justice BRENNAN, and Mr. Justice MARSHALL join.

The petitioner, Elliott Ashton Welsh II, was convicted by a United States District Judge of refusing to submit to induction into the Armed Forces in violation of 50 U.S.C. App. s 462(a), and was on June 1, 1966, sentenced to imprisonment for three years. One of petitioner's defenses to the prosecution was that s 6(j) of the Universal Military Training and Service Act exempted him from combat and noncombat service because he was 'by reason of religious training and belief * * * conscientiously opposed to participation in war in any form.'¹ After finding that there was no religious basis for petitioner's conscientious objector claim, the Court of Appeals, Judge Hamley dissenting, affirmed the conviction. 404 F.2d 1078 (1968). We granted certiorari chiefly to review the contention that Welsh's conviction should be set aside on the basis of this Court's decision in *United States v. Seeger*, 380 U.S. 163, 85 S.Ct. 850, 13 L.Ed.2d 733 (1965). 396 U.S. 816, 90 S.Ct. 53, 24 L.Ed.2d 67 (1969). For the reasons to be stated, and without passing upon the constitutional arguments that have been raised, we vote to reverse this conviction because of its fundamental inconsistency with *United States v. Seeger*, *supra*.

The controlling facts in this case are strikingly similar to those in *Seeger*. Both *Seeger* and *Welsh* were brought up in religious homes and attended church in their childhood, but in neither case was this church one which taught its members not to engage in war at any time for ***336** any reason. Neither *Seeger* nor *Welsh* continued his childhood religious ties into his young manhood, and neither belonged to any religious group or adhered to the teachings of any organized religion during the period of his involvement with the Selective Service System. At the time of registration for the draft, neither had yet come to accept pacifist principles. Their views on war developed only in subsequent years, but when their ideas did fully mature both made application to their local draft boards for conscientious objector exemptions from military service under s 6(j) of the Universal Military Training and Service Act. That section then provided, in part:²

'Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war ****1795** in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.'

In filling out their exemption applications both *Seeger* and *Welsh* were unable to sign the statement that, as printed in

the Selective Service form, stated ‘I am, by reason of my religious training and belief, conscientiously *337 opposed to participation in war in any form.’ Seeger could sign only after striking the words ‘training and’ and putting quotation marks around the word ‘religious.’ Welsh could sign only after striking the words ‘my religious training and.’ On those same applications, neither could definitely affirm or deny that he believed in a ‘Supreme Being,’ both stating that they preferred to leave the question open.³ But both Seeger and Welsh affirmed on those applications that they held deep conscientious scruples against taking part in wars where people were killed. Both strongly believed that killing in war was wrong, unethical, and immoral, and their consciences forbade them to take part in such an evil practice. Their objection to participating in war in any form could not be said to come from a ‘still, small voice of conscience’; rather, for them that voice was so loud and insistent that both men preferred to go to jail rather than serve in the Armed Forces. There was never any question about the sincerity and depth of Seeger’s convictions as a conscientious objector, and the same is true of Welsh. In this regard the Court of Appeals noted, ‘(t)he government concedes that (Welsh’s) beliefs are held with the strength of more traditional religious convictions.’ 404 F.2d, at 1081. But in both cases the Selective Service System concluded that the beliefs of these men were in some sense insufficiently ‘religious’ to qualify them for conscientious objector exemptions under the terms of s 6(j). Seeger’s conscientious objector claim was denied ‘solely because it was not based upon a ‘belief in a relation to a Supreme Being’ as required by s 6(j) of the Act,’ *United States v. Seeger*, 380 U.S. 163, 167, 85 S.Ct. 850, 854, 13 L.Ed.2d 733 (1965), while Welsh was *338 denied the exemption because his Appeal Board and the Department of Justice hearing officer ‘could find no religious basis for the registrant’s beliefs, opinions and convictions.’ App. 52. Both Seeger and Welsh subsequently refused to submit to induction into the military and both were convicted of that offense.

In *Seeger* the Court was confronted, first, with the problem that s 6(j) defined ‘religious training and belief’ in terms of a ‘belief in a relation to a Supreme Being * * *,’ a definition that arguably gave a preference to those who believed in a conventional God as opposed to those who did not. Noting the ‘vast panoply of beliefs’ prevalent in our country, the Court construed the congressional intent as being in ‘keeping with its long-established policy of not picking and choosing among religious beliefs,’ *id.*, at 175, 85 S.Ct., at 859, and accordingly interpreted ‘the meaning of religious training and belief so as to embrace all religions * * *.’ *Id.*, at 165, 85 S.Ct., at 854. (Emphasis added.) But, having decided that all religious conscientious objectors were entitled to the exemption, we faced the more serious

problem of determining which beliefs were ‘religious’ within the meaning of the statute. This question was particularly difficult in the case of Seeger himself. Seeger stated that his was a ‘belief in and devotion to goodness and **1796 virtue for their own sakes, and a religious faith in a purely ethical creed.’ 380 U.S., at 166, 85 S.Ct., at 854. In a letter to his draft board, he wrote:

‘My decision arises from what I believe to be considerations of validity from the standpoint of the welfare of humanity and the preservation of the democratic values which we in the United States are struggling to maintain. I have concluded that war, from the practical standpoint, is futile and self-defeating, and that from the more important moral standpoint, it is unethical.’ 326 F.2d 846, 848 (2 Cir. 1964).

*339 On the basis of these and similar assertions, the Government argued that Seeger’s conscientious objection to war was not ‘religious’ but stemmed from ‘essentially political, sociological, or philosophical views or a merely personal moral code.’

In resolving the question whether Seeger and the other registrants in that case qualified for the exemption, the Court stated that ‘(the) task is to decide whether the beliefs professed by a registrant are sincerely held and whether they are, in his own scheme of things, religious.’ 380 U.S., at 185, 85 S.Ct., at 863. (Emphasis added.) The reference to the registrant’s ‘own scheme of things’ was intended to indicate that the central consideration in determining whether the registrant’s beliefs are religious is whether these beliefs play the role of a religion and function as a religion in the registrant’s life. The Court’s principal statement of its test for determining whether a conscientious objector’s beliefs are religious within the meaning of s 6(j) was as follows:

‘The test might be stated in these words: A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition.’ 380 U.S., at 176, 85 S.Ct., at 859.

The Court made it clear that these sincere and meaningful beliefs that prompt the registrant’s objection to all wars need not be confined in either source or content to traditional or parochial concepts of religion. It held that s 6(j) ‘does not distinguish between externally and internally derived beliefs,’ *id.*, at 186, 85 S.Ct., at 864 and also held that ‘intensely personal’ convictions which some might find ‘incomprehensible’ or ‘incorrect’ come within the meaning of ‘religious belief’ in the Act. *Id.*, at 184—185, 85 S.Ct., at 863—864. What is necessary under *Seeger* for a registrant’s conscientious *340 objection to all war to be ‘religious’ within the meaning of s 6(j) is that this

opposition to war stem from the registrant's moral, ethical, or religious beliefs about what is right and wrong and that these beliefs be held with the strength of traditional religious convictions. Most of the great religions of today and of the past have embodied the idea of a Supreme Being or a Supreme Reality—a God—who communicates to man in some way a consciousness of what is right and should be done, of what is wrong and therefore should be shunned. If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, those beliefs certainly occupy in the life of that individual 'a place parallel to that filled by * * * God' in traditionally religious persons. Because his beliefs function as a religion in his life, such an individual is as much entitled to a 'religious' conscientious objector exemption under s 6(j) as is someone who derives his conscientious opposition to war from traditional religious convictions.

Applying this standard to Seeger himself, the Court noted the 'compulsion to ***1797** 'goodness' that shaped his total opposition to war, the undisputed sincerity with which he held his views, and the fact that Seeger had 'decried the tremendous 'spiritual' price man must pay for his willingness to destroy human life.' 380 U.S., at 186—187, 85 S.Ct., at 864. The Court concluded: 'We think it clear that the beliefs which prompted his objection occupy the same place in his life as the belief in a traditional deity holds in the lives of his friends, the Quakers.' 380 U.S., at 187, 85 S.Ct. at 864—865.

Accordingly, the Court found that Seeger should be granted conscientious objector status.

In the case before us the Government seeks to distinguish our holding in Seeger on basically two grounds, ***341** both of which were relied upon by the Court of Appeals in affirming Welsh's conviction. First, it is stressed that Welsh was far more insistent and explicit than Seeger in denying that his views were religious. For example, in filling out their conscientious objector applications, Seeger put quotation marks around the word 'religious,' but Welsh struck the word 'religious' entirely and later characterized his beliefs as having been formed 'by reading in the fields of history and sociology.' App. 22. The Court of Appeals found that Welsh had 'denied that his objection to war was premised on religious belief' and concluded that '(t)he Appeal Board was entitled to take him at his word.' 404 F.2d at 1082. We think this attempt to distinguish Seeger fails for the reason that it places undue emphasis on the registrant's interpretation of his own beliefs. The Court's statement in Seeger that a registrant's characterization of his own belief as 'religious' should carry great weight, 380

U.S., at 184, 85 S.Ct., at 863, does not imply that his declaration that his views are nonreligious should be treated similarly. When a registrant states that his objections to war are 'religious,' that information is highly relevant to the question of the function his beliefs have in his life. But very few registrants are fully aware of the broad scope of the word 'religious' as used in s 6(j), and accordingly a registrant's statement that his beliefs are nonreligious is a highly unreliable guide for those charged with administering the exemption. Welsh himself presents a case in point. Although he originally characterized his beliefs as nonreligious, he later upon reflection wrote a long and thoughtful letter to his Appeal Board in which he declared that his beliefs were 'certainly religious in the ethical sense of the word.' He explained:

'I believe I mentioned taking of life as not being, for me, a religious wrong. Again, I assumed Mr. (Bradey (the Department of Justice hearing ***342** officer)) was using the word 'religious' in the conventional sense, and, in order to be perfectly honest did not characterize my belief as 'religious.'" App. 44.

The Government also seeks to distinguish Seeger on the ground that Welsh's views, unlike Seeger's, were 'essentially political, sociological, or philosophical views or a merely personal moral code.' As previously noted, the Government made the same argument about Seeger, and not without reason, for Seeger's views had a substantial political dimension. *Supra*, at 1795. In this case, Welsh's conscientious objection to war was undeniably based in part on his perception of world politics. In a letter to his local board, he wrote:

'I can only act according to what I am and what I see. And I see that the military complex wastes both human and material resources, that it fosters disregard for (what I consider a paramount concern) human needs and ends; I see that the means we employ to 'defend' our 'way of life' profoundly change that way of life. I see that in our failure to recognize the political, ***1798** social, and economic realities of the world, we, as a nation, fail our responsibility as a nation.' App. 30.

