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# Constitutional Review: Supreme Court, October 1977 Term

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# First Amendment

## I. The News Media and the First Amendment

### *A. Punishing Breaches of the Confidentiality of Judicial Review Commissions:* Landmark Communications, Inc. v. Virginia

In *Landmark Communications, Inc. v. Virginia*,[1] the Supreme Court addressed the problem of accommodating a state's legitimate interest in maintaining the confidentiality of proceedings before a state judicial review commission[2] with the First Amendment guarantee that the news media shall be free of restrictions in discussing governmental affairs.[3] The Court held unconstitutional a Virginia statute[4] which made it a misdemeanor for any person to divulge information concerning proceedings before the state's Judicial Inquiry and Review Commission.[5] The Court's decision in *Landmark* serves to underscore the protection afforded the news media by the First Amendment when it engages in the "free discussion of governmental affairs."[6]

#### 1. The Virginia Supreme Court Decision

The facts underlying the *Landmark* litigation are relatively simple.[7] Landmark Communications, Inc., publishes *The Virginian-Pilot*, a general circulation newspaper in the Tidewater area of Virginia. On October 4, 1975, the *Pilot* published an article stating in pertinent part that the Judicial Inquiry and Review Commission (hereinafter Commission) had conducted a "formal hearing concerning possible disciplinary action against" a judge in Norfolk, Virginia. The newspaper account included the judge's name, and went on to state that the hear-

1. 435 U.S. 829 (1978).

2. *Id.* at 835. In recognition of this interest, the Court cited W. BRAITHWAITE, WHO JUDGES THE JUDGES 161-62 (1971); Buckley, *The Commission on Judicial Qualifications: An Attempt to Deal with Judicial Misconduct*, 3 U.S.F.L. REV. 244, 255-56 (1969).

3. *See* Mills v. Alabama, 384 U.S. 214 (1966). In *Mills*, the Court upheld the right of a newspaper to publish an election day editorial urging voters to support changing their form of government. The Court noted: "Whatever differences there may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Id.* at 218 (footnote omitted).

4. VA. CODE § 2.1-37.13 (1973).

5. This commission was created pursuant to VA. CONST. art. VI, § 10, which provides, *inter alia*, for the creation of a commission "vested with the power to investigate . . . charges which would be the basis for retirement, censure, or removal of a judge."

6. Mills v. Alabama, 384 U.S. 214, 218 (1966). *See* note 3 *supra*.

7. Except where otherwise noted, this summary of the facts is taken from the opinion of the Virginia Supreme Court. *See* Landmark Communications, Inc. v. Virginia, 217 Va. 699, 701-03, 233 S.E.2d 120, 122-23 (1977).

ing "apparently stemmed from charges of incompetence against the . . . judge." On November 5, 1975, Landmark was indicted for violating Virginia Code section 2.1-37.13, which provides that "[a]ll papers filed with and proceedings before the Commission . . . including the identification of the subject judge . . . shall be confidential and shall not be divulged by any person to anyone except the Commission, except that the record of any proceeding filed with the Supreme Court shall lose its confidential character."[8] The code further provides that "[a]ny person who shall divulge information in violation . . . of this section shall be guilty of a misdemeanor."[9] In the subsequent trial, the Circuit Court of the City of Norfolk found Landmark guilty of violating section 2.1-37.13 and fined the corporation the sum of $500.00.

Landmark appealed its conviction to the Supreme Court of Virginia.[10] Its initial contention was that the statute's proscription against divulging information regarding Commission proceedings was ambiguous in that it failed to indicate whether its sanctions applied only to participants in the proceedings or also to nonparticipating observers such as the news media. Landmark argued that the statute's penal nature required that any such ambiguity be resolved against the Commonwealth and in favor of the alleged violator.[11] The newspaper urged the Virginia court to construe section 2.1-37.13 to mean that a violation would occur only upon "the *first act of disclosure* . . . by an individual who had *actually participated* in some manner in the proceedings of [the] Commission."[12] Under such a construction, Landmark contended, the statute had been violated not by the newspaper but by the Commission participant who first disclosed the confidential information. Landmark's subsequent publication of information "*voluntarily and freely* given to it" was therefore outside the scope of the statute.[13] The major constitutional argument raised by Landmark on appeal was that the imposition of the statute's criminal sanctions "would unconstitutionally abridge its First Amendment guaranty of freedom of the press."[14] Landmark argued that the statute either constituted an impermissible prior restraint[15] or imposed a subsequent

8. VA. CODE § 2.1-37.13 (1973).
9. *Id.*
10. Landmark Communications, Inc. v. Virginia, 217 Va. 699, 233 S.E.2d 120 (1977).
11. *Id.* at 701, 233 S.E.2d at 122.
12. *Id.* at 702, 233 S.E.2d at 122-23 (emphasis in original).
13. *Id.*, 233 S.E.2d at 123 (emphasis in original).
14. *Id.* at 703, 233 S.E.2d at 123.
15. *Id.* at 704, 233 S.E.2d at 124. Landmark based this contention on the decisions of the Supreme Court in New York Times Co. v. United States, 403 U.S. 713 (1971), and Near v. Minnesota, 283 U.S. 697 (1931).

punishment for publication without satisfying the requisite "clear and present danger" elements necessary to impose such punishment.[16]

The Supreme Court of Virginia rejected Landmark's statutory construction argument, holding that the statute was clear and unambiguous in its terms and that its proscription applied to any person (including corporate entities) who divulged information regarding Commission proceedings before a complaint was filed with the state supreme court.[17] Turning to the constitutional claim, the state court disagreed with Landmark's contention that the statute imposed a prior restraint, finding instead that its provisions fit more properly into the subsequent punishment category.[18] This characterization compelled the court to subject the statute to a clear and present danger analysis. The court examined and then distinguished the administration of justice cases cited by Landmark.[19] Whereas those cases involved a court's common law power of contempt, and thus arose from the exercise of judicial power, the Virginia Supreme Court observed that the instant case was based on the violation of a statute designed to protect a legislatively determined state interest.[20] The court asserted that the requirement of confidentiality was essential to preserve the legitimate state interest in maintaining the effectiveness of the Commission and ensuring the orderly administration of justice.[21] The Virginia Supreme Court concluded its opinion by accepting the Commonwealth's position that criminal sanctions are a legitimate and necessary means to protect those state interests and prevent the clear and present danger

16. 217 Va. at 705, 233 S.E.2d at 124. Landmark relied on a line of cases which had applied the "clear and present danger" test in overturning contempt citations based on media criticism of the manner in which courts were handling pending matters. These cases are discussed *infra*: Bridges v. California, 314 U.S. 252 (1941); Pennekamp v. Florida, 328 U.S. 331 (1946); Craig v. Harney, 331 U.S. 367 (1947); Wood v. Georgia, 370 U.S. 375 (1962). While the contempt citations stemmed from a perceived threat to "the orderly administration of justice," the Supreme Court held in each case that expression critical of a court or its operations is protected by the First Amendment unless it poses a clear and present danger to the system. *See generally* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 449-59 (1970); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 623-31 (5th ed. 1978).

17. 217 Va. at 702-03, 233 S.E.2d at 123.

18. *Id.* at 704, 233 S.E.2d at 124.

19. *See* note 16 *supra*.

20. 217 Va. at 707-08, 233 S.E.2d at 126-27.

21. *Id.* at 712-13, 233 S.E.2d at 129. The court pointed out that the requirement of confidentiality provides the following benefits: "(1) protects the reputation of an individual judge by shielding him from publicity involving frivolous complaints, (2) protects public confidence in the judicial system by preventing disclosure of a complaint against a judge until the Commission has determined the charge is well-founded, and (3) protects complainants and witnesses from possible recrimination by prohibiting disclosure of their identity prior to a determination that the complaint is meritorious." *Id.* at 712, 233 S.E.2d at 128-29.

which would result from premature disclosure of the Commission's proceedings.[22]

### 2. The United States Supreme Court Decision

On appeal, the Supreme Court reversed.[23] Chief Justice Burger, writing for the six-member majority,[24] disagreed with the Virginia Supreme Court's conclusion that a clear and present danger to the administration of justice justified the curtailment of speech by criminal sanctions.[25] He noted that some form of confidential judicial inquiry and disciplinary procedure exists in virtually every state.[26] The "substantial uniformity" of these plans suggested that "confidentiality is perceived as tending to insure the ultimate effectiveness of the judicial review commissions."[27] But Landmark did not challenge the need for confidentiality in proceedings to review the conduct and integrity of judicial officers. Rather, it claimed only that confidentiality could not be preserved by the imposition of criminal sanctions on third parties not involved in the proceedings themselves, an approach that only one other state besides Virginia had found necessary to adopt.[28]

In view of the foregoing, the Chief Justice formulated the issue in *Landmark* as follows: "The narrow and limited question presented, then, is whether the First Amendment permits the criminal punishment

22. *Id.* at 712-13, 233 S.E.2d at 129.

23. Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978).

24. Chief Justice Burger was joined by Justices White, Marshall, Blackmun, Rehnquist and Stevens. Justice Stewart filed an opinion concurring in the judgment. Justices Brennan and Powell took no part in the consideration or decision of the case.

25. 435 U.S. at 845.

26. *Id.* at 834. The Chief Justice pointed out that 47 states, the District of Columbia and Puerto Rico have such judicial inquiry and disciplinary procedures. All of these jurisdictions except Puerto Rico require confidentiality in the early stages of the proceedings. A list of the states and their relevant constitutional and statutory provisions was attached as an appendix to the opinion. *Id.* app., at 846-48.

27. *Id.* at 835. Chief Justice Burger summarized the interests said to be served by the requirement of confidentiality as follows: "First, confidentiality is thought to encourage the filing of complaints and the willing participation of relevant witnesses by providing protection against possible retaliation or recrimination. Second, at least until the time when the meritorious can be separated from the frivolous complaints, the confidentiality of the proceedings protects judges from the injury which might result from publication of unexamined and unwarranted complaints. And finally, it is argued, confidence in the judiciary as an institution is maintained by avoiding premature announcement of groundless claims of judicial misconduct or disability since it can be assumed that some frivolous complaints will be made against judicial officers who rarely can satisfy all contending litigants." *Id.* (footnote omitted). *See* note 2 *supra*. Confidentiality is also thought to facilitate the removal or retirement of judges without a formal proceeding with its attendant publicity, and to permit a judge to be made aware of valid complaints. 435 U.S. at 835-36.

28. *Id.* at 836-37.

of third persons who are strangers to the inquiry, including the news media, for divulging or publishing truthful information regarding confidential proceedings of the Judicial Inquiry and Review Commission."[29] Before examining this issue in light of the facts of the case, the Court considered Landmark's contention that recent decisions regarding the truthful and even untruthful reporting about public officials[30] and the dissemination of accurate commercial information[31] should be dispositive of the question presented. Holding that the speech in question "lies near the core of the First Amendment,"[32] the Court rejected the need to rely on the more tangential First Amendment values implicated in the context of libel or commercial speech. As Chief Justice Burger observed: "The operations of the courts and the judicial conduct of judges are matters of utmost public concern."[33]

The operation of the Commission was deemed such a matter of public interest, and Landmark's article of October 4 was found to have provided accurate factual information about its proceedings.[34] In the Court's view, this reporting "clearly served those interests in public scrutiny and discussion of governmental affairs which the First Amendment was adopted to protect."[35]

The Court responded to the Commonwealth's argument that the First Amendment does not protect the publication of information "which by Constitutional mandate is to be confidential."[36] The state had relied on *Cox Broadcasting Corp. v. Cohn*[37] in support of this position. In *Cox* the Court held that the First and Fourteenth Amend-

29. *Id.* at 837 (footnote omitted). In an accompanying footnote, the Court explained that while the statute in question might have been construed by the Virginia Supreme Court so as to apply only to participants to the proceedings and not to third parties, the broad construction given the statute by the lower court precluded a narrow reading by the Supreme Court since " 'it is not our function to construe a state statute contrary to the construction given it by the highest court of a State.' " *Id.* at 837 n.9 (quoting O'Brien v. Skinner, 414 U.S. 524, 531 (1974)).

30. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

31. Linmark Assoc., Inc. v. Township of Willingboro, 431 U.S. 85 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).

32. 435 U.S. at 838 (citing Buckley v. Valeo, 424 U.S. 1, 64-65 (1976)).

33. 435 U.S. at 839. *See, e.g.*, Sheppard v. Maxwell, 384 U.S. 333, 350 (1966); Bridges v. California, 314 U.S. 252, 289 (1941) (Frankfurter, J., dissenting). *Cf.* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 492 (1975) ("With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice.").

34. 435 U.S. at 839.

35. *Id.* (citing New York Times Co. v. Sullivan, 376 U.S. 254, 269-70 (1964)).

36. 435 U.S. at 840 (quoting Brief for Appellee at 17). VA. CONST. art. VI, § 10, provides, *inter alia*, that "[p]roceedings before the Commission shall be confidential."

37. 420 U.S. 469 (1975).

ments shielded a newspaper from liability for invasion of privacy based on the accurate reporting of the name of a deceased rape victim.[38] Crucial to the decision in *Cox* was the fact that the name of the victim had been revealed in a public proceeding.[39] Moreover, the Court in *Cox* specifically reserved the question of the scope of First Amendment protection where, as in *Landmark*, public records are not involved.[40] Because *Cox* did not answer the question presented, the *Landmark* Court undertook an inquiry to determine whether Landmark's actions were protected by the First Amendment.

The Court examined the interests which the Commonwealth claimed were protected by the statute.[41] The Court was willing to assume that confidentiality serves legitimate state interests, but nevertheless concluded that this did not justify the imposition of criminal sanctions on third parties to the proceedings such as Landmark.[42] Chief Justice Burger noted that the Commonwealth had provided no factual basis to demonstrate the necessity for criminal proscriptions and emphasized that most states had not adopted such an approach.[43] Injury to official reputation does not constitute a sufficient justification for punishing otherwise protected speech.[44] Consequently, the reputation of the courts as an institution merits no greater protection.[45] Support for these conclusions was found in Justice Black's observation in *Bridges v. California*:[46]

> The assumption that respect for the judiciary can be won by shielding judges from public criticism wrongly appraises the character of American political opinion. . . . [A]n enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.[47]

Since the Commonwealth had not justified the burden its statutory scheme placed on protected speech, the Supreme Court reversed

38. *Id.* at 495.
39. *Id.* at 496-97.
40. *Id.* at 497 n.27.
41. Criminal sanctions were said to be necessary to prevent the public discussion of unfounded allegations of judicial misconduct and the premature disclosure of the details of proceedings before the Commission. *See* 435 U.S. at 840. *See also* note 27 *supra*.
42. 435 U.S. at 841.
43. *Id.* & n.12.
44. *Id.* at 841-42 (citing New York Times Co. v. Sullivan, 376 U.S. 254, 272-73 (1964)).
45. 435 U.S. at 842.
46. 314 U.S. 252 (1941).
47. *Id.* at 270-71. *See also id.* at 291-92 (Frankfurter, J., dissenting).

Landmark's conviction.[48]

In the final section of the *Landmark* opinion, the Court criticized the Virginia Supreme Court's reliance upon and mechanical application of the clear and present danger test.[49] A legislatively determined state interest was viewed as an insufficient basis for a judicial finding of a clear and present danger.[50] In the words of Chief Justice Burger: "Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake."[51] The Court disapproved of the Virginia court's attempt to distinguish *Landmark* from prior cases which had rejected findings of clear and present danger arising from out-of-court media commentaries.[52] If anything, the Court noted, the threat to the administration of justice posed in those cases was more direct and substantial than that presented by *Landmark's* disclosure.[53] Referring to the availability of contempt powers to punish breaches of confidentiality by commission members and staff, as well as to oaths of secrecy sometimes required of commission members, staff and witnesses, the Court concluded that "much of the risk [to the administration of justice] can be eliminated through careful internal procedures to protect the confidentiality of Commission proceedings."[54] Despite the availability of alternative measures for protecting the state's interest in confidentiality, the Court found that the "danger" embodied in Landmark's publication " 'is precisely one of the types of activity envisioned by the Founders in presenting the First Amendment for

48. 435 U.S. at 842, 845-46.

49. *Id.* at 842-43: "Mr. Justice Holmes' test was never intended 'to express a technical legal doctrine or to convey a formula for adjudicating cases.' Pennekamp v. Florida, 328 U.S. 331, 353 (1946) (Frankfurter, J., concurring). Properly applied, the test requires a court to make its own inquiry into the imminence and magnitude of the danger said to flow from the particular utterance and then to balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression. The possibility that other measures will serve the State's interests should also be weighed."

50. *Id.* at 844. *See also* Justice Poff's dissent from the Virginia Supreme Court's decision, 217 Va. 699, 713, 233 S.E.2d 120, 129 (1977) (Poff, J., dissenting) "Just as a court cannot infer the existence of a clear and present danger from allegations made in a contempt citation and adopt that inference as a conclusion of law, Wood v. Georgia, 370 U.S. 375 (1962), a court cannot infer the existence of a clear and present danger from the mere enactment of a penal statute." *Id.*

51. 435 U.S. at 843. In support of the need for an independent judicial inquiry into the existence of a clear and present danger, the Chief Justice quoted from Pennekamp v. Florida, 328 U.S. 331, 335 (1946) and Whitney v. California, 274 U.S. 357, 378-79 (1927) (Brandeis, J., concurring). *See* 435 U.S. at 843-44.

52. *See* notes 16 & 17 and accompanying text *supra*.

53. 435 U.S. at 845.

54. *Id.* (citing 435 U.S. at 841 n.12).

ratification.' "[55]

Justice Stewart concurred in the Court's judgment but could not agree that section 2.1-37.13 was unconstitutional.[56] In his view, "[t]here could hardly be a higher governmental interest than a State's interest in the quality of its judiciary."[57] Based on this paramount concern, Justice Stewart recognized the legitimate "derivative interest" in maintaining the confidentiality of Commission proceedings.[58] Thus, the state could constitutionally punish any individual who breached this confidentiality.[59] However, rather than attempting to enforce criminal sanctions against an individual, Virginia sought to punish a newspaper for its publication of the information. This application of the statute to the press was deemed unconstitutional: "If the constitutional protection of a free press means anything, it means that government cannot take it upon itself to decide what a newspaper may and may not publish."[60]

### 3. Analysis

Analysis of the questions raised and resolved in *Landmark* can best be accomplished by focusing on two aspects of the case. The first section that follows will discuss the extent to which *Landmark* is consistent with the "clear and present danger" cases relied upon by the Virginia Supreme Court. The second section will examine the utility of applying the clear and present danger test in future media cases.

