

January 1969

## Constitutional Law

James E. Leahy

Follow this and additional works at: <http://digitalcommons.law.ggu.edu/callaw>



Part of the [Constitutional Law Commons](#)

---

### Recommended Citation

James E. Leahy, *Constitutional Law*, 1969 Cal Law (1969), <http://digitalcommons.law.ggu.edu/callaw/vol1969/iss1/12>

This Article is brought to you for free and open access by the Academic Journals at GGU Law Digital Commons. It has been accepted for inclusion in Cal Law Trends and Developments by an authorized administrator of GGU Law Digital Commons. For more information, please contact [jfischer@ggu.edu](mailto:jfischer@ggu.edu).

## ***Constitutional Law***

by *James E. Leahy*\*

This was an eventful year in the field of constitutional law. The court upheld the right of individuals to distribute anti-war literature within a railway station, struck down an injunction prohibiting county employees from peaceful picketing, upheld an ordinance punishing conduct which urges a riot or which urges others to commit acts of force or violence, and held the California loyalty oath unconstitutional.

A public transit district which permits commercial ads in its motor buses must now accept ads designed to influence public opinion on political, social, and economic matters.

The right to remain anonymous while expressing one's views was extended to include recorded telephone messages, and a

\* LL.B. 1949, University of North Dakota; LL.M. 1967, New York University. Associate Professor of Law, California Western University, School of Law, San Diego, California. Member, State Bar Association of North Dakota.

The author extends his appreciation to Joseph N. Gruber, student at Golden Gate College, School of Law, for assistance in preparation of this article.

political party's newspaper was held exempt from a newspaper licensing tax.

Pandering is not part of the definition of obscenity in California, so said the supreme court.

"Good moral character" was said to be too vague a standard for the licensing of theaters, but this raises the question of whether it is also too vague as a standard for determining who may receive a license to practice an occupation or profession.

The right to wear a beard was denied a high school student based on a finding that benefits to the public outweigh the infringement upon that right.

Resort to the equal protection clause proved futile, and it appears that the appellate courts in California have rendered it about as dead as the United States Supreme Court has rendered the privileges and immunities clause.

Many other constitutional issues were before the courts in the past year. Some of these are reviewed in this article, but others not considered as important have been omitted.

## First Amendment

### *Expression-Related Activities*

Although the First Amendment protects against "abridging the freedom of speech," the protection afforded by that amendment is not limited to verbal expressions. Many activities may be expression-related to such a degree as to be entitled to First Amendment protection. Among the kinds of activities which fall into this category are the distribution of printed material,<sup>1</sup> peaceful picketing,<sup>2</sup> parading,<sup>3</sup> demonstrating,<sup>4</sup> sitting in,<sup>5</sup> soliciting,<sup>6</sup> and the providing of group legal services.<sup>7</sup>

1. *Lovell v. City of Griffin*, 303 U.S. 444, 82 L.Ed. 949, 58 S.Ct. 666 (1939).

2. *Thornhill v. Alabama*, 310 U.S. 88, 84 L.Ed. 1093, 60 S.Ct. 736 (1940).

3. *Cox v. New Hampshire*, 312 U.S. 569, 85 L.Ed. 1049, 61 S.Ct. 762, 133 A.L.R. 1396 (1941).

4. *Cox v. Louisiana*, 379 U.S. 536, 13 L.Ed.2d 471, 85 S.Ct. 453 (1965).

5. *Brown v. Louisiana*, 383 U.S. 131, 15 L.Ed.2d 637, 86 S.Ct. 719 (1966).

6. *Staub v. City of Baxley*, 355 U.S. 313, 2 L.Ed.2d 302, 78 S.Ct. 277 (1958).

7. *United Mine Workers v. Illinois*

In summing up its approach to these expression-related activity cases, the United States Supreme Court in the recent case of *United States v. O'Brien*<sup>8</sup> set forth its general approach to the question this way:

This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest.<sup>9</sup>

The appellate courts of California were presented with several expression-related activity cases this past year. The supreme court confronted the problem first in the case of *In re Hoffman*.<sup>10</sup> In this case petitioners were convicted of violating a Los Angeles ordinance that restricted the right to be in a railway station.<sup>11</sup> The petitioners entered the Los Angeles

State Bar, 389 U.S. 217, 19 L.Ed.2d 426, 88 S.Ct. 353 (1967); *Brotherhood of Railway Trainmen v. Virginia*, 377 U.S. 1, 12 L.Ed.2d 89, 84 S.Ct. 1113, 11 A.L.R.3d 1196 (1964).

8. 391 U.S. 367, 20 L.Ed.2d 672, 88 S.Ct. 1673 (1968). Hereafter the term "Supreme Court" will be used to refer to the United States Supreme Court.

9. 391 U.S. at 372, 20 L.Ed.2d at 679-680, 88 S.Ct. at 1678-79.

10. 67 Cal.2d 845, 64 Cal. Rptr. 97, 434 P.2d 353 (1967).

11. Los Angeles Municipal Code § 421.11.1: "It shall be unlawful for any person to loaf or loiter in any waiting room, lobby . . . of any railway station . . . airport or bus depot . . . or to remain in any such station, airport, or depot . . . for a period of time longer than reasonably necessary to transact such business as such person may have to transact with any

Union Station and began to distribute leaflets protesting the Vietnam war. They did not interfere with the free flow of traffic nor with other persons in the station. The police were called and, after determining that the petitioners were engaged in activities prohibited by the ordinance, they were asked to leave. When they refused to do so, petitioners were arrested, charged with a violation of the ordinance, and found guilty.

In challenging the constitutionality of the conviction the court pointed out that First Amendment activities can be regulated on streets and in parks only upon a showing of "a valid municipal interest that cannot be protected by different or more narrow means."<sup>12</sup> Even then the regulations are limited "to the extent necessary to prevent interference with the municipality's interest in protecting the public health, safety, or order or in assuring the efficient and orderly use of the streets and parks for their primary purposes."<sup>13</sup> Although *O'Brien* had not yet been decided, it appears that the test used by the California Supreme Court contains the same basic criteria as the United States Supreme Court's statement in that case, when referring to expression-related activities upon public property.

The station in *Hoffman*, however, was private property open to the public upon the general invitation of the owner. The court hurdled this problem by pointing out that the rule with regard to such activities on streets and in parks applied even though the street was in a privately owned town. The court cited *Marsh v. Alabama*<sup>14</sup> wherein the Supreme Court had reversed a conviction of an individual for distributing religious literature on the sidewalk of a company-owned town contrary to regulations of the town management.

It seems dubious that either *Marsh*, or its companion case *Tucker v. Texas*<sup>15</sup> (where the town was owned by the United States), provide authority for extending the rule referred to

common carrier using . . . such station, airport, or depot, . . ."

14. 326 U.S. 501, 90 L.Ed. 265, 66 S.Ct.276 (1946).

12. 67 Cal.2d at 849, 64 Cal. Rptr. at 99, 434 P.2d at 355.

15. 326 U.S. 517, 90 L.Ed. 274, 66 S.Ct. 274 (1946).

13. 67 Cal.2d at 849, 64 Cal. Rptr. at 99, 434 P.2d at 355.

above to private property which has been opened to the public for business purposes. In *Marsh* there was a town with streets, sidewalks and stores, just like any other municipality, although completely company-owned. In *Marsh* the curtailing of First Amendment activities on the streets of Chicksaw, Alabama, not only would have deprived the distributee of his right to express his views, but also would have deprived the citizens thereof of the liberties guaranteed by the First and Fourteenth Amendments for no justifiable reason.

These people, just as residents of municipalities, are free citizens of their State and country. Just as all other citizens they must make decisions which affect the welfare of community and nation. To act as good citizens they must be informed. In order to enable them to be properly informed their information must be uncensored.<sup>16</sup>

It is clear that if those wishing to distribute literature could not do so upon the streets of Chicksaw, Alabama, then their right to be heard, and the right of the citizens of the town to hear, would have been seriously curtailed. The same cannot be said of the situation at Union Station from the viewpoint of either those desiring to express their views or of the potential recipients of those views. The streets around the station were certainly open to those desiring to distribute their material<sup>17</sup> and the patrons of the railway could have been contacted as they arrived at or left the station.

If the rule which applies to public places is to apply to the inside of a railway station, it would seem appropriate to ask to what other areas of privately owned property does the rule apply? Would the same rule apply to an airport, to a department store, or to a hotel lobby?

In *Hoffman* the court used as a test whether or not the

16. 326 U.S. at 508, 90 L.Ed. at 269-270, 66 S.Ct. at 279.

17. In a footnote to this case the court cites *Schneider v. State*, 308 U.S. 147, 84 L.Ed. 155, 60 S.Ct. 146 (1939) for the proposition that expression cannot be abridged by simply saying that

it may be exercised at some other place. In *Schneider*, however, the choice was not between a public place and private property, but was a case in which expression-related activities were prohibited in certain public places and permitted at others.

conduct interfered with the use of the premises as a railway station.

Similarly in the present case, the test is not whether petitioners' use of the station was a railway use but whether it *interfered with that use*.<sup>18</sup> (Emphasis added.)

In arriving at this test the court referred to *Brown v. Louisiana*<sup>19</sup> wherein the Supreme Court struck down a conviction under a breach of peace statute for sitting in at a public library. In *Brown* the facts indicated that the defendants did not interfere with the use of the library nor were they disorderly or noisy. The library, however, was a public facility. Further, the defendants were protesting because they were barred from using it because of their race. They were petitioning the government, which operated the library, to discontinue its illegal segregation policy. This is quite different from the petitioners' situation insofar as the railway station was concerned. They were not barred from the station, nor discriminated against by the owner or by the city in its use. If interference with use is to be the test, it would seem to follow that non-interference with the use of any private facility which is open to the public would permit the same kind of expression-related activities which the court says were permissible in the station.