We certainly do not think that s 6(j)'s exclusion of those persons with 'essentially political, sociological, or philosophical views or a merely personal moral code' should be read to exclude those who hold strong beliefs about our domestic and foreign affairs or even those whose conscientious objection to participation in all wars is founded to a substantial extent upon considerations of public policy. The two groups of registrants that obviously do fall within these exclusions from the exemption are those whose beliefs are not deeply held and those whose objection to war does not rest at all upon moral, ethical, or

religious principle but instead rests solely upon *343 considerations of policy, pragmatism, or expediency. In applying s 6(j)'s exclusion of those whose views are 'essentially political, sociological, or philosophical' or of those who have a 'merely personal moral code,' it should be remembered that these exclusions are definitional and do not therefore restrict the category of persons who are conscientious objectors by 'religious training and belief.' Once the Selective Service System has taken the first step and determined under the standards set out here and in Seeger that the registrant is a 'religious' conscientious objector, it follows that his views cannot be 'essentially political, sociological, or philosophical.' Nor can they be a 'merely personal moral code.' See *United States v. Seeger*, 380 U.S., at 186, 85 S.Ct. at 864.

Welsh stated that he 'believe(d) the taking of life—anyone's life—to be morally wrong.' App. 44. In his original conscientious objector application he wrote the following:

'I believe that human life is valuable in and of itself; in its living; therefore I will not injure or kill another human being. This belief (and the corresponding 'duty' to abstain from violence toward another person) is not 'superior to those arising from any human relation.' On the contrary: it is essential to every human relation. I cannot, therefore, conscientiously comply with the Government's insistence that I assume duties which I feel are immoral and totally repugnant.' App. 10.

Welsh elaborated his beliefs in later communications with Selective Service officials. On the basis of these beliefs and the conclusion of the Court of Appeals that he held them 'with the strength of more traditional religious convictions,' 404 F.2d, at 1081, we think Welsh was clearly entitled to a conscientious objector exemption. Section *344 6(j) requires no more. That section exempts from military service all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war.

The judgment is reversed.

Reversed.

Mr. Justice BLACKMUN took no part in the consideration or decision of this case.

Mr. Justice HARLAN, concurring in the result.

Candor requires me to say that I joined the Court's opinion in *United States v. Seeger*, 380 U.S. 163, 85 S.Ct. 850, 13 L.Ed.2d 733 (1965), only with the gravest misgivings as to whether it was a legitimate exercise in statutory construction, and today's decision convinces me that in doing so I made a mistake which I should now acknowledge.¹

****1799** In *Seeger* the Court construed s 6(j) of the Universal Military Training and Service Act so as to sustain a conscientious objector claim not founded on the theistic belief. The Court, in treating with the provision of the statute that limited conscientious objector claims to those stemming from belief in 'a Supreme Being,' there said: 'Congress, in using the expression 'Supreme Being' rather than the designation 'God,' was merely clarifying the meaning of religious training and belief so as to embrace all religions and to exclude essentially political, sociological, or philosophical views,' and held that the test of belief "in a relation to a Supreme Being' is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox *345 belief in God of one who clearly qualifies for the exemption.' 380 U.S., at 165—166, 85 S.Ct., at 854. Today the prevailing opinion makes explicit its total elimination of the statutorily required religious content for a conscientious objector exemption. The prevailing opinion now says: 'If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time' (emphasis added), he qualifies for a s 6(j) exemption. In my opinion, the liberties taken with the statute both in *Seeger* and today's decision cannot be justified in the name of the familiar doctrine of construing federal statutes in a manner that will avoid possible constitutional infirmities in them. There are limits to the permissible application of that doctrine, and, as I will undertake to show in this opinion, those limits were crossed in *Seeger*, and even more apparently have been exceeded in the present case. I therefore find myself unable to escape facing the constitutional issue that this case squarely presents: whether s 6(j) in limiting this draft exemption to those opposed to war in general because of theistic beliefs runs afoul of the religious clauses of the First Amendment. For reasons later appearing I believe it does, and on that basis I concur in the judgment reversing this conviction, and adopt the test announced by Mr. Justice BLACK, not as a matter of statutory construction, but as the touchstone for salvaging a congressional policy of long standing that would otherwise have to be nullified.

I

Section 6(j) provided during the period relevant to this case: ‘Nothing contained in this title shall be construed to require any person to be subject to combatant *346 training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual’s belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.’ Universal Military Training and Service Act of 1948, s 6(j), 62 Stat. 612, 50 U.S.C.App. s 456(j).

The issue is then whether Welsh’s opposition to war is founded on ‘religious training and belief’ and hence ‘belief in a relation to a Supreme Being’ as Congress used those words. It is of course true that certain words are more plastic in meaning than others. ‘Supreme Being’ is a concept of theology and philosophy, not a technical term, and consequently may be, in some circumstances, capable of bearing a contemporary construction as notions of theology and philosophy evolve. Cf. *United States v. Storrs*, 272 U.S. 652, 47 S.Ct. 221, 71 L.Ed. 460 (1926). This language appears, however, in a congressional enactment; it is not a phrase of the Constitution, like **1800 ‘religion’ or ‘speech,’ which this Court is freer to construe in light of evolving needs and circumstances. Cf. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098 (1952), and my concurring opinion in *Estes v. Texas*, 381 U.S. 532, 595—596, 85 S.Ct. 1628, 1666—1667, 14 L.Ed.2d 543 (1965), and my opinion concurring in the judgment in *Garner v. Louisiana*, 368 U.S. 157, 185, 82 S.Ct. 248, 263, 7 L.Ed.2d 207 (1961). Nor is it so broad a statutory directive, like that of the Sherman Act, that we may assume that we are free to adopt and shape policies limited only by the most general statement of purpose. Cf. e.g., *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911). It is Congress’ will that must here be divined. In that endeavor *347 it is one thing to give words a meaning not necessarily envisioned by Congress so as to adapt them to circumstances also un contemplated by the legislature in order to achieve the legislative policy, Rector, etc., of *Holy Trinity Church v. United States*, 143 U.S. 457, 12 S.Ct. 511, 36 L.Ed. 226 (1892); it is a wholly different matter to define words so as to change policy. The limits of this

Court’s mandate to stretch concededly elastic congressional language are fixed in all cases by the context of its usage and legislative history, if available, that are the best guides to congressional purpose and the lengths to which Congress enacted a policy. *Rosado v. Wyman*, 397 U.S. 397, 90 S.Ct. 1207, 25 L.Ed.2d 442 (1970).² The prevailing opinion today snubs both guidelines for it is apparent from a textual analysis of s 6(j) and the legislative history that the words of this section, as used and understood by Congress, fall short of enacting the broad policy of exempting from military service all individuals who in good faith oppose all war.

*348 A

The natural reading of s 6(j), which quite evidently draws a distinction between theistic and nontheistic religions, is the only one that is consistent with the legislative history. Section 5(g) of the 1940 Draft Act exempted individuals whose opposition to war could be traced to ‘religious training and belief,’ 54 Stat. 889, without any allusion to a Supreme Being. In *United States v. Kauten*, 133 F.2d 703 (C.A.2d Cir. 1943), the Second Circuit, speaking through Judge Augustus Hand, broadly construed ‘religious training and belief’ to include a ‘belief finding expression in a conscience which categorically requires the believer to disregard elementary self-interest and to accept martyrdom in preference to transgressing its tenets.’ 133 F.2d, at 708. The view was further elaborated in subsequent decisions of the Second Circuit, see *United States ex rel. Phillips v. Downer*, 135 F.2d 521 (C.A.2d Cir. 1943); **1801 *United States ex rel. Reel v. Badt*, 141 F.2d 845 (C.A.2d Cir. 1944). This expansive interpretation of s 5(g) was rejected by a divided Ninth Circuit in *Berman v. United States*, 156 F.2d 377, 380—381 (1946):

‘It is our opinion that the expression ‘by reason of religious training and belief’ * * * was written into the statute for the specific purpose of distinguishing between a conscientious social belief, or a sincere devotion to a high moralistic philosophy, and one based upon an individual’s belief in his responsibility to an authority higher and beyond any worldly one.

‘(I)n *United States v. Macintosh*, 283 U.S. 605, 51 S.Ct. 570, 578, 75 L.Ed. 1302, Mr. (Chief) Justice Hughes in his dissent * * * said: ‘The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation.’“

***349** The unmistakable and inescapable thrust of the Berman opinion, that religion is to be conceived in theistic terms, is rendered no less straightforward by the court's elaboration on the difference between beliefs held as a matter of moral or philosophical conviction and those inspired by religious upbringing and adherence to faith. 'There are those who have a philosophy of life, and who live up to it. There is evidence that this is so in regard to appellant. However, no matter how pure and admirable his standard may be, and no matter how devotedly he adheres to it, his philosophy and morals and social policy without the concept of deity cannot be said to be religion in the sense of that term as it is used in the statute. It is said in *State v. Amana Society*, 132 Iowa 304, 109 N.W. 894, 898 * * *: 'Surely a scheme of life designed to obviate such results (man's inhumanity to man), and by removing temptations, and all the inducements of ambition and avarice, to nurture the virtues of unselfishness, patience, love, and service, ought not to be denounced as not pertaining to religion when its devotee regards it as an essential tenet of their (sic) religious faith. '''' (Emphasis of Court of Appeals.) Ibid.

In the wake of this intercircuit dialogue, crystallized by the dissent in Berman which espoused the Second Circuit interpretation in Kauten, supra, Congress enacted s 6(j) in 1948. That Congress intended to anoint the Ninth Circuit's interpretation of s 5(g) would seem beyond question in view of the similarity of the statutory language to that used by Chief Justice Hughes in his dissenting opinion in *Macintosh* and quoted in Berman and the Senate report. The first half of the new language was almost word for word that of Chief Justice Hughes in ***350** *Macintosh*, and quoted by the Berman majority;³ and the Senate Committee report adverted to Berman, ****1802** thus foreclosing any possible speculation as to whether Congress was aware of the possible alternatives. The report stated:

'This section reenacts substantially the same provisions as were found in subsection 5(g) of the 1940 act. Exemption extends to anyone who, because of religious training and belief in his relationship to a Supreme Being, is conscientiously opposed to combatant military service or to both combatant and non-combatant military service. (See *United States v. Berman* (sic) 156 F. (2d) 377, certiorari denied, 329 U.S. 795 (67 S.Ct. 480, 91 L.Ed. 680).)' S.Rep. No. 1268, 80th Cong., 2d Sess., 14.⁴

***351 B**

Against his legislative history it is a remarkable feat of judicial surgery to remove, as did Seeger, the theistic requirement of s 6(j). The prevailing opinion today, however, in the name of interpreting the will of Congress, has performed a lobotomy and completely transformed the statute by reading out of it any distinction between religiously acquired beliefs and those deriving from 'essentially political, sociological, or philosophical views or a merely personal moral code.'

