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The Los Angeles International Airport (LAX) is owned and operated by the City of Los Angeles. In 1968, several homeowners who lived near the airport's north runways filed suit against the City, alleging that they had sustained personal injuries and property damage as a result of the noise, smoke, and vibrations created by the arrival and departure of jet aircraft at LAX.

The homeowners' action for personal injuries was tried separately on a nuisance theory. On the basis of its findings, the trial court awarded the homeowners $86,000 in damages for annoyance, inconvenience, discomfort, and emotional distress and imposed prejudgment interest on the award. In addition, the City was charged with $200,000 in attorney's fees.

The City appealed this ruling, but the court of appeal affirmed the judgment of the trial court insofar as it awarded personal injury damages and prejudgment interest to the plaintiffs. The City then brought its case before the California Supreme Court.

The City's first and most significant argument against the imposition of nuisance liability involved the doctrine of federal preemption. The City contended that since the Federal Aviation Act of 1958 grants the federal government exclusive control over flying aircraft, local airport operators are pre-
emptied from taking any action to control aircraft noise emissions and therefore may not be held liable for personal injuries resulting from such noise.8

In addressing this argument, the court took notice of the limits of the preemption doctrine as defined by the United States Supreme Court. Essentially, federal law preempts state regulation of the same subject matter when: 1) there is an apparent congressional intent to blanket the field, 2) the federal and state schemes directly conflict, or 3) any state intervention would burden or frustrate the full purposes and objectives of Congress.4 Justice Richardson’s majority opinion focused on the first element of the Court’s test and examined the issue of whether Congress had intended to preempt all local efforts to regulate or control aircraft noise.

In deciding this first question, the court was confronted with the United States Supreme Court decision in City of Burbank v. Lockheed Air Terminal,5 which invalidated a city ordinance that imposed a night curfew on jet flights. In striking down this exercise of a municipality’s police power, the Burbank decision reasoned that the Federal Aviation Act completely preempts local noise abatement measures regulating aircraft flight.

Justice Richardson distinguished Burbank on the grounds that it had preempted only police power regulations. The majority found that Burbank’s holding did not purport to cover situations in which the challenged local regulation originated under the proprietary authority that a public entity possesses in its capacity as the owner and operator of an airport.6 The court therefore concluded that possession of such authority makes airport operators partially exempt from the rule of preemption. The court also cited FAA regulations stressing local airport operators’ responsibility for noise control as additional evidence of a lack of congressional intent to entirely preempt airport proprietors from taking action to reduce noise. In the

3. 26 Cal. 3d at 93, 603 P.2d at 1331, 160 Cal. Rptr. at 735.
6. 26 Cal. 3d at 95-96, 603 P.2d at 1331-32, 160 Cal. Rptr. at 736-37. The City of Burbank did not own or manage the Hollywood-Burbank Airport and therefore lacked the proprietary power possessed by the City of Los Angeles. See Burbank v. Lockheed Air Terminal, 411 U.S. 624, 635 n.14 (1973).
court’s view, this created a “proprietors’ exception”, the scope of which was then analyzed in an effort to discover which regulatory measures airport proprietors might take without fear of federal preemption. After surveying several conflicting decisions on the subject, the court apparently decided that although an airport operator may be preempted from exercising control over aircraft in flight, it could nevertheless be subjected to tort liability for the “noise consequences of its land planning decisions and the improper use and maintenance of its ground facilities.”

In light of the above conclusion, the court was able to focus on the City’s role in the creation of the nuisance. Because the City itself had independently decided to locate LAX near a residential district and had taken no action to diminish the noise damages caused by its location of the airport, it had failed to meet its responsibilities for noise control. Also, no ground barriers had ever been erected to reduce airport noise levels and the City had failed to exercise its statutory authority to condemn land adversely affected by aircraft noise. Thus, since the City could lawfully have taken steps to abate the plaintiffs’ losses, the court ruled that the doctrine of preemption could not be invoked as a defense to the homeowners’ nuisance action.

The Greater Westchester opinion next observed that the Federal Aviation Act had never precluded private plaintiffs from bringing inverse condemnation actions to recover damages for property “taken” when the quiet enjoyment of their land was disrupted by aircraft noise. Recognizing that these


9. 26 Cal. 3d at 99, 603 P.2d at 1335, 160 Cal. Rptr. at 739. The City also contended that the case of San Diego Unions v. Garmon, 359 U.S. 236 (1959), upheld its claim of preemption, but the court disposed of this argument by stating that Garmon’s holding was confined to labor relations cases. In addition, the court stated that Garmon did not require preemption where the governmental agency whose regulations allegedly preempt state action has no power to adjudicate the issue at hand. Since the FAA has no authority to settle disputes between airport operators and noise victims, the court found Garmon to be inapplicable.

claims for property damage had consistently been upheld, the court could perceive no legal distinction that would justify the preemption of personal injury claims arising out of similar factual circumstances. Justice Richardson also took note of a provision of the Federal Aviation Act preserving common law and statutory remedies to support his view that Congress had not intended to prohibit personal injury suits through the enactment of the federal legislation.

