10-1974

Gonzales v. Automatic Employees Credit Union

Lewis F. Powell Jr.

Preliminary Memo

February 15, 1974 Conference
List 7, Sheet 1

No. 73-858

GONZALEZ

v.

AUTOMATIC
EMPLOYEES
CREDIT UNION

Timely

Appeal from 3-Judge Ct.
N.D. Illinois
(Swygert, Circuit Judge;
Austin & McGarr, D.J.'s;
memorandum opinion)
Federal/Civil

1. SUMMARY: Appellant sued on behalf of himself and a class for declaratory and injunctive relief on the grounds that the automobile repossession and resale provisions of the Illinois Commercial Code were unconstitutional. The heart of the six count complaint at issue was the constitutionality of Ill. Rev. Stat., ch. 26, §§ 9-503 and 9-504 allowing private repossession by creditors without prior notice and a hearing to

the debtors. The relevant statutes are in an appendix to the Jurisdictional Statement. The 3-judge court dismissed the suit for lack of standing of the named plaintiffs, and held that giving the relief requested would be a "useless act." The class action was also dismissed.

Then why was the 3 J ct ever convened?

2. FACTS: Appellant Gonzalez was one of four named plaintiffs. Three, including Gonzalez, alleged almost identical factual situations. In each case, the debtor-appellant granted the creditor-appellee a purchase money security interest in a used automobile. The creditor summarily repossessed the car, applied for and received repossession title, and resold it to a third party not involved in the litigation. In each case, Gonzalez and the two other debtors alleged that there was no default at the time the automobile was repossessed.

The 3-judge court began by noting that the Commercial Code expressly conditions a creditor's right to repossession upon the existence of an actual, bona fide default. Ill. Rev. Stat., ch. 26, §§ 1-203, 9-501(1), 9-503, 9-504. Moreover, use of Ill. Rev. Stat., ch. 95 1/2, §§ 3-114(b), 3-116(b) and 3-612 is contingent upon a lawful and proper transfer of interest in the automobile. Each complaint alleged a violation of the statute, since the debtor claimed there was no default. "Thus, in a case where they assert that the repossession and resale provisions of the Illinois Code were used improperly and maliciously against them, plaintiffs ask this Court to determine the validity of these statutes when properly applied to debtors actually in default." If appellants

were correct, the court stated, they would have a damage remedy under § 9-507 of the Illinois Commercial Code for wrongful conversion, but lacked standing to challenge the constitutionality of the statutes, since their claim was that these statutes were violated.

The court further stated that since the automobiles of Gonzalez, and another plaintiff, had already been repossessed and resold, with titles transferred, before either party had joined the action, injunctive relief would be a "useless act." This holding was also couched in standing terms.

Since the representatives lacked standing, they could not represent the class, and the complaint was dismissed.

3. CONTENTIONS:

a. Appellant

Appellant says his claim was for notice and a hearing before repossession, and that no subsequent determination of the validity or invalidity of the repossession can affect his constitutional right. He relies on Fuentes v. Shevin, 407 U.S. 67 (1972), which dealt exclusively with the claim to notice and a hearing before summary replevin of goods. He cites language in Fuentes to the effect that "no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred." 407 U.S., at 81-82.

On the question of default, he claims no other court in a suit alleging a right to prior notice and hearing has

dismissed for standing on the failure to allege the complainant was in default (see J.S., at 11), and says the court ruling "amounts to stating that a person who pays his bills has no right to a hearing before his property is taken away from him." J.S., at 11. He asks that the standing holding be reversed and that the case be remanded for a determination on the merits.

As to that part of the court's opinion sounding in mootness, e.g., that injunctive relief was impossible because the automobile had already been repossessed, title transferred and sold, appellant says this is also inconsistent with Fuentes, where the plaintiffs had already had their property taken away from them. Also, the constitutional violation would otherwise be capable of repetition but evading review. Moore v. Ogilvie, 394 U.S. 815 (1969). Finally, even if the injunctive relief requested were moot, damages for the unconstitutional taking were not.

b. Appellee

The creditor-repossessor, Mercantile National Bank of Chicago, first argues that the suit should be dismissed for want of jurisdiction because the suit should not have been before a 3-judge court and, even if it should have been, appeal should have lied to the CA and not directly here. The main point made is that the ruling below was on standing and not the merits. No case of this Court is cited for this proposition, which must be, that a dismissal on standing grounds is not an order granting or denying relief within the meaning of 28 U.S.C. § 1253.

Appellee also argues that this is not a suit seeking to restrain the action of a state official in the "enforcement or execution" of a state statute, and thus does not require a 3-judge court under 28 U.S.C. 2281. The Secretary of State was named as a defendant in the suit, but appellee claims the Secretary of State has nothing to do with the private repossession; he merely recognizes a transfer of title of the motor vehicle which has already taken place by a mere ministerial act. The Secretary of State is only a nominal defendant and the requirement of § 2281 is not satisfied by joining, as nominal parties defendant, state officers whose action is not the effective means of the enforcement or execution of the challenged statute." Wilentz v. Sovereign Camp, W.O.W., 306 U.S. 573, 579-80 (1939); Moody v. Flowers, 387 U.S. 97, 102 (1967). Appellee cites district court cases holding that this kind of action is improper for 3-judge court determination -- Nicholas v. Tower Grove Bank, 362 F. Supp. 374, 377-78 (E.D. Mo. 1973); Kirksey v. Theilig, 351 F. Supp. 727, 729-32 (D. Colo. 1972); Gibbs v. Titelman, No. 72-2165 (E.D. Pa. 1972) (Motion of Appellee, at App. 12).

Appellee argues in the alternative that the 3-judge court should be affirmed, and that its ruling on standing and the class action was correct. Appellee argues there is no "capable of repetition" problem, since numerous courts have ruled on the merits of suits of this kind.

4. DISCUSSION: The standing ruling of the 3-judge court is doubtful, to say the least. I don't know why you have to allege

you are in default to claim a right to prior notice and hearing before respossession, and the injunction would not be useless ~~or~~ to the future enjoining of the statute as unconstitutional, on the "capable of repetition" rationale, and ~~for~~ damages remain for an unconstitutional taking in the instant suit. This is the clear implication of Fuentes and nothing in Mitchell v. Grant, No. 72-6160, is likely to change that.

As to the jurisdictional question, the first point of appellee, that you cannot have direct appeal to this Court because relief was denied on standing grounds, seems doubtful. There is no case of this Court that I know of which stands for that proposition. The second argument of appellee is a harder one, that a 3-judge court should not have been convened in the first place because appellant did not seek to restrain the act of a state official. In addressing this question, a number of considerations may come into play: (1) there were other counts of the complaint aimed at the Secretary of State's role in validating title transfers -- this may be "ministerial," but it is some form of action, and arguably would not be permitted if appellant succeeded on the merits; (2) to some extent this question is tied into the ultimate question in the suit, whether there is state action in private repossession, an issue which lower courts have split on. Assuming one could rule there was state action, would it follow that there was state participation in the enforcement of the statute, thus undercutting appellee's arguments on the proper jurisdiction of a three-judge court?

This issue at least seems close. Perhaps the best thing to do, if the Court disagrees with the standing below, is to note and postpone jurisdiction to the merits. The best argument in appellees' favor is the cited cases of the lower courts, holding attacks of this kind appropriate for single judge disposition, but there seems to be no case of this Court dealing with the problem of the possible state-action/state-enforcement overlap.

There is a motion to DWJ/or AFFIRM.

2/4/74 Scott Opinion of 3-Judge Court in J.S. Appx.