In the realm of statutory construction it is appropriate to search for meaning in the congressional vocabulary in a lexicon most probably consulted by Congress. Resort to Webster's⁵ reveals that the meanings of 'religion' are: '1. The service and adoration of God or a god as expressed in forms of worship, in obedience to divine commands * * *; 2. The state of life of a religious * * *; 3. One of the systems of faith and worship; a form of theism; a religious faith * * *; 4. The profession or practice of religious beliefs; religious observances collectively; pl. rites; 5. Devotion or fidelity; * * *conscientiousness; ***352** 6. An apprehension, awareness, or conviction of the existence of a supreme being, or more widely, of supernatural powers or influences controlling one's own, humanity's, or nature's destiny; also, such an apprehension, etc., accompanied by or arousing reverence, love, gratitude, the will to obey and serve, and the like * * *.' (Emphasis added.)

Of the five pertinent definitions four include the notion of either a Supreme Being or a cohesive, organized group pursuing a common spiritual purpose together. While, as the Court's opinion in Seeger points out, these definitions do not exhaust the almost infinite and ****1803** sophisticated possibilities for defining 'religion,' there is strong evidence that Congress restricted, in this instance, the word to its conventional sense. That it is difficult to plot the semantic penumbra of the word 'religion' does not render this term so plastic in meaning that the Court is entitled, as matter of statutory construction, to conclude that any asserted and strongly held belief satisfies its requirements. It must be recognized that the permissible shadow of connotation is limited by the context in which words are used. In s 6(j) Congress has included not only a reference to a Supreme Being but has also explicitly contrasted 'religious' beliefs with those that are 'essentially political, sociological, or philosophical' and a 'personal moral code.' This exception certainly is, at the very least, the statutory boundary, the 'asymptote,' of the word 'religion.'⁶

***353** For me this dichotomy reveals that Congress was not embracing that definition of religion that alone speaks in terms of 'devotion or fidelity' to individual principles acquired on an individualized basis but was adopting, at least, those meanings that associate religion with formal, organized worship or shared beliefs by a recognizable and cohesive group. Indeed, this requirement was explicit in the predecessor to the 1940 statute. The Draft Act of 1917

conditioned conscientious objector status on membership in or affiliation with a ‘well-recognized religious sect or organization (then) organized and existing and whose existing creed or principles forb(ade) its members to participate in war in any form * * *.’ s 4, 40 Stat. 78. That s 5(g) of the 1940 Act eliminated the affiliation and membership requirement does not, in my view, mean as the Court, in effect, concluded in *Seeger* that Congress was embracing a secular definition of religion.⁷

354** Unless we are to assume an Alice-in-Wonderland world where words have no meaning, I think it fair to say that Congress’ choice of language cannot fail to convey to the discerning reader the very policy choice that the prevailing opinion today completely obliterates: that between conventional religions that usually have an organized and formal structure and dogma and a cohesive group identity, even when nontheistic, and cults that *1804** represent schools of thought and in the usual case are without formal structure or are, at most, loose and informal associations of individuals who share common ethical, moral, or intellectual views.

II

When the plain thrust of a legislative enactment can only be circumvented by distortion to avert an inevitable constitutional collision, it is only by exalting form over substance that one can justify this veering off the path that has been plainly marked by the statute. Such a course betrays extreme skepticism as to constitutionality, and, in this instance, reflects a groping to preserve the conscientious objector exemption at all cost.

I cannot subscribe to a wholly emasculated construction of a statute to avoid facing a latent constitutional question, in purported fidelity to the salutary doctrine of avoiding unnecessary resolution of constitutional issues, a principle to which I fully adhere. See *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 348, 56 S.Ct. 466, 483, 80 L.Ed. 688 (1936) (Brandeis, J., concurring). It is, of course, desirable to salvage by construction legislative enactments whenever there is good reason to believe that Congress did not intend to legislate consequences that are unconstitutional, but it is not permissible, in my judgment, to take a lateral step that robs legislation of all meaning in order to avert the collision between its plainly intended purpose and the commands of the Constitution. ***355** Cf. *Yates v. United States*, 354 U.S. 298, 77 S.Ct. 1064, 1 L.Ed.2d 1356 (1957). As the Court stated in *Aptheker v.*

Secretary of State, 378 U.S. 500, 515, 84 S.Ct. 1659, 1668—1669, 12 L.Ed.2d 992 (1964):

‘It must be remembered that ‘(a)lthough this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute * * *’ or judicially rewriting it. *Scales v. United States*, 367 U.S., (203) at 211, 81 S.Ct., (1469) at 1477 (6 L.Ed.2d 782). To put the matter another way, this Court will not consider the abstract question of whether Congress might have enacted a valid statute but instead must ask whether the statute that Congress did enact will permissibly bear a construction rendering it free from constitutional defects.’

The issue comes sharply into focus in Mr. Justice Cardozo’s statement for the Court in *Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379, 53 S.Ct. 620, 622, 77 L.Ed. 1265 (1933):

‘A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score.’ * * * But avoidance of a difficulty will not be pressed to the point of disingenuous evasion. Here the intention of the Congress is revealed too distinctly to permit us to ignore it because of mere misgivings as to power. The problem must be faced and answered.’

If an important congressional policy is to be perpetuated by recasting unconstitutional legislation, as the prevailing opinion has done here, the analytically sound approach is to accept responsibility for this decision. Its justification cannot be by resort to legislative intent, as that term is usually employed, but by a different kind of legislative intent, namely the presumed grant of power to the courts to decide whether it more nearly accords with ***356** Congress’ wishes to eliminate its policy altogether or extend it in order to render what Congress plainly did intend, constitutional. Compare, e.g., *Yu Cong. Eng v. Trinidad*, 271 U.S. 500, 46 S.Ct. 619, 70 L.Ed. 1059 (1926); *United States v. Reese*, 92 U.S. 214, 23 L.Ed. 563 (1876), with ****1805** *Skinner v. Oklahoma*, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942); *Nat. Life Ins. Co. v. United States*, 277 U.S. 508, 48 S.Ct. 591, 72 L.Ed. 968 (1928). I therefore turn to the constitutional question.

III

The constitutional question that must be faced in this case

is whether a statute that defers to the individual's conscience only when his views emanate from adherence to theistic religious beliefs is within the power of Congress. Congress, of course, could, entirely consistently with the requirements of the Constitution, eliminate all exemptions for conscientious objectors. Such a course would be wholly 'neutral' and, in my view, would not offend the Free Exercise Clause, for reasons set forth in my dissenting opinion in *Sherbert v. Verner*, 374 U.S. 398, 418, 83 S.Ct. 1790, 1801, 10 L.Ed.2d 965 (1963). See *Jacobson v. Massachusetts*, 197 U.S. 11, 29, 25 S.Ct. 358, 362, 49 L.Ed. 643 (1905) (dictum); cf. *McGowan v. Maryland*, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961); *Davis v. Beason*, 133 U.S. 333, 10 S.Ct. 299, 33 L.Ed. 637 (1890); *Hamilton v. Board of Regents of University*, 293 U.S. 245, 264—265, 55 S.Ct. 197, 204—205, 79 L.Ed. 343 (1934); *Reynolds v. United States*, 98 U.S. 145, 25 L.Ed. 244 (1879); *Kurland, Of Church and State and the Supreme Court*, 29 U.Chi.L.Rev. 1 (1961). However, having chosen to exempt, it cannot draw the line between theistic or nontheistic religious beliefs on the one hand and secular beliefs on the other. Any such distinctions are not, in my view, compatible with the Establishment Clause of the First Amendment. See my separate opinion in *Walz v. Tax Comm'n*, 397 U.S. 664, 694, 90 S.Ct. 1409, 1424, 25 L.Ed. 697 (1970); *Epperson v. Arkansas*, 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968); *School District of Abington Township v. Schempp*, 374 U.S. 203, 305, 83 S.Ct. 1560, 1615, 10 L.Ed.2d 844 (1963) (Goldberg, J., concurring); *357 *Engel v. Vitale*, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962); *Torcaso v. Watkins*, 367 U.S. 488, 495, 81 S.Ct. 1680, 1683, 6 L.Ed.2d 982 (1961); *Fowler v. Rhode Island*, 345 U.S. 67, 73 S.Ct. 526, 97 L.Ed. 828 (1953). The implementation of the neutrality principle of these cases requires, in my view, as I stated in *Walz v. Tax Comm'n*, supra 'an equal protection mode of analysis. The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders. In any particular case the critical question is whether the scope of legislation encircles a class so broad that it can be fairly concluded that (all groups that) could be thought to fall within the natural perimeter (are included).' 397 U.S., at 696, 90 S.Ct., at 1425.

The 'radius' of this legislation is the conscientiousness with which an individual opposes war in general, yet the statute, as I think it must be construed, excludes from its 'scope' individuals motivated by teachings of nontheistic religions,⁸ and individuals guided by an inner ethical voice that bespeaks secular and not 'religious' reflection. It not only accords a preference to the 'religious' but also disadvantages adherents of religions that do not worship a Supreme Being. The constitutional infirmity cannot be cured, moreover, even by an impermissible construction that eliminates the theistic requirement and **1806 simply

draws the line between religious and nonreligious. This is my view offends the Establishment Clause and is that kind of classification *358 that this Court has condemned. See my separate opinion in *Walz v. Tax Comm'n*, supra; *School District of Abington Township v. Schempp* (Goldberg, J., concurring) supra; *Engel v. Vitale*, supra; *Torcaso v. Watkins*, supra.

If the exemption is to be given application, it must encompass the class of individuals it purports to exclude, those whose beliefs emanate from a purely moral, ethical, or philosophical source.⁹ The common denominator must be the intensity of moral conviction with which a belief is held.¹⁰ Common experience teaches that among *359 'religious' individuals some are weak and others strong adherents to tenets and this is no less true of individuals whose lives are guided by personal ethical considerations.

The Government enlists the Selective Draft Law Cases, 245 U.S. 366, 38 S.Ct. 159, 62 L.Ed. 349 (1918), as precedent for upholding the constitutionality of the religious conscientious objector provision. That case involved the power of Congress to raise armies by conscription and only incidentally the conscientious objector exemption. The language emphasized by the Government to the effect that the exemption for religious objectors and ministers constituted neither an establishment nor interference with free exercise of religion can only be considered an afterthought since the case did not involve any individuals who claimed to be nonreligious conscientious objectors.¹¹ This conclusory assertion, unreasoned and unaccompanied by citation, surely cannot foreclose consideration **1807 of the question in a case that squarely presents the issue.