In its discussion of the final two elements of the United States Supreme Court's test for preemption, the court summarily stated that it was not convinced that the allowance of personal injury claims would excessively burden interstate commerce. Therefore, the court held that the doctrine of federal preemption does not prohibit homeowners from suing an airport proprietor for personal injuries suffered as a result of exposure to excessive aircraft noise. The Greater Westchester opinion next considered the City's contention that, because the operation of aircraft was sanctioned by state and federal statutes, aircraft noise emissions could not constitute a nuisance. The City's argument was predicated on the wording of Civil Code section 3482 which states: "Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance." The court narrowly construed section 3482, finding that it privileged only those acts that the legislature has unequivocally expressed its intent to sanction. Accordingly, the court reasoned that the generalized language of the relevant statutes disclosed no specific legislative intention to permit the operation of airport facilities in a manner that would create a nuisance.

The City had attempted to use section 3482 by claiming that legislative approval of aircraft noise was necessarily implied from the fact that both state and federal governments approve of and encourage aviation. Justice Richardson refuted

11. 26 Cal. 3d at 100, 603 P.2d at 1335, 160 Cal. Rptr. at 739.
12. "Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." 49 U.S.C. § 1506 (1979).
13. 26 Cal. 3d at 100, 603 P.2d at 1335, 160 Cal. Rptr. at 739.
15. 26 Cal. 3d at 101-02, 603 P.2d at 1337, 160 Cal. Rptr. at 740, citing Nestle v. City of Santa Monica, 6 Cal. 3d 920, 938 n.16, 496 P.2d 480, 492 n.16, 101 Cal. Rptr. 668, 680 n.16 (1972).
the City's logic by pointing out that the vigorous measures that both state and federal governments had taken to curb aircraft noise could not be reconciled with the implication that such noise was governmentally sanctioned. To the contrary, the court found that the goal of noise abatement legislation is to ensure that airport proprietors share in the responsibility of reducing airport noise.

The court also declared that in cases involving the interpretation of statutes under section 3482, a "particularized" inquiry into the specific statute in question is necessary. Consequently, the court ignored the City's attempt to use a case decided in a different statutory context as controlling precedent. In so doing, the court ruled that section 3482 did not immunize the City from nuisance liabilities incurred in connection with the operation of LAX. 18

The ensuing portion of the Greater Westchester opinion dealt with the propriety of the trial court's award of prejudgment interest for the plaintiffs' personal injuries and emotional distress. Because of the nonpecuniary nature of the homeowners' personal injury damages, the court assumed that attempts to compute the amount of prejudgment interest on those claims would result in unfairly speculative awards. Although it acknowledged that Civil Code section 328817 allows recovery of prejudgment interest for certain unliquidated tort claims, the court restricted section 3288's application to instances in which the plaintiff has sustained property loss or other tangible economic damage.

To justify its holding, the court noted that since the finder of fact is entitled to consider the duration of the plaintiff's mental and physical suffering in determining the amount of damages, the denial of prejudgment interest does not have the effect of depriving plaintiffs of any compensation for actual damage. Thus, the court reversed the court of appeal and denied recovery of prejudgment interest for the mental and emotional injuries that the plaintiffs had sustained. 18 Finally, the court remanded the case to the trial court for a redetermination of the proper amount of attorney's fees to be paid by

16. 26 Cal. 3d at 102, 603 P.2d at 1337, 160 Cal. Rptr. at 741.
17. CAL. CIV. CODE § 3288 (West Supp. 1979) states: "In an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice, interest may be given in the discretion of the jury."
18. 26 Cal. 3d at 103, 603 P.2d at 1338, 160 Cal. Rptr. at 741.
the City.

By exposing airport operators to liability for personal injuries caused by aircraft noise, Greater Westchester has considerably narrowed the scope of federal preemption in the field of aircraft noise disputes. Whether the court’s reasoning is entirely valid is unclear. In her concurring opinion, Chief Justice Bird criticized the majority’s reliance on analogies to inverse condemnation law to support its holding. The Chief Justice pointed out that inverse condemnation proceedings, unlike personal injury claims, are founded on constitutionally guarded rights of property that may never be preempted.19 Nonetheless, the Chief Justice agreed that the majority’s interpretation of congressional intent was correct and that the homeowners’ claims were not preempted by federal law.