Since the *Hoffman* decision the United States Supreme Court decided the case of *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza*.<sup>20</sup> In this case the court upheld the right to peacefully picket upon a privately owned shopping center which was open to the general public. In a case decided prior to *Logan Valley Plaza*, the California Supreme Court had reached the same result.<sup>1</sup>

These cases can be distinguished from *Hoffman* in that in the case of a shopping center there is factually a situation

18. 67 Cal.2d at 851, 64 Cal. Rptr. at 100, 434 P.2d at 356.

19. 383 U.S. 131, 15 L.Ed.2d 637, 86 S.Ct. 719 (1966).

20. 391 U.S. 308, 20 L.Ed.2d 603, 88 S.Ct. 1601 (1968).

1. Schwartz-Torrance Investment Corp. v. Baker & Confectionery Workers Union, Local 31, 61 Cal.2d 766, 40 Cal. Rptr. 233, 394 P.2d 921 (1964), cert. den. 380 U.S. 906, 13 L.Ed.2d 794, 85 S.Ct. 888.

very similar to a company-owned town, as in *Marsh*. There are streets, sidewalks, and stores, and in some shopping centers, areas for rest and relaxation similar to parks. Further, one need only visit a modern-day shopping center to ask, if the employees cannot picket their employers upon the sidewalks and streets within the center, where can they picket? In many of today's shopping centers the right to picket would be nonexistent if picketing were prohibited therein because generally there are no public sidewalks or streets upon which to effectively picket.

Freedom of expression must be protected. There is a great deal of difference, however, in expressing one's opinion in those areas traditionally open for that purpose and private property (open to the public) not traditionally used as places for expression. Confining expression-related activities to those areas traditionally open for such purposes<sup>2</sup> is adequate protection for expression-related activities on some private property, such as shopping centers, because they are like traditional public areas. The right of the actors to act, and the potential hearers to hear, would be seriously curtailed if such activities were prohibited on such property. A railway station (and other related private areas) is not an area where expression of this type is traditionally carried on. There are generally sidewalks and streets which can be used with little curtailment of the expression-related activities. The interests of the individual, the government, and the private owner are thus protected.

A second expression-related activity case was presented to the supreme court in *In re Berry*.<sup>3</sup> In this case the court held invalid an injunction issued in connection with a strike of county welfare workers, which prohibited:

(4) picketing or causing picketing, or "causing, participating in or inducing others to participate in any demonstration or demonstrations" on any grounds or street or

2. See *Adderley v. Florida*, 385 U.S. 39, 17 L.Ed.2d 149, 87 S.Ct. 242 (1966).

3. 68 Cal.2d 137, 65 Cal. Rptr. 273,

436 P.2d 273 (1968). For further discussion of this case, see York, REMEDIES, and Grodin, LABOR RELATIONS, in this volume.



sidewalk adjoining grounds owned or possessed by the County on which structures are located which are occupied by county employees or in which such employees "are assigned to work."<sup>4</sup>

Before taking up the question of the constitutionality of the injunction the court pointed out that "[i]n this state it is clearly the law that the violation of an order in excess of the jurisdiction of the issuing court cannot produce a valid judgment of contempt. . . ."<sup>5</sup> The court added further that a court order violating a citizen's constitutional rights is void for lack of jurisdiction in the court to issue it.<sup>6</sup>

The real issue involved here was whether the injunction was unconstitutional. The court held:

[T]his order is unconstitutionally overbroad in that it improperly restricts the exercise of First Amendment freedoms, and further that it is too vague and uncertain to satisfy the requirements of notice and fair trial which are inherent in the due process clause of the Fourteenth Amendment.<sup>7</sup>

The test to be used in such cases, the court stated, quoting from *Thornhill* is:

Abridgment of the liberty of such discussion [i.e. peaceful picketing] can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion.<sup>8</sup>

4. 68 Cal.2d at 151, 65 Cal. Rptr. at 282-283, 436 P.2d at 282-283.

5. 68 Cal.2d at 147, 65 Cal. Rptr. at 280, 436 P.2d at 280.

6. The court distinguished *Walker v. City of Birmingham*, 388 U.S. 307, 18 L.Ed.2d 1210, 87 S.Ct. 1824 (1967) by concluding that what the United States Supreme Court held in that case was that the Alabama rule of law requiring resort to legal channels to contest the

validity of a court order affecting first amendment freedoms, rather than disobey it and then contest the validity did not constitute an intrusion upon such freedoms. The rule in California is that an order void upon its face cannot support a contempt judgment.

7. 68 Cal.2d at 151, 65 Cal. Rptr. at 283, 436 P.2d 283.

8. 68 Cal.2d at 153, 65 Cal. Rptr. at 284, 436 P.2d at 284.

On this basis the court concluded that “[t]he County has fallen far short of demonstrating a compelling public interest sufficient to justify limitation of *informational* picketing and demonstration per se in the locations where the order forbids such activities.”<sup>9</sup>

The court also concluded that in directing the order not only at the Union but also at other persons acting with them and the inclusion in the order of the phrase “ ‘ in concert among themselves’ [there was injected] into the description a baffling element of uncertainty as to the application of the order”<sup>10</sup> which made it vague and uncertain under the due process clause.

The *Berry* case is significant not only because of its basic conclusion that this order was unconstitutional and as such could not support a contempt judgment; it is also significant because the court made no distinction as to the status of the petitioners who were private citizens and those petitioners to whom the order was primarily directed—the welfare workers. Thus under this decision public employees were accorded the same constitutional protection as private citizens.<sup>11</sup>

The constitutionality of a statute punishing expression-related conduct was before the supreme court in *People v. Davis*.<sup>12</sup> The statute punishes one who engages in conduct which urges a riot or urges others to commit acts of force or violence. The record of the case did not contain evidence of the kind of conduct or what “urging” the defendant had engaged in. The only question before the court was whether the statute was unconstitutional on its face. The statute refers to both acts or conduct which urge a riot, and to the mere “urging” of others to commit acts of force or violence. Concentrating on the second part, the court noted that what was being punished here was the urging of others to commit acts

9. 68 Cal.2d at 154, 65 Cal. Rptr. at 284, 436 P.2d at 284.

10. 68 Cal.2d at 156, 65 Cal. Rptr. at 286, 436 P.2d at 286.

11. See Leahy, The public employee and the first amendment—Must he sacrifice his civil rights to be a civil

servant, 4 Cal. Western L. Rev. 1, 12 (1968).

12. 68 Cal.2d 481, 67 Cal Rptr. 547, 439 P.2d 651 (1968). For further discussion of this case, see Collings, CRIMINAL LAW AND PROCEDURE, in this volume.

of violence, etc., which could be punished under the decision in *Feiner v. New York*.<sup>13</sup> This case, the court argued, is distinguishable from *Terminiello v. Chicago*<sup>14</sup> in which the Supreme Court overturned a conviction of one who had been found guilty under jury instructions which permitted a finding of guilt if the defendant's "speech stirred people to anger, incited public dispute, or brought about a condition of unrest."<sup>15</sup>

To persons of ordinary understanding, the urging of others to acts of force or violence or to burn or destroy property, as proscribed by section 404.6, is neither similar nor comparable to speech which merely stirs to anger, invites public dispute, or brings about a condition of unrest.<sup>16</sup>

As long ago as 1939, in *Cantwell v. Connecticut*,<sup>17</sup> and as recently as 1968, in *Carroll v. President and Commissioners of Princess Anne*,<sup>18</sup> the court has asserted that freedom to speak does not sanction "incitement to riot"<sup>19</sup> and on that principle alone the statute should be constitutional. Although not discussed by the court, the statute seems even more limited than the *Cantwell* concept because the statute also requires the showing of intent on the part of the accused and evidence that at the time and place there existed circumstances which produced a clear, present, and immediate danger.<sup>20</sup>

In another expression-related activity case, the court of appeal, fifth district, upheld a conviction under a trespass statute a refusal to leave a public building when it was regularly closed to the public. The case is *Parrish v. Municipal*

13. 340 U.S. 315, 95 L.Ed. 295, 71 S.Ct. 303 (1951).

14. 337 U.S. 1, 93 L.Ed. 1131, 69 S.Ct. 894 (1949).

15. 337 U.S. at 5, 93 L.Ed. at 1135, 69 S.Ct. at 896.

16. 68 Cal.2d at 485, 67 Cal. Rptr. at 549, 439 P.2d at 653.

17. 310 U.S. 296, 84 L.Ed. 1213, 60 S.Ct. 900. 128 A.L.R. 1352 (1939).

18. — U.S. —, 21 L.Ed.2d 325, 89 S.Ct. 347 (1968).

19. — U.S. at —, 21 L.Ed.2d at 331, 89 S.Ct. at 351.

20. For a discussion of the part the intent of the speaker should play in determining whether the speech should be prohibited see Note: Freedom of speech and assembly: The problem of the hostile audience, 49 Col. L. Rev. 1118, 1123 (1949).

*Court, Modesto Judicial District.*<sup>1</sup> This was in line with the statement in *Adderley v. Florida*<sup>2</sup> to the effect that “[n]othing in the Constitution of the United States prevents Florida from even-handed enforcement of its general trespass statute.

Although this statute was upheld as against an attack that it was unconstitutionally vague under the due process clause of the Fourteenth Amendment,<sup>4</sup> the writer is of the opinion that because it predicates violation upon “the surrounding circumstances . . . [being] such as to indicate to a reasonable man that such person has no apparent lawful business to pursue,”<sup>5</sup> the statute is vague and uncertain from the point of view of the individual who must determine whether or not he is in violation of it. In determining whether he is in violation if he stays in the building, he must determine whether a reasonable man (not himself) would determine whether he (the individual) has a lawful reason for being there. This is asking too much of any individual.