Other authorities assembled by the Government, far from advancing its case, demonstrate the unconstitutionality of the distinction drawn in s 6(j) between religious and nonreligious beliefs. *Everson v. Board of Education*, 330 U.S. 1, 67 S.Ct. 504, 1135, 1144, and 1122, 91 L.Ed. 711, 551, 563, and 536 (1947); the Sunday Closing Law Cases, 366 U.S. 420, 582, 599, and 617, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961), and *360 *Board of Education v. Allen*, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968), all sustained legislation on the premise that it was neutral in its application and thus did not constitute an establishment, notwithstanding the fact that it may have assisted religious groups by giving them the same benefits accorded to nonreligious groups.¹² To the extent that *Zorach v. Clauson*, 343 U.S. 306, 72 S.Ct. 679, 96 L.Ed. 954 (1952), and *Sherbert v. Verner*, supra, stand for the proposition that the Government may (*Zorach*), or must (*Sherbert*), shape its secular programs to accommodate the beliefs and tenets of religious *361 groups, I think these cases unsound.¹³ See generally *Kurland*, supra. To conform with the

requirements of the First Amendment's religious clauses as reflected in the mainstream of American history, legislation must, at the very least, be neutral. See my separate opinion in *Walz v. Tax Comm'n*, supra.

IV

Where a statute is defective because of underinclusion there exist two remedial alternatives: a court may either declare ****1808** it a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion. Cf. *Skinner v. Oklahoma*, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942); *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239, 52 S.Ct. 133, 76 L.Ed. 265 (1931).¹⁴

***362** The appropriate disposition of this case, which is a prosecution for refusing to submit to induction and not an action for a declaratory judgment on the constitutionality of s 6(j), is determined by the fact that at the time of Welsh's induction notice and prosecution the Selective Service was, as required by statute, exempting individuals whose beliefs were identical in all respects to those held by petitioner except that they derived from a religious source. Since this created a religious benefit not accorded to petitioner, it is clear to me that this conviction must be reversed under the Establishment Clause of the First Amendment unless Welsh is to go remediless. Cf. *Iowa-Des Moines National Bank v. Bennett*, supra; *Smith v. Cahoon*, 283 U.S. 553, 51 S.Ct. 582, 75 L.Ed. 1264 (1931).¹⁵

****1809 *363** This result, while tantamount to extending the statute, is not only the one mandated by the Constitution in this case but also the approach I would take had this question been presented in an action for a declaratory judgment ***364** or 'an action in equity where the enforcement of a statute awaits the final determination of the court as to validity and scope.' *Smith v. Cahoon*, 283 U.S., at 565, 51 S.Ct., at 586.¹⁶ While the necessary remedial operation, extension, is more analogous to a graft than amputation, I think the boundaries of permissible choice may properly be considered fixed by the legislative pronouncement on severability.

Indicative of the breadth of the judicial mandate in this regard is the broad severability clause, 65 Stat. 83, which provides that '(i)f any provision of this Act or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the Act and of the application of such provision to other persons and

circumstances shall not be affected thereby.' While the absence of such a provision would not foreclose the exercise of discretion in determining whether a legislative policy should be repaired or abandoned, cf. *United States v. Jackson*, 390 U.S. 570, 585, n. 27, 88 S.Ct. 1209, 1218, 20 L.Ed.2d 138 (1968), its existence 'discloses an intention to make the act divisible, and creates a presumption that, eliminating invalid parts, the Legislature would have been satisfied with what remained * * *.' *Champlin Rfg. Co. v. Corporation Commission*, 286 U.S. 210, 235, 52 S.Ct. 559, 565, 76 L.Ed. 1062 (1932). See also *Skinner v. Oklahoma*, supra; *Nat. Life Ins. Co. v. United States*, 277 U.S. 508, 48 S.Ct. 591, 72 L.Ed. 968 (1928).¹⁷

****1810** In exercising the broad discretion conferred by a severability clause it is, of course, necessary to measure the intensity of commitment to the residual policy and consider the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation. Cf. *Nat. Life Ins. Co. v. United States*, supra (Brandeis, J., dissenting); *Dorchy v. Kansas*, 264 U.S. 286, 44 S.Ct. 323, 68 L.Ed. 686 (1924).

The policy of exempting religious conscientious objectors is one of longstanding tradition in this country and accords recognition to what is, in a diverse and 'open' society, the important value of reconciling individuality ***366** of belief with practical exigencies whenever possible. See *Girouard v. United States*, 328 U.S. 61, 66 S.Ct. 826, 90 L.Ed. 1084 (1946). It dates back to colonial times and has been perpetuated in state and federal conscription statutes. See Mr. Justice Cardozo's separate opinion in *Hamilton v. Board of Regents of University*, 293 U.S., at 267, 55 S.Ct., at 206; *Macintosh v. United States*, 2 Cir., 42 F.2d 845, 847 (1930). That it has been phrased in religious terms reflects, I assume, the fact that ethics and morals, while the concern of secular philosophy, have traditionally been matters taught by organized religion and that for most individuals spiritual and ethical nourishment is derived from that source. It further reflects, I would suppose, the assumption that beliefs emanating from a religious source are probably held with great intensity.

When a policy has roots so deeply embedded in history, there is a compelling reason for a court to hazard the necessary statutory repairs if they can be made within the administrative framework of the statute and without impairing other legislative goals, even though they entail, not simply eliminating an offending section, but rather building upon it.¹⁸ Thus I am prepared to accept the prevailing opinion's conscientious objector test, not as a reflection of congressional statutory intent but as patch ***367** work of judicial making that cures the defect of underinclusion in s 6(j) and can be administered by local boards in the usual course of business.¹⁹ ****1811** Like the

prevailing opinion, I also conclude that petitioner's beliefs are held with the required intensity and consequently vote to reverse the judgment of conviction.

Mr. Justice WHITE, with whom THE CHIEF JUSTICE and Mr. Justice STEWART join, dissenting.

Whether or not *United States v. Seeger*, 380 U.S. 163, 85 S.Ct. 850, 13 L.Ed.2d 733 (1965), accurately reflected the intent of Congress in providing draft exemptions for religious conscientious objectors to war, I cannot join today's construction of s 6(j) extending draft exemption to those who disclaim religious objections to war and whose views about war represent a purely personal code arising not from religious training and belief as the statute requires but from readings in philosophy, history, and sociology. Our obligation *368 in statutory construction cases is to enforce the will of Congress, not our own; and as Mr. Justice HARLAN has demonstrated, construing s 6(j) to include Welsh exempts from the draft a class of persons to whom Congress has expressly denied an exemption.

For me that conclusion should end this case. Even if Welsh is quite right in asserting that exempting religious believers is an establishment of religion forbidden by the First Amendment, he nevertheless remains one of those persons whom Congress took pains not to relieve from military duty. Whether or not s 6(j) is constitutional, Welsh had no First Amendment excuse for refusing to report for induction. If it is contrary to the express will of Congress to exempt Welsh, as I think it is, then there is no warrant for saving the religious exemption and the statute by redrafting it in this Court to include Welsh and all others like him.

If the Constitution expressly provided that aliens should not be exempt from the draft, but Congress purported to exempt them and no others, Welsh, a citizen, could hardly qualify for exemption by demonstrating that exempting aliens is unconstitutional. By the same token, if the Constitution prohibits Congress from exempting religious believers, but Congress exempts them anyway, why should the invalidity of the exemption create a draft immunity for Welsh? Surely not just because he would otherwise go without a remedy along with all those others not qualifying for exemption under the statute. And not as a reward for seeking a declaration of the invalidity of s 6(j); for as long as Welsh is among those from whom Congress expressly withheld the exemption, he has no standing to raise the establishment issue even if s 6(j) would present no First Amendment problems if it had included Welsh and

others like him. '(O)ne to whom application of a statute is constitutional will not be heard to attack the *369 statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be **1812 unconstitutional.' *United States v. Raines*, 362 U.S. 17, 21, 80 S.Ct. 519, 522, 4 L.Ed.2d 524 (1960). Nothing in the First Amendment prohibits drafting Welsh and other nonreligious objectors to war. Saving s 6(j) by extending it to include Welsh cannot be done in the name of a presumed congressional will but only by the Court's taking upon itself the power to make draft-exemption policy.

If I am wrong in thinking that Welsh cannot benefit from invalidation of s 6(j) on Establishment Clause grounds, I would nevertheless affirm his conviction; for I cannot hold that Congress violated the Clause in exempting from the draft all those who oppose war by reason of religious training and belief. In exempting religious conscientious objectors, Congress was making one of two judgments, perhaps both. First, s 6(j) may represent a purely practical judgment that religious objectors, however admirable, would be of no more use in combat than many others unqualified for military service. Exemption was not extended to them to further religious belief or practice but to limit military service to those who were prepared to undertake the fighting that the armed services have to do. On this basis, the exemption has neither the primary purpose nor the effect of furthering religion. As Mr. Justice Frankfurter, joined by Mr. Justice Harlan, said in a separate opinion in the *Sunday Closing Law Cases*, 366 U.S. 420, 468, 81 S.Ct. 1101, 1158, 6 L.Ed.2d 393 (1961), an establishment contention 'can prevail only if the absence of any substantial legislative purpose other than a religious one is made to appear. See *Selective Draft Law Cases*, 245 U.S. 366, 38 S.Ct. 159, 62 L.Ed. 349.'

Second, Congress may have granted the exemption because otherwise religious objectors would be forced into conduct that their religions forbid and because *370 in the view of Congress to deny the exemption would violate the Free Exercise Clause or at least raise grave problems in this respect. True, this Court has more than once stated its unwillingness to construe the First Amendment, standing alone, as requiring draft exemptions for religious believers. *Hamilton v. Board of Regents*, 293 U.S. 245, 263—264, 55 S.Ct. 197, 204—205, 79 L.Ed. 343 (1934); *United States v. Macintosh*, 283 U.S. 605, 623—624, 51 S.Ct. 570, 574—575, 75 L.Ed. 1302 (1931). But this Court is not alone in being obliged to construe the Constitution in the course of its work; nor does it even approach having a monopoly on the wisdom and insight appropriate to the task. Legislative exemptions for those with religious convictions against war date from colonial days. As Chief Justice Hughes explained in his dissent in *United States v. Macintosh*,

supra, at 633, 51 S.Ct., at 578, the importance of giving immunity to those having conscientious scruples against bearing arms has consistently been emphasized in debates in Congress and such draft exemptions are “indicative of the actual operation of the principles of the Constitution.” However this Court might construe the First Amendment, Congress has regularly steered clear of free exercise problems by granting exemptions to those who conscientiously oppose war on religious grounds.