ME

February 6, 1974 JBO

DISCUSS

Vacate & Remand for single judge (Award Deference)

3 J/Ct was convened to consider Petrs attack on repossession pursuant of Ill. Commercial Code, But purpose of suit was to test validity of Code - not to enjoin enforcement. Thus Feel juris. is doubtful.

DISCUSS

No. 73-858

Gonzalez v. Automatic Employees Credit Union

The 3 j USDC is probably wrong on both its standing and mootness holdings. But I don't think this is properly a 3 j USDC case, due to the minimal involvement of a state officer. The relevant statute, 28 USC 2281, refers specifically to an injunction "restraining the action of any officer of [a]state in the enforcement or execution of [the challenged] statute . . .." The mainstream of this case is plainly not the enjoining of the actions of a state officer. You should either vacate and remand for the entry of judgment by a single judge (allowing appeal to the CA) or postpone juris to argument. I favor the former.

Jack

Conf 1/15/74

DISCUSS

Court USDC, N.D. Ill. | Voted on ...., 19...
Argued ...., 19... | Assigned ...., 19... | No. 73-858
Submitted ...., 19... | Announced ...., 19...

ALFREDO GONZALEZ, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, Appellant

vs.

AUTOMATIC EMPLOYEES CREDIT UNION, ET AL.

12/1/73 Appeal filed.

Others beat me down but 3 J/Ct arguably had juris. I am not convinced but don't want to vote & there is no majority

Affirm

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING	
		G	D	N	POST	DIS	AFF	REV	AFF	G	D			
Rehnquist, J.							✓							
Powell, J.							✓							
Blackmun, J.							✓							
Marshall, J.								Remand to D.C.						
White, J.								Postpone						
Stewart, J.							✓	No sub. Fed Q						
Brennan, J.							✓	" " " "						
Douglas, J.				✓										
Burger, Ch. J.							✓							

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

From: White, J.

Circulated: 2-21-74

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

ALFREDO GONZALEZ, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED *v.* AUTOMATIC EMPLOYEES CREDIT UNION ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

No. 73-858. Decided February —, 1974

Memorandum for the Conference.

I took this case off of Tuesday's order list in order to circulate the following:

Appellant Gonzalez, whose automobile was repossessed by appellee Mercantile National Bank of Chicago, sued on behalf of himself and a class, under 28 U. S. C. § 1983, claiming that §§ 9–503 and 9–504 of the Illinois Commercial Code were unconstitutional insofar as these sections permit and authorize the repossession and subsequent sale of a debtor's property upon an alleged default without prior notice or opportunity to be heard. A three-judge court dismissed the complaint for lack of standing. 363 F. Supp. 143 (ND Ill. 1973). The court observed that the transaction of which plaintiff complained involved an alleged violation of the challenged statutes. The court reasoned that if appellant was not in default, as alleged, his remedy was for damages for wrongful conversion, under § 9–507 of the Illinois Code, and that since the automobile of Gonzalez had already been repossessed and resold, and title transferred by the Secretary of State before Gonzalez became a named plaintiff in the action, granting declaratory and injunctive relief would be a "useless act."

Appellant asserts that damages for wrongful conversion is not an adequate remedy for the injury suffered as a

result of losing possession of his automobile without prior notice and a hearing, and relies on *Fuentes* v. *Shevin*, 407 U. S. 67, 81–82 (1972), where the Court stated "no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred." Appellant points out that the three-judge court ruling amounts to stating that a person who pays his bills has no constitutionally enforceable right to a hearing before his property is taken away from him.

Since the working assumption in *Fuentes*, as in *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337 (1969), was that the violation of a constitutional right is not adequately compensated by a damage remedy,[1] this case poses an issue of substantial importance.

In my view, the holding of the District Court that the granting of declaratory and injunctive relief would be a "useless act," in light of the subsequent sale and transfer of title, is only subsidiary to its holding that damages are an adequate remedy for the claimed due process violation. If, in fact, the violation of a constitutional right is an identifiable and separate injury, the entry of declaratory and injunctive relief would not be "useless." It is certainly arguable that to the extent the District Court meant to indicate that the case is moot, which it did not explicitly state, the speed of resale and transfer of title before a damage action may be heard, indicates that the

[1] If the District Court is correct as to standing, it calls into question not only the rationale of *Fuentes*, but the approaches in *Mitchell* v. *Grant*, No. 72–6160, and *Arnett* v. *Kennedy*, No. 72–1118, as well, since it suggests that both petitioners should have been dismissed for standing. Mitchell could have obtained damages for a wrongfully issued writ of sequestration, and Arnett could have received backpay, if wrongfully terminated. The approach of the District Court ultimately would seem to suggest that petitioner in *Arnett* would only have standing to raise the due process issue if he claimed that he *was* properly terminated, thus making backpay unavailable.

controversy is "capable of repetition yet evading review." *Southern Pacific Terminal Co.* v. *ICC*, 219 U. S. 498, 515 (1911). In any event, if the Court considers this case moot, it should dismiss for want of jurisdiction, since the District Court did not so hold.[2]

If the suit should not have been dismissed for standing or mootness, an issue of major importance is presented as to whether there is state action when creditors avail themselves of self-help remedies pursuant to the Illinois Commercial Code. See *Adams* v. *Southern California First National Bank*, — F. 2d — (CA9 1973). Cf. *Jackson* v. *Metropolitan Edison Co.*, 483 F. 2d 754 (CA3 1973), cert. granted, — U. S. — (February 19, 1974).

Appellees also argue that due to the lack of state action the case was not appropriate for disposition by a three-judge court. They argue that the actual repossession by the creditor did not constitute "enforcement or execution" of a state statute, under 28 U. S. C. § 2281, and that the transfer of title by the Secretary of State pursuant to Illinois statutes was, in effect, a ministerial act. This also is an issue of some complexity, since appellee appears to argue that disposition by a three-judge court was improper even if, on the merits, the District Court might have found state action sufficient to reach the merits of the due process claim.

The holding with respect to standing is important and highly questionable if debtors not in default are to prevent violation of their asserted rights to due process. It obviously deserves plenary consideration; but because the issues of mootness and the jurisdiction of the three-

[2] The mootness issue is also presented in No. 73-6042, *Hight* v. *Belgrade State Bank*, on the February 22, 1974 Conference List. In that case, however, petitioner signed and transferred title to the car to the original seller after entry of judgment in respondents' favor in the trial court. The creditor apparently did not act unilaterally, as in the instant case, to sell the repossessed car and transfer title.

judge court raise substantial questions,[3] I would postpone jurisdiction to the merits.

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[3] Alternatively, I would suggest holding this case pending appeal in the *Adams* case, which is likely to be well briefed and the focus of critical comment, and raises the same state action and due process issues as this case. In *Adams,* the plaintiff had his car repossessed and sold before bringing suit, and the District Court did not attach any importance to whether Adams claimed he was or was not in default.

Conference 2-22-74

Court .....

Argued ....., 19...

Submitted ....., 19...

Voted on ....., 19...

Assigned ....., 19...

Announced ....., 19...

No. 73-858

GONZALEZ

vs.

AUTOMATIC EMPLOYEES CREDIT UNION

RELIST

Voted & Postponed (Hold Right for this

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING	
		G	D	N	POST	DIS	AFF	REV	AFF	G	D			
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Blackmun, J.							✓							
Marshall, J.				✓		+		Postponed						
White, J.				✓										
Stewart, J.							✓							
Brennan, J.				✓		+		Postponed						
Douglas, J.				✓				Postpone						
Burger, Ch. J.							✓							

LFP/gg 9-9-74

No. 73-858 Gonzalez v. Automatic Employees Credit Union, Merchantile National Bank of Chicago, etc.