### *Loyalty Oaths Must Be Narrowly Drawn*

Loyalty oaths, and in particular the oath required by Section 3 of Article XX of the California Constitution, received judicial scrutiny during this past year in the case of *Vogel v. County of Los Angeles*.<sup>6</sup> This oath requires public employees to swear that they will support and defend the United States and California Constitutions. It also requires the affiant to swear or affirm that he is not a member, nor within the past five years has he been a member, of any organization that advocates the overthrow of the government by force or violence, and that he will not advocate nor become a member of any such organization.

1. 258 Cal. App.2d 497, 65 Cal. Rptr. 862 (1968). For further discussion of this case, see Collings, CRIMINAL LAW AND PROCEDURE, in this volume.

2. 385 U.S. 39, 17 L.Ed.2d 149, 87 S.Ct. 242 (1966).

3. 385 U.S. at 47, 17 L.Ed.2d at 156, 87 S.Ct. at 247.

4. See *In re Bacon*, 240 Cal. App.2d 34, 49 Cal. Rptr. 322 (1966).

5. Cal. Penal Code § 602(n).

6. 68 Cal.2d 18, 64 Cal. Rptr. 409, 434 P.2d 961 (1967).

In approaching the question the court noted that a similar oath was upheld by the California Supreme Court in 1952.<sup>7</sup> This was in accordance with the previous United States Supreme Court case of *Adler v. Board of Education of the City of New York*.<sup>8</sup> But said the California court:

Subsequent decisions of the United States Supreme Court, however, have established constitutional doctrines not recognized in *Adler*, and the holding in that case has since been rejected by the United States Supreme Court. (*Keyishian v. Board of Regents*, 385 U.S. 589, 595, 87 S Ct 675, 17 L Ed 2d 629, 636.)<sup>9</sup>

In determining that the oath was unconstitutional, the court relied upon what are now generally accepted constitutional concepts: (1) that although there is no constitutional right to public employment, "the government may not condition public employment . . . upon any terms that it may choose to impose . . .;" (2) that when the government conditions public employment by limiting an individual's constitutional rights, "it bears the heavy burden of demonstrating the practical necessity for the limitation . . .;" and (3) in the area of First Amendment freedoms such limitations "must be drawn with narrow specificity."<sup>10</sup>

In requiring narrow specificity, the Supreme Court has been concerned with the effect such statutes would have upon the First Amendment right of freedom of association. In *Elfbrandt v. Russell*,<sup>11</sup> the court pointed out that:

Those who join an organization but do not share its unlawful purposes and who do not participate in its unlawful activities surely pose no threat, either as citizens or as public employees.<sup>12</sup>

7. *Pockman v. Leonard*, 39 Cal.2d 676, 249 P.2d 267 (1952), app. dismd. 345 U.S. 962, 97 L.Ed. 1381, 73 S.Ct. 951.

8. 342 U.S. 485, 96 L.Ed. 517, 72 S.Ct. 380, 27 A.L.R.2d 472 (1952).

9. 68 Cal.2d at 21, 64 Cal. Rptr. at 411, 434 P.2d at 963.

10. 68 Cal.2d at 22, 64 Cal. Rptr. at 411, 434 P.2d at 963.

11. 384 U.S. 11, 16 L.Ed.2d 321, 86 S.Ct. 1238 (1966).

12. 384 U.S. at 17, 16 L.Ed.2d at 325, 86 S.Ct. at 1241.

Leahy: Constitutional Law

It follows that a law which applies to “membership without ‘specific intent’ to further the illegal aims of the organization infringes unnecessarily on protected freedoms.”<sup>13</sup>

The California oath clearly violates this standard. This section of the Constitution “proscribes membership, past, present, or future, in any party or organization which advocates the overthrow of the government by force, violence . . . and [t]here is no provision requiring a specific intent to further the unlawful aims of the organization.”<sup>14</sup>

Justice McComb’s dissent in the *Vogel* case, to a great extent, is the adoption verbatim of most of the opinions in three prior cases: *Steiner v. Derby*,<sup>15</sup> *Garner v. Board of Public Works*,<sup>16</sup> and *Garner v. Board of Public Works*.<sup>17</sup> Justice McComb also quotes Justice Clark’s dissenting opinion in *Keyishian v. Board of Regents of University of State of New York*.<sup>18</sup>

After *Elfbrandt* and *Keyishian* the California decisions in *Steiner* and *Garner* are of doubtful validity. As for the Supreme Court decision in *Garner*, one can argue that it too would not survive judicial scrutiny today. The approach used by the court in *Elfbrandt* if applied to *Garner* would have brought about a different result.<sup>19</sup>

Justice McComb concluded his dissent with the following statement:

In my opinion, the judiciary should not disregard the law as laid down by the citizens of California, directly or through their representatives in the state legislature.<sup>20</sup>

One wonders what Justice McComb means by this statement. Does he mean that when the people or the legislature

13. 384 U.S. at 19, 17 L.Ed.2d at 326, 86 S.Ct. at 1242.

14. 68 Cal.2d at 24, 64 Cal. Rptr. at 413, 434 P.2d at 965.

15. 88 Cal. App.2d 481, 199 P.2d 429 (1948), cert. dismd. 338 U.S. 327, 94 L.Ed. 144, 70 S.Ct. 161.

16. 98 Cal. App.2d 493, 220 P.2d 958 (1950), affd. 341 U.S. 716, 95 L.Ed. 1317, 71 S.Ct. 909.

17. 341 U.S. 716, 95 L.Ed. 1317, 71 S.Ct. 909 (1951).

18. 385 U.S. 589, 17 L.Ed.2d 629, 87 S.Ct. 675 (1967).

19. See Leahy, Loyalty and the first amendment—A concept emerges, 43 N. Dak. L. Rev. 53 (1966).

20. 68 Cal.2d at 51, 64 Cal. Rptr. at 430, 434 P.2d at 982.

make laws the judiciary should never declare them unconstitutional? Surely he can't mean that. The power of the judiciary to measure duly enacted laws against constitutional mandates was settled long ago in the case of *Marbury v. Madison*.<sup>1</sup>

### *Use of Sound Amplification Devices May Be Limited*

Ordinances regulating the use of sound amplification devices are part and parcel of many municipal codes. One such ordinance was before the court of appeal of the fifth district in the case of *Chavez v. Municipal Court of Visalia Judicial District*.<sup>2</sup> The court in attacking the ordinance acknowledged that the public does not have unrestricted right to use public highways and that the county can make reasonable restrictions with regard to such use.

This ordinance, however, "presents great opportunity for discrimination, political preference and the type of censorship which is repugnant to the very concept upon which our free form of government is founded."<sup>3</sup>

There is nothing unusual about this case. It follows prior Supreme Court doctrine with regard to conditioning First Amendment rights on the granting of permits. The court does point out, however, that another court of appeal, the fourth district, had held in a 1953 case<sup>4</sup> that an almost identical ordinance was constitutional.

The fifth district refused to follow the fourth district because "the paramount public interest which is inextricably connected with the subject matter of the ordinance has impelled us to reconsider the question in light of conditions which have prevailed in this nation during more recent years."<sup>5</sup>

The California Supreme Court refused to hear an appeal from the *Chavez* decision, two justices dissenting. In view of the fact that there undoubtedly are some sound device ordi-

1. 1 Cranch 137, 2 L.Ed. 60 (1803).  
2. 256 Cal. App.2d 149, 64 Cal. Rptr. 76 (1967).  
3. 256 Cal. App.2d at 157, 64 Cal. Rptr. at 81.  
4. *Haggerty v. County of Kings*, 117 Cal. App.2d 470, 256 P.2d 393 (1953).  
5. 256 Cal. App.2d at 157, 64 Cal. Rptr. at 82.

Leahy: Constitutional Law  
nances similar to the one involved here still in effect in some municipalities, a resolution of the matter would have eliminated the uncertainty that now exists as to whether a county may enforce a similarly drawn ordinance.

*Free Speech and Advertising on Public-Operated Motor Coaches*

May a public transit district restrict the use of advertising space upon its motor coaches to commercial messages offering goods and services for sale? The California Supreme Court answered this unusual question in the negative in the case of *Wirta v. Alameda-Contra Costa Transit District*.<sup>6</sup>

We conclude that defendants, having opened a forum for the expression of ideas by providing facilities for advertisements on its buses, cannot for reasons of administrative convenience decline to accept advertisements expressing opinions and beliefs within the ambit of First Amendment protection.<sup>7</sup>

In reaching this conclusion the court equated advertising upon buses to the use of public buildings to hold public meetings. In the case of *Danskin v. San Diego Unified School District*,<sup>8</sup> the court struck down a statute which granted the use of public facilities for meetings of organizations formed for education and related purposes but “prohibited the granting of the privilege to those who constitute a ‘subversive element,’ as that term was broadly defined in the statute.”<sup>9</sup>

In *Danskin* the court could see the heavy hand of the censor denying the use of the facilities to those with whom the censor disagreed. The same kind of censorship, however, is not involved in the transit district’s choice to accept only commercially oriented advertisements or political ads at election time. The court recognized this but was of the opinion that

6. 68 Cal.2d 51, 64 Cal. Rptr. 430, 434 P.2d 982 (1967).

7. 68 Cal.2d at 55, 64 Cal. Rptr. at 433, 434 P.2d at 985.

8. 28 Cal.2d 536, 171 P.2d 885 (1946).