#### *a. Background of the Clear and Present Danger Standard*

The decisions of the United States Supreme Court in *Bridges v. California*,[61] *Pennekamp v. Florida*,[62] *Craig v. Harney*[63] and *Wood v.*

55. *Id.* at 845 (quoting Wood v. Georgia, 370 U.S. 375, 388 (1962)).
56. 435 U.S. at 848 (Stewart, J., concurring in the judgment).
57. *Id.*
58. *Id.*
59. *Id.* at 849. Because Justice Stewart refused to join the majority opinion, his concurrence must be taken as an endorsement of the state's right to punish *any* nonmedia individual or entity who divulges information concerning Commission proceedings. The majority declined to address the question of the possibility of imposing criminal sanctions on persons who actually participated in the proceedings. *See id.* at 837 & n.9. Indeed, the Court even suggested that such punishment would be constitutional. *See id.* at 841 n.12. But the majority did not limit its holding to the protection of the news media; any third person who was a stranger to the proceedings is within the Court's decision. *See id.* at 837. Justice Stewart apparently wrote separately to emphasize his belief that First Amendment protections for the disclosure of confidential information should be extended only to members of the press.
60. *Id.* at 849 (Stewart, J., concurring in the judgment).
61. 314 U.S. 252 (1941).
62. 328 U.S. 331 (1946).
63. 331 U.S. 367 (1947).

*Georgia*[64] constitute the "clear and present danger" cases upon which the Virginia Supreme Court relied in affirming Landmark's conviction.[65] Each of these cases involved a lower court's use of the common law power of contempt to punish out-of-court statements concerning pending cases or investigations. Such statements, in the view of the courts, created a clear and present danger to the orderly administration of justice.

Writing for the Court in *Bridges*, Justice Black reversed a decision of the California Supreme Court[66] which upheld a ruling that the *Los Angeles Times* had been in contempt of court when it published an editorial urging a judge to imprison two criminal defendants then on trial. Justice Black began his analysis by noting that there had been no legislative determination that such out-of-court commentary posed a danger justifying punishment.[67] Thus, the decision by the California Supreme Court did not come up for review "encased in the armor wrought by prior legislative deliberation."[68] Relying on language from *Cantwell v. Connecticut*,[69] Justice Black noted that had there been an indication of legislative intent, such a " 'declaration of the State's policy would weigh heavily in any challenge of the law as infringing constitutional limitations.' "[70] In the absence of such a legislative declaration, the Court in *Bridges* was reluctant to rely on the California courts' determinations that the editorials at issue had either an "inherent" or "reasonable" tendency to interfere with the orderly administration of justice.[71] Unfortunately, the Court failed to set forth with any specificity precisely what type of speech would be punishable under a clear and present danger analysis. Instead, Justice Black provided the following summary: "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."[72]

Five years later, in delivering the opinion of the Court in *Penne-*

64. 370 U.S. 375 (1962).

65. *See* Landmark Communications, Inc. v. Virginia, 217 Va. at 706-13, 233 S.E.2d at 125-29.

66. Bridges v. Superior Court, 14 Cal. 2d 464, 94 P.2d 983 (1939). *Compare* Times Mirror v. Superior Court, 15 Cal. 2d 99, 98 P.2d 1029 (1940).

67. 314 U.S. at 260.

68. *Id.* at 261.

69. 310 U.S. 296 (1940) (absence of a state policy restricting street discussion of religious affairs weighed heavily in reversal of defendant's conviction).

70. 314 U.S. at 260 (quoting Cantwell v. Connecticut, 310 U.S. 296, 307-08 (1940)).

71. 314 U.S. at 272-73.

72. *Id.* at 263.

*kamp v. Florida*,[73] Justice Reed recognized the vagueness of the *Bridges* standard and reiterated the Court's belief that clarity and definiteness would somehow emerge in subsequent cases.[74] The *Pennekamp* decision did not fulfill this expectation, however, only adding to the *Bridges* standard the requirement of "a solidarity of evidence."[75] The *Pennekamp* Court's major contribution to the clear and present danger test was not this addition to the guidelines but rather the instructions on how the required evidence is to be obtained. The *Pennekamp* Court noted that it was "compelled to examine for [itself] the statements in issue and the circumstances under which they were made to see whether or not they do carry a threat of clear and present danger. . . ."[76] The Virginia Supreme Court's failure to carry out this investigative process was a major factor underlying the Supreme Court's rejection of its analysis in *Landmark*. The Virginia court's reliance solely on the legislative determination was deemed insufficient,[77] and Chief Justice Burger reiterated the importance of undertaking an independent judicial investigation.[78] He concluded by asserting that if the Virginia court had undertaken such an inquiry it would have realized that Landmark's article did not present a clear and present danger to the administration of justice.[79]

Applying the guidelines established in *Bridges* and *Pennekamp* to the Court's decision in *Landmark*,[80] it appears that the latter decision is

73. 328 U.S. 331 (1946).

74. *Id.* at 334.

75. *Id.* at 347. The only other suggestion of a guideline for determining the existence of a clear and present danger appears in Justice Frankfurter's concurring opinion: "It is the focused attempt to influence a particular decision that may have a corroding effect on the process of justice, and it is such comment that justifies the corrective process." *Id.* at 366 (Frankfurter, J., concurring). Yet even this statement provides little guidance since the nature and extent of the "focused attempt" were not defined.

76. *Id.* at 335.

77. 435 U.S. at 844. The Court stated: "It was . . . incumbent upon the Supreme Court of Virginia to go behind the legislative determination and examine for itself 'the particular utteranc[e] here in question and the circumstances of [its] publication to determine to what extent the substantive evil of unfair administration of justice was a likely consequence, and whether the degree of likelihood was sufficient to justify [subsequent] punishment.' " *Id.* (quoting Bridges v. California, 314 U.S. 252, 271 (1941)).

78. 435 U.S. at 844: "A legislature appropriately inquires into and may declare the reasons impelling legislative action but the judicial function commands analysis of whether the specific conduct charged falls within the reach of the statute and if so whether the legislation is consonant with the Constitution."

79. *Id.* at 844-45. *See* note 90 *infra*.

80. *Bridges* and *Pennekamp* having established the basic, albeit vague, guidelines for applying the clear and present danger test, the primary significance of the two subsequent press cases, Craig v. Harney, 331 U.S. 367 (1947), and Wood v. Georgia, 370 U.S. 375 (1962), is their reaffirmation of the requirement of an independent judicial investigation of

consistent with its predecessors insofar as it represents the continuation of the Court's policy of reversing the use by lower courts of the contempt power to restrain out-of-court commentary by the media concerning pending proceedings or investigations. Where the *Landmark* decision appears to break with precedent is in the Court's suggestion that the clear and present danger test is not applicable to cases like *Landmark*,[81] a suggestion whose effect would be virtually to eliminate the test from the active lexicon of constitutional adjudication.

*b. The Future of the Clear and Present Danger Test*

**(1) The Question of Relevancy**

The *Landmark* decision significantly diminishes the usefulness of the clear and present danger standard in contempt of court prosecutions of the news media. By questioning whether the test was relevant to the situation presented in *Landmark*,[82] the Court may have eliminated the last area in which it had been actively applied—the administration of justice cases.[83]

The Court began its discussion of the applicability of the standard by noting that the Virginia Supreme Court had relied on the test in rejecting Landmark's constitutional challenge to its conviction.[84] Disapproving this reliance, the Court criticized the use of the clear and present danger test in *Landmark* on two grounds: it questioned the relevancy of the test to the *Landmark* situation, and particularly rejected what it termed the "mechanical application" of the test by the state court.[85] Although the Court did not set forth specific support for its contention that the test was not relevant to the question presented in

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the alleged threat to the administration of justice. The only additional guidelines these cases provided were as follows: 1) The Court in *Craig* asserted that the danger "must not be remote or even probable; it must immediately imperil." 331 U.S. at 376. *Craig* also indicated that publications which were merely in bad taste could not be considered dangerous. *Id.* at 377. 2) In *Wood*, the Court overturned a contempt citation for criticizing the charging of a grand jury and interfering with its investigation. Relying on the *Bridges-Pennekamp* standard, the Court based its reversal on the failure of the lower court to adduce evidence demonstrating an actual interference with justice, 370 U.S. at 386-88, and the failure to adhere to legislative limitations on the use of the contempt power. *Id.* at 385-86 & n.10. In making this latter ground an explicit basis for its decision, *see id.*, the Court reaffirmed the prior legislative deliberation doctrine of *Bridges*. *See* notes 67-68 and accompanying text *supra*.

81. *See* notes 49-55 and accompanying text *supra*.

82. 435 U.S. at 842.

83. T. EMERSON, *supra* note 16, at 456.

84. 435 U.S. at 842.

85. *Id.* Quoting from Pennekamp v. Florida, 328 U.S. 331, 353 (1946) (Frankfurter, J., concurring), the *Landmark* Court noted that the test had never been intended to provide a

*Landmark*, it substantiated this view by measuring the evidence presented by the Commonwealth of Virginia against the requirements established in *Bridges* and *Pennekamp*.[86] The Supreme Court of Virginia had conceded that the record was devoid of actual facts demonstrating a clear and present danger to the administration of justice.[87] It nonetheless held that the legislative declaration that such a danger would exist, coupled with the stipulated fact that Landmark published the article, was sufficient to warrant the imposition of a criminal sanction.[88] The propriety of the Virginia court's reliance on this legislative determination was emphatically rejected by the Supreme Court: "Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake."[89] In Chief Justice Burger's view, if the Supreme Court of Virginia had looked behind the legislative declaration and examined the particular facts surrounding the speech at issue, it would not have found any threat to the administration of justice sufficiently serious to justify the imposition of criminal sanctions.[90] Thus, the absence of an adequate factual basis for Landmark's conviction seems to have been one ground for the Court's view that the clear and present danger test was inapplicable in that context.[91]

A second basis for regarding this test as unnecessary to the disposition of *Landmark* is the Court's characterization of the speech at issue as lying "near the core of the First Amendment."[92] Citing as an example its ruling in *Buckley v. Valeo*,[93] the Court concluded that the Commonwealth's asserted interests were insufficient to justify the encroachment on freedom of speech and of the press that follow from the imposition of criminal sanctions.[94] The Court's subsequent analy-

formula or technical legal doctrine for adjudicating free speech cases. 435 U.S. at 842. *See* note 49 *supra*.

86. *See* notes 66-76 and accompanying text *supra*.

87. 217 Va. at 707, 233 S.E.2d at 126.

88. *Id.* at 708-09, 233 S.E.2d at 126-27.

89. 435 U.S. at 843. *See* note 51 *supra*.

90. 435 U.S. at 844-45. The Court noted that the threat to the administration of justice posed in *Landmark* was less direct and substantial than that claimed to arise in *Bridges, Pennekamp, Craig* and *Wood*. It concluded that if the requirements of the clear and present danger test could not be satisfied in those cases, they could not be met in *Landmark*. *Id.* at 845.

91. The decision in *Landmark* brings the Court closer to acceptance of the "full protection rule." As discussed by T. EMERSON, *supra* note 16, at 457: "Under that doctrine a communication critical of the court could be punished or suppressed only if it amounted to 'action' rather than 'expression.'" The author suggests that threats of physical violence or an employer's threats to employees would be examples of such "action."

92. 435 U.S. at 838.

93. 424 U.S. 1 (1976).

94. 435 U.S. at 838. In *Buckley*, the Court rejected a challenge to the constitutionality

sis focused on the public interest in the operation of the Judicial Inquiry and Review Commission. Landmark's article was found to have accurately reported on its proceedings, a function which promoted values central to the First Amendment.[95] The Court relied on its prior decisions which had underscored the amenability of judges and the judiciary to criticism voiced in the press.[96] The subsequent discussion of the clear and present danger test was therefore a response to the Virginia Supreme Court's analysis rather than a basis for the decision in *Landmark*.

### (2) The Alternative Means Analysis

As noted earlier,[97] the administration of justice cases constitute one of the last areas in which the Court, prior to *Landmark*, had utilized the clear and present danger test. One factor the Court apparently considered in striking down the criminal conviction in *Landmark* was that the Virginia statute, with its imposition of criminal sanctions, was out of step with the laws of over forty states, none of which "found it necessary to enforce confidentiality by use of criminal sanctions against nonparticipants."[98] The Court noted that these other states only punish breaches of confidentiality by commission members and staff, and that such breaches are punishable as civil contempt rather than criminal violations.[99] The Court also noted that some states require witnesses as well as staff and commission members to take an oath of secrecy. A violation of this requirement is similarly treated as contempt.[100] While the Court did not consider these sister state approaches to ensuring confidentiality dispositive of the issue before it,[101]

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of the disclosure provisions of the Federal Election Campaign Act of 1971. Responding to the argument that compelled disclosure of the identity of campaign contributors infringed the right of associational privacy, the Court conceded that a "mere showing of some legitimate governmental interest" would be insufficient to justify such an encroachment upon First Amendment values. The appropriate analysis, the Court held, involves strict scrutiny of the asserted state interests to determine whether there is a "relevant correlation" or "substantial relation" between the governmental interest and the information to be disclosed. 424 U.S. at 64.

95. 435 U.S. at 839 (citing New York Times Co. v. Sullivan, 376 U.S. 254, 269-70 (1964)).

96. Sheppard v. Maxwell, 384 U.S. 333, 350 (1966); New York Times Co. v. Sullivan, 376 U.S. 254, 272-73 (1964); Bridges v. California, 314 U.S. 252, 270-71 (1941); *id.* at 289, 291-92 (Frankfurter, J., dissenting). *See also* Mills v. Alabama, 384 U.S. 214, 218 (1966).

97. *See* text accompanying note 83 *supra.*

98. 435 U.S. at 841 (footnote omitted).

99. *Id.* at 841 n.12.

100. *Id.*

101. *Id.* at 841.

it seems reasonable to assume that the existence and widespread use of non-criminal alternative means for protecting the asserted state interests was a significant factor in the Court's resolution of *Landmark*.[102] The widespread use of civil contempt sanctions and other non-criminal approaches to ensuring confidentiality points to another reason for the inapplicability of the clear and present danger test in situations such as that presented in *Landmark*. Legislatures are now cognizant of the fact that when the news media criticizes the functioning of the judiciary, courts should hold such criticism fully protected by the First Amendment unless it goes so far as to amount to "action" instead of expression.[103] Consequently, most state legislatures now protect the confidentiality of their judicial review commission proceedings through non-criminal sanctions aimed primarily at participants.[104] The effect of this trend is to limit the use of the clear and present danger test to those rare situations in which the speech at issue creates an imminent danger of harm.[105]

### *c. The Publication of Legally Confidential Information*

One further aspect of the *Landmark* decision merits discussion in this review, although it is not related to the clear and present danger analysis previously discussed. The Commonwealth had argued in *Landmark* that the First Amendment right of a free press to report on and criticize judicial conduct did not extend to the publication of information " 'which by Constitutional mandate is to be confidential.' "[106] The Commonwealth relied on the Court's decision in *Cox Broadcasting Corp. v. Cohn*[107] to support this contention. In *Cox* the Court held that

102. The Court noted that its prior decisions had struck down the suppression of speech claimed necessary by a state to protect the reputations of its judges or to maintain the institutional integrity of its courts. *Id.* at 841-42 (citing New York Times Co. v. Sullivan, 376 U.S. 254, 272-73 (1964); Bridges v. California, 314 U.S. 252, 270-71 (1941)). These principles were deemed controlling and dispositive of the criminal punishment issue in *Landmark*. 435 U.S. at 842.

103. *See* note 91 *supra*.

104. The Court did not indicate whether it would consider these non-criminal approaches constitutionally valid in a fact situation similar to that presented in *Landmark*. The Court pointed out that the scope of other states' non-criminal sanctions is limited by their application solely to participants to the proceedings, as opposed to the Virginia statute's broad prohibition against disclosure by "any person." 435 U.S. at 841 & n.12. Thus it remains possible that a legislative enactment prohibiting the disclosure of confidential information by a non-participant (*i.e.*, a newspaper) might be found unconstitutional by the Court irrespective of the nature of the punishment imposed.

105. *See* note 91 *supra*.

106. 435 U.S. at 840 (citing Brief for Appellee at 17).

107. 420 U.S. 469 (1975).

a civil action would not lie against a television station for invasion of privacy based on the broadcast of the name of a deceased rape victim obtained from public records.[108] The *Landmark* Court rejected the Commonwealth's reliance on *Cox* since that decision had explicitly reserved the broader question of "whether the publication of truthful information withheld by law from the public domain is similarly privileged."[109] The Court in *Landmark* also refused to deal fully with the question left open in *Cox*. Noting its belief that *Cox* did not provide a dispositive answer to the question presented in *Landmark*, the Court concluded: "We need not address all the implications of that question here, but only whether in the circumstances of this case Landmark's publication is protected by the First Amendment."[110] Since the Court proceeded to hold that the publication could not be criminally punished,[111] it can be inferred that the Court answered the *Cox* question in the affirmative. In the wake of *Landmark*, newspapers would appear to be free to publish truthful information withheld from the public domain, insofar as that information pertains to judicial review commission proceedings in which the newspaper is not a participant. A more general grant of privilege cannot fairly be inferred from *Landmark* given the intent of the Court to limit their resolution of the *Cox* question to the facts in *Landmark*.

### *B. Searches of Newspaper Offices:* Zurcher v. Stanford Daily

In *Zurcher v. Stanford Daily*,[112] the Supreme Court addressed a controversy regarding a different facet of the non-participant observer role of the news media than was confronted in the *Landmark*[113] case. The issue in *Zurcher* was how the terms of the Fourth Amendment,[114] applicable to the states under the Fourteenth Amendment,[115] should be construed in the context of a third-party search[116] of a newspaper of-

108. *See* notes 38-39 and accompanying text *supra*.

109. 435 U.S. at 840 (citing Cox Broadcasting Corp. v. Cohn, 420 U.S. at 497 n.27). *See* note 40 and accompanying text *supra*.

110. 435 U.S. at 840.

111. *Id.* at 841-42.

112. 436 U.S. 547 (1978).

113. Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978). For a discussion of *Landmark, see* notes 1-111 and accompanying text *supra*.

114. U.S. CONST. amend. IV. The Fourth Amendment provides that: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and 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."

115. Wolf v. Colorado, 338 U.S. 25 (1949).

116. The Supreme Court characterized a third-party search as "the recurring situation

fice. The object of the search in *Zurcher* was evidence pertaining to criminal activity which a member of the newspaper staff may have photographed and written about, but in which he did not participate. The crucial question in the case was procedural: whether such evidence can properly be obtained by means of a search warrant or whether its production must be compelled by service of a subpoena duces tecum.

A federal district court ruled that the First Amendment protects newspapers from being subjected to searches pursuant to a warrant, except where a clear showing could be made that upon service of a subpoena the evidence sought would be removed from the jurisdiction or destroyed, notwithstanding the issuance of a restraining order in conjunction with the subpoena.[117] The Court of Appeals for the Ninth Circuit affirmed *per curiam*, adopting the opinion of the district court.[118] The Supreme Court granted certiorari[119] and subsequently reversed the lower court decisions.

### 1. The Decision

The fact situation underlying the *Zurcher* litigation is uncomplicated.[120] On Friday, April 9, 1971, demonstrators then occupying the administrative offices of the Stanford University Hospital engaged in a violent altercation with nine police officers in a hallway of the occupied building. The officers were part of a joint force comprised of officers from the Santa Clara County Sheriff's and Palo Alto Police Departments, who had been called to the scene by the hospital director to oust the demonstrators. The latter had barricaded the doors to both ends of a hallway next to the administrative offices. After peaceful means failed to persuade the demonstrators to leave, the police forced their way in through the west end of the hallway. Simultaneously, the demonstrators, armed with sticks and clubs, burst through the east end of the hallway, attacking and injuring the nine officers stationed there. Since the police photographer and most other bystanders had congregated at the west end of the hall, few of the assailants were identified;

where state authorities have probable cause to believe that fruits, instrumentalities, or other evidence of crime is located on identified property but do not then have probable cause to believe that the owner or possessor of the property is himself implicated in the crime that has occurred or is occurring." 436 U.S. at 553.