This is a summary memo, primarily as a "memory jog" of the facts and issue presented by the above case. This memorandum reflects no specific analysis, and reflects only a most tentative and superficial viewpoint.

* * * * *

This is an appeal from an Illinois three judge District Court, in which we postponed the jurisdictional issues until we hear the case.

I must say, from a preliminary reading of the briefs, that I think the case should be dismissed as improvidently granted. The facts, issues and opinion of the DC, together with subsequent settlement in whole or in part of all of the claims, leaves the case in a position in which there seems to me to be no clear cut issue. Moreover, the Secretary of State of Illinois has substantially amended the procedure followed by him with respect to the issuance of "repossession certificates of title" to motor vehicles, and this in itself may make the case moot.

The case, purporting to be a class action, is an attack on the constitutionality of the Illinois Uniform

Commercial Code and the Illinois Motor Vehicle Code, as they relate to the repossession of automobiles upon default in payment of deferred installments and the issuance of repossession certificates of title by the Illinois Secretary of State. This is a 1983 suit for an injunction, declaratory judgment, and for compensatory and punitive damages, In view of the asserted state action, involving a statute of statewide applicability and with the Secretary of State named as a defendant, a three judge court was convened. On the basis of affidavits, that court dismissed the case on two grounds: (i) lack of standing by the parties to maintain the action, and (ii) mootness, because the automobiles of the plaintiffs had already been repossessed, resold, with titles transferred to individuals who were not joined as parties.

This suit also was dismissed as a class action on the ground that there must always be a named party with standing who is entitled to maintain the suit as a member of the class he purports to represent. Absent such a party in this case, the DC dismissed the class action suit.

T The facts are difficult to state, as they vary from time to time, as did the parties and their status. One is inclined to believe that the suit must have been a "manufactured one", and that the named parties are being financed by someone - as none of them appears to have any real interest in the case.

The suit was originally brought by Mojica on March 16, 1972. In July 1972, the Secretary of State proposed a new procedure with respect to the issuance of repossession title certificates, a procedure which included rather elaborate provisions for notice and opportunity to object. (See Appellee's Brief, p. 5). Appellee states in its Brief that on July 7, 1972, Mojica approved the Secretary of State's new rules - but apparently his suit was not dismissed. Thereafter, on September 28, 1972, Gonzales and two other parties joined the litigation with an expanded and amended complaint, and with new defendants including Merchantile National Bank of Chicago.

The DC decided the case on August 16, 1973 at which time apparently all four of the plaintiffs remained in the litigation. We are now told that "all named plaintiffs other than Mr. Gonzales, and all named defendants other than Merchantile Bank and the Secretary of State" actually"settled with each other prior to the decision of the District Court and are no longer directly involved in the litigation". See n. 1, p. 3 of Appellee's Brief. We are further informed by Appellee's Brief (p. 9) that Gonzalez - the sole remaining named plaintiff - has settled his claim for damages (originally in the amount of $62,000) for $750. Gonzalez persists, however, in maintaining the class action on behalf of all others who may be similarly situated.

As to the jurisidictional issue, appellee contends that a direct appeal to this Court is no longer available where a three judge court dismisses a case on grounds either of mootness or lack of standing, citing Rosado v. Wyman, 395 U.S. 826 and 9 Moore's Federal Practice. It is argued that even at the commencement of the litigation, there was no basis for either injunctive or declaratory relief - and hence no case or controversy. The automobiles had been seized and resold, and the purchasers were not named as parties. No effective injunctive or declaratory relief could be given.

Moreover, subsequently thereto (but before the amended complaint was filed) the Secretary of State adopted a new procedure which - as I read the opinion of the District Court - was not considered or discussed. Thus, we do not have the benefit, on the substantive constitutional issue, of any decision below as to whether or not the new procedure is valid.

Although I find the arguments - by both parties - as to mootness and standing to be confused, and as failing sharply often to distinguish between the two, I have the distinct impression that the case is "tilting with windmills" in the sense that no one presently involved actually has a case or controversy.

If we were to reach the substantive constitutional

issue (Appellant has predicated his case primarily on Fuentes and Sniacach - without commenting on the modification of Fuentes by the Court's decision in Mitchell v. Grant), we would not have the benefit of a Circuit Court opinion. Whatever may have been the deficiencies of Illinois law as to lack of notice, the Secretary of State has now promulgated new regulations and an interpretation of those by the DC and CA 7 would be helpful.

As will be evident from reading this memorandum, I have dictated it as I worked my way through the Brief, but I am still inclined to dismiss the case as improvidently granted.

L.F.P., Jr.

LFP/gg 9-9-74

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Commercial Code and the Illinois Motor Vehicle Code, as they relate to the repossession of automobiles upon default in payment of deferred installments and the issuance of repossession certificates of title by the Illinois Secretary of State. This is a 1983 suit for an injunction, declaratory judgment, and for compensatory and punitive damages. In view of the asserted state action, involving a statute of statewide applicability and with the Secretary of State named as a defendant, a three judge court was convened. On the basis of affidavits, that court dismissed the case on two grounds: (i) lack of standing by the parties to maintain the action, and (ii) mootness, because the automobiles of the plaintiffs had already been repossessed, resold, with titles transferred to individuals who were not joined as parties.

This suit also was dismissed as a class action on the ground that there must always be a named party with standing who is entitled to maintain the suit as a member of the class he purports to represent. Absent such a party in this case, the DC dismissed the class action suit.

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L.F.P., Jr.

db/ss 10/16/74

BENCH MEMO

TO: Mr. Justice Powell DATE: October 15, 1974

FROM: David Boyd

No. 73-858 Gonzalez v. Automatic Employees Credit Union - Appeal, 3 J.Ct.

Perhaps the most important and challenging issue in this appeal is how to get out of it without doing any significant damage to federal jurisprudence. The case has some flavor of a "put up" suit, and the district court, while having its heart in the right place, had its head screwed on backwards. Such disastrous appeals are invitations to bad law.

Jurisdiction: Moore's Theory

A preliminary question is whether the three-judge court's rulings on standing and mootness are cognizable in this Court under 28 U.S.C. § 1253. Appellee asserts that there is a discernible and growing trend in this Court for holding that they are not, relying principally on 9 Moore's Federal Practice § 110.13 [3] for that proposition. Appellants simply maintain that such an assertion is foreclosed by precedent, citing cases that Moore's maintains are about to be abandoned.

The relevant portion of Moore's acknowledges that the Court previously has taken on direct appeal judgments of three-judge courts dismissing actions for lack of a case or controversy, Florida Lime & Avocado Growers, Inc. v. Jacobson, 362 U.S. 73,

80 (1960), lack of standing, Flast v. Cohen, 392 U.S. 83 (1968), political question, Baker v. Carr, 369 U.S. 186 (1962), and abstention, Zwickler v. Koota, 398 U.S. 241 (1967). It asserts, however, that more recent cases indicate that the Court will not continue this practice.