9. 68 Cal.2d at 55, 64 Cal. Rptr. at 433, 434 P.2d at 985.



the prohibition was painted with a broader brush than that condemned in *Danskin*. From this the court concluded that:

The vice is not that the district has preferred one point of view over another, but that it chooses between classes of ideas entitled to constitutional protection, sanctioning the expression of only those selected, and banning all others. Thus the district's regulation exercises a most pervasive form of censorship.<sup>10</sup>

Just what the court referred to here is not clear, unless the court meant that there were three classes of ideas seeking public attention: (1) commercial ads; (2) political ads at election time; and (3) public opinion ads such as those plaintiffs offered.<sup>11</sup> Because commercial ads are not entitled to constitutional protection, the phrase "chooses between classes of ideas entitled to constitutional protection" cannot mean those ads.<sup>12</sup> The classes of ideas to which the court then referred must be those in classes 2 and 3. What the court said is that the district cannot make a choice between those two classifications because this is "a most pervasive form of censorship."<sup>13</sup> The court did not rest its decision on this alone. After pointing out that commercial ads are not entitled to First Amendment protection, the court noted that in this case the district had chosen to give such messages preference over nonmercantile ads. This, too, is censorship according to Justice Black's concurring opinion in *Cox v. Louisiana*,<sup>14</sup> wherein he asserted that a statute which prohibited "obstruction of public passageways," but did not apply to

**10.** 68 Cal.2d at 56, 64 Cal. Rptr. at 434, 434 P.2d at 986.

**11.** The ad which the plaintiffs desired to display on the buses read as follows: "‘Mankind must put an end to war or war will put an end to mankind.’ President John F. Kennedy. Write to President Johnson: Negotiate Vietnam.

Women for Peace  
P. O. Box 944, Berkeley."

**12.** *Valentine v. Chrestenson*, 316 U.S. 52, 86 L.Ed. 1262, 62 S.Ct. 920 (1942).

**13.** 68 Cal.2d at 56, 64 Cal. Rptr. at 434, 434 P.2d at 986.

**14.** 379 U.S. 536, 13 L.Ed.2d 471, 85 S.Ct. 453 (1965).

labor organizational activity was “censorship in a most odious form . . . .”<sup>15</sup>

While one may agree that this is in effect a form of censorship, there is not in it the same evil as in *Danskin*. There the school had the power to choose between conflicting viewpoints on religious, political, social, and economic matters. It had the power to promote those views with which it agreed and to deter those with which it did not. The district in *Wirta* is not making that kind of choice. During election time it does just the opposite. It seeks out the opposing candidates and proponents and opponents of ballot propositions and offers advertising space to them. The district argued that this was really an equal protection question and that its regulation was valid because its classification of ads rests upon a rational basis. The court did not accept this argument because it could not find any societal interest which would be enhanced by the classification.

Despite efforts of the district to articulate a rationale for its policy, if there is a societal interest, other than free speech, requiring protection here, it is too obscure or trivial to be readily apparent.<sup>16</sup>

The court then went on to point out that the test of reasonableness which is applicable to due process and equal protection is not a test used to determine whether governmental action infringes upon First Amendment rights. The test in cases such as this is the clear and present danger test and there was no clear and present danger here.

*Wirta* is a difficult case. At the outset it is agreed that the district need not have offered any of its space for advertising. Until it did so there could be no claim of infringement upon constitutional rights. When it did open its space to certain classes of ads, did this give rise to a First Amendment right in the plaintiffs? The majority said that it did, whereas three dissenting Justices, Burke, McComb and Schauer, disagreed.

Once one crosses the threshold of giving the plaintiffs a

<sup>15</sup> 379 U.S. at 581, 13 L.Ed.2d at 502, 85 S.Ct. at 470.

<sup>16</sup> 68 Cal.2d at 59–60, 64 Cal. Rptr. at 436, 434 P.2d at 988.

First Amendment right to use such space the regulation appears clearly unconstitutional. It is unconstitutional under the clear and present danger test because as the court noted, there is no clear and present danger of the occurrence of any substantive evil by the acceptance of such ads.<sup>17</sup> A balancing test does not save the regulation either because here again, whatever societal interest there may be in not accepting such ads, it is obscure in this case.<sup>18</sup> Assuming that the district can make some regulations with regard to the ads it accepts as to size and shape, etc., the present regulation would also fall because of overbreadth. It bans all public opinion ads and thus absolutely annuls the First Amendment right which the majority held arose when the district opened its space for advertising.<sup>19</sup>

## *Anonymity and the Recorded Telephone Message*

That anonymity plays a part in the protection of constitutional rights is now well established. The United States Supreme Court has held that anonymity of affiliation is indispensable to the protection of freedom of association.<sup>20</sup> In *Talley v. California*,<sup>1</sup> the court held that freedom of speech also included the right to remain anonymous while exercising that right.

In the case of *Huntley v. Public Utilities Commission*,<sup>2</sup> the court was called upon to determine whether the right to remain anonymous was applicable to recorded telephone messages. At issue was a regulation of Pacific Telephone and Telegraph Company which required all subscribers to its recorded an-

17. *Dennis v. United States*, 341 U.S. 494, 95 L.Ed. 1137, 71 S.Ct. 857 (1951); *Schenck v. United States*, 249 U.S. at 47, 63 L.Ed. 470, 39 S.Ct. 247 (1919).

18. *Konigsberg v. State Bar of Calif.*, 366 U.S. 36, 6 L.Ed.2d 105, 81 S.Ct. 997 (1961); *Barenblatt v. United States*, 360 U.S. 109, 3 L.Ed.2d 1115, 79 S.Ct. 1081 (1959).

19. *Thornhill v. Alabama*, 310 U.S. 88, 84 L.Ed. 1093, 60 S.Ct. 736 (1940).

20. *Bates v. City of Little Rock*, 361 U.S. 516, 4 L.Ed.2d 480, 80 S.Ct. 412 (1960); *NAACP v. Alabama*, 357 U.S. 449, 2 L.Ed.2d 1488, 78 S.Ct. 1163 (1958).

1. 362 U.S. 60, 4 L.Ed.2d 559, 80 S.Ct. 536 (1960).

2. 69 Cal.2d 67, 69 Cal. Rptr. 605, 442 P.2d 685 (1968).

nouncement service to include in their recorded messages their names and addresses. Huntley subscribed to this service, under the slogan "Let Freedom Ring," to air his views on certain political matters. Because he did not wish to give his name or address, he sought a review of an order of the Public Utilities Commission which had approved the Pacific Telephone regulation.

In striking down the regulation as a violation of freedom of speech, the court discussed such cases as *NAACP v. Alabama*<sup>3</sup> and *Bates v. City of Little Rock*,<sup>4</sup> wherein the Supreme Court had struck down state attempts to force disclosure of membership in the NAACP. The court used a balancing test in those cases, balancing the infringement upon free association against an alleged interest of the government in requiring disclosure of such membership.

The California Supreme Court also likened *Huntley* to *Talley*, supra, a case wherein the United States Supreme Court had struck down an ordinance which prohibited distribution of handbills that did not contain the name and address of the person producing or distributing it. *Talley*, and the line of cases it follows,<sup>5</sup> are not balancing cases. The *Talley* opinion is written by Justice Black, who is no friend of balancing.<sup>6</sup> While Justice Black cites with approval *NAACP* and *Bates*, it appears that his real attack on the ordinance in *Talley* is that it is too broad:

Counsel has urged that this ordinance is aimed at providing a way to identify those responsible for fraud, false advertising and libel. Yet the ordinance is in no manner so limited, nor have we been referred to any legislative history indicating such a purpose. Therefore we do not

3. 357 U.S. 449, 2 L.Ed.2d 1488, 78 S.Ct. 1163 (1958). 1423, 59 S.Ct. 954 (1939); *Lovell v. City of Griffin*, 303 U.S. 444, 82 L.Ed. 949, 58 S.Ct. 666 (1939).

4. 361 U.S. 516, 4 L.Ed.2d 480, 80 S.Ct. 412 (1960).

5. *Schneider v. State*, 308 U.S. 147, 84 L.Ed. 155, 60 S.Ct. 146 (1939); *Hague v. CIO*, 307 U.S. 496, 83 L.Ed.

6. See Justice Black's dissent in *Konigsberg v. State Bar of Calif.*, 366 U.S. at 56, 6 L.Ed.2d at 120, 81 S.Ct. at 1010 (1961).

pass on the validity of an ordinance limited to prevent these or any other supposed evils.<sup>7</sup>

*Huntley* is a mixture of balancing and overbreadth. The court did not find a "compelling state interest" which would tip the scales in favor of the regulation. Even if there were interests that need protection, such as an indication that the message is not sponsored by Pacific Telephone, such a disclaimer could have been required without identifying the actual sponsor of the message.

It appears to the writer that the balancing test does not adequately protect the anonymity that is necessary for the exercise of free expression in cases such as this. Balancing can result in requiring full disclosure which to some people might be a complete deterrent.<sup>8</sup> Approaching the problem from the viewpoint that a narrowly drawn regulation might be permissible would require the maker of the regulation to seek out ways to accommodate the public interest without deterring potential speakers. If it were impossible to draft the regulation without it having such a deterring effect, the regulation should not be allowed to stand unless there is a clear and present danger that the anonymous speech would result in a substantive evil which the government has a right to prevent.<sup>9</sup>

## *Speech Versus Unobstructed Justice*

The exercise of one's right to free speech clashed with the public's interest in having unobstructed justice in the case of *Crosswhite v. Municipal Court of Eureka Judicial District*.<sup>10</sup> Just prior to the trial of two individuals for violating a "bed tax" ordinance, Crosswhite placed ads in local newspapers calling attention to the case and asking why the city had to have such a tax when many cities in California did not.

7. 362 U.S. at 64, 4 L.Ed.2d at 562, 80 S.Ct. at 538.

8. See *Canon v. Justice Court*, 61 Cal.2d 446, 39 Cal. Rptr. 228, 393 P.2d 428 (1964).

9. See: Comment: The constitutional right to anonymity: Free speech, disclosure and the devil, 70 Yale L. Jour. 1084, 1128 (1961).

10. 260 Cal. App.2d 428, 67 Cal. Rptr 216 (1968).

Leahy: Constitutional Law

When the ads were brought to the attention of the court, it postponed the trial and commenced contempt proceedings against Crosswhite. After finding that the ads constituted a clear and present danger to the administration of justice, the court found him guilty. A petition for a writ of review to the superior court was denied and an appeal to the court of appeal, first district, was taken. That court reversed and sent the case back to the superior court for review. In so doing the court reviewed the Supreme Court cases which have touched upon the question and concluded correctly that the test that should apply is whether there was a clear and present danger to the administration of justice by the exercise of the right of free speech. Although the court sent the case back to the superior court to resolve the issue, it is clear that the appellate court did not believe that there was a clear and present danger of any substantive evil in this case.