117. Stanford Daily v. Zurcher, 353 F. Supp. 124 (N.D. Cal. 1972), *aff'd*, 550 F.2d 464 (9th Cir. 1977), *rev'd*, 436 U.S. 547 (1978).

118. 550 F.2d 464 (9th Cir. 1977), *rev'd*, 436 U.S. 547 (1978).

119. 434 U.S. 816 (1977).

120. The summary of the facts of the case is taken from the Supreme Court opinion. 436 U.S. at 550-52.

however, the officers did see someone photographing the fight from the east end of the hall.

In a special edition published the following Sunday, the *Stanford Daily*, the student newspaper of Stanford University, carried articles and photographs concerning the hospital demonstration and the hallway incident. The photographs carried the byline of a *Daily* staff member and indicated that he had been present at the east end of the hallway, giving rise to the inference that he might have photographed the assault on the nine officers. Accordingly, on the following day the Santa Clara County District Attorney's Office requested a warrant from the municipal court authorizing an immediate search of the *Daily*'s offices for any evidence the newspaper may have obtained regarding the hospital fight. The warrant was issued based on the municipal court's findings of " 'just, probable and reasonable cause for believing that: Negatives and photographs and films, evidence material and relevant to the identity of the perpetrators of felonies, to wit, Battery on a Peace Officer, and Assault with a Deadly Weapon, will be located [on the premises of the Daily].' "[121] The affidavit supporting the request for the search warrant did not link any *Daily* staff members with the unlawful activity.

Later that same day four policemen searched the *Daily*'s offices, accompanied by several *Daily* staff members. The officers inspected photographic laboratories, filing cabinets, desks and wastepaper baskets; locked rooms and drawers were not searched. The search yielded only those photographs which had already been published; no new evidence was discovered. Approximately one month later, the *Daily* and members of its staff instituted a civil action in federal court seeking declaratory and injunctive relief against all law enforcement agents responsible for the issuance and execution of the warrant.[122] The complaint alleged that the search of the *Daily*'s offices under color of law had denied the newspaper and its staff of rights guaranteed to them by the First, Fourth and Fourteenth Amendments to the United States Constitution.

The district court refused to issue an injunction but did grant the

121. 436 U.S. at 551 (quoting language from the search warrant, app. 31-32, issued Apr. 12, 1971, Santa Clara County Municipal Court).

122. The action was brought pursuant to 42 U.S.C. § 1983 (1976), which provides that, "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

*Daily*'s request for declaratory relief.[123] Although acknowledging the existence of probable cause to believe that relevant evidence regarding the criminal activity would be found in the *Daily*'s office, the court nonetheless held that under the circumstances a search warrant was a constitutionally impermissible means of obtaining such evidence.[124] Rather, the use of a subpoena duces tecum, unless made impracticable by the circumstances, was regarded by the district court as the appropriate procedure for third-party searches where the possessor of the evidence is not suspected of any crime.[125]

First Amendment considerations played a significant role in the district court decision. The defendants' contention that newspapers, reporters and photographers have no greater Fourth Amendment protections than other citizens was held to be without merit.[126] Judge Peckham reasoned that "[t]he First Amendment is *not* superfluous. Numerous cases have held that the First Amendment 'modifies' the Fourth Amendment to the extent that extra protections may be required when First Amendment interests are involved."[127] The court examined the threats to freedom of the press said to arise more readily from the use of a search warrant than from employing a subpoena: 1) police officers executing such warrants would, owing to the generally disorganized nature of newspaper offices, have the opportunity to rummage through drawers and cabinets, thus endangering confidential materials and relationships;[128] 2) unlike a subpoena duces tecum, search warrants are issued and executed *ex parte*, which deprives the newspaper and its staff of the protections afforded by "judicial control";[129] and 3) police searches might also jeopardize the newspaper's

123. 353 F. Supp. at 136.

124. *Id.* at 127.

125. *Id.* The court noted that impracticability could be established by a showing that the materials sought would be destroyed or removed from the jurisdiction despite a restraining order. *Id.* at 133.

126. *Id.* at 134.

127. *Id.* (emphasis in the original) (citing A Quantity of Books v. Kansas, 378 U.S. 205 (1964) (seizure of allegedly obscene books); Marcus v. Search Warrant, 367 U.S. 717 (1961) (seizure of allegedly obscene magazines); NAACP v. Alabama, 357 U.S. 449 (1958) (seizure of organization's membership lists); Demich, Inc. v. Ferdon, 426 F.2d 643 (9th Cir. 1960) (seizure of allegedly obscene motion picture film), *vacated and remanded on other grounds*, 401 U.S. 990 (1971); Bethview Amusement Corp. v. Cahn, 416 F.2d 410 (2nd Cir. 1969), *cert. denied*, 397 U.S. 920 (1970) (seizure of allegedly obscene motion picture film)). None of these cases dealt specifically with warrantless searches of newspaper offices.

128. 353 F. Supp. at 134-35. Such incursions by law enforcement agencies were thought to have the potential for chilling the exchange of information these confidential relationships foster, ultimately affecting the ability of the press to gather news. *Id.*

129. *Id.* at 135. In support of the need for such "judicial control" over searches of newspapers, the court cited Branzburg v. Hayes, 408 U.S. 665, 708 (majority opinion), 710 (Pow-

credibility and create a risk of self-censorship.[130]

In the view of the district court, a police search of a newspaper office creates an "overwhelming threat" to the proper functioning of the press, especially where less drastic means can be employed to secure the needed information.[131] The court therefore held that third-party searches of newspapers are constitutionally impermissible except where there is a clear showing before a magistrate that the materials sought will be destroyed or removed and that a restraining order would be futile.[132] Since the defendants had not made such a showing, the court declared the search of the *Daily*'s offices to have been unlawful.[133]

On appeal, the United States Supreme Court reversed.[134] Writing for the majority,[135] Justice White characterized the district court decision as placing such a severe burden on the state to justify the use of a search warrant that "the effect of the rule is that fruits, instrumentalities, and evidence of crime may be recovered from third parties only by subpoena, not by search warrant."[136] The Court contrasted this "sweeping revision of the Fourth Amendment" by the district court with the language of the Amendment and its subsequent interpretation in the federal judicial system, concluding that there was no direct authority for the rule propounded by the lower court.[137] Justice White

ell, J., concurring). *Branzburg* involved a newspaper reporter subpoenaed to testify before a grand jury regarding the sources for one of his stories.

130. 353 F. Supp. at 135.

131. *Id.*

132. *Id.* Judge Peckham underscored his concern for First Amendment values by adding: "To stop short of this standard would be to sneer at all the First Amendment has come to represent in our society." *Id.*

133. *Id.* The court also dismissed defendants' contentions that the *Daily* and members of its staff lacked standing to question the legality of the search and that this question was moot. *Id.* at 135-36.

134. Zurcher v. Stanford Daily, 436 U.S. 547 (1978).

135. Justice White was joined by Chief Justice Burger and Justices Blackmun, Powell and Rehnquist. Two dissenting opinions were filed, one by Justice Stewart, who was joined by Justice Marshall, and a second by Justice Stevens. Justice Powell wrote a separate concurring opinion in which he addressed the issues raised in Justice Stewart's dissent. Justice Brennan took no part in the consideration or decision of the case.

136. 436 U.S. at 553.

137. *Id.* at 554: "It is an understatement to say that there is no direct authority in this or any other federal court for the District Court's sweeping revision of the Fourth Amendment." (footnote omitted).

The district court had focused upon the Fourth Amendment rights of third parties, noting that few reported cases touched even generally upon the issue. 353 F. Supp. at 127. The district court was unable to cite any cases dealing specifically with whether or when a subpoena duces tecum should be used in lieu of a search warrant. Observing that the Fourth Amendment rights of third parties had previously been considered only in the context of

began his examination of the prior cases construing and applying the Fourth Amendment by quoting from the Court's recent decision in *Fisher v. United States*.[138] In *Fisher* the Framers' approach to personal privacy was interpreted to mean that "when the State's reason to believe incriminating evidence will be found becomes sufficiently great, the invasion of privacy becomes justified and a warrant to search and seize will issue."[139] Justice White also referred to the Court's decision in *Camara v. Municipal Court*.[140] In *Camara* the question of whether or not an administrative search warrant should issue under the standard of probable cause was said to turn on a balancing of the governmental interest justifying the intrusion against the constitutional standard of reasonableness.[141] Finally, Justice White observed that a recent decision of the Court[142] established that search warrants are not directed at persons but rather at "places" and "things," so that a warrant need not even name the person from whom the property will be seized.[143]

Based on this analysis of Fourth Amendment precedent, the Court

standing to challenge the legality of a search, *see, e.g.*, Alderman v. United States, 394 U.S. 165 (1969), the district court went on to examine state court cases dealing with what it believed to be an analogous situation to that presented in the instant case—the rights of third parties in the face of a warrantless seizure of property by the police. *See* Owens v. Way, 141 Ga. 796, 82 S.E. 132 (1914); Newberry v. Carpenter, 107 Mich. 567, 65 N.W. 530 (1895); Commodity Mfg. Co. v. Moore, 198 N.Y.S. 45 (Sup. Ct. 1923). In *Commodity Mfg.*, the New York Supreme Court came closest to anticipating the district court's position: "No case has been cited where the court has gone so far as to say that property, not an instrument of a crime, but only evidence of its commission, and which was the property of someone besides the defendant, could be seized either under a search warrant or as an incident of an arrest of defendant.

"I can well believe that property used in the commission of a crime, even though belonging to a third party, might properly be seized, and also that property not used in the commission of the crime, but containing evidence of the commission of the crime, might properly be seized, where it is the property of the accused; *but to sanction the seizure of the property of innocent persons, or persons not accused, not used in the commission of the crime, but merely because they contained evidence of the crime, would open the door to grave abuses of invasion of property rights*." 198 N.Y.S. at 47 (emphasis added).

Justice White rejected as inapposite the district court's reliance upon these cases, as well as its reliance on Bacon v. United States, 449 F.2d 933 (9th Cir. 1971) (a showing of probable cause to believe that a subpoena would be an impracticable alternative is required before a court can issue a warrant for the arrest of a material witness). Zurcher v. Stanford Dailey, 436 U.S. at 554 n.5. For a discussion of the lower court's analysis of the applicability of *Bacon, see* notes 206-10 and accompanying text *infra*.

138. 425 U.S. 391 (1976).
139. *Id.* at 400, *quoted in* 436 U.S. at 554.
140. 387 U.S. 523 (1967).
141. *Id.* at 534-35.
142. United States v. Kahn, 415 U.S. 143 (1974).
143. *See id.* at 155 n.15.

concluded that the state's interest in enforcing its criminal laws and in recovering evidence of violations of those laws is the same regardless of the degree of culpability attributable to the person occupying the premises to be searched or in possession of the evidence to be seized.[144] The Court thus rejected the premise underlying the district court holding, which Justice White found to be "that State entitlement to a search warrant depends on the culpability of the owner or possessor of the place to be searched and on the State's right to arrest him."[145] In support of this rejection of the lower court's position, the Court cited both *Camara* and *See v. City of Seattle*[146] for the proposition that the state need not rely on an individual's culpability as a prerequisite to the issuance of a search warrant. *Camara* and *See* were challenges to convictions for refusal to permit warrantless searches of commercial property.[147] The search in each instance was to have been conducted by representatives of municipal administrative agencies (housing and fire department inspectors), and was intended to ensure compliance with local housing and fire ordinances.[148] Justice White, writing for the majority in both *Camara* and *See*,[149]refused to follow the Court's earlier decision in *Frank v. Maryland*[150] and held that in civil as well as criminal cases, the Fourth Amendment requires that search warrants be issued before officials enter a private citizen's home or business premises.[151] Since the culpability of the individual property holders in *Camara* and *See* was deemed irrelevant to the state's right to conduct searches of their property, the *Zurcher* Court reasoned that culpability on the part of the *Daily* or its staff need not be a consideration in the case before it.[152] Consequently, the Court concluded that, "[t]he criti-

144. Zurcher v. Stanford Daily, 436 U.S. at 555.

145. *Id.*

146. 387 U.S. 541 (1967).

147. Appellant in *Camara* had been charged with violating San Francisco Housing Code § 507 and sought a writ of prohibition against his prosecution in state court. Appellant in *See* was convicted of violating the City of Seattle Fire Code § 8.01.150. These statutes made criminal the refusal to permit an inspection by the housing and fire authorities, respectively.

148. The endorsement of these warrantless searches by the lower courts in each case was based on the United States Supreme Court's decision in Frank v. Maryland, 359 U.S. 360 (1959). The Court in *Frank* had ruled that a search warrant was not a necessary prerequisite to an entry into a citizen's home to investigate sanitary conditions pursuant to a local health ordinance.

149. Justice White was joined in each case by Chief Justice Warren and Justices Black, Douglas, Brennan and Fortas. A dissenting opinion covering both cases was filed by Justice Clark, who was joined by Justices Stewart and Harlan.

150. 359 U.S. 360 (1959). *See* note 148 *supra*.

151. Camara v. Municipal Court, 387 U.S. at 534; See v. City of Seattle, 387 U.S. at 546.

152. 436 U.S. at 555-56. The validity of this reading of *Camara* is questionable in light of the facts underlying that case. The Court's opinion in *Camara* reveals that appellant

cal element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought."[153] In support of this conclusion, Justice White analyzed a prior case[154] which had challenged the right of police officers to search a car and seize contraband therefrom when the occupants were not subject to arrest. The Court there rejected the claim that the right of police to search was dependent on the right to arrest.[155] Justice White combined this rule with more recent interpretations of the Fourth Amendment, as reflected in Rule 41 of the Federal Rules of Criminal Procedure,[156] and found that "it is untenable to conclude that property may not be searched unless its occupant is reasonably suspected of crime and is subject to arrest."[157] In the *Zurcher* Court's opinion, the Fourth Amendment had established the proper balance between privacy interests and public need, and the interpretation of that Amendment postulated by the district court was therefore unnecessary and burdensome.[158]

In the next section of the majority opinion, the Court examined the reasons advanced by the district court in support of its decision. Justice White first questioned whether the lack of culpability on the part of the property owner requires the use of a subpoena rather than a search warrant. He noted that the *Daily* and its staff had conceded that if a third party knows that there is contraband on his premises, he is then sufficiently culpable to justify the issuance of a search warrant.[159] And once an innocent third party is apprised of the existence of such evidence on his property, there is no reason why he should then be

Camara was suspected of using the rear portion of his leasehold as a personal residence in violation of the building's occupancy permit. *See* 387 U.S. at 526. It was with knowledge of this possible violation that the housing inspector confronted appellant and requested permission to inspect the premises. Upon appellant's subsequent refusals to permit entry, he was arrested for violating the municipal housing code. *See* note 147 *supra*. It appears, therefore, that his possible culpability was a factor motivating the request to search the premises. *See* 387 U.S. at 526-27.

153. 436 U.S. at 556 (footnote omitted).

154. Carroll v. United States, 267 U.S. 132 (1925).

155. *Id.* at 158-59.

156. FED. R. CRIM. P. 41. *See* United States v. Ventresca, 380 U.S. 102, 105 n.1 (1965).

157. 436 U.S. at 559. *See* United States v. Manufacturers Nat'l Bank, 536 F.2d 699, 703 (6th Cir. 1976), *cert. denied sub nom.* Wingate v. United States, 429 U.S. 1039 (1977).

158. 436 U.S. at 559. The Court therefore held that, "the courts may not, in the name of Fourth Amendment reasonableness, forbid the States from issuing warrants to search for evidence simply because the owner or possessor of the place to be searched is not then reasonably suspected of criminal involvement." *Id.* at 560.

159. *Id.*

allowed to object to the search, withhold the evidence and insist upon service of a subpoena duces tecum.[160]

The Court also considered the potential impact of a subpoena requirement on the efficiency and success of law enforcement efforts. The Court posited two difficulties such a requirement would bring about and characterized them as creating "[serious] hazards to criminal investigation."[161] The first of these is that the seemingly innocent third party might not actually be blameless and may in fact be connected with or sympathetic to those who are culpable. Arguably such an individual could not be relied upon to retain evidence that might implicate or otherwise harm his friends. Secondly, the Court voiced concern that any close relationship between the third party and those suspected of criminal acts would result in the "real culprits [having] access to the property . . . [which] could easily result in the disappearance of the evidence, whatever the good faith of the third party."[162] In view of these potential impediments to the efforts of law enforcement agencies, the Court concluded that the use of search warrants is necessary to secure and preserve valuable evidence.[163]

The final section of the majority opinion addressed the question of whether and to what extent First Amendment considerations should modify the application of the Fourth Amendment when the subject of the search is a newspaper office. Justice White began by reciting the threats to the due functioning of the press claimed by the *Daily* to arise from such searches: 1) physical disruption resulting in publication delays; 2) loss of confidential sources; 3) deterrence of the recording and preservation of information; 4) chilling of the processing and dissemination of news; and 5) resort to self-censorship on the part of the press.[164] After acknowledging that the struggle which gave birth to the Fourth Amendment was largely one " 'between the Crown and the press,' "[165] Justice White briefly reviewed the judicial history of the tension between the First and Fourth Amendments. He referred to prior

160. *Id.* This assertion by the Court seems to ignore the possibility that the innocent third party may have a valid objection to the search on the ground that it is an unnecessary and unreasonable invasion of privacy.

161. *Id.* at 561.

162. *Id.*

163. *Id.* at 563. For an analysis of this aspect of the Court's opinion, *see* notes 232-35 and accompanying text *infra*.

164. 436 U.S. at 563-64.

165. *Id.* at 564 (quoting Stanford v. Texas, 379 U.S. 476, 482 (1965)). The Court also noted that "[w]here the materials sought to be seized may be protected by the First Amendment, the requirements of the Fourth Amendment must be applied with 'scrupulous exactitude.' " 436 U.S. at 564 (quoting Stanford v. Texas, 379 U.S. at 485).

decisions of the Court which had invalidated as too broad a warrant authorizing the search of a private home for materials relating to the Communist Party,[166] and which rejected as unconstitutional searches pursuant to a warrant where the required showing of probable cause was not made before a neutral and disinterested magistrate.[167] But in contrast to the district court's view that these First Amendment considerations require the use of a subpoena rather than a search warrant,[168] the Court concluded:

> [T]he prior cases do no more than insist that the courts apply the warrant requirements with particular exactitude when First Amendment interests would be endangered by the search. As we see it, no more than this is required where the warrant requested is for the seizure of criminal evidence reasonably believed to be on the premises occupied by a newspaper.[169]

Having articulated this standard for the issuance of warrants authorizing searches of newspaper offices, the Court examined the specific harms cited by the district court in support of its rule requiring the use of subpoenas. Justice White first stated his confidence in the ability of local magistrates to guard against searches of the type and scope that would actually interfere with the timely publication of a newspaper.[170] He further emphasized that if the requirement of reasonableness and specificity were properly applied to the issuance of search warrants, there would be no opportunity for police to rummage at large through newspaper offices; a search would therefore not inhibit editorial or publication decisions.[171] Finally, citing *Branzburg v. Hayes*,[172] Justice White underscored the Court's doubts that confidential sources would

166. Stanford v. Texas, 379 U.S. 476 (1965). The search warrant issued in *Stanford* was held to be the functional equivalent of a general warrant, the use of which it was the purpose of the Fourth Amendment to forbid. *Id.* at 480. *Cf.* note 165 *supra* (terms of the Fourth Amendment must be applied with "scrupulous exactitude" when First Amendment values are at stake).

