SUPREME COURT OF THE UNITED STATES

No. 92–1625

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, ET AL., PETITIONERS
v. JOHN L. BAGWELL ET AL.
ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA
[June 30, 1994]

JUSTICE SCALIA, concurring.

I join the Court's opinion classifying the $52,000,000 in contempt fines levied against petitioners as criminal. As the Court's opinion demonstrates, our cases have employed a variety of not easily reconcilable tests for differentiating between civil and criminal contempts. Since all of those tests would yield the same result here, there is no need to decide which is the correct one—and a case so extreme on its facts is not the best case in which to make that decision. I wish to suggest, however, that when we come to making it, a careful examination of historical practice will ultimately yield the answer.

That one and the same person should be able to make the rule, to adjudicate its violation, and to assess its penalty is out of accord with our usual notions of fairness and separation of powers. See *ante*, at 10; *Green* v. *United States*, 356 U. S. 165, 198–199 (1958) (Black, J., dissenting); cf. *Bloom* v. *Illinois*, 391 U. S. 194, 202 (1968); *Cooke* v. *United States*, 267 U. S. 517, 539 (1925). And it is worse still for that person to conduct the adjudication without affording the protections usually given in criminal trials. Only the clearest of historical practice could establish that such

a departure from the procedures that the Constitution normally requires is not a denial of due process of law. See *Burnham* v. *Superior Court of Cal., County of Marin*, 495 U. S. 604, 623–625 (1990); cf. *Honda Motor Co.* v. *Oberg*, *ante*, at ___ (slip op., at 14–15).

At common law, contempts were divided into criminal contempts, in which a litigant was punished for an affront to the court by a fixed fine or period of incarceration; and civil contempts, in which an uncooperative litigant was incarcerated (and, in later cases, fined[1]) until he complied with a specific order of the court. See *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 441–444 (1911). Incarceration until compliance was a distinctive sanction, and sheds light upon the nature of the decrees enforced by civil contempt. That sanction makes sense only if the order requires performance of an identifiable act (or perhaps cessation of continuing performance of an identifiable act). A general prohibition for the future does not lend itself to enforcement through conditional incarceration, since no single act (or the cessation of no single act) can demonstrate compliance and justify release. One court has expressed the difference between criminal and civil contempts as follows: "Punishment in criminal contempt cannot undo or remedy the thing which has been done, but in civil contempt punishment remedies the disobedience." *In re Fox*, 96 F. 2d 23, 25 (CA3 1938).

As one would expect from this, the orders that underlay civil contempt fines or incarceration were usually mandatory rather than prohibitory, see

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[1]The per diem fines that came to be used to coerce compliance with decrees were in most relevant respects like conditional prison terms. With them, as with incarceration, the penalty continued until the contemnor complied, and compliance stopped any further punishment but of course did not eliminate or restore any punishment already endured.

Gompers, *supra*, at 442, directing litigants to perform acts that would further the litigation (for example, turning over a document), or give effect to the court's judgment (for example, executing a deed of conveyance). The latter category of order was particularly common, since the jurisdiction of equity courts was generally *in personam* rather than *in rem*, and the relief they decreed would almost always be a directive to an individual to perform an act with regard to property at issue. See 4 J. Pomeroy, Equity Jurisprudence §1433, pp. 3386–3388 (4th ed. 1919). The mandatory injunctions issued upon termination of litigation usually required "a single simple act." H. McClintock, Principles of Equity §15, pp. 32–33 (2d ed. 1948). Indeed, there was a "historical prejudice of the court of chancery against rendering decrees which called for more than a single affirmative act." *Id*., at §61, p. 160. And where specific performance of contracts was sought, it was the categorical rule that no decree would issue that required ongoing supervision. See *e.g.*, *Marble Co.* v. *Ripley*, 10 Wall. 339, 358–359 (1870); see also H. McClintock, *supra*, at §61, pp. 160–161; 1 J. Story, Commentaries on Equity Jurisprudence §778b, p. 782 (Redfield ed.; 10th ed. 1870). Compliance with these "single act" mandates could, in addition to being simple, be quick; and once it was achieved the contemnor's relationship with the court came to an end, at least insofar as the subject of the order was concerned. Once the document was turned over or the land conveyed, the litigant's obligation to the court, and the court's coercive power over the litigant, ceased. See *United States* v. *Mine Workers*, 330 U. S. 258, 332 (1947) (Black, J., concurring in part and dissenting in part). The court did not engage in any ongoing supervision of the litigant's conduct, nor did its order continue to regulate his behavior.

Even equitable decrees that were prohibitory rather than mandatory were, in earlier times, much less

sweeping than their modern counterparts. Prior to the labor injunctions of the late 1800's, injunctions were issued primarily in relatively narrow disputes over property. See, *e.g.*, W. Kerr, A Treatise on the Law and Practice of Injunctions *7 (1880); see also F. Frankfurter & N. Greene, The Labor Injunction 23–24, 87–88 (1930).

Contemporary courts have abandoned these earlier limitations upon the scope of their mandatory and injunctive decrees. See G. McDowell, Equity and the Constitution 4, 9 (1982). They routinely issue complex decrees which involve them in extended disputes and place them in continuing supervisory roles over parties and institutions. See, *e.g.*, *Missouri* v. *Jenkins*, 495 U. S. 33, 56–58 (1990); *Swann* v. *Charlotte-Mecklenburg Bd. of Ed.*, 402 U. S. 1, 16 (1971). Professor Chayes has described the extent of the transformation:

> "[The modern decree] differs in almost every relevant characteristic from relief in the traditional model of adjudication, not the least in that it *is* the centerpiece. . . . It provides for a complex, on-going regime of performance rather than a simple, one-shot, one-way transfer. Finally, it prolongs and deepens, rather than terminates, the court's involvement with the dispute." Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281, 1298 (1976).

The consequences of this change for the point under discussion here are obvious: When an order governs many aspects of a litigant's activities, rather than just a discrete act, determining compliance becomes much more difficult. Credibility issues arise, for which the factfinding protections of the criminal law (including jury trial) become much more important. And when continuing prohibitions or obligations are imposed, the order cannot be complied with (and the contempt "purged") in a single act; it continues to govern the party's behavior,

on pain of punishment—not unlike the criminal law.

The order at issue here provides a relatively tame example of the modern, complex decree. The amended injunction prohibited, *inter alia*, rock-throwing, the puncturing of tires, threatening, following or interfering with respondents' employees, placing pickets in other than specified locations, and roving picketing; and it required, *inter alia*, that petitioners provide a list of names of designated supervisors. App. to Pet. for Cert. 113a-116a. Although it would seem quite in accord with historical practice to enforce, by conditional incarceration or per diem fines, compliance with the last provision—a discrete command, observance of which is readily ascertained—using that same means to enforce the remainder of the order would be a novelty.

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The use of a civil process for contempt sanctions "makes no sense except as a consequence of historical practice." *Weiss* v. *United States*, 510 U. S. ___, ___ (1994) (slip op., at 4) (SCALIA, J., concurring in part and concurring in judgment). As the scope of injunctions has expanded, they have lost some of the distinctive features that made enforcement through civil process acceptable. It is not that the times, or our perceptions of fairness, have changed (that is in my view no basis for either tightening or relaxing the traditional demands of due process); but rather that the modern judicial order is in its relevant essentials not the same device that in former times could always be enforced by civil contempt. So adjustments will have to be made. We will have to decide at some point which modern injunctions sufficiently resemble their historical namesakes to warrant the same extraordinary means of enforcement. We need not draw that line in the present case, and so I am content to join the opinion of the Court.