*Freedom of the Press and the Licensing of Newspapers*

The application of a business license tax to a newspaper published by a political party was before the court of appeal, fourth district, in the case of *Long v. City of Anaheim*.<sup>11</sup> The newspaper in question was published by the Socialist Labor Party and was used to promote nominees of the party and to disseminate the party's political philosophy. It carried no commercial advertising but was sold on newsstands for five cents a copy. Not being successful in securing an exemption from the license taxes of the cities of Anaheim and Garden Grove, the petitioners brought an action to enjoin those cities from requiring the payment of the tax. The Anaheim ordinance contained an exemption for charitable and non-profit organizations, while the Garden Grove ordinance defined "business" that was subject to the tax as one "carried on for profit or livelihood [*sic*]." <sup>12</sup>

Upon examining the facts, the court found that the paper in question had always operated at a loss and that the limited amount of revenue obtained by the sale of the paper only

11. 255 Cal. App.2d 191, 63 Cal. Rptr. 56 (1967).

12. 255 Cal. App.2d at 196, 63 Cal. Rptr. at 59.

reduced the annual deficit. Further, the court noted that in the case of *Murdock v. Commissioner of Pennsylvania*<sup>13</sup> the Supreme Court had held that selling religious literature did not transform evangelism into a commercial enterprise.

In the instant case, "the primary function of the 'Weekly People' is to present the views of the Socialist Party to the paper's subscribers and not to realize a pecuniary profit."<sup>14</sup> On this basis the court held that the paper was "a noncommercial nonprofit, purely political publication, and that under any reasonable interpretation of the . . . ordinances, the publication . . . (is) exempt from the payment of the business license fee."<sup>15</sup> The court stated that if the paper was not entitled to the exemption the ordinances would probably be unconstitutional because "[i]f the guarantees of freedom of speech and freedom of the press are to be preserved, municipalities should not be free to raise general revenue by taxes on the circulation of information and opinion in non-commercial causes. . . ."<sup>16</sup>

### *Freedom of the Press and the Distribution of a Newspaper*

The city of Pacific Grove, California, has an ordinance that prohibits the throwing of newspapers or other printed matter on any residential property without the consent of the owner. In the case of *Di Lorenzo v. City of Pacific Grove*,<sup>17</sup> the publisher of a local newspaper sought to enjoin the enforcement of this ordinance, claiming that it violated her First Amendment right of freedom of the press. Recognizing that the right of freedom of the press includes protection for the means of dissemination, the court held that "the proper test of regulation . . . in this area turns upon whether the regulation is a reasonable and necessary one. . . ."<sup>18</sup>

13. 319 U.S. 105, 87 L.Ed. 1292, 63 S.Ct. 870, 146 A.L.R. 81 (1943).

14. 255 Cal. App.2d at 198-199, 63 Cal. Rptr. at 61.

15. 255 Cal. App.2d at 199, 63 Cal. Rptr. at 61.

16. 255 Cal. App.2d at 200, 63 Cal. Rptr. at 62.

17. 260 Cal. App.2d 68, 67 Cal. Rptr. 3 (1968). For further discussion of this case, see McKinstry, STATE AND LOCAL GOVERNMENT.

18. 260 Cal. App.2d at 71, 67 Cal. Rptr. at 5.

Constitutional Law  
Finding that the ordinance was reasonable and narrowly drawn, the court held that it was constitutional.

If one considers that what is being regulated is the *means* of effectively pursuing one's rights, in this case freedom of the press, the court's use of the test of reasonableness appears to be valid. The Supreme Court itself has not only upheld "reasonable" regulations aimed at the means of exercising a right<sup>19</sup> but has upheld reasonable regulations upon the exercise of the right itself.<sup>20</sup> Even in those cases where the court has struck down a regulation as a violation of a right, it has declared that some reasonable regulation of the right is acceptable.<sup>1</sup>

### *Pandering Is Not Part of Obscenity Definition in California*

The definition of obscenity and its application to a specific publication was before the California Supreme Court in *People v. Noroff*.<sup>2</sup> The defendants were charged with possession of obscene matter for distribution in this state. The issue was whether the magazine in question was obscene *per se* under the statutory definition.<sup>3</sup> The court held that it was not.

The case is noteworthy in that the state argued that the trial court should have permitted the jury to hear evidence bearing upon defendant's "pandering" of the magazine. The

19. *Breard v. City of Alexandria*, 341 U.S. 622, 95 L.Ed. 1233, 71 S.Ct. 920, 35 A.L.R.2d 335 (1951); *Kovacs v. Cooper*, 336 U.S. 77, 93 L.Ed. 513, 69 S.Ct. 448, 10 A.L.R.2d 608 (1949).

20. *Poulos v. New Hampshire*, 345 U.S. 395, 97 L.Ed. 1105, 73 S.Ct. 760, 30 A.L.R.2d 987 (1953); *Prince v. Massachusetts*, 321 U.S. 158, 88 L.Ed. 645, 64 S.Ct. 438 (1944); *Cox v. New Hampshire*, 312 U.S. 569, 85 L.Ed. 1049, 61 S.Ct. 762, 133 A.L.R. 1396 (1941).

1. *Martin v. City of Struthers*, 319 U.S. 141, 87 L.Ed. 1313, 63 S.Ct. 862 (1943); *Lovell v. City of Griffin*, 303

U.S. 444, 82 L.Ed. 949, 58 S.Ct. 666 (1939).

2. 67 Cal.2d 791, 63 Cal. Aptr. 575, 433 P.2d 479 (1967).

3. Cal. Penal Code § 311(a) reads as follows:

"Obscene" means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance, . . .



Cal Law Trends and Developments, Vol. 1969, Iss. 1 (1969), Art. 12  
court's answer was that the indictment did not charge the defendant with pandering and even if it had, pandering is not a crime in California.<sup>4</sup>

In discussing the matter of pandering the court disapproved of some statements made in *Landau v. Fording*.<sup>5</sup> In that case the court of appeal had referred to the fact that the movie in question had earned substantial sums of money from its exhibition and that fact bolstered its conclusion that the movie was obscene. As a basis for this it used the rationale of *Ginzburg v. United States*,<sup>6</sup> wherein the Supreme Court held that evidence of pandering may be used to determine whether the material in question is obscene.

The trial court in the *Noroff* case seemed to be of the opinion that the *Landau* decision added the pandering factor to the California definition, but the court of appeal rejected this view.

### *Ordinance Licensing Theaters Must Contain Precise Standards*

Section 103.109 of the Los Angeles Municipal Code provides that no person shall engage in the business of exhibiting motion picture films without a written permit from the board of police commissioners. The Code also provides that the board shall not issue a license if the operation of the theater will not comport with the peace, health, safety, convenience, good morals, and general welfare of the public; or if the business has been or is a public nuisance; or if the applicant is unfit to be trusted with the privileges granted by such permit, or has a bad moral character, intemperate habits or bad reputation for truth, honesty, or integrity.

In *Burton v. Municipal Court*<sup>7</sup> defendants, charged with the

4. Pandering is the business of purveying sexual matter openly advertised to appeal to the erotic interest of the customer.

5. 245 Cal. App.2d 820, 54 Cal. Rptr. 177 (1966), aff'd mem., 388 U.S. 456, 18 L.Ed.2d 1317, 87 S.Ct. 2109 (1967).

See discussion of this case *Cal Law Trends and Developments* 1967, pages 346-349.

6. 383 U.S. 463, 16 L.Ed.2d 31, 86 S.Ct. 942 (1966).

7. 68 Cal.2d. 684, 68 Cal. Rptr. 721, 441 P.2d 281 (1968).

violation of the ordinance, sought a declaration that these sections of the Code were unconstitutional under the First and Fourteenth Amendments. Although the petitioners argued that the requirement of a license infringed upon their right of free expression, the court had little difficulty disposing of that question:

No credible authority supports an exemption for motion picture theaters from the requirement of obtaining a license pursuant to a city's police power to regulate theaters, and a substantial number of decisions have upheld such authority and the exaction of a license fee.<sup>8</sup>

The next question that the court had to answer was more difficult: Did the standards by which the board was to act violate any constitutional requirement? The court's answer was in the affirmative. The Code did "not provide precise standards capable of objective measurement—the sensitive tools to be employed whenever First Amendment rights are involved."<sup>9</sup> The court equated the exhibition of motion pictures with the exercise of such First Amendment rights as solicitation and the distribution of non-commercial printed material. Statutes licensing these activities have been held unconstitutional where the laws give the licensing authority discretionary power under vague standards governing the issuing of the license.

It is this equation that makes this an unusual case. What the court said is that when a license is required to engage in a business that embodies the exercise of a constitutional right, the licensing statute must be narrowly drawn. This is so because "overly broad standards are fraught with the hazard that an applicant will be denied his rights to free speech and press through exercise of the power of the board, in its discretion, to refuse a permit because of the content of the films which the applicant exhibits in his theater."<sup>10</sup>

8. 68 Cal.2d at 689, 68 Cal. Rptr. at 724, 441 P.2d at 284. See also AMUSEMENTS AND EXHIBITIONS, 4 Am. Jur.2d 150.

9. 68 Cal.2d at 692, 68 Cal. Rptr. at 726, 441 P.2d at 286.

10. 68 Cal.2d at 692, 68 Cal. Rptr. at 726, 441 P.2d at 286.