167. *See, e.g.*, Lee Art Theatre, Inc. v. Virginia, 392 U.S. 636, 637 (1968) (obscene films); Marcus v. Search Warrant, 367 U.S. 717, 732 (1961) (obscene publications). The search warrants in these cases were held defective because their issuance was based solely on the conclusory allegations of police officers, without any independent inquiry by the magistrates. *See* 392 U.S. at 637; 367 U.S. at 732.

168. *See* notes 123-30 and accompanying text *supra*.

169. Zurcher v. Stanford Daily, 436 U.S. at 565.

170. *Id.* at 566.

171. *Id. See also id.* at 565: "Properly administered, the preconditions for a warrant—probable cause, specificity with respect to the place to be searched and the things to be seized, and overall reasonableness—should afford sufficient protection against the harms that are assertedly threatened by warrants for searching newspaper offices."

172. 408 U.S. 665 (1972). *Branzburg* held that the First Amendment does not afford a newspaper reporter a constitutional privilege against testifying before a grand jury regarding criminal activity he observed while performing his newsgathering function. Claims that

disappear or that the press would engage in self-censorship if searches of newspaper offices could be authorized by the issuance of warrants. Whatever marginal effect such searches might have on newsgathering, he noted, "does not make a constitutional difference in our judgment."[173]

The majority opinion concluded by pointing out that since the date of the search which gave rise to the instant action, there had been very few third-party searches of newspaper offices.[174] From this the Court inferred that law enforcement agencies were not abusing their power under the Fourth Amendment.[175] Any such abuses could be dealt with as they arose, an unlikely occurrence in the Court's view given the power of the press.[176] The Court also rejected the *Daily*'s claim that it should have been afforded an opportunity to litigate the state's right to obtain the materials sought before they were seized.[177] A subpoena requirement was not regarded as providing the press any greater protection than permitting searches pursuant to a warrant, since a showing of relevancy sufficient to support a finding of probable cause would, in the Court's view, also justify the issuance of a subpoena.[178] The Court did leave open the possibility of legislative or executive action "to establish nonconstitutional protections against possible abuses

forced disclosure by newspersons of confidential information or sources relating to criminal activity would greatly damage their effectiveness were rejected by the court. *Id.* at 693-99.

173. Zurcher v. Stanford Daily, 436 U.S. at 566.

174. *Id.*

175. *Id.*

176. *Id.*: "The press is not only an important, critical, and valuable asset to society, but it is not easily intimidated. . . ."

177. *Id.* The majority opinion stated that "presumptively protected materials are not necessarily immune from seizure under warrant for use at a criminal trial." *Id.* at 567. The Court found that most such seizures would not impose an unconstitutional prior restraint. *Id.* (citing Heller v. New York, 413 U.S. 483 (1973)).

178. 436 U.S. at 567. It should be noted, however, that with a warrant, the determination as to the existence of probable cause to search is made in an *ex parte* proceeding, whereas if a subpoena duces tecum is issued, the person or entity at whom it is directed will have an opportunity to litigate the issue of the state's entitlement to the material *before* it is seized. Thus, the opportunity to contest allegations of such entitlement may result in the quashing of the subpoena and the consequent preservation of the confidentiality of the material. In contrast, even if the validity of a search warrant can be successfully challenged, such a ruling can only be obtained after the material has been seized, when the harms arising from its disclosure will have already occurred. *See id.* at 575-76 (Stewart, J., joined by Marshall, J. dissenting). *See also* Branzburg v. Hayes, 408 U.S. 665, 710 (Powell, J., concurring).

In addition, the Court noted that certain privileges against complying with a subpoena, such as those based on the Fifth Amendment or a state shield law, "are largely irrelevant to determining the legality of a search warrant under the Fourth Amendment." 436 U.S. at 567. Utilization of the warrant procedure therefore permits the circumvention of important statutory and constitutional rights.

of the search warrant procedure."[179]

In addition to reiterating the contentions advanced and relied upon by the district court and adopted by the court of appeals,[180] Justice Stewart's dissenting opinion made two significant observations. Addressing the specific facts of the case, he pointed out that no showing had been made by the police that there was an existing emergency situation at the time the warrant was issued, nor was the evidence sought contraband or any other illegal instrumentality.[181] Moreover, there was no indication at the time the warrant was obtained that the *Daily* would not comply with a subpoena.[182] Given this situation, Justice Stewart argued that the police should have been required to establish the impracticability of a subpoena *before* the magistrate authorized the intrusion resulting from a search pursuant to a warrant.[183] The second important observation is Justice Stewart's contention that the First Amendment's specific guarantee of freedom of the press compels the conclusion that there is a significant difference between a search of a newspaper office and that of any other type of premises.[184] He found that the explicit constitutional protection for a free press justifies the rule prohibiting searches of newspaper offices pursuant to a warrant fashioned by the lower court.[185]

A separate dissent was filed by Justice Stevens,[186]wherein he argued that the Court had erred in its application of the doctrine of *War-*

179. *Id.*

180. *Id.* at 570-74 (Stewart, J., joined by Marshall, J., dissenting).

181. *Id.* at 574-75.

182. *Id.* at 575 & n.9.

183. *Id.* at 575.

184. *Id.* at 576. In addition to joining the majority opinion, Justice Powell wrote a separate concurring opinion in which he challenged this aspect of Justice Stewart's dissent. Justice Powell pointed out that the Fourth Amendment was largely a response to the struggle between the Crown and the press. 436 U.S. at 569 (Powell, J., concurring). Given this history, Justice Powell stated that if the Framers had wished to accord the press special protection against searches otherwise authorized by the Fourth Amendment, they would have formulated that Amendment explicitly to reflect that desire. *Id.* As Justice Stevens pointed out in his dissenting opinion, however, searches of the type carried out in the *Daily*'s offices—those for documentary evidence—were not permitted until the Court's decision in Warden v. Hayden, 387 U.S. 294 (1967). 436 U.S. at 577-79 (Stevens, J., dissenting). *See* notes 187-89 and accompanying text *infra*. In Justice Powell's view, First Amendment values can adequately be vindicated by a magistrate's consideration of the rights of the free press in connection with his determination of the reasonableness of the requested warrant. 436 U.S. at 570 & n.3 (Powell, J., concurring).

185. *Id.* at 576 (Stewart, J., dissenting, joined by Marshall, J.). Justice Stewart endorsed the district court decision only insofar as it granted special protection to newspapers. He agreed with the majority that the Fourth Amendment does not generally forbid third-party searches. *Id.* at 571 n.1.

186. *Id.* at 577 (Stevens, J., dissenting).

*den v. Hayden*.[187] The Court in *Hayden* extended the permissible scope of searches to include the seizure of "mere evidence," generally defined as documentary materials, in addition to that of the traditional objects of a search: contraband, weapons and plunder.[188] Justice Stevens noted that the pre-*Hayden* limitation on the permissible objects of a search had had the effect of restricting the category of persons who could properly be subjected to a search.[189] By permitting the seizure of documentary evidence of crime, the *Hayden* decision greatly expanded the number of persons whose privacy interests could be infringed by such searches. Where the object of the search is contraband or the fruits of crime, Justice Stevens found it reasonable to infer that the possessor is involved in criminal activity and that if given prior notice of the search will dispose of the evidence.[190] In such cases a showing of probable cause to believe that the individual is in fact in possession of such objects justifies the invasion of privacy.[191] But where mere documentary evidence, such as that sought from the *Stanford Daily*, is involved, the custodian is much less likely to be guilty of criminal wrongdoing and is more likely to honor a subpoena or informal request to produce the material.[192] In such cases, Justice Stevens contended that the probable cause standard can only be satisfied by a showing that the subject of the search is involved in criminal activity or, if given notice, will conceal or destroy the evidence.[193] Since no such showing was made in the warrant application in *Zurcher*, Justice Stevens would have held that the search of the *Daily* offices was unreasonable and therefore violative of the Fourth Amendment.[194]

### 2. Analysis

In order better to analyze the Court's decision in *Zurcher*, consideration of the case will be trisected. The first section will examine the validity of the Court's holding that the Fourth Amendment does not grant special protection to non-culpable third-party possessors of evidence sought by law enforcement agencies. The second section will evaluate the necessity of using search warrants rather than subpoenas. The third section will scrutinize the possible harm to the press that may

187. 387 U.S. 294 (1967).
188. *Id.* at 300-10.
189. 436 U.S. at 579 (Stevens, J., dissenting).
190. *Id.* at 581.
191. *Id.*
192. *Id.*
193. *Id.* at 582-83.
194. *Id.* at 583.

arise in the wake of *Zurcher*. The potential for legislative or executive action to bolster the First Amendment guarantees potentially threatened by the decision will also be discussed.

Before embarking on this specific analysis, however, it is important to make one general observation regarding the contrast between the approach taken by a majority of the Supreme Court in *Zurcher* and that adopted by the district court and echoed by several justices who dissented from the Court's decision. The crucial difference is that a majority of the Supreme Court treated *Zurcher* essentially as a case posing issues relating to the construction and application of the Fourth Amendment. Consequently, the First Amendment issues were given secondary importance by the Court. In contrast, the district court and several dissenters on the Supreme Court focused directly on the First Amendment implications of a search of a newspaper office. The *Zurcher* majority first inquired whether or not the state had a valid interest in and probable cause to conduct the search. Once that was established, the Court required only that the warrant requirements be applied with "scrupulous exactitude" when the premises to be searched are a newspaper office.[195] Conversely, the district court and Justices Stewart and Marshall looked first to the *Stanford Daily*'s rights under the First Amendment and then sought to weigh those rights against the state's interest in obtaining the materials. Finding that the state had failed to show that the evidence sought could not be obtained in a less intrusive manner than by a search pursuant to a warrant, the district court and these dissenters urged that an appropriate balancing of interests could best be struck by limiting the use of search warrants against newspapers to those instances where a subpoena duces tecum would be impracticable.[196]

*a. The Court's Interpretation of the Fourth Amendment*

The Supreme Court based its rejection of the district court's interpretation of the Fourth Amendment on a number of grounds, each of which merits examination. The first was that nothing in the language of the Fourth Amendment precludes the issuance of third-party search warrants. The Court rejected as inapposite the authorities relied upon by the district court[197] and founded its own view on language in *United States v. Kahn*[198] which suggested that search warrants are not directed

195. *Id.* at 564 (majority opinion). *See* text accompanying note 169 *supra*.
196. 436 U.S. at 575 (Stewart, J., joined by Marshall, J., dissenting).
197. *Id.* at 554. *See* note 137 and accompanying text *supra*.
198. 415 U.S. 143 (1974).

at persons but rather at "places" and "things."[199] The inference the Court appeared to draw from *Kahn* was that the requirements of the Fourth Amendment are satisfied, even where the person or persons at whom the search is directed are not specified, when probable cause for the search is demonstrated.[200] Although the Court's reliance on *Kahn* may not have been well founded,[201] it is the summary rejection of the authorities cited by the district court that requires closer examination.

The Court's rejection of the four state cases cited in the district court opinion[202] is understandable in light of its ruling in *Warden v. Hayden*[203] that "mere evidence" can properly be the object of a search.[204] Since the cases relied upon by the lower court were pre-*Hayden* decisions which did not address the specific question of whether the issuance of a subpoena is a preferable alternative to the use of a search warrant, they were properly held inapposite by the Supreme Court. The same cannot be said for the Court's rejection of the district court's argument by analogy to *Bacon v. United States*.[205] In *Bacon* the Ninth Circuit Court of Appeals held the issuance of a warrant for the arrest of a material witness invalid for failure to establish probable cause to believe that securing the witness's presence by means of subpoena would be impractical.[206] The district court in *Zurcher* accepted the *Daily*'s argument that "if one not suspected of a crime cannot be *arrested* unless there is a showing that subpoena is impracticable, one not suspected of a crime cannot be searched unless there is a showing

199. *Id.* at 155 n.15.

200. 436 U.S. at 555.

201. A careful reading of the cited footnote in *Kahn* makes the Court's reliance on it questionable. *Kahn* dealt with the question of whether the wiretapped conversations of a person not named in the application seeking authorization for the wiretap could subsequently be used as evidence to prosecute the subject of the tap. But the basis for the decision in *Kahn* was the Court's construction of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520 (1976); it did not rest upon constitutional grounds. *See* 415 U.S. at 150, 152-55. The footnote cited by the Court in *Zurcher* was therefore merely dicta. Further, the *Kahn* Court stated in the same footnote that "even a warrant failing to name the owner of the premises at which a search is directed, *while not the best practice*, has been held to pass muster under the Fourth Amendment." *Id.* at 155 n.15 (emphasis added). It thus appears that while search warrants which do not specify the person from whom the material is to be seized are permissible, the Court in *Kahn* did attach some importance to naming the party whose premises are to be searched, an emphasis not reflected in the *Zurcher* Court's reference to *Kahn*.

202. Owens v. Way, 141 Ga. 796, 82 S.E. 132 (1914); Newberry v. Carpenter, 107 Mich. 567, 65 N.W. 530 (1895); People v. Carver, 172 Misc. 820, 16 N.Y.S.2d 268 (County Ct. 1939); Commodity Mfg. Co. v. Moore, 198 N.Y.S. 45 (Sup. Ct. 1923).

203. 387 U.S. 294 (1967).

204. *Id.* at 301-02.

205. 449 F.2d 933 (9th Cir. 1971).

206. *Id.* at 943.

that a subpoena duces tecum is impracticable."[207] In response to the argument that *Bacon* dealt only with the issue of permissible grounds for an arrest and was not a search and seizure case, the district court replied: "But historically the right against unlawful seizures has if anything been *more* protected, not less protected, than the right against unlawful arrests."[208] The argument by analogy to *Bacon* was deemed strong enough by the district court, and subsequently by the court of appeals, to compel the conclusion that no search warrant can issue against a third party unless the state shows that resort to a subpoena is impractical.[209] Given this heavy reliance on *Bacon*, it would appear that the case merited greater attention from the Supreme Court than its summary treatment in a footnote.[210]

The second ground relied upon by the Supreme Court in reversing the district court decision was that the culpability of the third-party property holder is immaterial to the state's interest in enforcing its criminal law and recovering evidence of crime.[211] The Court bolstered this contention by reference to *Camara v. Municipal Court*[212] and *See v. City of Seattle*.[213] The applicability of *Camara* and *See* in the factual context of *Zurcher* is questionable for several reasons. First, at least insofar as *Camara* is concerned, it is not at all clear that the culpability of the property holder was not a factor in the Court's decision.[214] Secondly, neither of these cases arose initially out of situations involving the issuance of search warrants. The common issue in *Camara* and *See* was whether city health and fire inspectors could enter private premises without judicial authorization for the purpose of conducting inspections to determine compliance with municipal ordinances. Petitioners

207. 353 F. Supp. at 129 (emphasis in the original) (footnote omitted).

208. *Id.* at 130 (emphasis in the original) (citing Kaplan, *Search and Seizure: A No-Man's Land in Criminal Law*, 49 CAL. L. REV. 474 (1961); Orfield, *Warrant of Arrest in Summons upon Complaint in Federal Criminal Procedure*, 27 U. CIN. L. REV. 1 (1958)). Defendants had also attempted to distinguish *Bacon* on the ground that it was based on 18 U.S.C. § 3149 (1976) and Rule 46(b) of the Federal Rules of Criminal Procedure rather than the Fourth Amendment. *See* 353 F. Supp. at 129. The district court ruled, however, that the procedures set out in the Federal Rules are mandated by the Fourth Amendment. *Id.* (citing Jones v. United States, 357 U.S. 493 (1958); Giordenello v. United States, 357 U.S. 480 (1958)).

209. 353 F. Supp. at 130.

210. Justice White rejected the applicability of *Bacon* because "that case dealt with arrest of a material witness and is unpersuasive with respect to the search for criminal evidence." Zurcher v. Stanford Daily, 436 U.S. at 554 n.5.

211. *Id.* at 555.

212. 387 U.S. 523 (1967).

213. 387 U.S. 541 (1967).

214. *See* note 152 *supra*.

in both cases insisted that the inspectors obtain search warrants before they would grant them permission to enter. The Supreme Court subsequently vindicated their claims, holding that a search warrant is required for such inspections.

Since search warrants were required in *Camara* and *See* regardless of the culpability of the property-holders there, the *Zurcher* Court seemed to infer that the same rule should hold true in the case before it. The difficulty with this analysis is that in *Camara* and *See* there existed no less burdensome alternative to the use of a search warrant, while there was such an alternative in *Zurcher*. The only viable method for inspecting a personal residence or business premises is by a search. The same is not true in situations such as that presented in *Zurcher*, where the magistrate could have issued a subpoena for the desired materials and thereby accomplished their acquisition. In view of the Court's apparent unwillingness to consider the district court's analysis based on its analogy to *Bacon*,[215] it seems inconsistent for the Court to have relied on such distinguishable cases as *Camara* and *See*.

An additional problem with the majority's discussion of the culpability question is its failure to squarely address two arguments made by the lower court. The district court stated that "as a historical matter the notion of search warrants has involved only those suspected of a crime."[216] It was perhaps in response to this observation that the Supreme Court presented its analysis of Rule 41 of the Federal Rules of Criminal Procedure to show that considerations relating to searches and seizures are separate and distinct from arrest procedures.[217] If so, the Court missed the thrust of the district court's argument. The lower court only felt that in light of the historical limitation on the use of search warrants to those suspected of crime, a less burdensome alternative that could achieve the same results should be utilized to obtain evidence from innocent third parties.[218]

The district court also noted that the practice of issuing search

215. *See* notes 205-10 and accompanying text *supra*.

216. 353 F. Supp. at 131. In support of this contention, the district court cited Henry v. United States, 361 U.S. 98, 100 (1959); United States v. Poller, 43 F.2d 911, 914 (2d Cir. 1930) (opinion of Learned Hand, J.); Kaplan, *Search and Seizure: A No-Man's Land in Criminal Law*, 49 CAL. L. REV. 474, 475-77 (1961).

217. *See* 436 U.S. at 558-59 (citing ALI, A MODEL CODE OF RE-ARRAIGNMENT PROCEDURE, COMMENTARY 491 (Proposed Off. Draft 1975)). *See also* United States v. Manufacturers Nat'l Bank, 536 F.2d 699, 703 (1976), *cert. denied sub nom.* Wingate v. United States, 429 U.S. 1039 (1977). *See* text accompanying note 157 *supra*.

