Cal Law Trends and Developments

Volume 1970 | Issue 1 Article 6

January 1970

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*, 1970 Cal Law (1970), http://digitalcommons.law.ggu.edu/callaw/vol1970/iss1/6

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.

Constitutional Law

by *James E. Leahy**

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

The author extends his appreciation to William M. Flanagan, Student at Golden Gate College, School of Law, for assistance in preparation of this article.

Published by GGU Law Digital Commons, 1970

I. Introduction

This was a year in which the reviewing courts in California were confronted with contemporary problems of constitutional law. Teachers were given the right to circulate petitions on school campuses during their duty-free time, and the disclosure of the names of the officers of organizations granted on-campus privileges was required on the ground that the

public has a right to know how public officials perform their duties.

"Topless" dancers were given First Amendment protection, and the question of whether the dance (and hereafter any other matter) is obscene is to be tested by the contemporary standards of the *entire* state.

The Due Process Clause now protects the "right to bear children," but the right is not absolute. The right to wear long hair also received protection as a liberty within the Due Process Clause.

A Court of Appeal construed the due process requirement of notice and hearing to apply to the assessment of a statutory penalty in cases where a prime contractor violates his contract with a public agency.

In an unusual use tax case, the Court held that a company that has stores in Oregon, Nevada, and California need not collect a use tax upon credit sales made at the out-of-state stores to California residents. Requiring the store to be a tax collector in this situation was held to violate the Due Process, Commerce, and Equal Protection Clauses.

The Buy California Act was held to be unconstitutional as an intrusion of the state into the field of foreign affairs, a field reserved to the federal government. Section 1850, of the Labor Code, prohibiting employment of aliens on public works projects, was found to conflict with a comprehensive scheme of immigration and naturalization enacted by Congress.

In a case illustrating that the courts do not always protect the ideals they assert exist under the Constitution, the Court of Appeal approved the discharge of a public employee because his religious beliefs prevented him from taking a loyalty oath in the form required by the government, even though there was no question as to his loyalty.

II. First Amendment

A. *Prohibition of Pretrial Statements*

To what extent may a judge prohibit pretrial statements concerning a criminal case pending before him? The defendants in *Hamilton v. Municipal Court for Berkeley-Albany Judicial Dist.*[1] had been charged with committing a public nuisance and unlawful occupation of real property; both charges grew out of a demonstration on the Berkeley campus of the University of California.

Prior to the trial, the Court upon its own initiative ordered the parties not to release any information concerning the trial.[2] Shortly before the trial, the defendants held a news conference in front of the Municipal Court building, in direct violation of the court's order. Charged with criminal contempt, the defendants sought a writ of prohibition against the county to forestall prosecution. The writ was denied and the Superior Court's decision was affirmed by the Court of Appeal, with one judge dissenting.

The majority of the Court of Appeal was of the opinion that the order came within the limits of permissible restrictions on pretrial publicity set forth in *Sheppard v. Maxwell.*[3]

1. 270 Cal. App. 2d 797, 76 Cal. Rptr. 168 (1969). Certiorari denied, Hamilton et al, petitioners v. The Municipal Court for the Berkeley-Albany Judicial District, 90 S. Ct. 479 (1970).

2. The court's order read:
"A. The parties shall not, directly or indirectly, release to any news media information or opinion concerning the trial or any issue likely to be involved therein, other than the date and place of trial, the names of the parties and counsel, the contents of the complaint, and the plea of defendants. Specifically, and without limitation, there shall be no public statements or releases concerning the merits of the complaint, the evidence or arguments to be adduced by either side, or trial tactics or strategy. B. This order shall apply inter alia to the parties and their counsel, to all law enforcement agencies, to the Regents of the University of California and their agents and employees and to the Associated Students of the University of California, their members and affiliated organizations. The court recognizes the difficulties inherent in framing any order in this matter and expects the full cooperation of the parties and their counsel in carrying out the letter and the spirit of this order. The court will entertain motions for any further orders that may be necessary or desirable in this matter." 270 Cal. App.2d 797, 799–800, 76 Cal. Rptr. —, 169–170.

3. 384 U.S. 333, 16 L.Ed.2d 600, 86 S.Ct. 1507 (1966).