Greater Westchester has also attempted to delineate the basis of the airport operator’s liability for personal injuries caused by airport noise. In the future, courts guided by Greater Westchester should determine the liability of an airport proprietor by focusing on the extent to which the proprietor’s control over the location and maintenance of its ground facilities contributed to the plaintiff’s injuries. Unfortunately, it may be impossible to calculate the proportion of the plaintiff’s damages that are caused by this non-preempted activity.

With respect to the question of prejudgment interest for personal injuries, the court firmly curtailed any expansion of the scope of recovery of prejudgment interest. By flatly prohibiting the recovery of prejudgment interest for physical, mental, and emotional suffering, the court clarified its language in Bullis v. Security Pacific National Bank,20 and limited the recovery of prejudgment interest to cases involving tangible economic loss. Chief Justice Bird highlighted this fact21 and pointed out that economic aspects of a personal injury claim such as medical bills and lost wages may still be the proper subject of prejudgment interest awards.

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19.  Id. at 105, 603 P.2d at 1339, 160 Cal. Rptr. at 742.
20. 21 Cal. 3d 801, 814, 582 P.2d 109, 116, 148 Cal. Rptr. 22, 29 (1978). In a context not involving personal injuries, Bullis had stated that prejudgment interest could properly be awarded for unliquidated tort damages.
21. 26 Cal. 3d at 108, 603 P.2d at 1341, 160 Cal. Rptr. at 744.
LABOR RELATIONS—SECONDARY BOYCOTTS—TECHNICALLY DEFICIENT “RESERVE GATE” SYSTEM IS VALID IF PICKETS AFFIRMATIVELY RECOGNIZE ITS EXISTENCE—International Association of Bridge, Structural & Ornamental Iron Workers Local No. 433 v. NLRB, 598 F.2d 1154 (9th Cir. 1979).

Members of Iron Workers Local 433 began picketing a Long Beach, California construction site on May 16, 1977. Their dispute was with R.F. Erection, one of several subcontractors on the site. On May 18, the general contractor attempted to establish a “reserve gate” system, directing employees of R.F. Erection to use a separate access gate from those used by employees of neutral subcontractors. In an effort to notify the union of these restrictions, the project superintendent posted signs at the three site gates and sent a telegram to the union’s business agent.

On May 18, the pickets did not confine their activities to the R.F. Erection gate. The union agent testified that he learned of the superintendent’s telegram at two or two-thirty that afternoon and drove to the construction site, but the pickets had already left for the day. That same evening, the agent instructed strikers to restrict picketing to the primary gate.

The next day, picketing was limited to the R.F. Erection gate. That morning, however, two union officials were seen conversing with employees of neutral subcontractors at secondary site gates. The union strike halted construction at the site on both May 18 and May 19.

The National Labor Relations Board (NLRB or Board), reviewing a complaint filed by the Board’s General Counsel, found that the union’s picketing had an unlawful, secondary

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1. The purpose of a reserve gate system has been described as follows:
   By maintaining a separate gate for access to the site, the employees, suppliers, and deliverymen of neutral employers operating at a common situs, thus, can be insulated from disputes involving other employers at the site, in that pickets can operate only at the gate of the employer with whom they have a grievance.
   Iron Workers Local 433 v. NLRB, 598 F.2d 1154, 1156 (9th Cir. 1979) (citing Linbeck Constr. Corp. v. NLRB, 550 F.2d 311, 316 (5th Cir. 1977) (citation omitted).  
2. The sign at the R.F. Erection gate read “This gate for R.F. Erectors [sic] only.” 598 F.2d at 1155. The signs at the other site gates read “This gate for employees of Robert E. McKee, Inc., and sub-contractors only. R.F. Erectors [sic] excluded.” Id. McKee was the general contractor at the site.  
object in that 1) picketing continued at all site gates on May 18 despite establishment of a valid reserve gate system, and 2) union leaders, through their actions at secondary site gates, "signaled" neutrals to remain off the job on May 19. These activities, aimed at secondary employers with whom the union had no dispute, constituted unfair labor practices as defined by sections 8(b)(4)(i) and 8(b)(4)(ii)(B) of the National Labor Relations Act (NLRA or Act). Accordingly, the Board issued a cease and desist order to the union.

The union petitioned the Ninth Circuit Court of Appeals for review of the order, contending that the reserve gate system was per se invalid since neither the gate signs nor the telegram made any provision restricting R.F. Erection's suppliers to the primary gate. In addition, the union argued that the Board's finding of "signal picketing" was not supported by substantial evidence. The court of appeals rejected the Board's finding of illegal picketing on May 18, but affirmed the finding of signal picketing on May 19.