One can agree with the court that such overly broad standards do give a board a great deal of discretionary control over theater operators. However, among the standards which the court found overly broad was the standard that the applicant have "good moral character," stating "[f]or example, the board may consider that an applicant who has exhibited films offensive to the sensibilities of the board members does not have 'good moral character' . . . ."<sup>11</sup> The court was concerned that the board could use this standard and the others to impose a censorship or previous restraint upon the exercise of the applicant's First Amendment right to freedom of expression. "Good moral character," however, is the basic standard for testing the qualifications of applicants for a great variety of occupations. For example, in California one who wishes to practice cosmetology or barbering must have "good moral character and temperate habits."<sup>12</sup> Dentists, pharmacists, engineers, physicians, and attorneys must all possess "good moral character."<sup>13</sup>

To engage in an occupation or profession of one's choice is a constitutional right. In *Stewart v. County of San Mateo*<sup>14</sup> the court of appeal, first district, stated:

[W]e note first that it is firmly established that the right of every person to engage in a legitimate employment, business or vocation is an individual freedom secured by the due process provision of the federal and state Constitutions.<sup>15</sup>

And in the recent case of *Hallinan v. Committee of Bar Examiners of the State Bar*,<sup>16</sup> the supreme court affirmed that there is a constitutional right to practice law.<sup>17</sup> If "good moral

11. 68 Cal.2d at 692, 68 Cal. Rptr. at 726, 441 P.2d at 286.

12. Cal. Bus. & Prof. Code §§ 7362.1 and 6545.

13. Cal. Bus. & Prof. Code § 1628, *Dentists*; § 4089, *Pharmacists*; § 6751, *Engineering*; § 2168, *Physicians*; and § 6060, *Attorneys*. Funeral directors and embalmers need only have good character. See §§ 7619 and 7643.

14. 246 Cal. App.2d 273, 54 Cal. Rptr. 599 (1966).

15. 246 Cal. App.2d at 284-285, 54 Cal. Rptr. at 606.

16. 65 Cal.2d 447, 55 Cal. Rptr. 228, 421 P.2d 76 (1966).

17. Concerning the part that "good moral character" plays in admission to the Bar see *March v. Committee of Bar Examiners*, 67 Cal.2d 718, 63 Cal. Rptr.

character<sup>Leahy: Constitutional Law</sup> is a standard which can be used as a weapon to deny the licensing of a theater, it would seem that it would have the same inherent danger as a standard to judge qualifications of applicants for licenses to engage in any occupation or profession.

### *The Right to Remain Silent and Freedom of Speech*

A novel application of freedom of speech was asserted by the petitioner in the case of *Fallis v. Department of Motor Vehicles*.<sup>18</sup> The case arose when the petitioner sought a writ of mandamus to the Department of Motor Vehicles to set aside its order suspending his driver's license and asserted, among other things, that freedom of speech included a right to remain silent. The Department of Motor Vehicles has the power to suspend a driver's license for refusal to take a chemical test to determine the alcoholic content of the licensee's blood, under section 13353 of the Vehicle Code. In contesting the validity of the suspension of his license, the licensee contended that requiring him to give an answer to the request to take the test, such as saying "no," was a violation of his right of freedom of speech because that right includes a right not to communicate at all.<sup>19</sup>

The court answered that "it may be argued that freedom of speech implies the right not to speak under compulsion: (a) not to be compelled to utter an opinion in a certain tenor, but also (b) not to be compelled to make any utterance of any kind."<sup>20</sup> It found some support for the first proposition in *West Virginia State Board of Education v. Barnette*<sup>1</sup> but could find none for the second proposition and thus concluded

399, 433 P.2d 191 (1967) and *Hallinan v. Committee of Bar Examiners*, 65 Cal.2d 447, 55 Cal. Rptr. 228, 421 P.2d 76 (1966).

**18.** 264 Cal. App.2d —, 70 Cal. Rptr. 595 (1968). For further discussion of this case, see Manuel, ADMINISTRATIVE LAW, in this volume.

**19.** See *Escobedo v. Illinois*, 378 U.S. 478, 12 L.Ed.2d 977, 84 S.Ct. 1758

(1964) wherein the Supreme Court declared that there is an absolute right to remain silent based upon the privilege against self-incrimination of the Fifth Amendment. This, of course, relates to criminal matters.

**20.** 264 Cal. App.2d at —, 70 Cal. Rptr. at 600.

**1.** 319 U.S. 624, 87 L.Ed. 1628, 63 S.Ct. 1178, 147 A.L.R. 674 (1943).

that there was no First Amendment violation in the enforcement of Section 13353.

*Public Employment and Constitutional Rights*

Public employment versus the exercise of one's right to freedom of religion became the basis of the case of *Hollon v. Pierce*.<sup>2</sup> Hollon was a school bus driver. Just before his annual contract was to be renewed the district trustees were informed that he was a sponsor of a religious tract containing unorthodox religious views and violent denunciations of certain Christian denominations. The authorities became concerned about Hollon's emotional stability and fitness to drive a school bus. In reviewing his file it was found to contain some references to emotional outbursts over the happening of certain events which he disliked. After Hollon refused an offer to appear before them, and after considering the finding of two psychiatrists that he was not maladjusted, disoriented, psychotic or dangerous, the trustees refused to renew his contract.

The court of appeal, third district, in sustaining a superior court denial of reinstatement, found that the trustees had acted in good faith in not renewing Hollon's contract because of their determination that he did not have the emotional stability required of a school bus driver:

Irrationality takes many outward forms. Mental aberrations just as readily assume a religious guise as not. That an aberration is expressed in religious terms does not foreclose good faith inquiry into the aberration itself. Such an inquiry by those responsible for the employee's fitness is not an invasion of his private religious beliefs.<sup>3</sup>

This case appears to be in accordance with Supreme Court doctrine in matters involving the relationship between the government and its employees where the question of fitness is concerned.

2. 257 Cal. App.2d 468, 64 Cal. Rptr. 808 (1968). For further discussion of this case, see Manuel, ADMINISTRATIVE LAW, in this volume.

3. 257 Cal. App.2d at 477, 64 Cal. Rptr. at 814.

Leahy: Constitutional Law

In *Shelton v. Tucker*<sup>4</sup> the court held that a state certainly had a right to investigate the competence and fitness of those it employs as teachers. The same, of course, should apply to any other public employee.

Although the court of appeal cites with approval the case of *Bagley v. Washington Township Hospital District*,<sup>5</sup> wherein the supreme court enunciated a test to be used in judging governmental restrictions on its employees in the exercise of their constitutional rights, the *Hollon* case is not in the same class. In this latter case the basic issue was whether the trustees acted within the concept of due process in determining Hollon's *fitness* to continue as a school bus driver. The *Bagley* standard does not really fit this kind of an inquiry. The *Bagley* standard is more applicable to a situation where the employee desires to exercise a constitutional right and the government concludes that the public interest requires the subordination of that right.<sup>6</sup>

Fitness for public employment and the exercise of a constitutional right were also before the court of appeal, first district, in the case of *Hofberg v. County of Los Angeles Civil Service Commission*.<sup>7</sup> In that case the petitioner in applying for county employment stated that if he were ever called before the House Un-American Activities Committee he would refuse, on advice of counsel and on Fifth Amendment grounds, to answer questions concerning so-called subversive activities of the kind required to be answered by Section 1028.1 of the California Government Code. He did agree to answer questions before any other U. S. Congressional Committee or before the county, or any state, employing agency.<sup>8</sup> On the basis of the information supplied by the petitioner

4. 364 U.S. 479, 5 L.Ed.2d 231, 81 S.Ct. 247 (1960).

5. 65 Cal.2d 499, 55 Cal. Rptr. 401, 421 P.2d 409 (1966).

6. For an exhaustive discussion of *Bagley v. Washington Township* see *Cal Law Trends and Developments 1967*, Constitutional Law.

7. 258 Cal. App.2d 433, 65 Cal. Rptr. 759 (1968). For further discussion of this case, see Manuel, ADMINISTRATIVE LAW, in this volume.

8. Petitioner was a former employee of Los Angeles County but had been discharged in 1957 because he had asserted his Fifth Amendment privilege before HUAC the year before.

and without any type of a hearing on the issue, the county refused to place his name on the eligibility list. He then sought a writ of mandate, to compel the county to place him on the eligibility list.

In affirming the decision of the superior court which granted the writ of mandate, the court reviewed the course which the Supreme Court cases have taken since the early 1950's. Two concepts run through these cases. In a number of cases the court has upheld the right of the government to make inquiry into the loyalty of its employees, concluding that the failure of the employee to supply such information relates to his fitness and reliability.<sup>9</sup> The court has also held, however, that an employee cannot be discharged just because he invokes the privilege against self-incrimination.<sup>10</sup> If the employee is to be discharged following the taking of the privilege it must be for reasons other than his invoking the privilege. The reasons must relate to his fitness and must be determined by holding a hearing on the matter.

The instant case does not fall within either of these concepts. In this case, while the petitioner has indicated he will refuse to answer certain questions if ever again called before HUAC, he has volunteered to answer any and all questions put to him by any other county or state agency. The court stated: "All information relevant to loyalty and subversive activities, bearing on Hofberg's fitness as a county employee, can be obtained by the Commission's merely asking respondent."<sup>11</sup>

## **Fourteenth Amendment**

### *Equal Protection Claimed, But Not Sustained*

Justice Jackson of the United States Supreme Court wrote in *Railway Express Agency v. New York*, "While claims of denial of equal protection are frequently asserted, they are

9. *Beilan v. Board of Education*, 357 U.S. 399, 2 L.Ed.2d 1414, 78 S.Ct. 1317 (1958); *Lerner v. Casey*, 357 U.S. 468, 2 L.Ed.2d 1423, 78 S.Ct. 1311 (1958).

*Education*, 350 U.S. 551, 100 L.Ed. 692, 76 S.Ct. 637 (1956).

11. 258 Cal. App.2d at 441, 65 Cal. Rptr. at 765.