Moore's finds support for this assertion in the manner this Court has used Mengelkoch v. Industrial Welfare Commission, 393 U.S. 83 (1968), and Wilson v. Port of Lavaca, 391 U.S. 352 (1968). Both were per curiam opinions. In Lavaca, the three judge court determined that the claim was not one that "must be heard by a three-judge court," and further ruled that the relief sought was not appropriate. The court dissolved itself, and the district judge thereafter adopted the three-judge court's action as its own. The per curiam opinion analogized that case to the instance in which the district judge refused to convene a three-judge court and denied relief. In thus determined that the proper route for appeal was to the court of appeals rather than the Supreme Court. Mengelkoch, also a per curiam opinion, began the same way. The three-judge court dissolved itself after determining that it lacked jurisdiction. Thereafter, the district judge considered the matter and dismissed on grounds of abstention, stating in his memorandum that the opinion of the three-judge court was adopted by reference. Considering appellants' appeal from both judgments, the Court held that Lavaca required that the entire matter

should be taken to the court of appeals, stating, "[W]e have held that when, as here, a three-judge court dissolves itself for want of jurisdiction, an appeal lies to the appropriate Court of Appeals and not to this Court." 393 U.S. at 84. Moore's concedes that Mengelkoch can be read only to stand for the proposition that three-judge court dissolutions for "want of jurisdiction" must be appealed in the court of appeals rather than the Supreme Court, but finds support for its reading of the law in the manner that the Court has since used the case. It notes that in Rosado v. Wyman, 395 U.S. 826 (1969), the Court cited Mengelkoch and Lavaca in dismissing a direct appeal from a three-judge court determination that an intervening change in the law mooted the case and that the resultant challenge was not ripe. It also argues, with somewhat less force, that the Court's per curiam opinion in Mitchell v. Donovan, 398 U.S. 427 (1970) can be read to support its view of the developing law.

Moore's asserts that the trend of these cases "strongly suggest that the Court is moving toward the position that a direct appeal will lie to it only when a three-judge court finds a substantial federal question, proceeds to decide it, and grants or denies an injunction." 9 Moore's Federal Practice ¶ 110.03[3] at 78-79. That may be as much advocacy as reporting. Its reading of Mitchell is quite a stretch. Moreover, Moore's fails to give proper recognition to a more recent case, Lynch v. Household Finance Corp., 405 U.S. 538 (1972) [You did not

participate in that case.] In Lynch a three-judge court dismissed on grounds that it lacked jurisdiction under 28 U.S.C. § 1343(3). The Court rejected a claim that it lacked jurisdiction to hear the appeal of a three-judge court decision dismissing for want of subject matter jurisdiction. In a footnote, Justice Stewart asserted that the question of availability of direct appeal depends on whether the three-judge court was properly convened. He noted that the Court had previously taken direct appeals from three-judge court dismissals for lack of subject matter jurisdiction, citing Baker v. Carr, one of the cases that Moore's had identified as a dying breed. Appellant has cited other fairly recent cases where the Court reached the merits of three-judge court decisions turning on lack of standing, Granite Falls State Bank v. Schneider, 402 U.S. 1006 (1971); Richardson v. Kennedy, 401 U.S. 901 (1971), and abstention, American Trial Lawyers Ass'n v. New Jersey Supreme Court, 409 U.S. 467 (1973).

As my very cursory scan of the law reveals, there is no rigid consistency in this area. The trend definitely seems to be shifting away from Moore's thesis, as Moore's now acknowledges. 9 Moore's (1973 Supp) at 11. Still, I find Moore's and appellee's assertions intriguing. And my limited experience on the Court convinces me that this should be the law, even though it appears that it isn't. I will probably have no time for further research on this point prior to argument, or even for much more thought than is revealed in this somewhat sketchy memorandum. I thought it best to develop the point now, however, because a ruling on this case will serve to pound another nail in the coffin of this theory. If the Court is ever going to reconsider the Lynch decision, it should do so now.

The Issues on Appeal

Assuming that these questions are cognizable here rather than in the court of appeals, the question becomes which of the myriad problems does the Court wish to focus on in disposing of this mess. The most obvious candidate is mootness.

The nature of this mootness ruling is somewhat unique. The mootness seems to go to the propriety of three-judge court relief rather than to the existence of Article III jurisdiction. The seizure and sale of appellant's car, in the opinion of the district court, mooted his request for injunctive relief. It would not have deprived a single district court judge of jurisdiction to award damages, however. This case differs from Indiana Employment Commission v. Burney, 409 U.S. 540 (1973), in that regard. There the class representative obtained the benefits she was seeking through the process of administrative appeal. Presumably no other action remained for a single district court to consider, save perhaps a highly tenuous action for damages resulting from the temporary deprivation of the benefits.

Proper analysis of the mootness question would require a more discriminating examination of the class purportedly represented by appellant Gonzalez than either the district court or appellee has provided. This, in turn, requires some elaboration of the rather complicated way in which appellant Gonzalez came to be the sole representative of his class.

Litigation in this case was first instituted by ex-litigant Mojica. In March of 1972 Mojica filed an action to have the court declare Illinois Code Sections 9-503 and 9-504 unconstitutional. He subsequently requested that a three-judge court be convened to hear his claim, and also that the district court issue a temporary restraining order prohibiting the Illinois Secretary of State from transferring title and issuing new certificates of title after involuntary repossession until after the debtor was granted the opportunity to have a hearing before an impartial trier of fact.

The state opposed the entry of a TRO. On July 3, 1972, it filed an opposition in which it indicated an intention to institute new procedures that would ameliorate plaintiff Mojica's concerns. The Secretary of State indicated he would promulgate new rules and regulations governing procedures for State transfer of title. The proposed new procedure would require that the creditor send the debtor notice of the potential application for transfer of title. Additionally, the State would only transfer titles ex parte in cases where the creditor submitted an affidavit indicating that he had sent notice by certified mail, return receipt requested, at least 15 days prior to the proposed transfer of title and that he had not received in response an affidavit of defense. If the debtor submitted an affidavit of defense, the state would require a

certified copy of an order of a court of competent jurisdiction before transferring title. App. at 19-20. In oral argument on the motion for TRO, the State indicated that this was more in the nature of an "office policy" than a formally promulgated rule.

The district court denied the motion for TRO on July 7th. The same day the district court convened a three judge court and plaintiff Mojica amended his complaint to include a court attempting to establish a class action. Appellant Gonzalex still had not appeared.

In September appellant Gonzalez joined the action. He, Mojica, and others submitted an amended complaint seeking to represent the class composed of:

> all persons who are debtors under security agreements invoking motor vehicles and who have had or may have their automobiles or other motor vehicles repossessed and sold for an alleged default without prior notice and an opportunity to be heard and whose certificate of title has been or will be terminated and transferred by the Secretary of State.

App. at 31. Mojica and the others have since dropped out, and Gonzalez is the sole remaining class representative.

The definition of the class is somewhat deceptive. In reality there are two classes, and the importance of distinguishing them is heightened by the state's amendment of its practice of transferring automobile titles.

Title cannot be transferred in Illinois without the participation of the Secretary of State. And, by the time

that the Gonzalez complaint was filed, the Secretary of State had devised procedures that seem to assure that the transfer will not likely occur in advance of provision of notice to the debtor and the passage of time permitting him to assert a defense.

The state's alteration of its administrative practice serves to define the classes. One is the class of persons who lost their automobiles and title under the prior state practice. (Those who "have had" in the words of the complaint.) The other is the class of persons who have lost their cars and title following the state's amendment of procedure, which was announced in court on July 7, and apparently adopted in August.

The constitutional claim of one class differs significantly from that of the other class. The second class (the post-reform class) have a much diminished claim to lack of notice prior to transfer of title. Indeed, unless the form of notice is deficient they appear to have no claim at all. And the form of notice is not likely to be deficient in light of the fact that the creditor can reasonably be expected to have the debtor's current address.

The first class would have seemed to have had a stronger case on the merits, since their claim of lack of notice prior to the State's transfer of title is more convincing. However, in light of the significant alteration of the state procedure,

it seems inappropriate for a three-judge court to act. It makes little sense to declare invalid and enjoin a procedure that the state has itself long-since abandoned. Appellant's claim that such a ruling is necessary to prevent the Secretary from slipping back into his old ways is sheer speculation. [1] All they need do if he slips back into his old ways is send Gonzalez out to buy another tin-lizzie on credit.