If there were no statutory exemption for religious objectors to war and failure to provide it was held by this Court to impair the free exercise of religion contrary to the First Amendment, an exemption reflecting this constitutional command would be no more an establishment of religion than the exemption required for Sabbatarians in *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), or the exemption from the flat tax on book sellers held required for evangelists, *Follett v. McCormick*, 321 U.S. 573, 64 S.Ct. 717, 88 L.Ed. 938 (1944). Surely a statutory exemption for religionists required by ****1813** the Free Exercise Clause is not an invalid establishment because it fails to include nonreligious believers as well; nor would it be any less an establishment ***371** if camouflaged by granting additional exemptions for nonreligious, but ‘moral’ objectors to war.

On the assumption, however, that the Free Exercise Clause of the First Amendment does not by its own force require exempting devout objectors from military service, it does not follow that s 6(j) is a law respecting an establishment of religion within the meaning of the First Amendment. It is very likely that s 6(j) is a recognition by Congress of free exercise values and its view of desirable or required policy in implementing the Free Exercise Clause. That judgment is entitled to respect. Congress has the power ‘To raise and support Armies’ and ‘To make all Laws which shall be necessary and proper for carrying into Execution’ that power. Art. I, s 8. The power to raise armies must be exercised consistently with the First Amendment which, among other things, forbids laws prohibiting the free exercise of religion. It is surely essential therefore—surely ‘necessary and proper’—in enacting laws for the raising of armies to take account of the First Amendment and to avoid possible violations of the Free Exercise Clause. If this was the course Congress took, then just as in *Katzenbach v. Morgan*, 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966), where we accepted the judgment of Congress as to what legislation was appropriate to enforce the Equal Protection Clause of the Fourteenth Amendment, here we should respect congressional judgment accommodating the Free Exercise Clause and the power to raise armies. This involves no surrender of the Court’s function as ultimate arbiter in disputes over interpretation of the Constitution. But it was enough in *Katzenbach* ‘to perceive a basis upon

which the Congress might resolve the conflict as it did,’ 384 U.S., at 653, 86 S.Ct., at 1725, and plainly in the case before us there is an arguable basis for s 6(j) in the Free Exercise Clause since, without the exemption, the law would compel some members of the public to engage in combat ***372** operations contrary to their religious convictions. Indeed, one federal court has recently held that to draft a man for combat service contrary to his conscientious beliefs would violate the First Amendment. *United States v. Sisson*, 297 F.Supp. 902 (D.C. 1969). There being substantial roots in the Free Exercise Clause for s 6(j) I would not frustrate congressional will by construing the Establishment Clause to condition the exemption for religionists upon extending the exemption also to those who object to war on nonreligious grounds.

We have said that neither support nor hostility, but neutrality, is the goal of the religion clauses of the First Amendment. ‘Neutrality,’ however, is not self-defining. If it is ‘favoritism’ and not ‘neutrality’ to exempt religious believers from the draft, is it ‘neutrality’ and not ‘inhibition’ of religion to compel religious believers to fight when they have special reasons for not doing so, reasons to which the Constitution gives particular recognition? It cannot be ignored that the First Amendment itself contains a religious classification. The Amendment protects belief and speech, but as a general proposition, the free speech provisions stop short of immunizing conduct from official regulation. The Free Exercise Clause, however, has a deeper cut: it protects conduct as well as religious belief and speech. ‘(I)t safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be.’ *Cantwell v. Connecticut*, 310 U.S. 296, 303—304, 60 S.Ct. 900, 903, 84 L.Ed. 1213 (1940). Although socially harmful acts ****1814** may as a rule be banned despite the Free Exercise Clause even where religiously motivated, there is an area of conduct that cannot be forbidden to religious practitioners but that may be forbidden to others. See *United States v. Ballard*, 322 U.S. 78, 64 S.Ct. 882, 88 L.Ed. 1148 (1944); ***373** *Follett v. McCormick*, 321 U.S. 573, 64 S.Ct. 717, 88 L.Ed. 938 (1944). We should thus not labor to find a violation of the Establishment Clause when free exercise values prompt Congress to relieve religious believers from the burdens of the law at least in those instances where the law is not merely prohibitory but commands the performance of military duties that are forbidden by a man’s religion.

In *Braunfeld v. Brown*, 366 U.S. 599, 81 S.Ct. 1144, 6 L.Ed.2d 563 (1961), and *Gallagher v. Crown Koshier Super Market*, 366 U.S. 617, 81 S.Ct. 1122, 6 L.Ed.2d 536 (1961), a majority of the Court rejected claims that Sunday closing laws placed unacceptable burdens on Sabbatarians’

religious observances. It was not suggested, however, that the Sunday closing laws in 21 States exempting Sabbatarians and others violated the Establishment Clause because no provision was made for others who claimed nonreligious reasons for not working on some particular day of the week. Nor was it intimated in *Zorach v. Clauson*, 343 U.S. 306, 72 S.Ct. 679, 96 L.Ed. 954 (1952), that the no-establishment holding might be infirm because only those pursuing religious studies for designated periods were released from the public school routine; neither was it hinted that a public school's refusal to institute a released-time program would violate the Free Exercise Clause. The Court in *Sherbert v. Verner*, supra, construed the Free Exercise Clause to require special treatment for Sabbatarians under the State's unemployment compensation law. But the State could deal specially with Sabbatarians whether the Free Exercise Clause required it or not, for as Mr. Justice HARLAN then said—and I agreed with him—the Establishment Clause would not forbid an exemption for Sabbatarians who otherwise could not qualify for unemployment benefits.

The Establishment Clause as construed by this Court unquestionably has independent significance; its function is not wholly auxiliary to the Free Exercise Clause. It bans some involvements of the State with religion that *374 otherwise might be consistent with the Free Exercise Clause. But when in the rationally based judgment of Congress free exercise of religion calls for shielding religious objectors from compulsory combat duty, I am reluctant to frustrate the legislative will by striking down the statutory exemption because it does not also reach those to whom the Free Exercise Clause offers no protection whatsoever.

I would affirm the judgment below.

All Citations

398 U.S. 333, 90 S.Ct. 1792, 26 L.Ed.2d 308

Footnotes

- ¹ 62 Stat. 612. See also 50 U.S.C.App. s 456(j). The pertinent provision as it read during the period relevant to this case is set out infra at 1794.
- ² 62 Stat. 612. An amendment to the Act in 1967, subsequent to the Court's decision in the *Seeger* case, deleted the reference to a 'Supreme Being' but continued to provide that 'religious training and belief' does not include 'essentially political, sociological, or philosophical views, or a merely personal moral code.' 81 Stat. 104, 50 U.S.C.App. s 456(j) (1964 ed., Supp. IV).
- ³ In his original application in April 1964, Welsh stated that he did not believe in a Supreme Being, but in a letter to his local board in June 1965, he requested that his original answer be stricken and the question left open. App. 29.
- ¹ For a discussion of those principles that determine the appropriate scope for the doctrine of stare decisis, see *Moragne v. States Marine Lines*, also decided today, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970); *Boys Markets v. Retail Clerk's Union*, 398 U.S. 235, 90 S.Ct. 1583, 26 L.Ed.2d 199 (1970); *Helvering v. Hallock*, 309 U.S. 106, 60 S.Ct. 444, 84 L.Ed. 604 (1940).
- ² The difference is between the substitution of judicial judgment for a principle that is set forth by the Constitution and legislature and the application of the legislative principle to a new 'form' that is no different in substance from the circumstances that existed when the principle was set forth. Cf. *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). As the Court said in *Weems v. United States*, 'Legislation, both statutory and constitutional, is enacted, * * * from an experience of evils, * * * its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. * * * (A) principle, to be vital, must be capable of wider application than the mischief which gave it birth.' 217 U.S. 349, 373, 30 S.Ct. 544, 551, 54 L.Ed. 793 (1910) (emphasis added).
While it is by no means always simple to discern the difference between the residual principal in legislation that should be given effect in circumstances not covered by the express statutory terms and the limitation on that principle inherent in the same words, the Court in *Seeger* and the prevailing opinion today read out language that, in my view, plainly limits the principle rather than illustrates the policy and circumstances that were in mind when s 6(j) was enacted.
- ³ The substitution in s 6(j) of 'Supreme Being' instead of 'God' as used in *Macintosh* does not, in my view, carry the burden, placed on it in the *Seeger* opinion, of demonstrating that Congress 'deliberately broadened' Chief Justice Hughes' definition. 'God' and 'Supreme Being' are generally taken as synonymous terms meaning Deity. It is common practice to use various synonyms for the Deity. The Declaration of Independence refers to 'Nature's God,' 'Creator,' 'Supreme Judge of the world,' and 'divine Providence.' References to the Deity in preambles to the state constitutions include, for example, and use interchangeably 'God,' 'Almighty God,' 'Supreme Being.' A. Stokes & L. Pfeffer, *Church and State in the United States* 561 (1964). In *Davis v. Beason*, 133 U.S. 333, 342, 10 S.Ct. 299, 300, 33 L.Ed. 637 (1890), the Court spoke of man's relations to his 'Creator' and to his 'Maker'; in *Zorach v. Clauson*, 343 U.S. 306, 313, 72 S.Ct. 679, 683, 96 L.Ed. 954 (1952), and *Engel v. Vitale*, 370 U.S. 421, 424, 82 S.Ct. 1261, 1263, 8 L.Ed.2d

601 (1962), to the 'Almighty.'