10. *Slochower v. Board of Higher*

rarely sustained.”<sup>12</sup> This statement applies to the sixteen cases in which the equal protection issue was raised in the appellate courts in California this past year. In none of these cases was the appeal to this part of the Fourteenth Amendment successful. What makes the invocation of this constitutional right generally unsuccessful is the criteria by which alleged unequal treatment is judged:

In . . . cases, involving distinctions not drawn according to race, the Court has merely asked whether there is any rational foundation for the discriminations, and has deferred to the wisdom of state legislatures.<sup>13</sup>

This almost total submission to the wisdom of the legislature lends weight to another statement Justice Jackson made in *Railway Express Agency*:

The equal protection clause ceases to assure either equality or protection if it is avoided by any conceivable difference that can be pointed out between those bound and those left free.<sup>14</sup>

A review of just a few of the cases will illustrate the application of the equal protection clause by the California appellate courts this past year.

Different tax treatment with regard to income earned in a foreign country as compared to income earned in another state was approved in *Tetreault v. Franchise Tax Board*.<sup>15</sup> In this case the taxpayer earned income in Japan which was subject to income tax there. The Franchise Tax Board disallowed the tax paid to Japan in computing the taxpayer's California income tax. In answer to the taxpayer's argument that this denied him equal protection, the court quoted from the case of *Allied Stores of Ohio, Inc. v. Bowers*,<sup>16</sup> to the effect that while the equal protection clause does apply to state taxation,

**12.** 336 U.S. 106, 111, 93 L.Ed. 533, 539, 69 S.Ct. 463 (1949).

**13.** *Loving v. Virginia*, 388 U.S. 1 at 9, 18 L.Ed.2d 1010 at 1016, 87 S.Ct. 1817 at 1822 (1967).

**14.** 336 U.S. at 115, 93 L.Ed. at 541, 69 S.Ct. at 468.

**15.** 255 Cal. App.2d 277, 63 Cal. Rptr. 326 (1967).

**16.** 358 U.S. 522, 3 L.Ed.2d 480, 79 S.Ct. 437 (1959).



there is no iron rule of equality and the states therefore have broad power to fashion their tax schemes.

The California judicial system came under an equal protection attack in *Whittaker v. Superior Court*.<sup>17</sup> The issue before the court was whether there was a denial of equal protection in the state appellate procedure whereby in some counties an appeal from a justice court was heard by a single judge of the superior court, whereas in other counties such an appeal would be heard by a three-judge panel of the superior court.

Section 77 of the Code of Civil Procedure provides for an appellate department of the superior court only in counties having municipal courts. The court of appeal, third district, had concluded that Section 77 was a violation of the equal protection clause and therefore void. Because of the impact this would have had upon the appellate system, the Supreme Court, on its own motion, had the matter transferred to it for final decision.

After reviewing the judicial system in California and noting that the appellate procedures are significantly different in various geographical areas of the state, the court held that such differences are founded upon a reasonable classification by the legislature and thus do not offend the Fourteenth Amendment. The test used was the one enunciated by the Supreme Court, as set forth above: Does the classification here in question bear a substantial and reasonable relationship to a legitimate legislative objective?

Answering the question in the affirmative, the court noted that while the existence of an appellate department of a superior court is determined by the existence of a municipal court in the county, the determination is based on population and geography and such classification is rational because rural counties produce relatively few appeals and the cost of a multiple-judge court in those counties would be substantial.

The validity of a classification after the fact was the issue before the Supreme Court in the case of *City of Los Angeles v. Standard Oil Co. of California*.<sup>18</sup>

17. 68 Cal.2d 357, 66 Cal. Rptr. 710, 438 P.2d 358 (1968).

18. 262 Cal. App.2d 118, 68 Cal. Rptr. 512 (1968).

After a dam had broken because of oil drilling operations near it, the state legislature enacted a statute which changed the law with regard to contribution among tortfeasors so that it did not apply to the liability growing out of the bursting of the dam. Under Section 875 of the Code of Civil Procedure, the right of contribution does not arise until one tortfeasor has paid the judgment. The new law, designated AB9, gives rise to contribution among tortfeasors "when one tortfeasor has discharged by payment the common liability . . . although judgment has not been rendered against all or any of them in an action on the tort."<sup>19</sup>

In replying to the contention that AB9 violates constitutional guarantees against special and arbitrary legislation, the court relied upon the usual test that the legislature has wide discretion in making classifications and that such classifications will not be struck down unless arbitrary or unreasonable. In this case the court found that the need to get relief to the injured property owners as soon as possible justified the legislature in changing the law to meet this urgent situation.

A female holding an on-sale liquor license and the wife of any male holder of such a license may act as a barmaid but other females may not under Section 25656 of the Business and Professions Code. This classification was upheld in *Hargens v. Alcoholic Beverage Control Appeals Board*.<sup>20</sup>

Forbidding some female employees to mix drinks while others are permitted to do so is a reasonable legislative classification, the court held, and therefore does not violate the equal protection clause. The court believed that because the state could control two of the classifications, that is, female holders of licenses and wives of holders of licenses, by its power to suspend the license, the state could then control improper conduct by such females. The state, however, would not have such control over a female who was merely an employee. This made the classification a reasonable one.

<sup>19</sup>. 262 Cal. App.2d at 122, 68 Cal. Rptr. at 514.

<sup>20</sup>. 263 Cal. App.2d 601, 69 Cal. Rptr. 868 (1968).

*Congressional Redistricting Approved*

In *Silver v. Reagan*<sup>1</sup> the California Supreme Court refused to defer redistricting of the state's Congressional districts until after the 1970 census. The court was of the opinion that even though there had been a substantial increase in population since the 1960 census, reapportionment at this time would be less inequitable than allowing the then existing inequitable districts to remain for another two years.

The court gave the legislature until November 10, 1967, to submit to it a redistricting plan with the proviso that if the legislature did not do so the court would order into effect a plan the court deemed appropriate. The legislature did redistrict and what is now Section 30000 of the Elections Code was submitted to the court and approved by it in *Silver v. Reagan*.<sup>2</sup> This redistricting was then used as a basis for the primary and general elections of 1968.

*Due Process and the Wearing of a Beard*

In 1966 the Supreme Court of California, in *Bagley v. Washington Township Hospital District*,<sup>3</sup> set forth a three-part test to be used by the court to test governmental restriction upon the exercise of constitutional rights. In commenting upon the *Bagley* standard this writer stated:

The standard adopted in *Bagley* appears to be a workable formula. Any such standard should weigh heavily in favor of the individual, and his rights should be considered absolute insofar as possible to do so.<sup>4</sup>

The case of *Akin v. Riverside Unified School District Board of Education*<sup>5</sup> is another illustration of the application of the *Bagley* test. That case involved the question of the suspension of a high school student for wearing a beard in violation of

1. 67 Cal.2d 452, 62 Cal. Rptr. 424, 432 P.2d 26 (1967).

2. 67 Cal.2d 924, 64 Cal. Rptr. 325, 434 P.2d 621 (1967).

3. 65 Cal.2d 499, 55 Cal. Rptr. 401, 421 P.2d 409 (1966).

4. See *Cal Law Trends and Developments* 1967, page 341.

5. 262 Cal. App.2d 161, 68 Cal. Rptr. 557 (1968). For further discussion of this case, see McKinstry, STATE AND LOCAL GOVERNMENT, in this volume.

the school's "good grooming policy." Starting from a position that the student had a constitutional right to wear a beard, the court applied the *Bagley* standard and inquired:

(1) (W)hether the restraint imposed on the male students' freedom to grow a beard, . . . rationally and reasonably relates to the enhancement of a free public education; (2) whether the benefits which the public gains by the restraint prohibiting a beard outweigh the resulting impairment of the students' right to grow a beard; and (3) whether any alternative less subversive of the students' constitutional right is available.<sup>6</sup>

The court then reviewed the record and concluded that there was evidence that wearing beards by students was disruptive; that there was a benefit to the public to have the schools operate with a minimum of interruption; and that there appeared to be no alternative less subversive to the student's right to grow a beard.

The burden was upon the school board to meet the standard to the satisfaction of the court. Only by meeting the standard could the school restrict the student's constitutional right. In this case the student also argued that "[t]he board's ruling has the effect of extending into petitioner's home life thereby violating his right of privacy."<sup>7</sup> The court resolved this question by quoting from *Leonard v. School Committee of Attleboro*<sup>8</sup> in which the Massachusetts court apparently merely balanced the right against the interest of the other students, the teachers, and the public and concluded that the latter's interests were superior. The *Bagley* standard would appear to be applicable to the constitutional right of privacy as well as to the constitutional right of liberty of which wearing a beard is part, and would give greater protection to that right than a mere balancing test.

6. 262 Cal. App.2d at 167-168, 68 Cal. Rptr. at 562. (This is the *Bagley* standard worded to reflect the precise questions at issue.)

7. 262 Cal. App.2d at 169, 68 Cal. Rptr. at 563.

8. 349 Mass. 704, 212 N.E.2d 468, 14 A.L.R.3d 1192 (1965).

***Due Process: Suspend License First—Listen Later***

A compelling public interest supported the summary suspension of a license to operate a school for training guide dogs for the blind in *Eye Dog Foundation v. State Board of Guide Dogs*.<sup>9</sup> The constitutionality of Section 7214 of the Business and Professions Code, which requires automatic suspension of a school's license if there is no licensed trainer in charge, was attacked in this case as violating due process because it contained no provisions for a hearing.

Adopting most of the opinion of the court of appeal, second district, the supreme court sustained the statutory procedure. The opinion recognized that the general rule in California is that in the absence of a statute declaring otherwise, statutes ought to be construed to require a hearing before suspension of a license. Where there is a compelling public interest, however, summary suspension with "judicial review" thereafter does not violate due process.<sup>10</sup> Section 7214, however, does not provide for either a hearing or "judicial review." Judicial review is available by resort to the statutory writ of mandate or by way of a petition for declaratory relief. It was this latter method that petitioner used in *Eye Dog Foundation*. It is apparent that the judicial review referred to here would be in the nature of a hearing during which a licensee would be permitted to present evidence why his license should not have been suspended. Both the writ of mandate and the action for declaratory relief in California give the licensee a trial upon controverted issues of fact and thus fulfill due process requirements.<sup>11</sup>

The constitutionality of the hearing procedures under California's "implied consent" law, Section 13353 of the Vehicle Code, was before the court in *August v. Department of Motor Vehicles*.<sup>12</sup> This statute requires the Department of Motor

9. 67 Cal.2d 536, 63 Cal. Rptr. 21, 432 P.2d 717 (1967).