Gonzalez' role in representing the classes is even more tenuous. As a practical matter, he is a member of the first class. His car was repossessed on or about April 25, 1972 - prior to the state's revision of policy. The state's alteration of policy effectively makes him a class representative without a cause. Equally important, he is probably not qualified to represent that class. The briefs indicate that he accepted a settlement for damages for seizure and sale of the car. Under O'Shea v. Littleton, 415 U.S. ___ (1974) and Burney, supra, he is not a proper representative of that class.

There is some question whether the district court should have proceeded to hear the claim of the second class so soon after the significant alteration of the challenged state procedure. Wright v. Richardson, 405 U.S. 208 (1972), suggests that it should not. In any event, appellant Gonazalez is not qualified to represent that class. That class is comprised of persons who had their automobiles repossessed and their titles transferred under the new state procedure. Gonzalez does not fit that description. Moreover, to the extent that

1. One averting a "return to old ways" as a basis for finding a live controversy must demonstrate that "there is no reasonable expectation that the wrong will be repeated." United States v. W.T. Grant, 345 U.S. 629, 633 (1952). That "heavy burden", id., would appear to be met here, where the Secretary has apparently maintained this practice for two years.

Gonzalez argues that he represents that broad class of persons fearing future repossession and title transfer, he has not alleged a controversy of sufficient concreteness. There may be representatives for that class, but Gonzalez is not one of them. A proper representative would at least have to allege that he had purchased an automobile on an installment sale basis and that he had a reasonable basis for fearing loss of that automobile through the operation of the Illinois repossession and resale procedure. Cf. Steffel v. Thompson, 415 U.S. 452 (1974).

The State Action Question:

If you agree with my mootness analysis, there is no need to reach other issues. If you disagree, however, the next logical question would seem to be whether there is jurisdiction over the private party under § 2281. That section provides for actions seeking to restrain actions of a "state officer." Clearly the Secretary of State qualifies as a proper defendant under that statute. Whether the Secretary's presence suffices to provide pendent jurisdiction over the private creditor-repossessor is more questionable, however. I have only had time to look at the cases rather quickly. None of the cases cited by appellant seems to be one in which pendent jurisdiction supported three-judge court jurisdiction over a pendent party. All appear to be cases

involving the exercise of pendent jurisdiction over related claims involving the same parties.

I don't think that this would be a very good case for deciding the pendent party question, especially in light of the change in Illinois procedure. Some of the other cases here on cert seem to provide cleaner vehicles for resolution of this issue. My recollection is that the Ninth Circuit case, in which Judge Hufstedler dissented, presents the best case.

I question whether there is any current need to decide this issue at all, however. There appears to be no split in the lower courts. And the utilities case would seem to offer the Court a chance to ease into state action questions in another context. I would pass on the issue in this case and dismiss the hold cases.

Standing:

If this case ever gets to the standing question, reversal would be required. The lower court's ruling on that point is simply absurd. Analytically, the existence of alternative remedies is irrelevant to the question of standing. And in this case the alternative remedy was quite distinct from that sought by appellant Gonzalez.

D.B.

ss

No. 73-858 GONZALEZ v. AUTOMATIC EMPLOYEES Argued 10/21/74

Appeal from 3 J/Ct which dismissed class suit against the repossession of autos under UCC.

Various issues: Does appeal directly to this Court lie where the 3 J/Ct dismisses on ground of no substantial Fed Q? ~~Acc~~ In Lynch the Court took juris. on appeal even tho the 3 J/Ct had dismissed. Acc to I may be bound by Lynch (also Boker v Com), the better rule would be to deny direct appeal juris ~~under~~ unless the 3 J/Ct has heard the case & issued or denied an injunction. See Moore, Fed Practice. I think the appeal should have been to Ct. of Appeals. (This is one way we can protect our docket from 3 J/Ct appeals - Congress will not act).

Case also seems moot. At time Gonzalez intervened her car had been sold (he had notice & had done nothing). Her damage claim was subsequently ~~settled~~ settled.

Lattimer (for ~~Pltf~~ Appellant)

J. White raised Q of mootness.

Jenner (for Resp)

Issue of damages from the alleged tort has been settled.

1. Threshold issue whether Ct. has juris. at all.

2. Whether case is moot.

3. " Resp in standing.

As to facts:

Art XI
Sec. 503, 504 & 507. This Chapter of Code was re-examined by Commissioners & ALI & revised in 1972 — carefully to meet D/P. The validity (const.) of these self-help provisions of Code are not before us. Decision below was purely on procedural grounds.

Ctt bet. parties provided expressly for self-help repossession. This is old common law rule.

Jenner (Cont't)

There are 8 decisions by CAs (6 dif. cts of app) all of which upheld validity of ~~Section~~ 503, 504 & 507.

Notice of sale of auto was given to Gonzalez - who took no action. After him, Gonzalez intervened in then pending case. At that time no relief could be issued that would do Gonzalez "any good".

Jenner argues that at that time there was no Art III standing; also that case was moot.

Argues no juris. of this Court to hear a direct appeal. (See Appellees Br 10, 14-19. Appeal to this Ct is not proper if 3 J/Ct dismisses the case ~~as to him~~ on procedural grounds or because of lack of sub. fed. Q, there is no appeal here (no injunction or denial of injunction) - but only to CA 7.

Read Briefs on this Q - which interests me.

Jenner (cont)

Jenner was challenged by Whelk & Stewart on the standing issue: They say that in Fuentes, the repossession had occurred & could not be undone. (As I understood, Whelk & Stewart are saying the damage claim remained & this sufficed to sustain juris. to rule on const. issue).

Laturner (Rebuttal)

In 9 cases, ~~the~~ this Court has taken juris where there was no decision on merits below – no inj. granted or denied. (Stewart seemed to agree)

As to mootness, J Stewart denied that Fuentes is like this case. Stewart said ~~R~~ Gonzales has no further interest.

No. _____, Vacate & Remanded

73-748 GONZALEZ v. AUTOMATIC Conf. 10/25/74

The Chief Justice
Vacate & Remand

Douglas, J. Vacate & Remand
Fuentes controlling
on merits
Uncertain whether there
was state action. The
Sec. of State's action was
ministerial.
Not a proper 3 Judge
Ct.

Brennan, J. Vacate & Remand
to 3 J/Ct in Mootness.

Stewart, J. Vacate & Remand
Agree with Jenner's
first point — that no
appeal may be taken
directly to this Court
where the 3 J/Ct
dismissed the case
for mootness & lack
of standing — Thus, no
const. issue was involved.
Appeal should go to
CA 7.
Case is probably also
moot, but would prefer
to decide on above ground.

Potter agrees with
Douglas that Fuentes
would control case on merits

Potter cited Moore.
See Argument No 1 in
Jenner's Brief

White, J. V & R.

a 3 J/Ct is not required ~~to~~ – lacks juris – where issue is mootness or standing.

Thus, he agrees with Potter as to result (though I'm not clear that they ~~to~~ analyze situation in same way).

Agrees case is also moot.

(Potter stated he would make rule vs direct appeal somewhat broader than White would).

Byron says we should say in opinion that a single judge can act on standing & mootness

Marshall, J. V & R

Could go along with Potter.

Blackmun, J. V & R

Could go along with Potter.

Settlement is immaterial, but a footnote should at least

Powell, J. V & R

~~My 3 J/Ct dismissed~~

I agree with Potter.