- 4 The Seeger opinion relies on the absence of any allusion to the judicial conflict to parry the thrust of the legislative history and assigns significance to the Committee citation of Berman as manifestation of its intention to reenact s 5(g) of the 1940 Act, and also as authority for the exclusion of those whose beliefs are grounded in secular ethics. The citation to Berman would not be conclusive of congressional purpose if Congress had simply reenacted the 1940 Act adding only the express exclusion in the last clause. But the reasoning in Seeger totally ignores the fact that Congress without other apparent reason added the 'Supreme Being' language of the Berman majority in the face of the Berman dissent which espoused Judge Hand's view in Kauten. The argument in Seeger is not, moreover, strengthened by the fact that Congress in drafting the 1948 Selective Service laws placed great weight on the views of the Selective Service System which the Court suggested, did not view Berman and Kauten as being in conflict. 380 U.S., at 179, 85 S.Ct., at 860. The Selective Service System Monograph No. 11, Conscientious Objection (1950) was not before Congress when s 6(j) was enacted and the fact that the Service relied on both Kauten and Berman for the proposition that conscientious objection must emanate from a religious and not a secular source, does not mean that it considered the Supreme Being discussion in Berman as surplusage.
- 5 New International Dictionary, Unabridged (2d ed. 1934).
- 6 The prevailing opinion's purported recognition of this distinction slides over the 'personal moral code' exception, in s 6(j). Thus that opinion in concluding that s 6(j) does not exclude 'those who hold strong beliefs about our domestic and foreign affairs or even those whose conscientious objection to participation in all wars is founded to a substantial extent upon considerations of public policy' but excludes individuals, whose beliefs are not deeply held, and those whose objection to war does not rest upon 'moral, ethical, or religious principle,' but instead rests solely upon considerations of 'policy, pragmatism, or expediency,' ante, at 1798, blends morals and religion, two concepts that Congress chose to keep separate.
- 7 The apparent purpose of the 1940 change in language was to eliminate membership as a decisive criterion in recognition of the fact that mere formal affiliation is no measure of the intensity of beliefs, and that many nominal adherents do not share or pursue the ethics of their church. That the focus was made the conscientiousness of the individual's own belief does not mean that Congress was indifferent to its source. Were this the case there would have been no occasion to allude to 'religious training' in the 1940 enactment, and to contrast it with secular ethics in the 1948 statute. Yet the prevailing opinion today holds that 'beliefs that are purely ethical,' no matter how acquired, qualify the holder for s 6(j) status if they are held with the requisite intensity. However, even the prevailing opinion's ambulatory concept of 'religion' does not suffice to embrace Welsh, since petitioner insisted that his beliefs had been formed 'by reading in the fields of history and sociology' and 'denied that his objection to war was premised on religious belief.' 404 F.2d, at 1082. That opinion not only establishes a definition of religion that amounts to 'Newspeak' but it refuses to listen to petitioner who is speaking the same language.
- 8 This Court has taken notice of the fact that recognized 'religions' exist that 'do not teach what would generally be considered a belief in the existence of God,' *Torcaso v. Watkins*, 367 U.S. 488, 495 n. 11, 81 S.Ct. 1680, 1684, 6 L.Ed.2d 982, e.g. 'Buddhism, Taoism, Ethical Culture, Secular Humanism and others.' *Ibid*. See also *Washington Ethical Society v. District of Columbia*, 101 U.S.App.D.C. 371, 249 F.2d 127 (1957); 2 *Encyclopaedia of the Social Sciences*, 293; J. Archer, *Faiths Men Live By* 120—138, 254—313 (2d ed. revised by Purinton 1958); *Stokes & Pfeffer*, *supra*, n. 3, at 560.
- 9 In *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), the Court held unconstitutional over my dissent a state statute that conditioned eligibility for unemployment benefits on being 'able to work and * * * available for work' and further provided that a claimant was ineligible '(i)f * * * he has failed, without good cause * * * to accept available suitable work when offered him by the employment office or the employer * * *.' This, the Court held, was a violation of the Free Exercise Clause as applied to Seventh Day Adventists whose religious background forced them as a matter of conscience to decline Saturday employment. My own conclusion, to which I still adhere, is that the Free Exercise Clause does not require a State to conform a neutral secular program to the dictates of religious conscience of any group, I suggested, however, that a State could constitutionally create exceptions to its program to accommodate religious scruples. That suggestion must, however, be qualified by the observation that any such exception in order to satisfy the Establishment Clause of the First Amendment, would have to be sufficiently broad to be religiously neutral. See my separate opinion in *Walz v. Tax Comm'n*, *supra*. This would require creating an exception for anyone who, as a matter of conscience, could not comply with the statute. Whether, under a statute like that involved in *Sherbert*, it would be possible to demonstrate a basis in conscience for not working Saturday is quite another matter.
- 10 Without deciding what constitutes a definition of 'religion' for First Amendment purposes it suffices to note that it means, in my view, at least the two conceivable readings of s 6(j) set forth in Part II, but something less than mere adherence to ethical or moral beliefs in general or a certain belief such as conscientious objection. Thus the prevailing opinion's expansive reading of 'religion' in s 6(j) does not, in my view, create an Establishment Clause problem in that it exempts all sincere objectors but does not exempt others, e.g., those who object to war on pragmatic grounds and contend that pragmatism is their creed.

- 11 Thus, Mr. Chief Justice White said:
'And we pass without anything but statement the proposition that an establishment of a religion or an interference with the free exercise thereof repugnant to the First Amendment resulted from the exemption clauses of the act * * * because we think its unsoundness is too apparent to require us to do more.' 245 U.S., at 389—390, 38 S.Ct., at 165.
- 12 My Brother White in dissent misinterprets, in my view, the thrust of Mr. Justice Frankfurter's language in the Sunday Closing Law Cases. See 398 U.S., at 369, 90 S.Ct., at 1812. Section 6(j) speaks directly to belief divorced entirely from conduct. It evinces a judgment that individuals who hold the beliefs set forth by the statute should not be required to bear arms, and the statutory belief that qualifies is only a religious belief. Under these circumstances I fail to see how this legislation has 'any substantial legislative purpose' apart from honoring the conscience of individuals who oppose war on only religious grounds. I cannot, moreover, accept the view, implicit in the dissent, that Congress has any ultimate responsibility for construing the Constitution. It, like all other branches of government, is constricted by the Constitution and must conform its action to it. It is this Court, however, and not the Congress that is ultimately charged with the difficult responsibility of construing the First Amendment. The Court has held that universal conscription creates no free exercise problem, see cases cited *supra*, at 1804, and Congress can constitutionally draft individuals notwithstanding their religious beliefs. Congress, whether in response to political considerations or simply out of sensitivity for men of religious conscience, can of course decline to exercise its power to conscript to the fullest extent, but it cannot do so without equal regard for men of nonreligious conscience. It goes without saying that the First Amendment is perforce a guarantee that the conscience of religion may not be preferred simply because organized religious groups in general are more visible than the individual who practices morals and ethics on his own. Any view of the Free Exercise Clause that does not insist on this neutrality would engulf the Establishment Clause and render it vestigial.
- 13 That the 'released-time' program in *Zorach* did not utilize classroom facilities for religious instruction, unlike *People of State of Ill. ex rel. McCollum v. Board of Education*, 333 U.S. 203, 68 S.Ct. 461, 92 L.Ed. 649 (1948), is a distinction for me without Establishment Clause substance. At the very least the Constitution requires that the State not excuse students early for the purpose of receiving religious instruction when it does not offer to nonreligious students the opportunity to use school hours for spiritual or ethical instruction of a nonreligious nature. Moreover, whether a released-time program cast in terms of improving 'conscience' to the exclusion of artistic or cultural pursuits, would be 'neutral' and consistent with the requirement of 'voluntarism,' is by no means an easy question. Such a limited program is quite unlike the broad approach of the tax exemption statute, sustained in *Walz v. Tax Comm'n*, *supra*, which included literary societies, playgrounds, and associations 'for the moral or mental improvement of men.'
- 14 See *Skinner v. Oklahoma*, where Mr. Justice Douglas, in an opinion holding infirm under the Equal Protection Clause a state statute that required sterilization of habitual thieves who perpetrated larcenies but not those who engaged in embezzlement, noted the alternative courses of extending the statute to cover the excluded class or not applying it to the wrongfully included group. The Court declined to speculate which alternative the State would prefer to adopt and simply reversed the judgment.
- 15 In *Iowa-Des Moines National Bank v. Bennett*, Mr. Justice Brandeis speaking for the Court in a decision holding that the State had denied petitioners equal protection of the laws by taxing them more heavily than their competitors, observed that: 'The right invoked is that to equal treatment; and such treatment will be attained if either their competitors' taxes are increased or their own reduced.' 284 U.S., at 247, 52 S.Ct., at 136. Based on the impracticality of requiring the aggrieved taxpayer at that stage to 'assume the burden of seeking an increase of the taxes which * * * others should have paid,' the Court held that petitioner was entitled to recover the overpayment.
The Establishment Clause case that comes most readily to mind as involving 'underinclusion' is *Epperson v. Arkansas*, 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968). There the State prohibited the teaching of evolutionist theory but 'did not seek to excise from the curricula of its schools and universities all discussion of the origin of man.' 393 U.S., at 109, 89 S.Ct., at 273. The Court held the Arkansas statute, which was framed as a prohibition, unconstitutional. Since the statute authorized no positive action, there was no occasion to consider the remedial problem. Cf. *Fowler v. Rhode Island*, 345 U.S. 67, 73 S.Ct. 526, 97 L.Ed. 828 (1953). Most of the other cases arising under the Establishment Clause have involved instances where the challenged legislation conferred a benefit on religious as well as secular institutions. See, e.g., *Walz v. Tax Comm'n*, *supra*; *Everson v. Board of Education*, *supra*; *Board of Education v. Allen*, *supra*. These cases, had they been decided differently, would still not have presented the remedial problem that arises in the instant case, for they were cases of alleged 'overinclusion.' The school prayer cases, *School District of Abington Township v. Schempp*, *supra*; and *Engel v. Vitale*, *supra*; and the released-time cases, *Zorach v. Clauson*, *supra*; *People of State of Ill. ex rel. McCollum v. Board of Education*, *supra*, also failed to raise the remedial issue. In the school prayer situation the requested relief was an injunction against the saying of prayers. Moreover it is doubtful that there is any analogous secular ritual that could be performed so as to satisfy the neutrality requirement of the First Amendment and even then the practice of saying prayers in schools would still offend the principle of voluntarism that must be satisfied in First Amendment cases. See my separate opinion in *Walz v. Tax Comm'n*, *supra*. The same considerations prevented the issue from arising in the one released-time program case that held the practice unconstitutional.
In *McCollum*, where the Court held unconstitutional a program that permitted 'religious teachers, employed by private religious groups * * * to come weekly into the school buildings during the regular hours set apart for secular teaching, and then and there for a period of thirty minutes substitute their religious teaching for the secular education provided under the compulsory education law,' 333 U.S., at 205, 68 S.Ct., at 462, the relief requested was an order to mandamus the authorities to discontinue the program. No

question arose as to whether the program might have been saved by extending a similar privilege to other students who wished extracurricular instruction in, for example, atheistic or secular ethics and morals. Cf. my separate opinion in *Walz v. Tax Comm'n*, supra. Moreover as in the prayer cases, since the defect in the Illinois program was not the mere absence of neutrality but also the encroachment on 'voluntarism,' see *ibid.*, it is doubtful whether there existed any remedial alternative to voiding the entire program. A further complication would have arisen in these cases by virtue of the more limited discretion this Court enjoys to extend a policy for the State even as a constitutional remedy. Cf. *Skinner v. Oklahoma*, supra; *Morey v. Doud*, 354 U.S. 457, 77 S.Ct. 1344, 1 L.Ed.2d 1485 (1957); *Dorchy v. Kansas*, 264 U.S. 286, 44 S.Ct. 323, 68 L.Ed. 686 (1924).