In reference to *Sheppard,* the Court of Appeal stated:

> In *Sheppard* the court said the trial court in that case '. . . might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters, such as the refusal of Sheppard to submit to interrogation or take any lie detector tests; any statement made by Sheppard to officials; the identity of prospective witnesses or their probable testimony; any belief in guilt or innocence; or like statements concerning the merits of the case.'[4]

The *Sheppard* case does affirm the power of the Court to issue an order concerning news releases prior to a criminal trial. It is doubtful, however, that Justice Clark's statement therein was intended to determine the limits within which that power was to be exercised, particularly when that power collides with the defendant's right of free speech. The *Sheppard* case contained no First Amendment issue. That case concerned the problem of whether too much publicity might prejudice the defendant's right to a fair trial.[5]

In *Hamilton,* the defendants were not concerned with the effect pretrial publicity might have on their right to a fair trial. As a matter of fact, just the opposite may have been true. The defendants may have been very concerned about getting a fair trial if they were to be tried in a vacuum.

Since the *Sheppard* case is of doubtful validity as authority for the Court's position, it appears that the dissent is on sounder ground. As the dissent points out, the order was issued on the Court's own motion, and was not supported by any affidavits or papers pertaining to a possible danger to the judicial process. Close scrutiny, therefore, ought to be given to court orders restricting the right to free speech.

4. 270 Cal. App.2d 797, 76 Cal. Rptr. 168, 170.

5. The case of In re Berry, 68 Cal.2d 137, 65 Cal. Rptr. 273, 436 P.2d 273 (1968) also involved a court order that very broadly prohibited peaceful picketing. The Supreme Court of California struck down the order because it was overly broad and thus infringed upon a *speech-related activity.* The instant case involved the exercise of one's right to *free speech per se,* 76 Cal. Rptr. 169, 172.

In *Carroll v. President and Comrs of Princess Anne*,[6] the United States Supreme Court considered an ex parte order that restrained certain individuals from holding pretrial public rallies or meetings. The Court held that the issuance of the ex parte order was impermissible because when basic freedoms are at issue both parties must be given an opportunity to be heard. The Court recognized that there are circumstances in which "speech is so interlaced with burgeoning violence that it is not protected by the broad guaranty of the First Amendment."[7] However, the Court also pointed out that:

> Ordinarily, the State's constitutionally permissible interests are adequately served by criminal penalties imposed after freedom to speak has been so grossly abused that its immunity is breached. The impact and consequences of subsequent punishment for such abuse are materially different from those of prior restraint. Prior restraint upon speech suppresses the precise freedom which the First Amendment sought to protect against abridgment.[8]

The court order in *Hamilton* did precisely what the Supreme Court warned against in *Carroll*. It suppressed speech before there was an opportunity for it to come into conflict with whatever interests the state may have had in the guaranty of a fair trial to the defendants.

B. *Nonparticipation in Demonstrations as Conditioning Probation*

Another case of prior restraint upon First Amendment rights is the case of *People v. King*.[9] Defendant had been found guilty of certain crimes arising out of a public demonstration. As a condition of granting probation, the trial court ordered "that she not take an active or official part in any other demonstrations of this kind during the period of

6. 393 U.S. 175, 21 L.Ed.2d 325, 89 S.Ct. 347 (1968).

7. 393 U.S. 175, —, 21 L.Ed.2d 325, —, 89 S.Ct. 347, 351.

8. 393 U.S. 175, —, 21 L.Ed.2d 325, —, 89 S.Ct. 347, 351.

9. 267 Cal.App.2d 814, 73 Cal. Rptr. 440 (1968).

probation. . . ."[10] A short time later, the defendant was involved in blowing up balloons on the UCLA campus during a peaceful protest against recruiters from Dow Chemical Co. As a result, the court revoked defendant's probation and sentenced her to 30 days in jail.

In upholding the revocation, the reviewing court noted that there is no right to probation, and that the granting of it is within the sound discretion of the trial court. Whether the trial court attaches a condition to the probation is also a discretionary matter and will not be overturned unless the condition "(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct that is not in itself criminal, and (3) requires or forbids conduct that is not reasonably related to future criminality. . . ."[11]

Not only was the defendant's conduct, i.e., participation in demonstrations, "not in itself criminal," but it is in fact constitutionally protected as part of the freedom of expression guaranteed by the First Amendment

In cases of this kind, it should be recognized at the outset that a constitutional right is involved and that constitutional rights are to be free of restraint except when a competing governmental interest prevails.