In so holding, the court initially rejected the per se rule propounded by the union. Under this rule, failure to include a primary employer's suppliers in the gate signs would, without more, invalidate an attempted reserve gate system, thereby permitting union picketing at secondary gates. Emphasizing from the outset that the key to determining whether the NLRA was violated is to identify the object of union picketing, the

4. 29 U.S.C. §§ 158(b)(4)(i), (ii)(B) (1976). The sections provide as follows:

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . .: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; . . .

(Emphasis in original.)

5. The court described signal picketing as "activity, short of a true picket line, which acts as a signal to neutrals that sympathetic action on their part is desired by the Union." 598 F.2d at 1158 n.6.

6. Id. at 1157.
court concluded that a technical failure to include suppliers in gate signs is not determinative.\footnote{7} This is particularly the case if a union in some way affirmatively recognizes that a reserve gate system has been established.\footnote{8}

The court noted that cases involving picketing at common situs construction projects are guided by the four-part test set forth in the NLRB's \textit{Moore Dry Dock}\footnote{9} decision. Under the third criterion, picketing must be limited to places "reasonably close to the location of the situs."\footnote{10} The union arguably complied with this standard, since it picketed gates that R.F. Erection's suppliers were free to use. The court, however, emphasized that the \textit{Moore Dry Dock} rule is only an evidentiary tool, compliance with which creates an inference of primary activity that can be rebutted if the totality of the circumstances indicates a secondary union objective.\footnote{11} Such a secondary object may be inferred if the union demonstrates a belief that a reserve gate system has been established, yet seeks to circumvent that system.\footnote{12} Thus, affirmative recognition by a union can do two things: it can validate an otherwise technically deficient reserve gate system, and, if coupled with union attempts to circumvent that system, it can rebut the inference of lawful picketing created by compliance with \textit{Moore Dry Dock}.

Applying this analysis, the court found no evidence of union recognition of the gate system on May 18. Strikers disre-
garded the faulty signs that day, and the union agent made no response to the superintendent's telegram until the day's picketing had ended. This absence of recognition, together with the deficiency in the signs, led the court to reject the Board's finding that the union illegally picketed secondary gates on that day.13

By May 19, however, the agent had instructed pickets to observe the gate restrictions, and strikers in fact limited their actions to the R.F. Erection gate that day. In the court's view, these facts established union recognition "beyond any doubt" on May 19.14 The remaining question was whether the union tried to circumvent the system that day by "signal picketing."

The court noted initially that signal picketing determinations turn on the unique facts of each case.15 Moreover, common situs picketing is a delicate subject, since a union's right of expression is tempered by its duty to act with restraint so as to minimize secondary effects of picketing.16 The court in fact endorsed a Fifth Circuit opinion that placed upon the union the "heavy burden" of showing that the picketing was conducted in a manner least likely to encourage secondary effects.17

In this light, the court found that substantial evidence supported the Board's finding of signal picketing. Testimony indicated that two union leaders were present at secondary gates on May 19, and both were seen conversing with employees of various neutral subcontractors. The court found, as had the Board, that the excuses offered by the leaders for their presence at the gates were conflicting and unconvincing. In addition, none of the neutral subcontractors' employees reported for work on May 18 or May 19. Thus, there was substantial evidence that the leaders intended to induce neutrals to remain off the job on May 19 in violation of the National Labor Relations Act.

The Iron Workers Local 433 v. NLRB decision indicates the degree to which a court is willing to scrutinize union con-

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13. Id.
14. Id. at 1159.
15. Id. The court noted: "While other cases may demonstrate that generally it is more extreme conduct that earns the label of 'signal picketing,' they do not limit the applicability of the doctrine to certain facts." Id.
16. Id.
17. 598 F.2d at 1159 (citing Ramey Constr. Co. v. Local 544, Painters, 472 F.2d 1127, 1131 (5th Cir. 1973)).
duct in common situs picketing cases while overlooking arguably irresponsible management conduct. Though a union undeniable has a duty to limit secondary effects of picketing, prior cases have noted management's responsibility to follow certain procedures in setting up a reserve gate system, not the least of which is to properly prepare gate signs. The court narrowly construed these cases and fashioned an "affirmative recognition" analysis whereby management errors may be rendered unimportant if a union believes that the system is in effect despite such deficiencies. The case thus significantly extends judicial inquiry into union behavior and minimizes analysis of management conduct in cases where a reserve gate system is alleged to be inadequate.

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18. See note 7 supra.

A 1973 federal investigation linked the petitioner, Larry Dalia, to a conspiracy to steal goods shipped in interstate commerce. As part of this investigation, the United States District Court for the District of New Jersey issued an electronic surveillance order pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (hereinafter Title III). This order authorized the government to intercept all relevant oral communications at Dalia’s business office. While the order complied with traditional fourth amendment requirements, it did not specifically authorize a physical entry into the office in order to accomplish the surveillance. Nevertheless, government agents secretly entered Dalia’s office and installed an electronic bugging device in the ceiling. This action led to the interception of conversations which were used against Dalia at his subsequent trial.