218. *Cf.* 436 U.S. at 582-83 (Stevens, J., dissenting) (where the object of a search is an innocent third party, probable cause can only be established by a showing that if notice were given, he would conceal or destroy the evidence sought).

warrants without regard to the culpability of the person at whom the search is directed results in the inequitable treatment of innocent third parties. Whereas the exclusionary rule is available to vindicate the rights of criminal defendants, "[a] third-party . . . does not have the protection or deterrent of the exclusionary rule, for by definition he is not about to be tried for a crime."[219] Consequently, the district court held that in the case of an innocent third party, "an additional safeguard is necessary to assure that his Fourth Amendment rights are not trampled. That protection is the obligation of law enforcement to use a subpoena duces tecum unless it is shown, through sworn affidavits, that it is impractical to do so."[220]

Justice White was unpersuaded as to the necessity of this additional requirement. He asserted that the existing provisions and interpretations of the Fourth Amendment constitute an adequate balancing of the individual's right of privacy against the public need, regardless of whether a subpoena duces tecum is a less intrusive alternative.[221] The majority went further in rejecting the need for additional Fourth Amendment protections, relying on the reasoning of the Court's opinion in *Alderman v. United States*[222] to conclude that "the interest in deterring illegal third-party searches does not justify a rule such as that adopted by the District Court."[223] The majority also stated that "it would be placing the cart before the horse to prohibit searches otherwise conforming to the Fourth Amendment because of a perception that the deterrence provided by the existing rules of standing is insufficient to discourage illegal searches."[224] Finally, the district court was chastised for having overlooked the California Supreme Court's previ-

219. 353 F. Supp. at 132.

220. *Id.* (footnote omitted).

221. 436 U.S. at 559.

222. 394 U.S. 165 (1969). In *Alderman*, Justice White, writing for a majority of the Court, noted that "[t]he established principle is that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence." *Id.* at 171-72. *See, e.g.*, Wong Sun v. United States, 371 U.S. 471, 492 (1963); Goldstein v. United States, 316 U.S. 114, 121 (1942). He went on to state that "[w]e adhere to . . . the general rule that Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." 394 U.S. at 174. *See* Simmons v. United States, 390 U.S. 377, 389 (1968); Jones v. United States, 362 U.S. 257, 260-61 (1960).

223. 436 U.S. at 562 n.9. The Court in *Alderman* had ruled that the additional deterrent effect of extending the exclusionary rule did not "justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth." 394 U.S. at 175.

224. 436 U.S. at 562-63 n.9 (citing Warden v. Hayden, 387 U.S. 294, 309 (1967)).

ous ruling in *Kaplan v. Superior Court*[225] that the legality of a search and seizure can be challenged by anyone against whom the evidence obtained is used, regardless of whether his own Fourth Amendment rights were violated. In this vein, however, the *Zurcher* Court failed to recognize the apparent inconsistency between its views and the reasoning underlying *Kaplan*. In extending the applicability of the exclusionary rule beyond the parameters delineated in *Alderman*, the California Supreme Court in *Kaplan* reaffirmed its position that " 'if law enforcement officers are allowed to evade the exclusionary rule by obtaining evidence in violation of the rights of third parties, its deterrent effect is to that extent nullified. Moreover, such a limitation virtually invites law enforcement officers to violate the rights of third parties . . . .' "[226] But it was left unclear by the Supreme Court in *Zurcher* how California law would provide any protection for the rights of the *Stanford Daily* and its staff in an action for declaratory and injunctive relief brought in federal court under a federal statute.[227] If *Kaplan* grants the *Daily* no substantive rights, its very inapplicability together with its rationale would seem to support the district court's perception that additional Fourth Amendment protections are required for third-party searches. Thus, the *Zurcher* majority's reference to *Kaplan* does not resolve the question of the need for additional protections, but rather serves to call attention to the differing views of the United States and California Supreme Courts.

*b. The State's Interest—The Necessity of Search Warrants*

One basis for the district court's holding was its belief that requiring a subpoena for most third-party searches would not substantially impede criminal investigations. A majority of the Supreme Court found, however, that the state's interest in efficient and successful law enforcement would be seriously disserved if the use of search warrants was limited as provided under the lower court opinion. Two hypothetical examples of this undermining influence were advanced in the body of the majority opinion, with a third possibility discussed in a footnote.[228] Because search warrants are frequently employed early in an investigation, the Court suggested that the "seemingly blameless" third party who possesses the evidence may not turn out to be innocent after

225. 6 Cal. 3d 150, 491 P.2d 1, 98 Cal. Rptr. 649 (1971).

226. 6 Cal. at 157, 491 P.2d at 8, 98 Cal. Rptr. at 656 (quoting People v. Martin, 45 Cal. 2d 755, 760, 290 P.2d 855, 860 (1955)).

227. The action in *Zurcher* was brought pursuant to 42 U.S.C. § 1983 (1976). *See* note 122 *supra*. The district court had jurisdiction under 28 U.S.C. § 1343(3) (1976).

228. 436 U.S. at 561 & n.8.

all—and even if not directly culpable might still not be relied upon to surrender evidence which implicates his friends.[229] As a corollary to this possibility, Justice White stated that "it is likely that the real culprits will have access to the property, and the delay involved in employing the subpoena *duces tecum* . . . could easily result in the disappearance of the evidence."[230] Finally, it was suggested in a footnote that the use of a subpoena would allow the recipient to interpose a Fifth Amendment challenge to the request, and that the resultant litigation could "seriously impede criminal investigations."[231]

The Court's concern regarding the first two problems is unsupported either by authority or specific examples indicating the extent to which such problems have occurred in the past. As Justice Stevens pointed out in his dissenting opinion, prior to the change brought about by the Court's decision in *Warden v. Hayden*,[232] documentary evidence was routinely obtained by subpoena.[233] This procedure assumed that the person in possession of the evidence would honor the subpoena, and the *Zurcher* majority did not question its effectiveness. Moreover, the Court's assertion that problems of preserving evidence would occur and thereby hamper law enforcement efforts is not supported by the facts in *Zurcher*. As the district court pointed out, "[t]here was no hint whatsoever that the sought after materials would be destroyed or removed from the jurisdiction."[234] Although the *Daily* apparently had announced a policy of destroying any photographs that might implicate the protesters,[235] there is no evidence that such a destruction took place and the majority did not cite this policy in support of its holding. Even if it could be assumed that the *Daily* would not have preserved evidence of the assault on the police, it is unlikely that the same problem would arise in other factual contexts. It is difficult to believe, for example, that when a member of a newspaper staff photographs a bank robbery, he will return the incriminating photographs to the bank robbers. And it can be assumed that third parties will generally not act so as to impede criminal investigations. Yet this is what the unqualified language in *Zurcher* appears to suggest.

The third impediment to law enforcement efforts said to arise from the enforced use of the subpoena procedure—that challenges to the va-

229. *Id.* at 561.
230. *Id.*
231. *Id.* at 561-62 n.8.
232. 387 U.S. 294 (1967). *See* notes 187-89 and accompanying text *supra*.
233. 436 U.S. at 581 (Stevens, J., dissenting).
234. 353 F. Supp. at 129 n.2.
235. 436 U.S. at 568 n.1 (Powell, J., concurring).

lidity of subpoenas on Fifth Amendment grounds could be interposed and would slow investigations—is similarly based on conjecture and unsupported by authority. It seems doubtful that a third party would object to a subpoena merely out of a desire not to cooperate with the authorities. After all, such a course of conduct might result in the police focusing their attention on an individual previously believed innocent of any wrongdoing. And if the possessor of the evidence does have a valid Fifth Amendment claim, there is no reason why he should not be given an opportunity to assert it. Given the speculative nature of the other problems cited by the Court, it is questionable whether this additional concern justifies the Court's endorsement of the belief that "the warranted search is necessary to secure and to avoid the destruction of evidence."[236]

### *c. The Impact of* Zurcher *on First Amendment Guarantees*

At the root of the decision in *Zurcher* is the belief on the part of the majority that searches authorized by warrants, when properly conducted, will not significantly impinge on the functioning of a free press.[237] This belief and the specific conclusions derived therefrom by the Court were challenged in Justice Stewart's dissenting opinion, in which Justice Marshall joined. Although he agreed with the majority's conclusion as to the permissibility of third-party searches under the Fourth Amendment,[238] Justice Stewart argued that the First Amendment's express grant of protection to the press justifies requiring the use of a subpoena rather than a search warrant when the possessor of the evidence is a newspaper. He found it "self-evident that police searches of newspaper offices burden the freedom of the press,"[239] pointing out that such searches can be lengthy and disruptive[240] and would necessarily entail police examination of materials obtained from informers and other confidential sources—a prospect which could compel the newspaper to engage in self-censorship.[241]

Regarding the detrimental effect such searches would have on the vital confidential relationships developed by reporters, Justice Stewart

236. *Id.* at 563 (footnote omitted).

237. *See* notes 164-73 and accompanying text *supra*.

238. 436 U.S. at 571 n.1 (Stewart, J., joined by Marshall, J., dissenting).

239. *Id.* at 571.

240. *See, e.g.*, Note, *Search and Seizure of the Media: A Statutory, Fourth Amendment and First Amendment Analysis*, 28 STAN. L. REV. 957, 957-59 (1976) (describing one search of a Los Angeles radio station that lasted over eight hours).

241. 436 U.S. at 573 n.6 (Stewart, J., joined by Marshall, J., dissenting).

distinguished the ruling in *Branzburg v. Hayes*,[242] relied on by the majority,[243] from the instant case. He pointed out that whereas *Branzburg* dealt with "the more limited disclosure of a journalist's sources caused by compelling him to testify,"[244] the question in *Zurcher* was not whether there is an absolute First Amendment privilege against disclosure, but rather what is the most appropriate and least burdensome means of acquiring relevant evidence from a newspaper.[245] After reviewing the circumstances leading to the issuance of the search warrant,[246] he concluded that no impediment to law enforcement had been demonstrated in *Zurcher*, but that there was a great potential for harm in the wake of the majority's decision.[247]

Media concern over the impact of the *Zurcher* decision may be lessened if the legislature or the executive branch acts on the invitation extended by the majority to enact suitable safeguards against abuses of discretion in the issuance of search warrants directed at newspapers.[248]

## II. The Broadcast Media and the First Amendment: *Federal Communications Commission v. Pacifica Foundation*

In *Federal Communications Commission v. Pacifica Foundation*,[249] the United States Supreme Court was called upon to decide whether the Federal Communications Commission (FCC) has statutory and constitutional authority to impose sanctions for the broadcasting of language which, although not obscene, can be characterized as "indecent" and "patently offensive" when broadcast at a time when children are likely to be in the listening audience.[250] In resolving this question, the Court considered whether non-obscene speech can properly be re-

242. 408 U.S. 665 (1972).

243. *See* note 172 and accompanying text *supra*.

244. 436 U.S. at 574 (Stewart, J., joined by Marshall, J., dissenting).

245. *Id.*

246. *See* notes 181 & 182 and accompanying text *supra*.

247. 436 U.S. at 572-74 & n.8. Justice Stewart's concern over the effect the *Zurcher* decision will have on the press has been echoed by representatives of the mass media since the decision was handed down. *See, e.g.*, Javoslovsky, *Police in the Newsroom: The Stanford Case*, Wall St. J., June 20, 1978, at 20, cols. 4-6; Wall St. J., June 13, 1978, at 24, cols. 1-2; S.F. Chronicle, June 27, 1978, at 11, cols. 2-5.

248. *See* note 179 and accompanying text *supra*.

249. 98 S. Ct. 3026 (1978).

250. For discussions of the FCC's power to regulate obscene language, *see generally*, Comment, *Broadcasting Obscene Language: The Federal Communications Commission and Section 1464 Violations*, 1974 ARIZ. ST. L.J. 457 (1974); Note, *Morality and the Broadcast Media: A Constitutional Analysis of FCC Regulatory Standards*, 84 HARV. L. REV. 664 (1971); Note, *Filthy Words, the FCC, and the First Amendment: Regulating Broadcast Obscenity*, 61 VA. L. REV. 579 (1975); Note, *Offensive Speech and the FCC*, 79 YALE L.J. 1343 (1970).

stricted as to the time, place and manner of its dissemination, and also whether a distinction can constitutionally be drawn between "indecent" and "obscene" language.

### *A. The Decision*

In the early afternoon of October 30, 1973, a man and his young son were driving in New York City and listening to Station WBAI, licensed to the Pacifica Foundation. A comedy monologue by satirist George Carlin was being broadcast as part of a regularly scheduled live program, "Lunchpail," whose subject that day was an analysis of attitudes towards language held by contemporary society. The monologue, entitled "Filthy Words," was originally delivered before a live theatre audience, and sought to ridicule societal restrictions on the use of certain words, especially over the airways.[251] The father subsequently filed a complaint with the FCC stating that the airing of the monologue during a time when children were likely to be listening should not have been permitted.

On February 21, 1975, the Commission responded to the complaint by issuing a Memorandum Opinion and Declaratory Order granting the complaint and holding that Pacifica "could have been the subject of administrative sanctions" for the broadcast.[252] The Commission derived its authority to regulate indecent broadcasting from 18 U.S.C. § 1464, which specifically prohibits "obscene, indecent or pro-

251. "Filthy Words" is a monologue from the live album "George Carlin, Occupation: Foole," by Little David Records. A transcript of the monologue is appended to the decision of the Supreme Court, 98 S. Ct. at 3041-43. The words identified by the satirist were "shit," "piss," "fuck," "cunt," "cocksucker," "motherfucker" and "tits." They were not meant by him to comprise an exhaustive list; to the "original seven" words, Carlin would add "fart, turd, and twat." 98 S. Ct. at 3043. Although the FCC did not consider these additions to the list in its opinion, holding only that the broadcast of the "original seven" was indecent, 56 F.C.C.2d 94, 99 (1975), sanctions presumably could be imposed by the Commission in the future should it be determined that "fart, turd, and twat" are indecent as well. Other words might well be considered. For example, Georgia state Senator Julian Bond and the NAACP have filed suit with the FCC seeking to have the word "nigger" added to the list. S.F. Sunday Examiner & Chronicle, Aug. 20, 1978 (World), at 27.

252. 56 F.C.C.2d 94, 99 (1975). The Commission declined to impose formal sanctions on Pacifica, noting instead that the Order would be "associated with the station's license file," *id.*, and would be considered in the event subsequent complaints were filed. Under 47 U.S.C. § 503(b)(1) (1970), the Commission is empowered to impose forfeitures for violations of 18 U.S.C. § 1464 (1976). *See* note 253 *infra*. Specifically: "(1) Any licensee or permittee of a broadcast station who . . . (E) violates section . . . 1464 of Title 18, shall forfeit to the United States a sum not to exceed $1000. Each day during which such violation occurs shall constitute a separate offense. Such forfeiture shall be in addition to any other penalty provided by this chapter." 47 U.S.C. § 503(b)(1) (1970).

fane language,"[253] and from 47 U.S.C. § 303(g) which generally requires the Commission to "encourage the larger and more effective use of radio in the public interest."[254] In reaching its determination that the Carlin monologue was indecent, the Commission first observed that the broadcast medium has special qualities of intrusiveness which require a different standard of analysis than is normally applied to other, less intrusive forms of expression.[255] Particularly important to the Commission was the possibility, recognized by the Supreme Court in *Miller v. California*,[256] that inherent in the broadcasting medium is " 'a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles.' "[257]

Turning to the definition of "indecent," the Commission explained that, in its view, the term was not subsumed under the concept of obscenity, but was instead subject to an independent definition.[258] In reformulating the definition of "indecent" under section 1464,[259] the

253. 56 F.C.C.2d at 94 n.1. 18 U.S.C. § 1464 (1976) provides in full: "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both." The Commission had previously defined "indecent" to mean material that is "(a) patently offensive by contemporary community standards; and (b) is utterly without redeeming social value." Eastern Educ. Radio (WUHY), 24 F.C.C.2d 408, 412 (1970).

254. 56 F.C.C.2d at 94 n.1. 47 U.S.C. § 303(g) (1970) outlines the general powers and duties of the Commission.

255. 56 F.C.C.2d at 96-97. The Commission advanced four considerations in support of its view that a different standard of analysis is required for the broadcast media: "(1) [C]hildren have access to radios and in many cases are unsupervised by parents; (2) radio receivers are in the home, a place where people's privacy interest is entitled to extra deference, see Rowan v. Post Office Dept., 397 U.S. 728 (1970); (3) unconsenting adults may tune in a station without any warning that offensive language is being or will be broadcast; and (4) there is a scarcity of spectrum space, the use of which the government must therefore license in the public interest." *Id.* at 97.

256. 413 U.S. 15 (1973). *See* note 278 *infra*.

257. 56 F.C.C.2d at 97 (quoting Miller v. California, 413 U.S. at 19).

258. 56 F.C.C.3d at 97. The Commission cited three federal circuit court of appeals decisions in support of its position: United States v. Smith, 467 F.2d 1126 (7th Cir. 1972) (term "indecent" not necessarily included within definition of "obscene" and should be defined on retrial); Tallman v. United States, 465 F.2d 282 (7th Cir. 1972) ("indecent" not defined by court, but no prejudice to defendant where he was prosecuted only for using "obscene" language); Gagliardo v. United States, 366 F.2d 720 (9th Cir. 1966) (held reversible error where trial court did not issue jury instructions defining the term "indecent").

Although no court had previously defined "indecent" under § 1464, the Commission itself had, prior to Miller v. California, defined the term to mean that "the material broadcast is (a) patently offensive by contemporary standards; and (b) is utterly without redeeming social value." Eastern Educ. Radio (WUHY), 24 F.C.C.2d 408, 412 (1970). Inasmuch as this definition was tied to the then existing obscenity standard, Memoirs v. Massachusetts, 383 U.S. 413, 418 (1966), the Supreme Court's adoption of a new obscenity test in *Miller* required the Commission to update its definition of "indecent."

259. *See* note 258 *supra*.

Commission drew from the law of public nuisance.[260] Under nuisance law, behavior is generally *channelled* rather than *prohibited*. Thus, the Commission defined "indecent" to mean "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, *at times of the day when there is a reasonable risk that children may be in the audience*."[261] Although the Commission did not impose sanctions on the Pacifica Foundation, this new definition of "indecent" would, in future cases, allow the Commission to enforce its conviction that "such words [as the seven in the Carlin broadcast] are indecent within the meaning of the statute and have no place on radio when children are in the audience."[262]

In addition to the majority opinion, three concurring statements were filed. Commissioner Reid approved of the majority viewpoint but felt that it did not go far enough. In her opinion the indecent language of the monologue was inappropriate for broadcast at any time, whether night or day.[263] Whereas the Commission sought to channel broadcasts so as to limit possible exposure to children, Commissioner Reid would have prohibited indecent language from being broadcast at any time.[264] This view was shared by Commissioner Quello, who noted his support succinctly: "Garbage is garbage. . . . I believe such words are reprehensive no matter what the broadcast hour."[265]

260. 56 F.C.C.2d at 98. The Commission cited two federal decisions dealing with public nuisance statutes as examples of the principles supporting its new contextual definition of "indecent." *See* Von Sleichter v. United States, 472 F.2d 1244 (D.C. Cir. 1972); Williams v. District of Columbia, 419 F.2d 638 (D.C. Cir. 1969) (en banc). For criticism of the Commission's "nuisance" theory, see Chief Judge Bazelon's statement in favor of granting a rehearing en banc in Illinois Citizens Comm. for Broadcast v. FCC, 515 F.2d 397, 418-19 n.48 (D.C. Cir. 1975). *See also*, Pacifica Foundation v. FCC, 556 F.2d 9, 19 n.3 (D.C. Cir. 1977) (Bazelon, C.J., concurring). On the use of nuisance analysis as a method of regulating obscenity, *see generally*, Note, *Porno Non Est Pro Bono Publico: Obscenity as a Public Nuisance in California*, 4 HASTINGS CONST. L.Q. 385 (1977); Note, *Restricting the Public Display of Offensive Materials: The Use and Effectiveness of Public and Private Nuisance Actions*, 10 U.S.F. L. Rev. 232 (1975).