- 16 As long as the Selective Service continues to grant exemptions to religious conscientious objectors, individuals like petitioner are not required to submit to induction. This is tantamount to extending the present statute to cover those in petitioner's position. Alternatively the defect of underinclusion that renders this statute unconstitutional could be cured in a civil action by eliminating the exemption accorded to objectors whose beliefs are founded in religion. The choice between these two courses is not one for local draft boards nor is it one that should await civil litigation where the question could more appropriately be considered. Consequently I deem it proper to confront the issue here, even though, as a technical matter, no judgment could issue in this case ordering the Selective Service to refrain entirely from granting exemptions.
- 17 In *Skinner* the Court impliedly recognized the mandate of flexibility to repair a defective statute—even by extension—conferred by a broad severability clause. As already noted, the Court there declined to exercise discretion, however, since absent a clear indication of legislative preference it was for the state courts to determine the proper course. While Mr. Justice Brandeis in a dissenting opinion in *Nat Life Ins. Co.*, supra, 277 U.S., at 522, 534—535, 48 S.Ct., at 594, 598—599, expressed the view that a severability clause in terms like that before us now is not intended to authorize amendment by expanding the scope of legislation, his remarks must be taken in the context of a dissent to a course he deemed contrary to that Congress would have chosen. Thus, after quoting *Hill v. Wallace*, 259 U.S. 44, 71, 42 S.Ct. 453, 459, 66 L.Ed. 822 (1922), to the effect that a severability clause 'furnishes assurance to courts that they may properly sustain separate sections or provisions of a partly invalid act without hesitation or doubt as to whether they would have been adopted, even if the Legislature had been advised of the invalidity of part (b)ut * * * it does not give * * * power to amend the act,' Justice Brandeis observed, that: 'Even if such a clause could ever permit a court to enlarge the scope of a deduction allowed by a taxing statute, * * * the asserted unconstitutionality can be cured as readily by (excision) as by (enlargement)' and that the former would most likely have been the congressional preference in that particular case. Cf. *Iowa-Des Moines National Bank v. Bennett*, supra.
- 18 I reach these conclusions notwithstanding the admonition in *United States v. Reese* that it 'is no part of (this Court's) duty' '(t)o limit (a) statute in (such a way as) to make a new law, (rather than) enforce an old one.' 92 U.S. 214, 221, 23 L.Ed. 563 (1876). See also *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 46 S.Ct. 619, 70 L.Ed. 1059 (1926); *Marchetti v. United States*, 390 U.S. 39, 60, 88 S.Ct. 697, 708, 19 L.Ed.2d 889 (1968). Neither of these cases involved statutes evincing a congressional intent to confer a benefit on a particular group, thus requiring the frustration of third-party beneficiary legislation when the acts were held invalid. Moreover, the saving construction in *Marchetti* would have thwarted, not complemented, the primary purpose of the statute by introducing practical difficulties into that enforcement of state gambling laws that the statute was designed to further.
- 19 During World War I when the exemption was granted to members or affiliates of 'well-recognized religious sect(s)' the Selective Service System found it impracticable to compile a list of 'recognized' sects and left the matter to the discretion of the local boards. Second Report of the Provost Marshal General to the Secretary of War on the Operations of the Selective Service System to December 20, 1918, p. 56. As a result, some boards treated religious and nonreligious objectors in the same manner. Report of the Provost Marshal General to the Secretary of War on the First Draft Under the Selective-Service Act, 1917, p. 59. Finally, by presidential regulation dated March 20, 1918, it was ordered that conscientious objector status be open to all conscientious objectors without regard to any religious qualification. The experience during World War II, when draft boards were operating under the broad definition of religion in *United States v. Kauten*, 133 F.2d 703 (C.A.2d Cir. 1943), also demonstrates the administrative viability of today's test. Not only would the test announced today seem manageable but it would appear easier than the arcane inquiry required to determine whether beliefs are religious or secular in nature.

New York City, N.Y., Code § 17-109
NEW YORK CITY CHARTER, CODE, AMENDMENTS & RULES
NEW YORK CITY ADMINISTRATIVE CODE
TITLE 17. HEALTH
CHAPTER 1. DEPARTMENT OF HEALTH AND MENTAL HYGIENE.

The New York City Code is current with files received through September 30, 2019.

§ 17-109. Vaccinations.

- a. The department is empowered to collect and preserve pure vaccine lymph or virus, produce diphtheria antitoxin and other vaccines and antitoxins, and add necessary additional provisions to the health code in order to most effectively prevent the spread of communicable diseases.
- b. The department may take measures, and supply agents and offer inducements and facilities for general and gratuitous vaccination, disinfection, and for the use of diphtheria antitoxin and other vaccines and antitoxins.

the legislative product by prescribing rules and regulations consistent with the enabling legislation. While the legislative branch may grant an administrative agency the authority to promulgate regulations in furtherance of the legislative mandate, it may not constitutionally cede its fundamental policy-making responsibility to the agency. *Boreali v. Axelrod*, 71 N.Y.2d 9, 523 N.Y.S.2d 424 (1987) set forth a framework for determining whether an administrative agency has crossed the line between permissible administrative rule making and impermissible legislative policy making. The factors are: (1) whether the agency did more than balance the costs and benefits according to pre-existing guidelines, but instead made value judgments entailing difficult and complex choices between broad policy goals to resolve social problems; (2) the agency merely filled in details of a broad policy or it wrote on a clean slate, creating its own set of comprehensive rules without benefit or legislative guidance; (3) the legislature has unsuccessfully tried to reach an agreement on the issue, which would indicate that the matter is a policy consideration for the elected body to decide; or (4) the agency used special expertise or competence in the field to develop the challenged regulation.

On the first *Boreali* factor, the court found that the department improperly made value judgments by improperly creating a regulatory scheme with exceptions not grounded in promoting public health. The fact that the regulation allows schools to opt out of the vaccination requirement by paying a fine is not grounded in public health. The regulations stand in stark contrast to [Public Health Law Sec. 2164](#), which flatly forbids children from going to school until they receive the required immunizations. Giving schools an option to pay a relatively small fine rather than lose a year's tuition from students whose parents do not want them to be vaccinated flies in the face of legislative policies regarding vaccinations. The fourth *Boreali* factor favored the challengers (petitioners). No special health expertise was used or needed to develop the unique economic “opt out” scheme used here. [Garcia v. New York City Dept. of Health & Mental Hygiene](#), 144 A.D.3d 59, 38 N.Y.S.3d 880 (1st Dept. 2016).

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New York City, N.Y., Code § 17-142
NEW YORK CITY CHARTER, CODE, AMENDMENTS & RULES
NEW YORK CITY ADMINISTRATIVE CODE
TITLE 17. HEALTH
CHAPTER 1. DEPARTMENT OF HEALTH AND MENTAL HYGIENE.

The New York City Code is current with files received through September 30, 2019.

§ 17-142. Definition of nuisance.

The word “nuisance”, shall be held to embrace public nuisance, as known at common law or in equity jurisprudence; whatever is dangerous to human life or detrimental to health; whatever building or erection, or part or cellar thereof, is overcrowded with occupants, or is not provided with adequate ingress and egress to and from the same or the apartments thereof, or is not sufficiently supported, ventilated, sewerred, drained, cleaned or lighted in reference to its intended or actual use; and whatever renders the air or human food or drink, unwholesome. All such nuisances are hereby declared illegal.

¶ 4. The constitutionality of this section and of a resolution of the Board of Health pursuant to which the department of buildings promulgated an “Emergency Repair Program” was upheld as against claim by landlord that the code and program constituted a denial of equal protection of the laws, an unconstitutional impairment of the landlord's contractual rights and a deprivation of property without due process. The selection of one class of landlords for regulation because that one class “conspicuously offends” is not forbidden by the equal protection clause. And if the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end it is not unconstitutional even though it may interfere with rights established by existing contract. The state through its police power may establish regulations reasonably necessary to secure the general welfare although private property rights are curtailed.--*300 West 154th St. Realty Co. v. Dept. of Buildings*, 158 (76) N.Y.L.J. (10-19-67) 15 Col. 8 F.

¶ 5. Lewd exhibitions by “topless and bottomless” dancers at defendants' premises constituted illegal obscene performances and could be enjoined as a common nuisance.--*Commissioner of the Dept. of Buildings v. Sidne Enterprises, Inc.*, 90 Misc. 2d 386, 394 N.Y.S. 2d 777 [1977].

¶ 6. Question of whether an untenanted building which had a caretaker, which was secured and boarded up and upon which repair work was being done came within the definition of “nuisance” could not be determined on a motion for summary judgment but required a trial.--*Archbishopric of City of N.Y. v. City of N.Y.*, 63 A.D. 2d 912 [1978].

CASE NOTES

¶ 1. Taken with Health Code § 3.11, failure to provide acceptable window guards in building where children under the age of 11 years reside constitutes a “nuisance” and is a violation of this section. *State v. Portnoy*, 140 Misc. 2d 945 [1988].

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New York City, N.Y., Code § 17-143
NEW YORK CITY CHARTER, CODE, AMENDMENTS & RULES
NEW YORK CITY ADMINISTRATIVE CODE
TITLE 17. HEALTH
CHAPTER 1. DEPARTMENT OF HEALTH AND MENTAL HYGIENE.

The New York City Code is current with files received through September 30, 2019.

§ 17-143. Nuisances; punishment.

A wilful omission or refusal of any individual, corporation or body to forthwith abate any nuisance, as ordered by the department or board, such order having been duly served upon them, shall be a misdemeanor.

New York City, N.Y., Code § 17-144
NEW YORK CITY CHARTER, CODE, AMENDMENTS & RULES
NEW YORK CITY ADMINISTRATIVE CODE
TITLE 17. HEALTH
CHAPTER 1. DEPARTMENT OF HEALTH AND MENTAL HYGIENE.

The New York City Code is current with files received through September 30, 2019.

§ 17-144. Nuisances; who is liable.

It is hereby declared to be the duty, of which there shall be a joint and several liability, of every owner, part owner, person interested, and every lessee, tenant, and occupant, of, or in, any place, water, ground, room, stall, apartment, building, erection, vessel, vehicle, matter and thing in the city, and of every person conducting or interested in business therein or thereat, and of every person who has undertaken to clean any place, ground or street therein, and of every person, public officer and board having charge of any ground, place, building or erection therein, to keep, place and preserve the same and every part, and the sewerage, drainage and ventilation thereof in such condition, and to conduct the same in such manner that it shall not be dangerous or prejudicial to life or health, subject to the health code and orders of the department.

Section 558. Health code.

(a) The health code which is in force in the city on the date on which this chapter takes effect and all existing provisions of law fixing penalties for violation of the code and all regulations of the board of health on file with the city clerk on the date when this chapter takes effect shall continue to be binding and in force except as amended or repealed from time to time. Such code shall have the force and effect of law.