Even if 3 J/Ct was wrong in dismissing, the appeal still goes to CA 7.

There should be a granting of an injunction or denial of injunction on merits before there is a direct appeal here.

Rehnquist, J. V & R.

L. F. P.

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Stewart, J.

Circulated: NOV 26 1974

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L F P
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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73–858

Alfredo Gonzalez, individually and On Behalf of All Others Similarly Situated, Appellant, *v.* Automatic Employees Credit Union et al.

On Appeal from the United States District Court for the Northern District of Illinois.

[December —, 1974]

MR. JUSTICE STEWART delivered the opinion of the Court.

This is an appeal under 28 U. S. C. § 1253 from an order of a three-judge court dismissing the appellant's complaint for lack of "standing."[1] We deferred consideration of our jurisdiction until the hearing on the merits. 415 U. S. 947. For the reasons that follow, we have concluded that the District Court's order is not directly appealable to this Court.

I

The appellant Gonzalez and three other named plaintiffs brought a class action in the District Court attacking as unconstitutional various provisions of the Commercial Code and Motor Vehicle Code of Illinois governing repossession, retitling, and resale of automobiles purchased on an instalment payment basis under security agreements.[2] The plaintiffs alleged that the statutory scheme

[1] *Mojica* v. *Automatic Employees Credit Union*, 363 F. Supp. 143.

[2] Ill. Rev. Stat. c. 26, §§ 9–503 and 9–504, and Ill. Rev. Stat. c. 95½, §§ 3–114 (b), 3–116 (b), and 3–612.

violated a debtor-purchaser's rights—under the Fourteenth, Fourth, and Fifth Amendments to the United States Constitution—to notice, hearing, and impartial determination of contractual default prior to repossession of the car, transfer of title to the secured party, or resale of the car by the secured party. The plaintiffs sought a declaratory judgment to this effect, a permanent injunction, and compensatory and punitive damages for past violations of their alleged constitutional rights. A three-judge court was convened pursuant to 28 U. S. C. § 2281.[3]

The named plaintiffs sought to represent the class of all debtor-purchasers, under security agreements involving motor vehicles, "who have had or may have their automobiles or other motor vehicles repossessed for an alleged default, without prior notice or an opportunity to be heard . . . and whose certificate of title has been or will be terminated and transferred by the Secretary of State." The named defendants were the Secretary of State of Illinois, responsible for transferring title under the challenged statutes, and five organizations operating as secured creditors in the motor vehicle field. The complaint also designated a defendant class, consisting of all secured creditors who may, "upon their unilateral determination of default by debtor-obligees," seek to repossess, and to dispose of, motor vehicles under the challenged statutes.

The pleadings and supplementary documents showed

[3] Section 2281 provides:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by an district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

that Gonzalez had purchased a car on a retail installment contract, which had later been assigned to the defendant-appellee, Mercantile National Bank of Chicago (Mercantile). Before this lawsuit was begun, Mercantile had repossessed the car, resold it to a third party, and arranged a title transfer to that party through the office of the Secretary of State. The complaint alleged that all of this had been done without notice to Gonzalez, and that he had not in fact been in default under the installment contract. On the basis of these facts, the three-judge court dismissed the complaint.[4]

The court held that Gonzalez lacked "standing" to contest the constitutionality of the statutory scheme. First, the court observed that enjoining future enforcemen of the scheme would be a "useless act" so far as Gonzalez was concerned, since the events of which he complained—the repossession and resale of his car—had already taken place.[5] Secondly, the court reasoned that the complaint, because it alleged that Gonzalez had not been in default, was directed not at the constitutional validity of the statutory scheme but only at Mercantile's abuse of the scheme. Noting that the statutory provisions authorized repossession and title transfer only upon default, and provided for injunctive relief and damages where creditors acted in the absence of default, the court held that Gonzalez lacked standing to litigate "the validity of these statutes when *properly* applied to debtors *actually in default.*"[6] The complaint was dismissed

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[4] Since only Gonzalez has sought review of the three-judge court's dismissal of the complaint, we confine our summary of that court's analysis to the specific facts of his case. The District Court's analysis was similar, however, with regard to each of the named plaintiffs.

[5] *Mojica* v. *Automatic Employees Credit Union, supra,* at 145–146.

[6] *Id.,* at 145.

"[s]ince all plaintiffs in this case fail to present a claim which can be reached on the merits." [7]

II

Appealing here individually and as a purported class representative, Gonzalez seeks reversal of the District Court's "standing" determination, and an order directing the reinstatement of his complaint. Our appellate jurisdiction is controlled by 28 U. S. C. § 1253:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district Court of three judges."

Gonzalez's jurisdictional argument is very simple: The dismissal of his complaint did in fact "deny" him the permanent injunctive relief he requested, and the case was one "required . . . to be heard and determined" by three judges because the several conditions precedent to convening a three-judge court under 28 U. S. C. §§ 2281 and 2284 (1970) were met. That is, the constitutional question raised was substantial; [8] the action sought to enjoin a state official from executing statutes of statewide application; [9] and the complaint at least formally alleged a basis for equitable relief.[10]

Mercantile denies that all of these conditions were met, but places greater emphasis on an entirely different reading of § 1253. Mercantile argues that an injunction is not "denied" *for purposes of § 1253* unless the denial

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[7] *Id.*, at 146.

[8] See *Goosby* v. *Osser*, 402 U. S. 512.

[9] See *Moody* v. *Flowers*, 387 U. S. 97.

[10] See *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U. S. 713.

is based upon an adverse determination on the merits of the plaintiff's constitutional attack on the state statutes. In the present case, injunctive relief was denied not because the court found the challenged statutes constitutionally sound, but only because the court found that Gonzalez lacked standing to make the challenge. Mercantile argues that a dismissal premised on grounds short of the constitutional merits should be reviewed in the first instance by the Court of Appeals, rather than by direct appeal to this Court.

It is an understatement to say that this argument is not wholly supported by precedent, for the fact is that the Court has on several occasions entertained direct appeals from three-judge court orders denying injunctions on grounds short of the merits.[11] But it is also a fact that in the area of statutory three-judge court law the doctrine of *stare decisis* has historically been accorded considerably less than its usual weight. These procedural statutes are very awkwardly drafted,[12] and in struggling

[11] Cases in which the District Court had denied injunctive relief for want of standing, or of justiciability generally: *Florida Lime & Avocado Growers* v. *Jacobsen*, 362 U. S. 73; *Baker* v. *Carr*, 369 U. S. 186; *Flast* v. *Cohen*, 392 U. S. 83; *Richardson* v. *Kennedy*, 401 U. S. 901; *Granite Falls State Bank* v. *Schneider*, 402 U. S. 1006. Cases where deniel was for want of subject-matter jurisdiction; *Lynch* v. *Household Finance Corp.*, 405 U. S. 538; *Carter* v. *Stanton*, 405 U. S. 669. Cases where denial was on grounds of abstention or for want of equitable jurisdiction: *Doud* v. *Hodge*, 350 U. S. 485; *Zwickler* v. *Koota*, 389 U. S. 241; *Mitchum* v. *Foster*, 407 U. S. 225; *American Trial Lawyers Assn.* v. *New Jersey Supreme Court*, 409 U. S. 467.