The United States Supreme Court has adopted various tests to determine whether the infringement of a right is justified, e.g., a clear and present danger test,[12] a balancing test,[13] and a test of overbreadth.[14] Many years ago, the Court also enunciated a test of "prior restraint."[15] The California Supreme Court recently adopted, in the case of *Bagley v. Washington Township Hospital Dist.*,[16] a three-part test to be used

10. 267 Cal. App.2d 814, 818, 73 Cal. Rptr. 440, 443.

11. People v. Dominguez, 256 Cal. App.2d 623, 626, 64 Cal. Rptr. 290, 293 (1967).

12. Schenck v. United States, 249 U.S. 47, 63 L.Ed. 470, 39 S.Ct. 247, (1919).

13. N.A.A.C.P. v. Alabama, 357 U.S. 449, 2 L.Ed.2d 1488, 78 S.Ct. 1163 (1958).

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

15. Near v. Minnesota, 283 U.S. 697, 75 L.Ed. 1357, 51 S.Ct. 625 (1931).

16. 65 Cal.2d 499, 503, 55 Cal. Rptr. 401, 405, 421 P.2d 409, 413 (1966): "We hold that a governmental agency

as a guide to test governmental restrictions on the exercise of constitutional rights.

The instant case of Miss King and her probation violation like a case of prior restraint. As such, it should have been tested by the criteria used in those cases.[17] But regardless of whether it is tested by the clear and present danger test, the balancing test, the overbreadth test, or the *Bagley* test, the important point is that there must first be a recognition that a constitutional right is involved. Only then will constitutional rights be accorded the kind of protection the Bill of Rights sought to guarantee.

By approaching the question in this case from the viewpoint that probation is a discretionary matter, the Court was able to say:

> We cannot hold under the circumstances of this case what [sic] the condition of probation in any manner abridges defendant's First Amendment freedoms.[18]

C. Campus Buildings: Open to All Speakers or None

Twenty-three years ago, the Supreme Court of California wrote in *Danskin v. San Diego Unified School Dist.*:[19]

> The state is under no duty to make school buildings available for public meetings. . . . If it elects to do so, however, it cannot arbitrarily prevent any members of the public from holding such meetings. . . . Nor can it make the privilege of holding them dependent on conditions that would deprive any members of the public of their constitutional rights.[20]

which would require a waiver of constitutional rights as a condition of public employment must demonstrate: (1) that the political restraints rationally relate to the enhancement of the public service, (2) that the benefits which the public gains by the restraints outweigh the resulting impairment of constitutional rights, and (3) that no alternatives less subversive of constitutional rights are available."

17. Carroll v. President and Comrs. of Princess Anne, 393 U.S. 175, 21 L. Ed.2d 325, 89 S.Ct. 347 (1968).

18. 267 Cal. App.2d 814, 826, 73 Cal. Rptr. 440, 448.

19. 28 Cal.2d 536, 545, 171 P.2d 885, 891 (1946).

20. 28 Cal.2d 536, 545, 171 P.2d 885, 891.

This statement should have controlled the Superior Court's decision in *Dunbar v. Governing Board of Grossmont Jr. College Dist.*,[1] but it did not. The Superior Court upheld the college board's denial of a request by a member of the Communist Party to use campus facilities for a speech. The Superior Court seemed to be of the opinion that this was within the discretion of the board and that the court had no right to interfere.

The Court of Appeal reversed, pointing out that the concept set forth in *Danskin* controlled this case.

The Court of Appeal recognized that boards are vested with a certain amount of discretion in having guest speakers in their educational program, but said that that discretion does not extend to unbridled censorship.[2]

D. *Teachers' Circulation of Petitions During Duty-Free Time*

The issue in the case of *Los Angeles Teachers Union v. Los Angeles City Board of Education*[3] was whether a school board could prohibit teachers from circulating petitions on school premises during duty-free time. The California Supreme Court unanimously held that such a prohibition was unconstitutional in the absence of "substantial disruption of or material interference with school activities. . . ."[4]

The starting point for an analysis of questions involving the constitutional rights of teachers must be:

> Teachers, like others, have the right to speak freely and effectively on public questions as well as the 'inseparable' and 'cognate' . . . 'right . . . to petition the Government for a redress of grievances' . . . They do not 'shed' these rights 'at the schoolhouse gate'.[5]

1. 275 Cal. App. —, 79 Cal. Rptr. 662 (1969). For further discussion of this case, see Manuel, ADMINISTRATIVE LAW, in this volume.