At trial, Dalia moved to suppress the intercepted conversations. The district court denied his motion and ruled that a covert entry by government agents to install electronic surveillance equipment is not unlawful simply because the court order did not specifically authorize the entry. On the basis of this ruling, Dalia was convicted. The United States Court of

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1. As a means of investigating the conspiracy, wiretaps had been placed on the petitioner’s business telephone for a 20-day period prior to the request for and issuance of the court order in question.
3. Dalia v. United States, 441 U.S. 238, 255-57 (1979). “The Fourth Amendment requires that search warrants be issued only upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” The Court did not interpret this as requiring that the mode of executing the warrant must be set forth. Id.
4. As used in this discussion, “covert entry refers to the physical entry by a law enforcement officer into private premises without the owner’s permission or knowledge in order to install bugging equipment.” Id. at 241 n.2.
5. Id. at 245-46.
Appeals for the Third Circuit affirmed.6

Subsequently, the United States Supreme Court granted certiorari to consider the following issues: 1) whether a covert break-in employed to accomplish an otherwise lawful search and seizure is a per se violation of the fourth amendment; 2) if such entries are constitutionally permissible, whether Title III implicitly confers judicial authority to approve covert break-ins; and, 3) if the courts do have the authority to approve covert entries, whether the fourth amendment requires that a Title III electronic surveillance order contain specific authorization to break and enter the premises described in the order. In a 5-4 decision the Court affirmed Dalia’s conviction.

With regard to the first issue, Dalia argued that the fourth amendment absolutely prohibited the government from breaking and entering into private premises and that the entry into his office, therefore, was per se unconstitutional. Furthermore, Dalia reasoned that Title III was itself unconstitutional to the extent that it may have authorized the government to break and enter into his business premises.7

The Supreme Court disagreed, and found that earlier cases had established that in some circumstances secret break-ins are constitutionally permissible.8 These cases involved covert entries incident to warrantless searches and seizures; however, the decisions in these cases focused on the absence of a search warrant rather than on the physical break-in. The Court reasoned that it was, therefore, implicit in these prior decisions that the fourth amendment does not prohibit a covert break-in incident to a warranted search and seizure.9

Still, Dalia maintained that the secret break-in at his office was unconstitutional because the government agents did not provide him with advance notice of the search.10 The Court again disagreed, reasoning that Title III’s requirement

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6. United States v. Dalia, 575 F.2d 1344 (3d Cir. 1978). The decision noted that "the more prudent or preferable approach for government agents would be to include a statement regarding the need of a surreptitious entry in a request for the interception of oral communications when a break-in is contemplated." Id. at 1346-47.
7. 441 U.S. at 246-47.
9. 441 U.S. at 247.
10. Specifically, Dalia pointed to the requirement "that officers . . . announce their purpose before conducting an otherwise duly authorized search." Id.
that notice be given after an investigation provided Dalia with a "constitutionally adequate" alternative to advance notice.\textsuperscript{11} Moreover, the government was not required to give Dalia advance notice of the search because such notice might have provoked "the escape of the suspect or the destruction of critical evidence."\textsuperscript{12} Hence, the covert entry into Dalia's office was not held unconstitutional for lack of prior notice.

Dalia pressed for reversal on the alternative ground that, if covert break-ins are constitutionally permissible, judicial authority to approve them is limited to the express statutory grants contained in Title III. He reasoned that Title III's exhaustive description of the procedural formalities surrounding the use of electronic surveillance made it unreasonable to conclude that Congress intended to implicitly authorize secret break-ins, and, therefore, this lack of affirmative congressional authorization should be interpreted as denying the courts any power to approve covert entries.\textsuperscript{13}

The Court found that the "language, structure, and history" of Title III did not support Dalia's contention. In reaching this conclusion, the majority opinion focused on the above factors in the context of the "comprehensive scheme" of Title III. This scheme regulates electronic searches and seizures through the careful procedural supervision of two categories of surveillance: the interception of wire communications, which is generally not associated with covert break-ins; and the interception of oral communications, which frequently does involve secret physical entries.\textsuperscript{14} Moreover, Title III's procedural scheme makes no significant distinctions between these categories, applying essentially identical procedures to the interception of both wire and oral communications.\textsuperscript{15} These procedures protect individual privacy by guaranteeing that electronic surveillance will only be approved where ordi-