[12] Perhaps the oddest feature of § 1253 is that it conditions this Court's appellate jurisdiction on whether the three-judge court was correctly convened. But the Court has abjured this literalistic reading of the statute and has not hesitated to exercise jurisdiction "to determine the authority of the court below and 'to make such corrective order as may be appropriate to the enforcement of the limitations which that section imposes.'" *Bailey* v. *Patterson*, 369

to make workable sense of them, the Court has not infrequently been induced to retrace its steps.[13] Writing for the Court on one of these occasions, Mr. Justice Harlan noted:

> "Unless inexorably commanded by statute, a procedural principle of this importance should not be kept on the books in the name of *stare decisis* once it is proved to be unworkable in practice; the mischievous consequences to litigants and courts alike from the perpetuation of an unworkable rule are too great." *Swift & Co.* v. *Wickham*, 382 U. S. 111, 116.

The reading given to § 1253 by the appellant Gonzalez is not "inexorably commanded by statute." For the statute "authorizes direct review by this Court . . . as a means of accelerating a final determination on the merits." *Swift & Co.* v. *Wickham*, 382 U. S., at 119. It is true that dismissal of a complaint on grounds short of the merits does "deny" the injunction in a literal sense, but a literalistic approach is fully persuasive only if followed without deviation. In fact, this Court's interpretation of the three-judge court statutes has frequently deviated from the path of literalism.[14] If the opaque

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U. S. 31, 34, quoting *Gully* v. *Instate Natural Gas Co.*, 292 U. S. 16, 18.

[13] For example: Compare *Idlewild Bon Voyage Liquor Corp.* v. *Epstein, supra*, with *Stratton* v. *St. Louis S. W. R. Co.*, 282 U. S. 10 (whether review of a single judge's refusal to convene a three-judge court is available in the Court of Appeals); compare *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144 with *FHA* v. *The Darlington, Inc.*, 358 U. S. 84, 87 (whether three judges are required where only declaratory relief is requested); compare *Swift & Co.* v. *Wickham*, 382, U. S. 111 with *Kesler* v. *Dept. of Public Safety*, 369 U. S. 153 (whether a three-judge court is required when a complaint seeks to enjoin a state statute on the ground that it violates the Supremacy Clause).

[14] Read literally, § 1253 would give this Court appellate jurisdiction over even a *single judge's* order granting or denying an injunction

terms and prolix syntax of these statutes were given their full play, three-judge courts would be convened, and mandatory appeals would lie here, in many circumstances where such extraordinary procedures would serve no discernible purpose

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of the "action, suit, or proceeding" were in fact one "required . . . to be heard and determined" by three judges. But we have glossed the provision so as to restrict our jurisdiction to orders actually entered by three-judge courts. See *Ex parte Metropolitan Water Co.* v. *West Virginia*, 220 U. S. 539, 545.

A single judge is literally prohibited to "dismiss the action, or enter a summary or final judgment": in any case required to be heard by three judges. 28 U. S. C. § 2284 (5). Read literally, this provision might be held to prohibit a single judge from dismissing a case unless he has determined that it fails to meet the requirements of §§ 2281 or 2282. See Bereuffy, The Three-Judge Federal Court, 15 Rocky Mtn. Law Rev. 64, 73–74 (1942), and Note, 28 Minn. Law Rev. 131, 132 (1944). But we have always recognized a single judge's power to dismiss a complaint for want of general subject-matter jurisdiction, without inquiry into the additional requisites specified in §§ 2281 and 2282. *Ex parte Poresky*, 290 U. S. 30, 31; *Bailey* v. *Patterson*, 369 U. S., at 33; *Idlewild Bon Voyage Liquor Corp.*, 370 U. S., at 715; *Goosby* v. *Osser*, *supra*.

While the literal terms of the three-judge court statutes give us appellate jurisdiction over any three-judge court order granting or denying an "interlocutory or permanent injunction," we have in fact disclaimed jurisdiction over interlocutory orders denying permanent injunctions *Goldstein* v. *Cox*, 396 U. S. 471, and *Rockefeller* v. *Catholic Medical Center*, 397 U. S. 820.

While § 2281 requires a three-judge court where the injunction will operate against any state "statute," we have construed the term narrowly, to include only enactments of statewide application, *Moody* v. *Flowers*, 387 U. S. 97, 102. Cf. *King Mfg. Co.* v. *City Council of Augusta*, 277 U. S. 100, 103–104, construing far more broadly the term "statute" as used in the predecessor to 28 U. S. C. § 1257 (2).

Where § 2281 calls for three judges to enjoin a statute "upon the ground" of its "unconstitutionality," we have held that three judges are not in fact necessary where the unconstitutionality of the statute is obvious and patent, *Bailey* v. *Patterson*, 369 U. S. 31, or where the constitutional challenge is grounded on the Supremacy Clause, *Swift & Co.* v. *Wickham*, *supra*. See also n. 12, *supra*.

Congress established the three-judge court apparatus for one reason: to save state and federal statutes from improvident doom, on constitutional grounds, at the hands of a single federal district judge.[15] But some of the literal words of the statutory apparatus bear little or no relation to that underlying policy, and in construing these we have stressed that the three-judge court procedure is "not a measure of broad social policy to be construed with great liberality." *Phillips* v. *United States,* 312 U. S. 246, at 251. See also *Kesler* v. *Department of Public Safety*, 369 U. S. 153, 156–157; *Swift & Co.* v. *Wickham,* 382 U. S., at 124; *Allen* v. *State Board of Elections,* 393 U. S. 544, 561–562.

The words of § 1253 governing this Court's appellate jurisdiction over orders denying injunctions fall within this canon of narrow construction. Whether this jurisdiction be read broadly or narrowly, there will be no impact on the underlying congressional policy of ensuring this Court's swift review of three-judge court orders that *grant* injunctions. Furthermore, only a narrow construction is consonant with the overriding policy, historically encouraged by Congress, of minimizing the mandatory docket of this Court in the interests of sound judicial administration.[16]

Hear, hear!

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[15] *Phillips* v. *United States,* 312 U. S. 246, 250–251; *Bailey* v. *Patterson,* 369 U. S., at 33. The Court sketched the legislative history of the three-judge court statutes in *Swift & Co.* v. *Wickham,* 382 U. S., at 116–119. See also Currie, The Three-Judge District Court in Constitutional Litigation, 32 U. Chi. Law Rev. 1, 3–12 (1964); Note, The Three-Judge District Court: Scope and Procedure under § 2281, 77 Harv. Law Rev. 299, 299–301 (1963).

[16] "[I]nasmuch as this procedure also brings direct review of a district court to this Court, any loose construction of the requirements . . . would defeat the purposes of Congress, as expressed by the Jurisdictional Act of February 13, 1925, to keep within narrow confines our appellate docket." *Phillips* v. *United States,* 312 U. S., at 250. See also *Goldstein* v. *Cox,* 396 U. S., at 478; *Gunn* v. *Uni-*

Mercantile argues that § 1253 should be read to limit our direct review of three-judge court orders denying injunctions to those that rest upon resolution of the constitutional merits of the case. There would be evident virtues to this rule. It would lend symmetry to the Court's jurisdiction since, in reviewing orders granting injunctions, the Court is necessarily dealing with a resolution of the merits. While issues short of the merits—such as justiciability, subject-matter jurisdiction, equitable jurisdiction, and abstension—are often of more than trivial consequence, that alone does not argue for our reviewing them on direct appeal. Discretionary review in any case would remain available, informed by the mediating wisdom of a court of appeals. Furthermore, the courts of appeals might in many instances give more detailed consideration to these issues than this Court, which disposes of most mandatory appeals in summary fashion.[17]

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versity Committee, 399 U. S. 383, 387–388; *Allen* v. *Board of Elections*, 393 U. S., at 562; *Bd. of Regents* v. *New Left Education Project*, 404 U. S. 541, 543.