261. 56 F.C.C.2d at 98 (emphasis added).

262. *Id.* The Commission noted that a different standard for defining "indecent" might conceivably be used in the late evening hours when few children are in the audience. The definition would remain the same insofar as the language was concerned, *i.e.*, words which are patently offensive as measured by the contemporary community standards for the broadcast medium would remain prohibited. However, the Commission would also consider whether these late-evening expressions had serious literary, artistic, political or scientific value. 56 F.C.C.2d at 98 (citing Miller v. California, 413 U.S. 15 (1973)).

263. 56 F.C.C.2d at 102 (Reid, Comm'r., concurring).

264. *Id.* *See* notes 260-61 and accompanying text *supra*.

265. 56 F.C.C.2d at 103 (Quello, Comm'r., concurring).

Commissioner Robinson, joined by Commissioner Hook, concurred in the issuance of the order, but offered a more extensive review of the problems courts have faced in attempting to define the terms "obscene" and "indecent."[266] He noted that the " 'core problem'—what constitutes obscenity—has never been satisfactorily unraveled."[267] He noted as well that "people do not have an unlimited right to avoid exposure to [obscenity]."[268] In the view of Commissioners Robinson and Hook, the Commission's decision, embracing a "nuisance" analysis, adopted a limited but pragmatic approach to accommodating the interests protected by the First Amendment and the interests of the public in having the young protected from exposure to inappropriate language.

Shortly after the issuance of the order, the Radio Television News Directors Association (RTNDA) petitioned the Commission for clarification of the standards for determining indecency.[269] The RTNDA was concerned that the order would expose its members to the threat of sanctions when "indecent" words were uttered in the context of bona fide news or public affairs programs. The Commission reaffirmed its earlier decision, however, stressing that the order was issued in a specific factual context and was based primarily on the need to protect young children from sexually explicit language.[270] The Commission refused to comment on the hypothetical situations posed by the RTNDA and reiterated its conclusion that such language could only be broadcast, if at all, during the late evening hours.[271]

Following an appeal by the Pacifica Foundation, the Court of Appeals for the District of Columbia reversed the Commission.[272] Circuit Judge Tamm held that the order was issued in violation of the prohibition against censorship contained in 47 U.S.C. § 326,[273] and that even if

266. *Id.* at 103 (Robinson, Comm'r., joined by Hook, Comm'r., concurring).

267. *Id.* at 104 (citing Lockhart & McClure, *Obscenity Censorship: The Core Constitutional Issue—What is Obscene?*, 7 UTAH L. REV. 289 (1961)).

268. 56 F.C.C.2d at 106 (Robinson, Comm'r., joined by Hook, Comm'r., concurring).

269. 59 F.C.C.2d 892 (1976).

270. *Id.* at 893.

271. *Id.*

272. Pacifica Foundation v. FCC, 556 F.2d 9 (D.C. Cir. 1977). Chief Judge Bazelon and Circuit Judge Tamm filed separate opinions in favor of reversal; a dissenting opinion was entered by Circuit Judge Leventhal. For discussions of the Court of Appeals decision, see Note, *Pacifica Foundation v. FCC: "Filthy Words," the First Amendment and the Broadcast Media*, 78 COLUM. L. REV. 164 (1978); Note, *Constitutional Law—Pacifica Foundation v. FCC: First Amendment Limitations on FCC Regulation of Offensive Broadcasts*, 56 N.C.L. REV. 584 (1978).

273. 556 F.2d at 18. 47 U.S.C. § 326 (1970) provides: "Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio

the Commission had the authority to regulate non-obscene speech, the text of its order would have been subject to reversal on the grounds of vagueness and overbreadth.[274] The court of appeals was thus able to reverse the Commission on grounds which circumvented the need to define "indecent" under section 1464.

Chief Judge Bazelon concurred with the result reached by Judge Tamm, but felt that the protections against censorship provided by section 326 were not absolute because the terms of section 1464 authorized criminal punishment for anyone uttering "obscene, indecent, or profane" language over the radio.[275] Whereas Judge Tamm believed section 326 to be dispositive, Chief Judge Bazelon reformulated the issues to focus first on whether the Carlin monlogue would be protected by the First Amendment if disseminated by any other medium, and second whether the unique characteristics of broadcasting justified an expansion of governmental regulation of speech.[276] He concluded that the Commission's definition of "indecency" was prima facie unconstitutional.[277] Citing the strict standard for obscenity set forth by the Supreme Court in *Miller v. California*,[278] Chief Judge Bazelon found the order to be an overbroad, distorted interpretation of those guidelines.[279]

Examining the four circumstances claimed by the Commission to justify special regulation of speech disseminated over the broadcast medium,[280] Chief Judge Bazelon rejected the contention that the broad-

communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

In reversing the Commission, Judge Tamm stated his view that "[a]ny examination of thought or expression in order to prevent publication of objectionable material is censorship." 556 F.2d at 14.

274. Judge Tamm found the order to be vague because it lacked a definition of children, *id.* at 17, and that it was overbroad in that it prohibited the use of the seven indecent words in any context. *Id.*

275. *See* note 253 and accompanying text *supra*.

276. 556 F.2d at 20 (Bazelon, C.J., concurring).

277. *Id.* at 23.

278. 413 U.S. 15, 24 (1973). In rejecting as the constitutional standard the "*utterly* without redeeming social value" test articulated in Memoirs v. Massachusetts, 383 U.S. 413, 419 (1966) (emphasis in original), the Court in *Miller* set forth the following basic guidelines: "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole; appeals to the prurient interest. . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." 413 U.S. at 24 (citation omitted).

279. 556 F.2d at 23 (Bazelon, C.J., concurring).

280. *See* note 255 *supra*.

casting of offensive speech may offend the privacy interests of nonconsenting adults in their homes. Relying on the Supreme Court decisions in *Erznoznik v. City of Jacksonville*,[281] *Cohen v. California*,[282] and *Rowan v. Post Office Department*,[283] he reasoned that the radio listener "can avert his attention by changing channels or turning off the set."[284] The Commission's argument that the presence of children in the listening audience justifies increased government regulation of broadcast speech was also rejected on the ground that individual parental control is preferable to state action *in loco parentis*.[285] Chief Judge Bazelon concluded his concurring opinion by expressing disagreement with the contention that the scarcity of broadcasting frequencies and other considerations warranted the order promulgated by the Commission.[286]

Circuit Judge Leventhal dissented and expressed his support for the order. He argued that its definition of "indecent" was "a functional equivalent to the Supreme Court's current 'obscenity' ruling (*Miller*),"[287] and that the time and place restrictions of the order were a reasonable "constitutional trade-off."[288] Unlike Judge Tamm[289] and Chief Judge Bazelon,[290] Judge Leventhal did not find the order overbroad since, in his view, it was carefully limited by the Commission to prohibit only the broadcasting of indecent language during the afternoon.[291] Nor, despite "some inexactness in the agency's approach," did Judge Leventhal find the order void for vagueness.[292]

281. 422 U.S. 205 (1975) (limited privacy interests of persons on public street cannot justify censorship of otherwise protected speech).

282. 403 U.S. 15 (1971) (absent particularized and compelling reasons, state may not make public display of four-letter expletive a criminal offense).

283. 397 U.S. 728 (1970) (approval given to statutory scheme permitting addressee to give notice that he wishes no further mailings from specific sender of erotic or sexually provocative matter).

284. 556 F.2d at 26 (Bazelon, C.J., concurring). Chief Judge Bazelon also found that people's privacy interests in their homes are reduced when they open up their home by turning on the radio. *Id.* at 27.

285. *Id.* at 27-29.

286. *Id.* at 29. Chief Judge Bazelon believed that Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), did not support the Commission's spectrum space arguments since unlike *Red Lion*, where the FCC's fairness doctrine raised questions of broadcast freedom and public access to varied viewpoints, the instant case presented no divergence of First Amendment interests.

287. 556 F.2d at 32 (Leventhal, J., dissenting).

288. *Id.* at 37.

289. *Id.* at 16-17.

290. *Id.* at 21 (Bazelon, C.J., concurring).

291. *Id.* at 36 (Leventhal, J., dissenting).

292. *Id.* at 35.

The Supreme Court granted certiorari,[293] and in a five-four decision[294] reversed the court of appeals on both statutory and constitutional grounds. Writing for the majority, Justice Stevens first determined that in issuing its order, the Commission had not engaged in formal rulemaking or the promulgation of regulations. Rather, the Commission had simply adjudicated a dispute limited to the monologue "as broadcast" under 5 U.S.C. § 554(c).[295] This initial determination not only permitted the Court to avoid issuing an advisory opinion, but also served to focus attention on the precise factual context underlying the *Pacifica* litigation.

The Court analyzed the legislative purpose underlying section 326[296] and section 1464,[297] and concluded that the prohibition against censorship contained in section 326 does not so limit section 1464 as to prevent the Commission from applying administrative sanctions against licensees who "engage in obscene, indecent, or profane broadcasting."[298] Justice Stevens next addressed the question of whether the afternoon broadcast of the Carlin monologue was indecent within the meaning of section 1464. Examining the language of the statute, he reasoned that the words "obscene, indecent, or profane," are used in the disjunctive and inferred that each word was intended to have a separate and distinct meaning. Thus, the fact that the Carlin monologue lacked prurient appeal and was therefore not obscene under *Miller*[299] did not preclude its being indecent under section 1464.

The Court rejected Pacifica's contention that the term "indecent" in section 1464 should be interpreted in the same manner as it is under 18 U.S.C. § 1461. Section 1461 prohibits the use of the United States mails to disseminate, *inter alia*, obscene and indecent matter.[300] The

293. 434 U.S. 1008 (1978).

294. 98 S. Ct. 3026 (1978). Justice Stevens delivered the opinion of the Court, joined by Chief Justice Burger and Justices Rehnquist, Blackmun, Powell (Parts I, II, III & IV(C)), and an opinion in which the Chief Justice and Justice Rehnquist joined (Parts IV(A) & IV(B)). Justice Powell filed a concurring opinion, in which Justice Blackmun joined. Justice Brennan, joined by Justice Marshall, filed a dissenting opinion. Justice Stewart filed a separate dissenting opinion in which Justices Brennan, White and Marshall joined.

295. *Id.* at 3032. Section 554(e) provides: "The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty." 5 U.S.C. § 554(e) (1976).

296. *See* note 273 *supra*.

297. *See* note 253 *supra*.

298. 98 S. Ct. at 3035. This conclusion is supported by the fact that the two sections, now separate, had together previously formed § 29 of the Radio Act of 1927.

299. *See* note 278 *supra*.

300. 18 U.S.C. § 1461 (1970). Pacifica argued that the Court's interpretation of § 1461 in Hamling v. United States, 418 U.S. 87 (1974), which had subsumed "indecent" under the

two statutes were distinguished on the basis of their subject matter; section 1461 involves printed matter whereas section 1464 relates solely to broadcasting. Finding no controlling definition of "indecent," Justice Stevens concluded that there was no basis for disagreeing with the Commission's determination that the language used in the afternoon broadcast was indecent and therefore subject to sanction.[301]

Having resolved the statutory issues, Justice Stevens' opinion turned to the constitutional challenges raised by Pacifica. This section of the opinion did not command the support of Justices Powell and Blackmun.[302] In reviewing the claim that the Commission's order was overbroad and encompassed constitutionally protected speech, Justice Stevens observed that the Court's scope of review was limited to the issue of whether the Commission had the authority to prohibit this particular broadcast.[303] He pointed out that the order was properly limited to a specific factual situation, and asserted that "indecency is largely a function of context—it cannot be adequately judged in the abstract."[304] Admitting that the order might lead to some self-censorship by broadcasters and that the particular language of the Carlin monologue might be protected when used in some other context, Justice Stevens argued that the seven indecent words "surely lie at the periphery of First Amendment concern."[305] The issues having been narrowed to the question of whether "the First Amendment prohibits all governmental regulation that depends on the content of speech,"[306] Justice Stevens proceeded to determine that speech of the sort contained in the broadcast "is not entitled to absolute constitutional protection under all circumstances."[307] Justices Powell and Blackmun did not share the

concept of obscenity, should be controlling. Without disputing that interpretation of *Hamling*, Justice Stevens found it inapplicable to the present case. 98 S. Ct. at 3035-36.

301. *Id.* at 3036.

302. In failing to receive the support of Justices Powell and Blackmun, who did not join Parts IV (A) and (B) of the opinion, Justice Stevens spoke only for a plurality of the Court in his discussion of the constitutional issues. Part IV (C) of Justice Stevens' opinion, which Justices Powell and Blackmun did join, emphasized that "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection." *Id.* at 3040.

303. *Id.* at 3037.

304. *Id.*

305. *Id.* (citing Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (commercial speech); Young v. American Mini Theatres, 427 U.S. 50 (1976) (adult films)).

306. 98 S. Ct. at 3038.

307. *Id.* at 3039. *See, e.g.*, Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (commercial speech); Young v. American Mini Theatres, 427 U.S. 50 (1976) (adult films); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (libel of private citizen); Miller v. California, 413 U.S. 15 (1973) (obscenity); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (libel of

plurality view that content can be used to determine which speech is more "valuable" and therefore more deserving of First Amendment protection.[308] They did agree, however, that the result in *Pacifica* should turn on the context of the speech at issue.[309]

Justice Stevens, again writing for a majority of the Court, examined the basis for the Commission's conclusion that the special characteristics of the broadcast medium permit the imposition of restrictions on the use of language such as that contained in the Carlin monologue.[310] He agreed with the Commission that broadcasting has a pervasive influence on American life and observed that the listeners' ability to turn off broadcasts of objectionable material is an insufficient means of protecting the privacy of the home from unwanted and objectionable programing.[311] He characterized this answer to the problem as being akin to "saying that the remedy for an assault is to run away after the first blow."[312] In reversing the court of appeals, the majority also relied on the unique accessibility of broadcasts to children. This ease of access was found to "amply justify special treatment of indecent broadcasting."[313]

Justice Brennan, joined by Justice Marshall, filed a strongly-worded dissent in which he argued that the Court's decision validates a process "of governmental homogenization of radio communications"[314] and "permits majoritarian tastes completely to preclude a protected message from entering the homes of a receptive, unoffended minority."[315] Reiterating Chief Judge Bazelon's argument,[316] Justice Brennan contended that listeners who find such language offensive can turn the radio off with a minimum amount of effort.[317] He argued that

public official); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (fighting words); Schenck v. United States, 249 U.S. 47 (1919) (clear and present danger).

308. 98 S. Ct. at 3046 (Powell, J., joined by Blackmun, J., concurring).

309. *Id.* at 3047. *See* note 313 *infra*.

310. *See* note 255 and accompanying text *supra*.

311. 98 S. Ct. at 3040.

312. *Id.*

313. *Id.* at 3040-41. In agreeing with the majority's conclusion, Justice Powell stated: "The result turns . . . on the unique characteristics of the broadcast media, combined with society's right to protect its children from speech generally agreed to be inappropriate for their years, and with the interest of unwilling adults in not being assaulted by such offensive speech in their homes." *Id.* at 3047 (Powell, J., concurring, joined by Blackmun, J.).

314. *Id.* at 3048 (Brennan, J., dissenting).

315. *Id.* at 3049.

316. *See* notes 280-86 and accompanying text *supra*.

317. 98 S. Ct. at 3049 (Brennan, J., dissenting). Although agreeing that the individual's privacy interests in his home are substantial, Justice Brennan stated that "an individual's actions in switching on and listening to communications transmitted over the public airways and directed to the public at-large do not implicate fundamental privacy interests, even

the availability of this alternative justifies preserving the broadcaster's right to disseminate and its listeners' right to receive offensive but nonetheless constitutionally protected messages, especially since the effect of the Court's decision is to replace individual choice as to what is heard with governmental regulation of program content.[318]

Justice Brennan found the majority's reliance on the unique accessibility of broadcasts to children[319] equally unpersuasive. In his view, the Carlin monologue could not be considered obscene even as to the children.[320] The majority decision could therefore result in the screening from adults of material which could not constitutionally be kept from children.[321] And even conceding that most parents would not want their children to hear language such as that contained in the broadcast at issue, Justice Brennan observed that this decision properly resides with the parents and not in the government acting *in loco parentis*.[322] Addressing the majority's contention that the ideas embodied in the Carlin monologue could just as well have been expressed with less offensive language,[323] Justice Brennan cited Justice Harlan's opinion for the Court in *Cohen v. California*[324] for the proposition that restricting the use of certain words creates a substantial risk that the ideas those words convey will concurrently be restricted.[325]

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when engaged in within the home. Instead, because the radio is undeniably a public medium, these actions are more properly viewed as a decision to take part, if only as a listener, in an ongoing public discourse." *Id.* at 3048 (citing Note, *Filthy Words, the FCC, and the First Amendment: Regulating Broadcast Obscenity*, 61 VA. L. REV. 579, 618 (1975)).

318. 98 S. Ct. at 3049 (Brennan, J., dissenting).

319. *See* note 313 and accompanying text *supra*.

320. 98 S. Ct. at 3050 (Brennan, J., dissenting). *See* Erznoznik v. City of Jacksonville, 422 U.S. 205, 213-14 & n.10 (1975).

321. 98 S. Ct. at 3050 (Brennan, J., dissenting). *See* Butler v. Michigan, 352 U.S. 380, 383-84 (1957) (state may not restrict adults to reading only what is appropriate for children). This fear is valid only insofar as the FCC would fail to limit its prohibition against the broadcasting of "indecent" language to those hours when children are likely to be in the listening audience. *See* notes 261-62 and accompanying text *supra*.

322. 98 S. Ct. at 3051 (Brennan, J., dissenting). Justice Brennan noted that this substitution of governmental authority for parental discretion distinguished *Pacifica* from the Court's prior decisions in Wisconsin v. Yoder, 406 U.S. 205 (1972) and Pierce v. Society of Sisters, 268 U.S. 510 (1925). Although the majority stressed the principle that parents have a right to raise their children as they see fit, *see* 98 S. Ct. at 3040, Justice Brennan observed that the majority decision actually deprives parents of that right by giving what would otherwise be a parental responsibility to screen media programming to a government agency. *Id.* at 3051 (Brennan, J., dissenting).

323. *Id.* at 3037 n.18.

324. 403 U.S. 15 (1971).