\begin{itemize}
\item \textsuperscript{11} Id., quoting United States v. Donovan, 429 U.S. 413, 429 n.19 (1977).
\item \textsuperscript{12} Id., quoting Katz v. United States, 389 U.S. 347, 355 n.16 (1967).
\item \textsuperscript{13} Id. at 249.
\item \textsuperscript{14} Id.
\item \textsuperscript{15} Id. The Court saw no need to distinguish between these categories of surveillance on the basis of their relation to covert entries. This is exemplified by "the Senate report on Title III [and its] indiscriminate reference to ... Berger v. New York, 388 U.S. 41 (1967), and Katz v. United States, 389 U.S. 347 (1967) ... [as the report] did not find it significant that Berger involved a covert entry, whereas Katz did not." Id. at 251.
\end{itemize}
nary investigative measures are too dangerous or unreliable.\(^\text{16}\) Therefore, only where there exists a threat to the safety or success of an investigation is there a need to employ electronic surveillance, and this need justifies approving the surveillance without superimposing limitations on the means of execution.\(^\text{17}\)

Hence, the application of identical procedures in conjunction with a guarantee that electronic surveillance will be used only where there is a need, is consistent with the existence of broad judicial authority to approve all reasonable investigative techniques.\(^\text{18}\) The Court reasoned that, in this context, the "language and history" of Title III refute the proposition that statutory silence\(^\text{19}\) with regard to secret break-ins indicates a curtailment of the court's authority to issue warrants, and thus reveal that Congress implicitly authorized the courts to approve reasonable covert break-ins.\(^\text{20}\)

With regard to the issue of whether specific and prior judicial authorization to break and enter is required, Dalia argued that even if Title III implicitly confers an authority to approve covert break-ins, such break-ins must be expressly approved prior to an entry.\(^\text{21}\) He reasoned that since a warrant is the "sole written authorization" to search and seize, the execution of a warrant must be confined to the procedures unequivocally set forth in the order.\(^\text{22}\) Because the physical entry into his office was not expressly sanctioned by the warrant, Dalia contended that that entry violated his fourth amendment right to privacy.

The Court rejected this argument, and found that it was the "express design" of Title III to test the validity of an elec-


\(^{17}\) \textit{Id.} The surveillance, however, must still be reasonable under the circumstances.

\(^{18}\) \textit{Id.} at 250.

\(^{19}\) \textit{Id.} at 252. With regard to "statutory silence," Justice Stevens, in dissent, argued that "it is most unrealistic to assume that Congress granted such broad and controversial authority to the Executive without making its intention to do so unmistakably plain." \textit{Id.} at 266.

\(^{20}\) The Court further explained that any other interpretation is not only inconsistent with the statutory scheme of Title III, but is "self-defeating" and illusory as it would subordinate judicial "responsibility to review and approve surveillance applications" to the courts' power to authorize covert entries. \textit{Id.} at 254.

\(^{21}\) \textit{Id.}

\(^{22}\) \textit{Id.}
tronic search and seizure solely under fourth amendment criteria.\(^2\) The Court interpreted these criteria as requiring only three things: that a warrant be issued by a neutral magistrate, that a warrant be based upon a finding of probable cause to believe that the search and seizure will aid in a particular prosecution, and that a warrant particularly describe the place to be searched and the things to be seized.\(^3\) In short, the fourth amendment does not require a warrant to specify the “precise manner” in which it is to be executed.\(^4\) Therefore, Title III does not require an electronic surveillance order to specify that a secret break-in will be used to accomplish an otherwise lawful search and seizure. It follows that because the warrant authorizing the government to “bug” Dalia’s office complied with the fourth amendment, and its execution was reasonable under the circumstances,\(^5\) Dalia’s fourth amendment rights were not violated.

The Court reached this conclusion on three additional grounds. First, because the execution of a search warrant is subject to the discretion of the executing officers—subordinate to the “Fourth Amendment protection against unreasonable searches and seizures”—it would be inconsistent with this discretion to require the government to specify “anticipated means of execution” when applying for a search warrant.\(^6\) Second, because covert investigative practices are necessary in many criminal investigations, it would unjustifiably burden effective law enforcement to require a warrant to specify that a covert entry might be used.\(^7\) Finally, later judicial review makes it “unnecessary” to clearly and precisely set forth in the warrant the procedure to be followed because the integrity of privacy and property\(^8\) threatened by

\(^{23}\) Id. at 256 n.18.
\(^{24}\) Id. at 255.
\(^{25}\) Id. at 257.
\(^{26}\) Id. In particular, the warrant was issued upon a neutral magistrate’s finding of probable cause to believe that Dalia was connected with the offense in question, that Dalia’s office was being used in this connection, and that bugging his office would yield relevant evidence. Moreover, the warrant set forth the “exact location and dimensions” of the office, and the search was limited to the oral communications of Dalia and “others yet unknown.” Id. at 256.
\(^{27}\) Id. at 257 n.19.
\(^{28}\) Id. at 258. The Court found that this is true even where the government knows prior to the fact that a physical break-in will necessarily be used. Id. at 257 n.19.
\(^{29}\) Id. at 258. The privacy and property rights threatened include interference
a covert break-in is protected by the review of the reasonableness of the search and seizure.\textsuperscript{30}