10. *Escobedo v. State of California*, 35 Cal.2d 870, 222 P.2d 1 (1950).

11. See 32 Cal. Jur.2d MANDAMUS

§ 72 and 15 Cal. Jur.2d DECLARATORY RELIEF § 19.

12. 264 Cal. App.2d 52, 70 Cal. Rptr. 172 (1968). For further discussion of this case, see Manuel, ADMINISTRATIVE LAW, in this volume.

Leahy: Constitutional Law

Vehicles to suspend the driver's license of one who has refused to submit to a chemical test to determine the alcoholic content of his blood. But the procedure provides for notice and an opportunity to be heard before the suspension becomes effective. If the licensee does not request a formal hearing, he will be given an informal one.<sup>13</sup> There are no detailed requirements as to how an informal hearing must be conducted. The licensee is given an opportunity to attend, and to present and controvert evidence. The statute, however, does not require that the arresting officer testify in person or be subjected to cross examination. In the instant case the licensee attended the informal hearing, without counsel, and made no objection to the use of the arresting officer's written statements and reports. Upon conclusion of the hearing, the hearing officer recommended that the license be suspended, though the court which had accepted the licensee's plea of guilty to driving under the influence of intoxicating liquor had recommended that the license not be suspended because the licensee's employment made it necessary for him to drive.

The court held that the statutory procedure did not violate due process. It recognized that due process did require a hearing at some time either before or after suspension and that one ought to have an opportunity to know all of the information being used against him and an opportunity to cross examine. This applies, the court stated, where there are disputed questions of fact. In this case the licensee did not object to the information use by the hearing officer, therefore there were no disputed questions of fact. The court implied that had the licensee objected to the written evidence, it would have been necessary to have the arresting officer present and to afford the licensee an opportunity to cross examine him.

This case follows the procedure outlined in previous cases which require a hearing at some point before final suspension of a driver's license. Although the licensee bears some burden with regard to the extent of the hearing he receives, it is apparent that if he objects to the use of the written statements

<sup>13</sup>. Cal. Vehicle Code §§ 14100 and 14104.

of the officer, such statements cannot be used alone without an opportunity for confrontation.

*State Cannot Make a Man an Outcast in His Own Profession Without a Hearing*

The case of *Endler v. Schutzbank*<sup>14</sup> presented the California Supreme Court with this unusual due process question: Is an individual entitled to notice and an opportunity to be heard by a governmental agency which has taken no action against him, but, based on unproved accusations, threatens disciplinary action against third parties who employ him?

The Commissioner of Corporations notified the plaintiff's employer that he had information that charged the plaintiff with forgery and embezzlement and that unless the employer discharged the plaintiff, the commissioner would take steps to suspend the license of the employer as a personal property broker. Ultimately the employer acquiesced and discharged plaintiff. The commissioner offered to conduct an informal hearing into the alleged charges but retained the right to threaten disciplinary action against any licensee who employed the plaintiff. Plaintiff refused to submit to such a hearing. Thereafter the commissioner, according to the plaintiff, "embarked upon a policy of 'directing its licensees . . . not to employ plaintiff on threat of revocation or suspension of their personal property broker's license.'" <sup>15</sup>

Having found that it was virtually impossible to secure employment in California under these circumstances, plaintiff sought relief in the courts. The superior court dismissed the action but on appeal the supreme court reversed, concluding that the plaintiff was entitled to a hearing and unless given one by the commissioner, he was entitled to a declaration that the commissioner had acted arbitrarily and should be en-

<sup>14</sup>. 68 Cal.2d 162, 65 Cal. Rptr. 297, 436 P.2d 297 (1968). For further discussion of this case, see Collings, CRIMINAL LAW AND PROCEDURE, in this volume.

<sup>15</sup>. 68 Cal.2d at 167, 65 Cal. Rptr. at 301, 436 P.2d at 301.

joined from further threatening licensees who desire to hire the plaintiff.

Once it is accepted that plaintiff has an interest deserving of constitutional protection, the conclusion reached by the court is in accordance with due process standards. In this instance the interest of the plaintiff is to be able to follow any occupation he chooses. That interest cannot be destroyed without complying with the due process clause of the Fourteenth Amendment.

The court made a distinction between the Supreme Court cases of *Cafeteria & Restaurant Workers v. McElroy*<sup>16</sup> and *Willner v. Committee on Character and Fitness*<sup>17</sup> by pointing out that in the former the government was regulating its own internal operations (the individual involved was working in a government arsenal), while in the latter the state was withholding a license to practice law.

The government can demand more from its employees, the court implied, than from one who is seeking to follow a chosen trade or profession. If by this the court meant that the government as an employer may take good faith action, unencumbered by constitutional restrictions, against an employee based solely upon his fitness to perform his duties, the court would appear to be correct.

*Endler*, however, is more like *Willner*, and therefore "the state may not make a man an outcast in his own profession without affording him a full opportunity to present his defense."<sup>18</sup> Because the commissioner was not taking direct action against the plaintiff, the question of his standing to raise the issues was before the court. After reviewing a number of Supreme Court cases relating to standing, the court held that these cases

Coupled with the holding of *Willner*, . . . establish the principle that *any person whose freedom to pursue his profession is seriously restricted by an official action*

<sup>16.</sup> 367 U.S. 886, 6 L.Ed.2d 1230, 81 S.Ct. 1743 (1961).

<sup>18.</sup> 68 Cal.2d at 173, 65 Cal. Rptr. at 304, 436 P.2d at 304.

<sup>17.</sup> 373 U.S. 96, 10 L.Ed.2d 224, 83 S.Ct. 1175, 2 A.L.R.3d 1254 (1963).



*or course of conduct designed to discourage his employment may compel the government to afford him a hearing complying with the traditional requirements of due process.*<sup>19</sup>

Justice Friedman in *Rivera v. Division of Industrial Welfare of State*<sup>20</sup> characterized one of the issues as a “tug of war . . . between the employers’ insistence upon a ‘trial type’ hearing featured by opportunities for confrontation, cross-examination and rebuttal, and the commission’s pursuit of a quasi-legislative or ‘argument type’ hearing.”<sup>21</sup>

In this case the State Industrial Welfare Commission, after holding public meetings, issued certain orders relating to wages, hours, and working conditions for women and minors in industries handling products after harvest. During these hearings interested persons were allowed to appear and testify. In addition letters, statements, position papers, etc., were received by the commission. Witnesses were given a limited time to testify, but no cross-examination or rebuttal were permitted.

In reaching its conclusion that the manner in which the hearings were conducted did not offend due process, the court stated that there was a distinction between adjudicative hearings and legislative hearings. Due process does require access to evidence and an opportunity for cross-examination and rebuttal in the former but not in the latter. In the instant case the process before the commission was “quasi-legislative” and because so related to the legislative process, the restrictive procedures with regard to gathering of information upon which to base its order were permissible.

In a footnote to this decision<sup>2</sup> the court noted that Professor Davis in his treatise on administrative law,<sup>3</sup> prefers an ap-

19. 68 Cal.2d at 178, 65 Cal. Rptr. at 308, 436 P.2d at 308.

20. 265 Cal. App.2d —, 71 Cal. Rptr. 739 (1968).

1. 265 Cal. App.2d at —, 71 Cal. Rptr. at 748.

2. 265 Cal. App.2d at —, 71 Cal. Rptr. at 751.

3. Davis, *Administrative Law Treatise* (1958).

proach that would determine the requirements of the hearing upon resolving the question of whether the *facts* to be found were adjudicative or legislative. Whether one uses the court's approach, i.e., characterizing the proceedings as either legislative or adjudicative, or that of Professor Davis, the result reached in the instant case would be the same, that the statutory procedure was not constitutionally defective. The information being sought by the Commission here and the function it was performing were of the kind that was a prelude to the issuance of a general order respecting wages and hours. This was the kind of order that the legislature could have issued by the enactment of a statute without complying with due process requirements of notice and hearing.

### **Eminent Domain Versus the Police Power**

"Courts do not lightly interfere with public agencies to whom regulatory police powers have been conferred. It is our obligation to do so, however, when unreasonable or arbitrary action becomes manifest." This statement was taken from *Mid-Way Cabinet Fixture Manufacturing v. County of San Joaquin*.<sup>4</sup> It indicates that all is not lost for the citizen when the government seeks to exercise its almost all-powerful police power. What is even more encouraging is that the court which made that statement followed it by concrete action in ordering the issuance of a use permit unencumbered by conditions the court held to be invalid.

When petitioner sought a use permit from the county to enlarge its cabinet shop, the county tacked on several conditions relating to the conveyance to the county of certain adjoining lands without compensation for eventual use in constructing an expressway. Recognizing that the government could not function effectively if every diminution in value of property were compensable, the court nevertheless

4. 257 Cal. App.2d 181 at 191, 65 Cal. Rptr. 37 at 43-44 (1967). For further discussion of this case, see Manuel, ADMINISTRATIVE LAW, in this volume.

## **Constitutional Law**

*Cal Law Trends and Developments, Vol. 1969, Iss. 1 [1969], Art. 12*

found that in this case the county “was attempting to avoid the constitutional guarantee of payment of just compensation via the method of exacting ‘conditions’ to the granting of a use permit arbitrarily inspired and that in doing so it had exceeded its powers.”<sup>5</sup>

5. 257 Cal. App.2d at 189, 65 Cal. Rptr. at 42.