325. "[W]ords are often chosen as much for their emotive as their cognitive force." *Id.* at 26. And as Justice Brennan explained: "The idea that the content of a message and its potential impact on any who might receive it can be divorced from the words that are the

The concluding portion of Justice Brennan's dissenting opinion charged the majority with falling victim to an "acute ethnocentric myopia."[326] He accused the majority of failing to acknowledge that the supposedly offensive language at issue in *Pacifica* is in fact "the stuff of everyday conversations" in many of America's subcultures.[327] Thus, Justice Brennan concluded that when viewed in a broad perspective, the decision was "another of the dominant culture's inevitable efforts to force those groups who do not share its mores to conform to its way of thinking, acting, and speaking."[328]

In a dissenting opinion joined by Justices Brennan, White and Marshall, Justice Stewart criticized the majority's resolution of the question of whether broadcasting is entitled to less First Amendment protection than other forms of speech.[329] Justice Stewart would not have reached the constitutional issues since, in his view, the Court should not have construed "indecent" as having a broader meaning than "obscene."[330] He would have followed the Court's decision in *Hamling v. United States*[331] and held that "Congress intended, by using the word 'indecent' in section 1464, to prohibit nothing more than obscene speech."[332] In the view of the four dissenting justices, the term "indecent" should therefore have been construed for purposes of section 1464 as it had been in *Hamling*, with the result that the Carlin monologue—concededly not appealing to prurient interests—would not have been stripped of its First Amendment protections.

### *B. Analysis*

The Court's *Pacifica* decision can best be analyzed by a two-part consideration. The sections that follow will examine the reasoning underlying the majority's rejection of both the statutory and constitutional challenges to the Commission's order. They will also analyze whether the Court's judgment is consistent with prior decisions concerning the constitutionally permissible extent of regulation of protected speech.

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vehicle for its expression is transparently fallacious. A given word may have a unique capacity to capsule an idea, evoke an emotion, or conjure up an image." 98 S. Ct. at 3053 (Brennan, J., dissenting).

326. *Id.* at 3054.

327. *Id.*

328. *Id.* (citing Moore v. East Cleveland, 431 U.S. 494, 506-11 (1977)).

329. 98 S. Ct. at 3055-57. (Stewart, J., dissenting).

330. *Id.* at 3056.

331. 418 U.S. 87 (1974). *Hamling* held that the term "indecent" in 18 U.S.C. § 1461 has the same meaning as "obscene" under the Court's decision in Miller v. California, 413 U.S. 15 (1973). *See* note 278 *supra*.

332. 98 S. Ct. at 3056 (Stewart, J., dissenting) (footnote omitted).

### 1. The Statutory Claims

Circuit Judge Tamm, author of the court of appeals decision, construed 47 U.S.C. § 326[333] to prohibit the FCC from interfering with licensee discretion in programming. He cited prior FCC and federal court cases which he argued established an agency practice of relying on each licensee's judgment regarding program content.[334] This argument is also supported by *Jack Straw Memorial Foundation*,[335] wherein the Commission held that the decision whether or not to broadcast obscene or indecent language should be left to the licensee. That case involved the broadcasting of admittedly obscene language which was part of a recording entitled "Murder at Kent State." The licensee broadcast the language based on his decision that it was necessary in the context of the recording. The Commission found this exercise of licensee discretion to be in conformity with its standards.[336]

Judge Tamm also noted that the section 326 prohibition against FCC interference with licensee judgement as to programming content had been affirmed by the courts as well as by administrative rulings.[337] He found additional support for his contention that licensee discretion should be preserved in the language of the Commission's clarification memorandum regarding the original order.[338] He pointed out that the memorandum acknowledged that (1) some live news coverage of public events involves broadcasting offensive speech in circumstances which preclude journalistic editing, and (2) licensees who broadcast such language should not be subject to Commission discipline.[339] The Commission had therefore once again deferred to the judgment of individual licensees with respect to programming content.

In his concurring opinion, Chief Judge Bazelon noted his agreement with Judge Tamm's section 326 argument and asserted that the Commission's action in "channeling" broadcasts of indecent language into certain hours amounted to censorship.[340] He pointed to repeated

333. *See* note 273 *supra*.

334. 556 F.2d at 14-15 (1977).

335. 29 F.C.C.2d 334 (1971).

336. *Id.* at 354.

337. 556 F.2d at 14. *See, e.g.*, Writers Guild of America, West. Inc. v. FCC, 423 F. Supp. 1064 (C.D. Cal. 1976); Anti-Defamation League of B'Nai B'Rith v. FCC, 403 F.2d 169 (1968), *cert. denied*, 394 U.S. 930 (1969).

338. 59 F.C.C.2d 892 (1976). *See* notes 268-71 and accompanying text *supra*.

339. 556 F.2d at 14-15.

340. *Id.* at 19 (Bazelon, C.J., concurring). Chief Judge Bazelon found that the § 326 prohibition is not limited to rules and regulations that totally forbid the broadcasting of certain matter, but also bars any form of Commission censorship. He argued that "channeling may have substantially the same effect as an absolute ban." *Id.*

FCC abuses of its limited authority to regulate constitutionally protected speech as one basis for his opposition to any weakening of section 326.[341] In the collective view of Chief Judge Bazelon and Judge Tamm, the FCC order in *Pacifica* violated the prohibition against censorship contained in section 326 by permitting the imposition of sanctions for the broadcasting of the language at issue.

Writing for a majority of the Supreme Court, Justice Stevens agreed that section 326 bars the Commission from editing proposed broadcasts in advance. He asserted, however, that this prohibition had never operated to deny the Commission power to review the content of completed broadcasts or to take note of the nature of past programs when considering license renewal applications.[342] He further noted that judicial and administrative interpretations of section 326 have developed the view that its anti-censorship provision does not apply to the broadcasting of obscene, indecent or profane language.[343] In analyzing this point of disagreement between the Supreme Court and the court of appeals, it should be noted that the Commission's order did not merely examine the past programming of one radio station. Instead, it established a new standard for determining permissible language and put broadcasters on notice that the language at issue in *Pacifica* was not to be broadcast during certain hours. While it might be argued that such a decree does not amount to pre-broadcast censorship, it creates the possibility of an even more dangerous situation, one in which broadcasters censor themselves by excising protected as well as unprotected speech due to excessive caution.[344]

The second statutory issue in *Pacifica* concerned the interpretation of 18 U.S.C. § 1464[345] and the question of whether the terms "obscene" and "indecent" have separate meanings.[346] This problem arises in many situations involving the regulation of obscene language, due to the practice of including a string of generic terms in obscenity statutes. Thus, 18 U.S.C. § 1461 prohibits the mailing of "obscene, lewd, lascivious, indecent, filthy or vile" articles and 18 U.S.C. § 1464 prohibits the broadcasting of "obscene, indecent, or profane language." As a consequence of this practice, the question arose as to whether the terms following "obscene" in these and similar statutes are subsumed under the

341. *Id.* at 19 n.1.
342. 98 S. Ct. at 3033.
343. *Id.* at 3034.
344. Justice Stevens admitted that the Commission order created the possibility of self-censorship. *See id.* at 3037.
345. *See* note 253 *supra*.
346. 98 S. Ct. at 3035-36.

parameters of that which is obscene or are meant to establish additional limitations.

Pacifica argued that unless the term "indecent" in section 1464 was held to mean only "obscene," the statute would be unconstitutionally vague and overbroad.[347] This contention was based on the premise that the Supreme Court had defined obscenity in *Miller v. California*,[348] and had subsequently made it clear in *Hamling v. United States*[349] and *United States v. 12 200-Ft. Reels of Super 8mm Film*[350] that the use of the term "indecent" in federal criminal statutes must be construed to refer only to materials involving the specific types of explicit conduct set forth in *Miller*.[351] In *12 200-Ft. Reels of Film*, the Court suggested that the term "indecent" should be understood as referring only to representations or depictions of "hard core" sexuality:

> If and when . . . a "serious doubt" is raised as to the vagueness of the words "obscene," "lewd," "lascivious," "filthy," "*indecent*," or "immoral" as used to describe regulated material in . . . 18 U.S.C. § 1462 . . . *we are prepared to construe such terms as limiting regulated material to patently offensive representations or descriptions of that specific "hard core" sexual conduct given as examples in Miller v. California* . . . .[352]

The Court in *Miller* had offered the following examples of speech that could constitutionally be regulated: "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated; (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."[353] Pacifica argued that it followed from these standards established by the Court that the Carlin monologue was not obscene, since it neither appealed to the prurient interest nor lacked literary or political value.[354] Consequently, the argument concluded, the monologue was entitled to constitutional protection and the Commission's order should be adjudged overbroad.[355]

In his concurring opinion, Chief Judge Bazelon accepted Pacifica's overbreadth argument. He noted that the Commission's test for "indecency" did not consider the language at issue in light of the "local com-

347. 556 F.2d at 12.
348. 413 U.S. 15 (1973). *See* note 278 *supra*.
349. 418 U.S. 87 (1974). *See* note 331 *supra*.
350. 413 U.S. 123 (1973).
351. *See* note 278 *supra*.
352. 413 U.S. at 130 n.7 (emphasis added).
353. 413 U.S. at 25.
354. *See id.* at 24.
355. 556 F.2d at 18.

munity standards" impliedly required by *Miller*, but rather used "contemporary community standards for the broadcast medium" as its touchstone.[356] Chief Judge Bazelon pointed out that the Commission's indecency standard also ignored the *Miller* requirement that a work be judged as a whole, and that it must appeal to prurient interests to be considered obscene.[357] He noted that the FCC standard would preclude the broadcasting of indecent language despite the fact that the overall work contained literary, artistic, political or scientific value.[358] Consequently, Chief Judge Bazelon concluded that the definition of "indecency" in the Commission's order could be upheld only if "there exists an additional category of offensive speech that is unprotected when broadcast."[359]

Chief Judge Bazelon's conclusion was prophetic, in that the Supreme Court subsequently did carve out such an additional category of unprotected speech in *Pacifica*. Writing for the majority, Justice Stevens found that "indecency" was not subsumed under the definition of "obscene." He refined the appeal to prurient interest standard enunciated in *Miller*[360] by holding that indecency "merely refers to nonconformance with accepted standards of morality."[361] Responding to the argument that the conclusion in *Hamling* that section 1461's proscription was limited to language falling within the *Miller* definition of obscenity[362] was controlling, Justice Stevens distinguished that case on the basis of the different form of media involved there. Since section 1461 concerns printed matter sent by mail, he reasoned that the construction placed on it by the Court was inapplicable to a statute such as section 1464, which deals with public broadcasting.[363] Pacifica's reliance on *12 200-ft. Reels of Film* was dismissed as being based on dicta.[364]

Writing for four members of the Court,[365] Justice Stewart rejected the majority's interpretation of section 1464. He argued that this con-

356. *Id.* at 22 (Bazelon, C.J., concurring) (citing 51 F.C.C.2d at 433).

357. 556 F.2d at 23 (Bazelon, C.J., concurring). *See* 413 U.S. at 24

358. 556 F.2d at 23 (Bazelon, C.J., concurring). All of these criteria were enunciated in *Miller*. *See* note 278 *supra*.

359. 556 F.2d at 24 (Bazelon, C.J., concurring).

360. *See* 413 U.S. at 24.

361. 98 S. Ct. at 3035 (footnote omitted). The Court's adoption of this definition raises several questions, such as what constitutes "nonconformance," whose standards of morality are to be considered "accepted," and how these standards are to be communicated to broadcasters.

362. *See* note 331 *supra*.

363. 98 S. Ct. at 3036 & nn.16-17.

364. *Id.* at 3035.

365. Justice Stewart was joined by Justices Brennan, White and Marshall.

struction of the statute was plausible but "by no means compelled," and that "indecent" should be defined to mean "no more than 'obscene.' "[366] Justice Stewart agreed with Pacifica that the decision in *Hamling* was dispositive of the section 1464 interpretation issue. He noted that the *Hamling* Court had limited section 1461 so as to proscribe only those representations or descriptions of hard core sexual conduct set out in *Miller*.[367] Justice Stewart could find no adequate basis for the majority's conclusion that the term "indecent" had different meanings in each of these statutes. He concluded by noting that although sections 1461 and 1464 were enacted separately, they were codified together in the 1948 Criminal Code under the chapter entitled "Obscenity," which suggested that Congress intended that section 1464, like section 1461, should prohibit only obscene speech.[368]

### 2. The Constitutional Claims

The Supreme Court produced a majority decision in resolving the statutory issues in *Pacifica*. The constitutional questions, however, fragmented the Court. Most of Justice Stevens' constitutional discussion did not command the support of a majority of the Court, but was joined only by Justice Rehnquist and Chief Justice Burger. Justice Powell wrote a separate concurring opinion, joined by Justice Blackmun, which set forth his disagreement with certain of the conclusions reached by Justice Stevens. Justice Brennan, joined by Justice Marshall, filed a bitter dissenting opinion in which he addressed the constitutional issues.[369]

For Justice Brennan to serve as a spokesman for the dissenters in a Supreme Court obscenity decision is a significant indication of the shifting tides of interpretation in this area of constitutional law. Justice Brennan wrote the majority opinion in *Roth v. United States*,[370] wherein the Court first promulgated a uniform standard for determining what speech is obscene. He also authored the plurality opinion in *Memoirs v. Massachusetts*,[371] which further refined the *Roth* standard. By 1973, however, the composition of the Court had changed, and Jus-

366. 98 S. Ct. at 3056 (Stewart, J., dissenting).

367. *Id.* *See* note 353 and accompanying text *supra*.

368. *Id.* at 3056 (Stewart, J., dissenting).

369. Justices Stewart and White expressed no opinion regarding the merits of the constitutional issues in *Pacifica*. They believed that the construction of § 1464 set out in Justice Stewart's dissenting opinion, *see* notes 366-68 and accompanying text *supra*, made a constitutional analysis unnecessary.

370. 354 U.S. 476 (1957).

371. 383 U.S. 413 (1966).

tice Brennan found himself in the minority when *Miller* was decided. He also dissented in *Paris Adult Theatre I v. Slaton*,[372] and urged the Court to abandon its quest for a viable definition of "obscenity," at least insofar as consenting adults were concerned.[373] Justice Brennan continued to fill the role of minority spokesman in *Pacifica*.

The first of the two constitutional questions considered by Justice Stevens' plurality opinion was whether the Commission's order was overbroad in that it permitted the imposition of sanctions on the broadcasting of constitutionally protected speech. Justice Stevens began by noting that the Court's review of the order was limited to the question of whether it was appropriate in the specific factual context of the case.[374] Although acknowledging that the order may cause some broadcasters to engage in self-censorship, he asserted that this will only occur in situations where the material to be broadcast contains "patently offensive references to excretory and sexual organs and activities."[375] Such self-censorship, he argued, will not significantly affect the content of serious communication because "[t]here are few, if any, thoughts that cannot be expressed by the use of less offensive language."[376] Justice Stevens therefore concluded that invalidating the FCC order solely to preserve "the vigor of patently offensive sexual . . . speech" was unwarranted.[377]

The second constitutional question which the plurality addressed was whether the First Amendment precludes the government from punishing the public broadcast of indecent language under any circumstances. Justice Stevens acceded to the principle that the First Amendment requires the government to "remain neutral in the marketplace of ideas," but he argued that the speech at issue in *Pacifica* was not an essential part of that marketplace.[378] In Justice Stevens' view, the question was not whether the Carlin monologue was protected speech under any circumstances, but rather whether it warranted protection under the circumstances in which it was broadcast. Thus, although the Commission itself recognized that the monologue had some literary and po-

372. 413 U.S. 49 (1973).

373. *Id.* at 84-85 (Brennan, J., dissenting).

374. 98 S. Ct. at 3037 (plurality opinion).

375. *Id.* (footnote omitted).

376. *Id.* at n.18.

377. *Id.* at 3037.

378. *Id.* at 3038-39: "These words offend for the same reasons that obscenity offends." (Footnote omitted). It is difficult to reconcile this statement with Justice Stevens' attempt to delineate how the term "indecency" has a separate meaning apart from the concept of "obscenity." *See* notes 297-98 and accompanying text *supra*.

litical value and expressed a point of view, its objection focused on the manner in which that view was expressed.[379] Justice Stevens concluded this analysis by noting that since the content of the broadcast at issue was "vulgar," "offensive" and "shocking," the Court was required to examine the context of its dissemination to determine whether the Commission's actions were constitutional.[380]

As previously noted, Justices Powell and Blackmun did not join in the foregoing constitutional analysis. Justice Powell expressed his disagreement with the plurality because he could not "subscribe to the theory that the Justices of this Court are free generally to decide on the basis of its content which speech protected by the First Amendment is most 'valuable' and hence deserving of the most protection, and which is less 'valuable' and hence deserving of less protection."[381] In his dissenting opinion, Justice Brennan also voiced dissatisfaction with the analysis utilized in Justice Stevens' plurality opinion. He noted that a majority of the Court had rejected the notion "that the degree of protection the First Amendment affords protected speech varies with the social value ascribed to that speech by five Members of this Court."[382] Justice Brennan also took issue with the plurality's assertion that the FCC order would not chill free expression because language such as that at issue in *Pacifica* is unnecessary to serious communication.[383] He found it "fallacious" to presume that the content of a message could be divorced from the language used to express it.[384]

The only constitutional question on which the Court produced a majority opinion was whether the unique characteristics of the broadcast medium warranted a lower level of First Amendment protection. True to Chief Judge Bazelon's suggestion,[385] the Supreme Court answered this question in the affirmative. Writing for a majority on this issue, Justice Stevens noted that of all forms of communication, broad-

379. 98 S. Ct. at 3038-39 & n.22 (plurality opinion).

380. *Id.* at 3039. It is important to note that these constitutional questions were not resolved by a majority of the Court. Justice Stevens' discussion of these issues is therefore of only limited precedential value.

381. *Id.* at 3046 (Powell, J., concurring). Justices Powell and Blackmun did concur with Justice Stevens' resolution of the statutory issues and in the judgment of the Court. *See* note 313 *supra.*

382. 98 S. Ct. at 3047 (Brennan, J., dissenting) (citing *id.* at 3046-47 (Powell, J., concurring)). *Accord*, Young v. American Mini Theatres, 427 U.S. 50 (1976).

383. *Id.* at 3053 (Brennan, J., dissenting). *See* notes 375-76 and accompanying text *supra.*

384. *Id.* at 3053 (Brennan, J., dissenting). *See* notes 322-25 and accompanying text *supra. Accord*, Cohen v. California, 403 U.S. 15, 25-26 (1971) (opinion of Harlan, J.).

385. *See* text accompanying note 359 *supra.*

casting has received "the most limited First Amendment protection."[386] He advanced two justifications for this disparate treatment: 1) broadcasting has "established a uniquely pervasive presence in the lives of all Americans," jeopardizing individual privacy rights; and 2) broadcasting is "uniquely accessible to children," which implicates the government's interest in the "well being of its youth" and warrants greater regulation of this particular form of communication.[387] Justice Powell's concurring opinion also stressed the effect the broadcast media has on children and emphasized that this was a significant factor in his joining Justice Stevens' opinion to create a majority.[388] He noted that "[t]he language involved in this case is as potentially degrading and harmful to children as representations of many erotic acts."[389]

The Supreme Court in *Pacifica* delineated another category of speech, broadcasting, that is entitled to only limited First Amendment protection.[390] Although the majority attempted to limit its holding to a specific factual context,[391] its reasoning would seem to leave open the possibility of further expanding the Commission's power to regulate the broadcasting of "indecent" speech.[392] The decision evinces increasing concern for individual privacy rights and the need to shield children from expression viewed as inappropriate for them.[393] If in the future the Commission finds that "indecent" language was broadcast at

386. 98 S. Ct. at 3040.