The dissent argued that because the scheme of Title III is procedurally exhaustive, it is anomalous to find implicit authorization for secret break-ins.\textsuperscript{31} Specifically, the invasion of privacy incident to a covert entry is unjustifiable absent an express congressional statement. Moreover, effective law enforcement would not be frustrated by a finding that covert break-ins are unlawful. To the contrary, the dissent argued that Congress had anticipated that non-trespassory wiretaps would furnish the “most effective means of electronic surveillance” within the scheme of Title III.\textsuperscript{32} Thus, the dissent concluded that a breaking and entering incident to a covert investigation is a “distinct” and “constitutionally significant” invasion of privacy, which, if not per se unconstitutional, must yet be subject to specific and prior judicial authorization.\textsuperscript{33}

The 5-4 decision in \textit{Dalia} indicates that the controversy surrounding the exclusionary rule has not yet been settled. In this context, \textit{Dalia} narrows the scope of illegal police conduct by limiting the constitutional ban on the prosecution’s use of evidence produced by such conduct, and by restraining the breadth of exclusionary safeguards.

The conclusion reached reveals that the tension between the need for effective administration of the laws and the need to protect individual liberties continues. Although the Constitution endeavors to strike a balance between these needs by actively protecting individual rights, \textit{Dalia} suggests that there are circumstances where the needs of the government can subordinate the rights of the individual.

\textit{Alan Hunter}

\textsuperscript{30} \textit{Id.} at 258. The Court stated that prior authorization is the “preferable approach,” but found that later judicial review is an adequate substitute. \textit{Id.} at 259 n.22.

\textsuperscript{31} \textit{Id.} at 266-67.

\textsuperscript{32} \textit{Id.} at 278 n.33.

\textsuperscript{33} \textit{Id.} at 259-60. The dissent also referred to Berger v. New York, 388 U.S. 41 (1967), to argue that with regard to electronic surveillance, the warrant procedure must contain “specific safeguards” against fourth amendment violations; thus restricting the search and seizure. \textit{Id.} at 272 n.22.

Thirty-nine year old Geraldine G. Cannon applied for admission to two private university medical schools, both receiving federal funds, and was denied admission because of policies against admitting applicants over thirty years of age unless they possessed an advanced degree. After unsuccessfully seeking redress through school officials and the Department of Health, Education, and Welfare, Ms. Cannon filed suit against the schools in the District Court for the Northern District of Illinois, alleging that the policies were a violation of section 901(a) of Title IX of the Education Amendments of 1972.1 Section 901(a) prohibits discrimination on the basis of sex under any education program or activity receiving federal financial assistance,2 but the statute does not expressly authorize a private right of action.3 Ms. Cannon argued that the policies excluded qualified women from admission since the incidence of interrupted higher education was higher among women than men.4

The district court dismissed the complaint, concluding that no private remedy should be inferred from the statute.5 The court of appeals affirmed, adding that section 902 of the Act, providing for termination of federal funds, was intended as the exclusive means of enforcement.6 Following the enact-

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2. Section 901(a) of Title IX of the Education Amendments of 1972 provides, in pertinent part:
   No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.
3. 441 U.S. at 682.
4. Id. at 680 n.2.
5. Id. at 683.
6. Section 902 of the Education Amendments of 1972 establishes the procedure by which federal funds are terminated upon violation of section 901. 20 U.S.C. § 1683 (1976). This is a harsh remedy and is only resorted to after voluntary compliance has been sought. There must be a hearing resulting in an express finding of failure to comply with federal regulations effectuating section 901. Judicial review of actions

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ment of the Civil Rights Attorney's Fee Awards Act of 1976 which authorized awards of attorney's fees to prevailing parties in actions to enforce Title IX, the court of appeals granted petitioner's request for rehearing to consider whether, in light of that statute, its interpretation of Title IX had been correct. However, the court of appeals again concluded that Title IX was not intended to create a private remedy under section 901. The United States Supreme Court reversed.

In deciding whether the statute implied a private right of action, the Court relied on guidelines set forth in Cort v. Ash. Cort identified four factors demonstrating a legislative intent to create a private right of action under a federal statute: 1) Whether the statute was enacted for the benefit of a special class of which plaintiff is a member; 2) Whether the legislative history indicated an intent either to create a private remedy or to deny one; 3) Whether implying a private remedy would frustrate the underlying purposes of the statute; 4) Whether implying a federal remedy is inappropriate because the subject matter involved is basically an area of concern to the states.