"The history of latter-day judiciary acts is largely the story of restricting the right of appeal to the Supreme Court." F. Frankfurter & J. Landis, The Business of the Supreme Court 119 (1928). To this trend of reform, the Court's mandatory appellate jurisdiction under the three-judge court statutes represents a major, and increasingly controversial, exception. The number of cases heard by three-judge courts has dramatically increased in the past decade. See Ammerman, Three-Judge Courts: See How They Run!, 52 F. R. D. 293, 304–306; Annual Report of the Director of the Administrative Office of the United States Courts, 1974, IX 44. Nearly a quarter of the Supreme Court's opinions in the 1972 Term were in three-judge court cases. Symposium, The Freund Report: A Statistical Analysis and Critique, 27 Rutgers L. Rev. 878, 902 (1974).

[17] This Court typically disposes summarily of between ⅔ and ¾ of the three-judge court appeals filed each term. See Symposium, *supra*, 27 Rutgers L. Rev., at 902–903; Douglas, The Supreme Court and Its Case Load, 45 Cornell L. Q. 401, 410 (1960). It seems more than probable that many of these cases, while unworthy of

But the facts of this case do not require us to explore the full sweep of Mercantile's argument. Here the three-judge court dismissed the complaint for lack of "standing." This ground for decision, that the complaint was nonjusticiable, was not merely short of the ultimate merits; it was also, like an absence of statutory subject-matter jurisdiction, a ground upon which a single judge could have declined to convene a three-judge court, or upon which the three-judge court could have dissolved itself, leaving final disposition of the complaint to a single judge.[18]

A three-judge court is not required where the District Court itself lacks jurisdiction of the complaint or the complaint is not justiciable in the federal courts. See *Ex parte Poresky,* 290 U. S., at 31. It is now well settled that refusal to request the convention of a three-judge court, dissolution of a three-judge court, and dismissal of a complaint by a single judge are orders reviewable in the Court of Appeals, not here.[19] If the three-judge court

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plenary consideration here, would benefit from the normal appellate review available to single-judge cases in the courts of appeals.

[18] See *Rosado* v. *Wyman,* 304 F. Supp. 1354, appeal dismissed, 395 U. S. 826; *Mengelkoch* v. *Industrial Welfare Comm'n,* 284 F. Supp. 950, vacated to permit appeal to Court of Appeals, 393 U. S. 83; *Crossen* v. *Breckenridge,* 446 F. 2d 833, 837; *American Commuters Assn* v. *Levitt,* 279 F. Supp. 40, aff'd, 405 F. 2d 1148; *Hart* v. *Kennedy,* 314 F. Supp. 823, 824.

[19] Where a single judge refuses to request the convention of a three-judge court, but retains jurisdiction, review of his refusal may be had in the Court of Appeals, see *Idlewild Bon Voyage Liquor Corp.* v. *Epstein, supra,* and *Schackman* v. *Arnebergh,* 387 U. S. 427, either through petition for writ of mandamus or through a certified interlocutory appeal under 28 U. S. C. § 1292 (b). These also are the routes of review of a three-judge court's decision to dissolve itself, *Mengelkoch* v. *Industrial Welfare Comm'n,* 393 U. S. 83, and *Wilson* v. *Port Lavaca,* 391 U. S. 352. Where a single judge has disposed of the complaint through a final order, appeal lies to the Court of Appeals under 28 U. S. C. § 1291.

in the present case had dissolved itself on grounds that "standing" was absent, and had left subsequent dismissal of the complaint to a single judge, this Court would thus clearly have lacked appellate jurisdiction over both orders. The same would have been true if the dissolution and dismissal decisions had been made simultaneously, with the single judge merely adopting the action of the three-judge court.[20] The locus of appellate review should not turn on such technical distinctions.

Where the three-judge court perceives a ground justifying both dissolution and dismissal, the chronology of decisionmaking is typically a matter of mere convenience or happenstance. Our mandatory docket must rest on a firmer foundation than this. We hold, therefore, that when a three-judge court denies a plaintiff injunctive relief on grounds which, if sound, would have justified dissolution of the court as to that plaintiff, or a refusal to request the convention of a three-judge court *ab initio,* review of the denial is available only in the Court of Appeals.

In the present case, accordingly, the correctness of the District Court's view of Gonzalez's standing to sue is for the Court of Appeals to determine. We intimate no views on the issue, for we are without jurisdiction to consider it.[21] We simply vacate the order before us and remand the case to the District Court so that a fresh order may be entered and a timely appeal prosecuted to the Court of Appeals.[22]

It is so ordered.

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[20] *Wilson* v. *Port Lavaca, supra.*

[21] It appears that Gonzalez and Mercantile settled the former's damage claim while this appeal was pending. The Court of Appeals will, of course, be free to consider this new development in appraising the correctness of the dismissal of the complaint. See *SEC* v. *Medical Committee for Human Rights,* 404 U. S. 403.

[22] 28 U. S. C. § 1291. See *Mengelkoch* v. *Industrial Welfare Comm'n,* 393 U. S. 83, 84.

November 27, 1974

No. 73-858 Gonzalez v. Automatic Employees Credit Union

Dear Potter:

I am glad to join your excellent opinion.

Sincerely,

Mr. Justice Stewart

LFP/gg

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

November 27, 1974

Re: No. 73-858 - Gonzalez v. Automatic Employees Credit Union

Dear Potter:

Please join me in your opinion.

Sincerely,

WHR

Mr. Justice Stewart

Copies to the Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

FILE COPY
PLEASE RETURN
TO FILE

November 27, 1974

No. 73-858 Gonzalez v. Automatic Employees Credit Union

Dear Potter:

Please join me.

Sincerely,

Lewis

Mr. Justice Stewart

LFP/gg

November 27, 1974

No. 73-858 Gonzalez v. Automatic Employees Credit Union

Dear Potter:

Please join me.

Sincerely,

Mr. Justice Stewart

LFP/gg

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

November 27, 1974

Dear Potter:

Please join me in your opinion in 73-858, GONZALEZ v. EMPLOYEES CREDIT UNION.

William O. Douglas

Mr. Justice Stewart

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 29, 1974

Re: No. 73-858 - Gonzalez v. Automatic Employees Credit Union

Dear Potter:

Please join me. I think this opinion makes a distinct contribution, for it gathers together the law on 3-judge courts.

Sincerely,

Harry

Mr. Justice Stewart

cc: The Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

November 29, 1974

Re: No. 73-858 - Gonzalez v. Automatic Employees Credit Union

Dear Potter:

Please join me in your opinion in this case.

Sincerely,

Mr. Justice Stewart

Copies to Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

December 2, 1974

Re: No. 73-858 - Alfredo Gonzalez v. Automatic Employees Credit Union

Dear Potter:

Please join me.

You might get a "plug" in for our views on three-judge courts by a footnote on page 11, line 4, first full paragraph, along these lines: "Our mandatory docket on these three-judge court cases in the 1973 Term was 46 (?) argued cases, apart from other direct cases allowing appeal as of right. Thus, the 'control of our docket' envisioned by Chief Justice Taft in the 1925 Act has been markedly diluted."

Regards,

WEB

Mr. Justice Stewart

Copies to the Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 3, 1974

Re: No. 73-858 -- Alfredo Gonzalez v. Automatic Employees Credit Union et al.

Dear Potter:

Please join me in your opinion in this case.

Sincerely,

T.M.

Mr. Justice Stewart

cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 3, 1974

RE: No. 73-858 Gonzalez v. Automatic Employees Credit Union, et al.

Dear Potter:

I'm happy to join your first rate opinion in the above.

Sincerely,

Bill

Mr. Justice Stewart

cc: The Conference

THE C. J.	W. O. D.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.
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					73-858 Gonzalez v. Automatic			