387. *Id.*

388. *Id.* at 3044-45 (Powell, J., concurring).

389. *Id.* at 3045. Justice Powell also noted that broadcasting implicates fundamental privacy interests of the individual in his home. In his view, this factor justifies broadcasting regulations that would be constitutionally impermissible if imposed upon other forms of media. *See id.* at 3045-46. For Justice Brennan's response to the majority's rationale for extending less First Amendment protection to the broadcast media, *see* notes 314-22 and accompanying text *supra*.

390. 98 S. Ct. at 3040. Justice Stevens argued that "indecent" speech lies "at the periphery of First Amendment concern," *id.* at 3037, but this part of his opinion was joined only by Chief Justice Burger and Justice Rehnquist. *See id.* at 3046-47 & n.4 (Powell, J., concurring). The result in *Pacifica* actually turned on the unique characteristics of the broadcast media. *See id.* at 3040-41 (majority opinion), 3047 (Powell, J., concurring). For other categories of speech that are entitled to only limited First Amendment protection, *see, e.g.*, Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (commercial speech); Young v. American Mini Theatres, 427 U.S. 50 (1976) (adult films).

391. *See* 98 S. Ct. at 3041 (majority opinion), 3047 (Powell, J., concurring).

392. *See id.* at 3051-52 (Brennan, J., dissenting). Justice Brennan suggested that the absence of "principled limits" on the Commission's power in this area could lead to "the cleansing of public radio of any 'four-letter words' whatsoever, regardless of their context." *Id.* at 3051. He pointed out that this might result in the banning from radio of noted literary works, political speech and portions of the Bible. *Id.* at 3051-52.

393. *See id.* at 3040-41 (majority opinion), 3044-46 (Powell, J., concurring).

a time when children were likely to be in the listening audience,[394] the Court's rationale in deciding *Pacifica* would justify the imposition of criminal sanctions or other punishment on the disseminator.

## III. The Clergy and the Right to Hold Public Office: *McDaniel v. Paty*

The Supreme Court in *McDaniel v. Paty*[395] considered, but failed fully to clarify, the scope of religious freedom under the First Amendment.[396] The question posed in *McDaniel* was whether the state of Tennessee could bar an individual from seeking an elective position solely because of his status as a practicing minister. The decision in *McDaniel* reveals a Court united in agreement that the Tennessee provision was unconstitutional but divided over the legal basis for that conclusion.

### *A. The Decision*

Paul McDaniel, a Baptist minister, was a candidate for a position as a delegate to the 1977 Tennessee constitutional convention. An opponent, Selma Cash Paty, sued in State Chancery Court for a judgment declaring McDaniel disqualified from serving as a delegate to the convention. The basis for her claim was a Tennessee statute which barred ministers from seeking this position.[397] The Chancery Court held that the statute violated the First and Fourteenth Amendments of the United States Constitution and declared McDaniel an eligible candidate. In the subsequent election, he was elected by a large margin. After the election, however, the Tennessee Supreme Court reversed the

394. *See* note 261 and accompanying text *supra*.

395. 435 U.S. 618 (1978). Last term the Court also decided another case relating to freedom of religion, New York v. Cathedral Academy, 434 U.S. 125 (1977). The Court in *Cathedral Academy* held that a New York statute authorizing reimbursement to parochial schools for expenses incurred in performing state-required services during the 1971-72 school year violated the establishment clause of the First Amendment. *See* note 396 *infra*.

396. The First Amendment provides in part that "Congress shall make no law respecting an *establishment* of religion, or prohibiting the *free exercise* thereof." U.S. CONST. amend. I (emphasis added).

397. 1976 Tenn. Pub. Acts ch. 848, § 4: "Any citizen of the state who can qualify for membership in the House of Representatives of the General Assembly may become a candidate for delegate to the convention. . . ." The requirements for membership in the legislature include a specific constitutional limitation on participation by the clergy. This limitation was originally contained in article VIII, § 1 of the 1796 Tennessee Constitution and is now found in article IX, § 1 of the present state constitution: "Whereas Ministers of the Gospel are by their profession, dedicated to God and the care of Souls, and ought not to be diverted from the great duties of their functions; therefore, no Minister of the Gospel, or priest of any denomination whatever, shall be eligible to a seat in either House of the Legislature."

Chancery Court on the ground that the statute imposed no burden upon "religious belief" and restricted "religious action . . . [only] in the law making process of government—where religious action is absolutely prohibited by the establishment clause."[398] The Tennessee Court found a sufficient state interest in maintaining a separation between political and religious activity to warrant the disqualification,[399] notwithstanding the guarantee of the free exercise clause of the First Amendment.[400] The United States Supreme Court noted probable jurisdiction,[401] and subsequently reversed the decision of the Tennessee Supreme Court.

Chief Justice Burger, writing for a plurality of the Court,[402] began his opinion by tracing the history of the practice of disqualifying ministers from legislative office.[403] Drawing from the works of Locke, Jefferson and Madison, the Chief Justice reviewed the historical debate over the necessity of excluding ministers from such positions.[404] He concluded this review by noting that of the thirteen states which originally disqualified members of the clergy, only two, Maryland and Tennessee, continued this ban into the twentieth century.[405] In 1974, Maryland's statute was found unconstitutional as an infringement of the free exercise of religion by a federal district court,[406] leaving Tennessee as the only state maintaining a bar on clergy holding public office. Despite this singular position, the Tennessee statute came to the Court with the full support of the state's legislative and judicial branches, a posture recognized as supplying a presumption of validity which the Court did not summarily reject.

Notwithstanding this presumption, the plurality found that by conditioning McDaniel's right to seek public office on the surrender of his right to perform religious functions, Tennessee had impermissibly encroached upon his free exercise of religion.[407] Chief Justice Burger reached this conclusion by relying on the Court's decision in *Sherbert v. Verner*.[408] The Court in *Sherbert* held that a state's refusal to grant

398. Paty v. McDaniel, Tenn., 547 S.W.2d 897, 903 (1977).
399. *Id.* at 905.
400. *See* note 396 *supra*.
401. 432 U.S. 905 (1977) (*mem*).
402. 435 U.S. 618 (1978). The Chief Justice was joined by Justices Powell, Rehnquist and Stevens. Justice Blackmun took no part in the consideration or decision of the case.
403. *See generally* 1 A. STOKES, CHURCH AND STATE IN THE UNITED STATES (1950).
404. 435 U.S. at 622-25.
405. *Id.* at 625.
406. Kirkley v. Maryland, 381 F. Supp. 327 (D. Md. 1974).
407. 435 U.S. at 626.
408. 374 U.S. 398 (1963).

unemployment benefits to an individual who was unable to find work because her religious beliefs prohibited her from working on Saturdays imposed an unconstitutional burden on the free exercise of religion.[409] The Chief Justice distinguished the instant case from the Court's decision in *Torcaso v. Watkins*,[410] reasoning that *Torcaso* struck down a requirement limiting religious *belief*, whereas the Tennessee statute pertained to religious *conduct* or *activity*.[411] Focusing on McDaniel's *status* as a minister, the plurality concluded that the free exercise clause's "absolute prohibition of infringements on the 'freedom to believe' [was] inapposite here."[412]

Because an infringement upon First Amendment values had been found, Chief Justice Burger scrutinized the state interests claimed to justify the ban on ministers holding public office.[413] The state had argued that granting ministers the right to hold office would result in their exercise of legislative power and influence to promote the interests of one particular sect, thus pitting one sect against another and adding destructive religious conflict to the already difficult task of running a state government.[414] The plurality was not persuaded by these asserted justifications and found that Tennessee had failed to establish that the historically based view of the dangers of clergy participation in the political processes had contemporary validity.[415] Consequently, the Court held the Tennessee statute violative of the First Amendment right to the free exercise of religion.[416]

Justice Brennan filed a lengthy concurring opinion[417] in which he argued that the decision in *Torcaso*[418] should be controlling. He re-

409. *Id.* at 403-06.

410. 367 U.S. 488 (1961). In *Torcaso* the Court invalidated a Maryland constitutional requirement that applicants for public office declare their belief in God. The Court held that this test violated the freedom of belief and religion guaranteed by the First and Fourteenth Amendments. *Id.* at 496.

411. 435 U.S. at 627 (footnote omitted).

412. *Id.*

413. Chief Justice Burger cited Wisconsin v. Yoder, 406 U.S. 205, 215 (1972), for the proposition that "[t]he 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." 435 U.S. at 628 & n.8. In his concurring opinion, Justice Brennan questioned this reliance. *See id.* at 635 n.8 (Brennan, J., concurring).

414. Paty v. McDaniel, Tenn., 547 S.W.2d at 904-06. The Tennessee Supreme Court referred to the religious wars in Ireland and Lebanon as examples "that the human race has not advanced to a degree of civilization that will permit us to conclude that the fervor of religion will never again disturb and disrupt secular affairs and government." *Id.* at 906.

415. McDaniel v. Paty, 435 U.S. at 629.

416. *Id.*

417. Justice Brennan was joined by Justice Marshall.

418. *See* note 410 *supra*.

jected the distinction relied upon by the plurality between religious belief and religious conduct or activity.[419] Justice Brennan pointed out that "freedom of belief protected by the Free Exercise Clause embraces freedom to profess or practice that belief, even including doing so to earn a livelihood."[420] In addition to the free exercise violation, Justice Brennan found that the Tennessee statute violated the establishment clause.[421] He noted that except in a few, limited situations, government cannot use religion as a basis for imposing "duties, penalties, privileges or benefits."[422] Justice Brennan concluded his opinion by stating his faith in the self-corrective nature of the political process. He asserted that all individuals should have an opportunity to present their views in the "marketplace of ideas" for acceptance or rejection at the polls.[423]

Justice Stewart filed a brief concurring opinion in which he voiced his agreement with Justice Brennan that *Torcaso* should be controlling. He found the differences between the two cases to be without constitutional significance.[424] Justice Stewart rejected the plurality's view that religious status and religious belief are separable for purposes of free exercise analysis.[425] He argued that the Tennessee statute "penalized an individual for his religious status—for what he is and believes in—rather than for any particular act generally deemed harmful to society."[426]

Justice White filed a concurring opinion in which he offered a wholly different rationale for the Court's judgment. He found that the Tennessee statute which absolutely prohibited members of a particular class, in this case ministers, from holding public office, to be in violation of the equal protection clause of the Fourteenth Amendment. Justice White adopted this approach because the plurality and concurring opinions failed to persuade him that McDaniel's free exercise of religion was in any way restricted by the Tennessee statute.[427] Using an equal protection analysis, however, Justice White concluded that the state's interests were insufficient to warrant excluding the affected class.[428] This conclusion was further supported by his finding that the

419. 435 U.S. at 634 (Brennan, J., joined by Marshall, J., concurring). *See* notes 410-12 and accompanying text *supra*.

420. 435 U.S. at 631 (Brennan, J., joined by Marshall, J., concurring) (footnote omitted).

421. *See* note 396 *supra*.

422. 435 U.S. at 639 (Brennan, J., joined by Marshall, J., concurring) (footnote omitted).

423. *Id.* at 642.

424. *Id.* at 642-43 (Stewart, J., concurring).

425. *See* notes 410-12 and accompanying text *supra*.

426. 435 U.S. at 643 n.* (Stewart, J., concurring).

427. *Id.* at 643-44 (White, J., concurring).

428. *Id.* at 645: "All 50 States are required by the First and Fourteenth Amendments to

Tennessee statute was both underinclusive and overinclusive.[429]

*B. Analysis*

The unanimous conclusion reached by the Court in *McDaniel* is not surprising in light of the disappearance of clergy-disqualification statutes elsewhere in the United States.[430] The differences in approach, however, warrant examination. Seven members of the Court[431] believed that the protection afforded by the free exercise clause of the First Amendment compelled the reversal of the judgment of the Tennessee Supreme Court. Beyond this consensus, these justices produced three different opinions; two favored the interpretation of *Torcaso* set forth by Justice Brennan,[432] while the plurality distinguished *Torcaso* and relied on *Sherbert*.[433]

The issue separating these two segments of the Court is how far the scope of the free exercise clause can be extended in the face of legitimate state interests.[434] The view derived from *Torcaso*, that any statute which compels an individual to eschew protected religious practices as a condition of office is unconstitutional,[435] was rejected by a plurality of the Court. The plurality instead found that the Tennessee disqualification provision operated against McDaniel because of his *status* as a minister.[436] Stating that the meaning of "minister" or "priest" is a

maintain a separation between church and state, and yet all of the States other than Tennessee are able to achieve this objective without burdening ministers' rights to candidacy. This suggests that the underlying assumption on which the Tennessee statute is based—that a minister's duty to the superiors of his church will interfere with his governmental service—is unfounded."

429. *Id.* Justice White pointed out that the statute was underinclusive in that its limitations did not apply to executive and judicial office-seekers. He found the statute to be overinclusive since it also applied to ministers whose religious beliefs would not interfere with the proper discharge of the duties of a delegate to the constitutional convention.

430. *See* notes 405 & 406 and accompanying text *supra*. The decision in *McDaniel* technically leaves intact the Tennessee Constitution's bar on clergy serving as legislators, since only the statute relating to constitutional convention delegates was invalidated by the Court. 435 U.S. at 629. The decision in *McDaniel* nonetheless casts serious doubt on the constitutional validity of the underlying constitutional prohibition. *See* note 397 *supra*.

431. Chief Justice Burger and Justices Powell, Rehnquist, Stevens, Brennan, Marshall and Stewart.

432. *See* notes 417-20 and accompanying text *supra*.

433. *See* notes 408-12 and accompanying text *supra*.

434. In distinguishing *Torcaso*, the plurality noted that the First Amendment extends absolute protection to freedom of belief, which counsels against expanding the scope of that provision for fear of leaving "government powerless to vindicate compelling state interests." 435 U.S. at 627 n.7.

435. *See id.* at 632 (Brennan, J., concurring, joined by Marshall, J.).

436. *Id.* at 626-27. *See* notes 410-12 and accompanying text *supra*.

question of state law,[437] the plurality interpreted the available authority as indicating that "ministerial status is defined in terms of conduct and activity rather than in terms of belief."[438] Based on this reading of state authority, the plurality concluded that the Tennessee statute's limitation was different from that in *Torcaso* which specifically limited the right to hold public office to those who professed belief in God.[439]

Justice Brennan argued that the Court had no justification for equating "status" with "activity." Referring to the fact that Torcaso's refusal to declare a belief in God was viewed by the plurality as an act based on religious belief whereas McDaniel's performance of the functions of a minister were not so considered,[440] he stated: "I simply cannot fathom why the Free Exercise Clause 'categorically forbids' hinging qualification for office on the *act* of declaring a belief in religion, but not on the act of discussing that belief with others."[441] Justice Brennan's disagreement with the plurality's distinction between belief and activity apparently must await future Court terms for resolution. The absence of a clear-cut guideline on this issue is likely to pose problems for lower courts left in confusion as to what criteria to employ in determining whether certain activity involves freedom of belief so as to command absolute constitutional protection.

The members of the Court who utilized a freedom of religion analysis in *McDaniel* were in agreement regarding both the unconstitutionality of conditioning eligibility for office on the abandonment of religious activity and the support for that conclusion provided by *Sherbert*.[442] In relying on *Sherbert*, however, none of these justices responded directly to the argument relied upon by the lower court that *Braunfeld v. Brown*[443]was controlling. In *Braunfeld*, the Court sus-

437. The plurality simultaneously asserted that they were not bound by the Tennessee court's resolution of the issue, but were only required to consider it. 435 U.S. at 627 n.5.

438. *Id.* at 627 (footnote omitted). For a criticism of this interpretation, see *id.* at 643 n.* (Stewart, J., concurring).

439. *See* note 410 *supra*.

440. *See* 435 U.S. at 626-27.

441. *Id.* at 635 (Brennan, J., concurring, joined by Marshall, J.) (footnote omitted) (emphasis in original). In his concurring opinion, Justice Stewart pointed out that the activity/belief dichotomy, as previously enunciated by the Court in Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940), reflected the Court's judgment that acts claimed to constitute a free exercise of religion were still subject to judicial review so that "acts harmful to society should not be immune from proscription simply because the actor claims to be religiously inspired." 435 U.S. 643 n.* (Stewart, J., concurring). Justice Stewart asserted that McDaniel's disqualification was not based on his acts but rather on his beliefs. *Id.*

442. 435 U.S. at 626 (plurality opinion), 633-34 (Brennan, J., concurring, joined by Marshall, J.).

443. 366 U.S. 599 (1961).

tained a Sunday closing law despite conceding that it necessarily made the practice of religion by Orthodox Jewish merchants more expensive. Their religious beliefs required them to close on Saturday and the state law required them also to close on Sunday, thus resulting in two days of lost business. The *Braunfeld* Court held that the state's interest in having a uniform day of rest justified the "indirect burden" imposed on Orthodox Jews by the closing laws.[444]

The Tennessee Supreme Court had found that the disqualification statute, like the law at issue in *Braunfeld*, imposed only an indirect burden on McDaniel's free exercise of his religious beliefs.[445] It held that this indirect burden was justified by the state's interest in preserving the separation of church and state, an interest even more compelling than that asserted in *Braunfeld*.[446] The Tennessee court distinguished *Sherbert* on the ground that no compelling state interest could be shown in *Sherbert* to warrant the state's denial of unemployment benefits.[447] The failure of any of the opinions in *McDaniel* to respond to the lower court's analysis of *Braunfeld* adds to the lack of standards for the resolution of free exercise questions.

To a certain extent, the "indirect burden" doctrine enunciated in *Braunfeld* was echoed by Justice White in his concurring opinion, in which he chose to adopt an equal protection approach to the issues presented. Justice White felt compelled to analyze the issues in *McDaniel* by reference to the equal protection clause because the plurality had failed "to explain in what way McDaniel has been deterred in the observance of his religious beliefs."[448] He argued that Tennessee's disqualification statute did not interfere with McDaniel's free exercise of religion since the minister was not compelled to abandon the ministry or disavow any of his beliefs.[449] This implicit adoption of the indirect burden doctrine is susceptible to the same criticism made of the *Braunfeld* decision—that there is nothing "indirect" about compelling an individual to choose between the unfettered exercise of one's religious beliefs and the rights and privileges of citizenship, including holding public office.

The various decisions of the justices in *McDaniel* illustrate once again the difficulty the Court has encountered in positing clear guide-

444. *Id.* at 606-07.
445. Paty v. McDaniel, Tenn., 547 S.W.2d at 905.
446. *Id.*
447. *Id.* at 907. *See* notes 408 & 409 and accompanying text *supra*.
448. 435 U.S. at 643 (White, J., concurring).
449. *Id.* at 643-44.

lines for resolving the difficult questions arising under the free exercise and establishment clauses. While the result in *McDaniel* may be satisfactory in that it repudiates a doctrine long rejected by most states, it is unfortunate that the Court was unable to base its decision on a common ground expressed in a single opinion.

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