In regard to the requirement of enactment for a special class, the Court merely compared the language of Title IX with that of other statutes where the Court has typically found right- or duty-creating language. The Court found "an unmistakeable focus on the benefited class" consisting of persons discriminated against on the basis of sex. Being a member of that class, Ms. Cannon satisfied the threshold criteria.

Next, by examining the legislative history of the statute to determine whether a private right of action should be implied, the Court accepted petitioner's argument that Title IX was patterned after Title VI of the Civil Rights Act of 1964. Observing that at the time of passage of Title IX the courts had already recognized an implied private right of action under Title VI, the Court reasoned that Congress, presumably knowing the law, must have intended Title IX to be similarly construed as creating a private cause of action. The Court agreed
with the court of appeals that the 1976 Civil Rights Attorney's Fee Awards Act did not create a remedy where none existed previously. Nevertheless, attorney's fees did apply to a private right of action under Title IX because the right was implicit in the Act at the time of its passage.\(^\text{14}\) Hence, the legislative history indicated an intent by Congress to create a private remedy.

Third, the Court examined whether implication of a private remedy would frustrate the underlying purposes of Title IX. The Court found the purposes of the statute to be twofold: Congress wanted to avoid the use of federal resources to support discriminatory practices, and the statute was to provide individual citizens with effective protection against discrimination. To accomplish the first purpose, the statute provides that HEW can deny a university federal funds upon a finding of discriminatory practices. The Court found this to be a severe remedy, and an inappropriate one to aid the individual victim of an isolated incident of sex discrimination.\(^\text{15}\) A less severe and more appropriate remedy, the Court observed, would be to compel the school to admit the individual rather than cut off funds and impair the quality of education for all students.\(^\text{16}\) Thus, a private right of action, the Court concluded, would not frustrate but assist in effectively protecting the individual against sex discrimination.\(^\text{17}\)

The Court spent little time analyzing the final factor, concluding that the subject matter is not of basic concern to the states. Under the Civil Rights Act, the federal government and judiciary, as opposed to the states, are primarily responsible for protecting citizens against discrimination. Further, it is the expenditure of federal funds that justifies the statutory prohibition.\(^\text{18}\)

In finding an implied private right of action under Title IX, the Supreme Court construed the Cort criteria more liberally than did the lower courts.\(^\text{19}\) The countervailing policy con-

\(^{14}\) Id. at 686 n.7.
\(^{15}\) Id. at 704-05.
\(^{16}\) Id. at 705 & n.39.
\(^{17}\) At the time of the rehearing by the court of appeals, HEW switched its position against a private right of action and stated that it saw no inconsistency in allowing both a private and a public remedy. The Court considered the agency's position "unquestionably correct." Id. at 706-08.
\(^{18}\) Id. at 708-09.
\(^{19}\) See Carter, Implied Rights of Action to Enforce Civil Rights: The Case for a Sympathetic View, 87 YALE L. J. 1378 (1978), for a historical review of cases leading
siderations offered by respondents, including the probability of voluminous litigation and the resulting adverse effect on the independence of members of university admissions committees, were rejected by the Court as arguments resolved when Congress passed the statute.\textsuperscript{20} However, the concurring opinion of Justice Rehnquist warns both the Court and Congress that the Court should be extremely reluctant in the future to imply a cause of action absent a showing of specific legislative intent.\textsuperscript{21} Justice Powell’s dissent goes further, voicing concern that \textit{Cannon} may be an unconstitutional intrusion by the judiciary into the legislative sphere violative of separation of powers.\textsuperscript{22}

There may be problems with overlapping judicial and administrative enforcement of Title IX. Since \textit{Cannon} does not provide for primary jurisdiction, exhaustion of administrative remedies or election of remedies, it offers no clear procedural guideline for future plaintiffs. Whether HEW or the applicant, or both, are allowed to sue will have to be determined on a case-by-case basis.\textsuperscript{23}

Potentially, every disappointed applicant may now be armed with the power to sue a federally funded private university denying him admission. This costly litigation, with its impact on already dwindling academic resources, may force private universities to return to purely objective admissions criteria in order to justify more easily their admissions decisions. This judicial intrusion into admissions procedures, absent clear authorization from Congress, may impinge undemocratically on the freedom of the private academic community.\textsuperscript{24}

\textit{Sharon Gray}

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\item up to \textit{Cannon} and the theory that, at least in the area of civil rights, the \textit{Cort} indicia should be applied liberally.
\item \textsuperscript{20} 441 U.S. at 709.
\item \textsuperscript{21} \textit{Id.} at 718.
\item \textsuperscript{22} \textit{Id.} at 743.
\item \textsuperscript{23} HEW advocated this flexible approach. \textit{Id.} at 687 n.8 & 706 n.41.
\item \textsuperscript{24} \textit{Id.} at 747-49 (Powell, J., dissenting).
\end{itemize}