(b) The board of health from time to time may add to and alter, amend or repeal any part of the health code, and may therein publish additional provisions for security of life and health in the city and confer additional powers on the department not inconsistent with the constitution, laws of this state or this charter, and may provide for the enforcement of the health code or any orders made by the commissioner or the board of health, by such fines, penalties, forfeitures and imprisonment as may be prescribed therein or otherwise by law.

(c) The board of health may embrace in the health code all matters and subjects to which the power and authority of the department extends. The board of health shall prescribe in the health code the persons who shall be required to keep a registry of birth, fetal deaths, and deaths occurring in the city and file certifications thereof with the department and the form and manner in which such registry shall be kept and certificates filed, and, it shall provide for the recording of births which have not been recorded in accordance with law, for the change or alteration of any birth, fetal death or death certificate upon proof satisfactory, to the commissioner, for the examination and issuance of transcripts of such certificates and for fees to be charged therefor.

(d) The board of health shall prescribe in the health code that the parent with legal custody or legal guardian of any child receiving day care services as authorized in such code shall have unlimited and on demand access to such child or ward. The department of health and mental hygiene shall make unannounced visits of such day care services if such board receives a complaint that, if true, would indicate that children in such services are not receiving adequate or appropriate care. Such board shall also prescribe in such code that during the period for which day care services are authorized upon any premises, the department shall whenever possible make at least one unannounced visit of every such premises annually.

(e) Any violation of the health code shall be treated and punished as a misdemeanor. The board of health or an administrative tribunal established by the board of health to enforce the provisions of the health code shall have the power to enforce its final decisions and orders imposing pecuniary penalties as if they were money judgments, without court proceedings, in the manner described herein. After four months from the issuance of such a final decision and order by such board or tribunal a copy of such decision and order shall be filed in the office of the clerk of any county within the city. In the event that the decision and order were issued as a result of the respondent being in default, a notice of default shall be mailed to such respondent at least seven days before such filing, and a copy of such notice and a receipt of mailing thereof shall be filed with the copy of such decision and order. Upon such filing, such county clerk shall enter and docket such decision and order, in the same manner and with the same effect as a money judgment. Upon such entry and docketing, such decision and order may be enforced as provided in article fifty-two of the civil practice law and rules. Such board or tribunal shall not enter any final decision or order pursuant to the provisions of this subdivision unless the notice of violation shall have been served in the same manner as is prescribed for service of process by article three of the civil practice law and rules or article three of the business corporation law. Such board or tribunal may apply to a court of competent jurisdiction for enforcement of any other decision, order or subpoena issued by such board or tribunal. Nothing herein contained shall be construed to limit or abridge the board's or the department's right to pursue any other remedy prescribed by law. Pecuniary penalties for violations of the health code may be recovered in a civil action before any court in the city having jurisdiction of civil actions.

(f) No amendment or addition to the health code or repeal of any provision thereof adopted by the board of health subsequent to the effective date of this chapter shall become valid and effective until a copy of such amendment, addition or repeal is duly certified by the person serving as secretary of the board.

(g) The board of health may add, amend and repeal regulations in regard to any matter contained in the health code, and such regulations shall have the same force and effect as a provision of the health code.

(h) No action shall abate, or right of action already accrued be abolished, by reason of the expiration, repeal or amendment of any provision of the health code or regulations in regard thereto.

pursuant to subdivision (d) of section 3.01 of this article shall be deemed legally sufficient if served in accordance with the provisions specified therein.

§3.07 General standards to protect health and safety; prohibited acts; necessary acts and precautions.

No person shall do or assist in any act which is or may be detrimental to the public health or to the life or health of any individual unless the act is authorized by law. No person shall fail to do any reasonable act or take any necessary precaution to protect human life and health.

§3.09 Abatement of nuisances.

No person shall commit or maintain a nuisance as defined in §17-142 of the Administrative Code, and no person shall allow such a nuisance to exist or to be created in respect of any matter, thing, chattel or premises which he or she owns or controls.

§3.11 Civil Enforcement of the Code.

- (a) Except as provided in subdivisions (b) and (c) herein, any person who is determined to have violated this Code or any other applicable law or regulation that the Department is authorized to enforce, shall, unless otherwise specified in such other law or regulation, be subject to a fine, penalty and forfeiture of not less than two-hundred and not more than two thousand dollars for each violation of a provision of this Code or any other such applicable law or regulation. Each such violation may be treated as a separate and distinct offense, and in the case of a continuing violation, each day's continuance thereof may be treated as a separate and distinct offense.
- (b) Any person who is determined to have conducted, carried on, or in any way engaged in an activity without a permit, license, registration, or other authorization required by this Code shall be subject to a fine, penalty and forfeiture of not less than one thousand and not more than two thousand dollars.
- (c) Where a person fails to appear in a proceeding brought pursuant to Article 7 of this Code, the penalties imposed for each sustained violation shall be double the amount that would otherwise be assessed by the hearing examiner, but shall not exceed the maximum penalty specified in subdivision (a) or (b) of this Section, or in the other applicable law or regulation.
- (d) The penalty provided for in subdivision (a) of this section may be increased to an amount not to exceed five thousand dollars for a subsequent violation if the person committed the same violation within twelve months of the initial violation for which a penalty was assessed, pursuant to subdivisions (a) or (c) of this section and the violation was a serious threat to the health of an individual or individuals.
- (e) The penalty provided for in subdivision (a) of this section may be increased to an amount not to exceed ten thousand dollars if the violation directly results in serious physical harm to any person.

§3.12 Administrative Tribunal and Environmental Control Board proceedings.

- (a) *Administrative Tribunal.* The Administrative Tribunal established by the Board of Health pursuant to §558 of the Charter is hereby continued. It shall be operated by and within the City's Office of Administrative Trials and Hearings and known as the Health Tribunal at OATH.

ARTICLE 3 GENERAL PROVISIONS

§3.01 General powers of the Department.

- (a) The Department may inspect any premises, matter or thing within its jurisdiction, including but not limited to any premises where an activity regulated by this Code is carried on, and any record required to be kept pursuant to this Code, in accordance with applicable law.
- (b) In order to determine whether the provisions of this Code or the provisions of other law which the Department has the authority to enforce are being complied with, the Department may investigate or authorize an investigation to be made of any matter, incident, thing, person or event within its jurisdiction.
- (c) Subject to the provisions of this Code or other applicable law, the Department may take such action as may become necessary to assure the maintenance of public health, the prevention of disease, or the safety of the City and its residents.
- (d) Where urgent public health action is necessary to protect the public health against an imminent or existing threat, the Commissioner may declare a public health emergency. Upon the declaration of such an emergency, and during the continuance of such emergency, the Commissioner may establish procedures to be followed, issue necessary orders and take such actions as may be necessary for the health or the safety of the City and its residents. Such procedures, orders or actions may include, but are not limited to, exercising the Board's authority to suspend, alter or modify any provision of this Code pursuant to subdivision b of section 558 of the New York City Charter, or exercising any other power of the Board of Health to prevent, mitigate, control or abate an emergency, provided that any such exercise of authority or power shall be effective only until the next meeting of the Board, which meeting shall be held within five business days of the Commissioner's declaration if a quorum of the Board can be convened within such time period. If a quorum of the Board cannot be so convened, then said meeting shall be held as soon as reasonably practicable. At its next meeting, the Board may continue or rescind the Commissioner's suspension, alteration, modification of Health Code provisions or exercise of power. An order issued pursuant to this subdivision shall be effective from the time and in the manner prescribed in the order and shall be published as soon as practicable in a newspaper of general circulation in the city and transmitted to the radio and television media for publication and broadcast. In the alternative, in circumstances where the order is directed at a finite number of known persons, the Commissioner may transmit the order to such persons in a manner the Commissioner deems practicable under the circumstances, including but not limited to mail, electronic mail, facsimile, closed electronic network, in person, or by telephone. Copies of orders issued pursuant to this subdivision shall be immediately circulated to and filed with the Board, and the Department shall maintain records attesting to the manner and timing of their publication or transmittal.
- (e) The Commissioner's powers under this section are separate and apart from his or her powers pursuant to other provisions of law, including powers arising from a proclamation of emergency issued by the Mayor under section 24 of Article 2-B of the New York State Executive Law or the Mayor's directions thereunder. Nothing in this section shall be construed to preclude the exercise of the powers granted under this section in

combination with powers authorized under any other law or arising from such a proclamation or directions.

§3.03 Seizure, embargo, condemnation and disposition of prohibited materials.

- (a) The Department may seize, embargo or condemn any food, drug, device, cosmetic, article or thing that it determines (1) is unfit for human consumption or use; (2) is in a condition, kind, weight, quality or strength prohibited by this Code or other applicable law; (3) is not labeled as required by this Code or other applicable law; (4) contains false or misleading labeling; (5) is adulterated or misbranded; or (6) constitutes a danger or nuisance, or is otherwise prejudicial to the public health.
- (b) The Department may destroy, render harmless, or otherwise dispose of all seized, embargoed or condemned material without compensation and, in its discretion, at the expense of the owner or person in control thereof, or may direct such owner or person to do so. Embargoed, seized and condemned material which is hazardous shall be disposed of in accordance with applicable law.
- (c) When the Department determines that embargoed material consists in part of materials which are not in violation of the Code and which may be reasonably salvaged, or that embargoed materials or any part thereof can be reasonably brought into compliance with the Code, the Department shall permit the owner or person in control of such embargoed material, unless the public health otherwise requires, to separate the salvageable portions or to bring such materials into compliance with the Code at the place of embargo or seizure, or other place acceptable to the Department, in a manner directed by the Department. When seized material is disposed of by the Department otherwise than by destruction, it may be released to the owner or person in control if it may be rendered harmless.
- (d) All activities carried on pursuant to this section shall be done in a manner consistent with the maintenance of the public health, giving due regard to the property rights of the owner or person in control of the affected material.
- (e) Except where the Department determines that immediate action is required to protect the public health, the Department shall not seize, embargo, condemn, destroy, render harmless or otherwise dispose of any material pursuant to this section until the owner or person in control is notified by any effective means of communication and is given opportunity to be heard by such personnel of the Department as the Commissioner may designate. No person shall fail to comply with any order or subpoena of the Commissioner requiring disclosure of information concerning the sources or recipients of the embargoed or seized material.

§3.05 Orders of the Board, Commissioner or Department.

- (a) No person shall violate an order of the Board, Commissioner or Department.
- (b) Service of any order of the Commissioner or Department shall be deemed legally sufficient if delivered personally or if mailed by ordinary first class, certified or registered mail, express or overnight mail, through the United States Postal Service or through any commercial expedited mail or parcel delivery service, in no particular order of priority, upon any person, officer, department or employee referred to in Section 17-141 of the Administrative Code. The Department shall maintain records attesting to the manner of service used and the person or entity served in each instance. Service of any order issued

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