2. 275 Cal. App.2d —, —, 79 Cal. Rptr. 662, 665

3. 71 Cal.2d —, 78 Cal. Rptr. 723, 455 P.2d 827 (1969). For further discussion of this case, see Manuel, ADMINISTRATIVE LAW, in this volume.

4. 71 Cal.2d —, —, 78 Cal. Rptr. 723, 731, 455 P.2d 827, 835.

5. 71 Cal.2d —, —, 78 Cal. Rptr. 723, 727, 455 P.2d 827, 831.

Published by GGU Law Digital Commons, 1970

This properly places the burden squarely upon the government to sustain its need to restrict those rights. The government did not sustain its burden in this case.

The Court indicated that it was aware of the ferment and turmoil in educational circles today, and of the existence of those who are violent and heedless of the rights of others. But the Court said that when discouraging persons from engaging in wrongful activities, "the courts must take pains to assure that the channels of peaceful communication remain open and that peaceful activity is fully protected."[6]

E. *Distribution of Handbills on Private Walk*

The extent to which the First Amendment protects the distribution of handbills was the question before the Court in *In re Lane*.[7]

Petitioner was an officer of a union that was involved in a labor dispute with his employer, the publisher of certain newspapers. He went to a market that had advertised in one of the employer's newspapers for the purpose of distributing handbills to the customers urging them not to patronize the market.

The market was set back some distance from the street, and the space between it and the street was used for parking.

Adjacent to the front of the market was a sidewalk, and it was on this walk that petitioner was distributing his handbills. The owner of the market ordered him off the walk and directed him to the walk that ran along the street. When the petitioner refused to leave, the police were called and he was arrested for remaining on another's property and distributing handbills on the premises of another without the consent of the owner. Petitioner was convicted in the Municipal Court, but upon bringing a writ of habeas corpus in the California Supreme Court, the conviction was reversed and the petitioner discharged.

6. 71 Cal.2d —, —, 78 Cal. Rptr. 723, 732, 455 P.2d 827, 836.

7. 71 Cal.2d —, 79 Cal. Rptr. 729, 457 P.2d 561 (1969). For further discussion of this case, see Grodin, LABOR RELATIONS, in this volume.

The Court likened this case to the recent United States Supreme Court case of *Amalgamated Food Employees Union v. Logan Valley Plaza,*[8] in which the Court upheld the right to picket peacefully on the parking lot of a privately-owned shopping center. Even prior to the *Logan Valley Plaza* case, the California Supreme Court itself had "declared the existence of a right to peacefully picket on the sidewalks of a privately-owned shopping center."[9]

F. *Wearing Flag as a Vest as a Criminal Act*

Defendant in *People v. Cowgill*[10] cut up an American flag and had it sewn into a vest, which he then wore in public. He was tried and convicted of desecrating the flag. On appeal, he contended that the statute making it a crime to defile the flag was unconstitutional as applied to his actions because it violated his constitutional right of free speech. The Court of Appeal disagreed, holding the statute constitutional and affirming the conviction.

This case differs from *Street v. New York*[11] because the California statute contains no reference to casting contempt on the flag by words, as did the New York statute. The Court in *Cowgill* noted that the majority in *Street* did not determine whether a statute as narrowly drawn as the California statute could be used to punish someone who had "desecrated" a flag while expressing an opinion. The dissents in *Street,* however, argued that such a statute was valid and that the government has the power to protect the flag from acts of desecration.

In *Cowgill,* the Court of Appeal agreed with the dissents in *Street.* There can be no question that this position is correct if all that was involved was an *act.* Laws make certain acts criminal and, therefore, punishable. The use of

8. 391 U.S. 308, 20 L.Ed.2d 603, 88 S.Ct. 1601 (1968).

9. Schwartz-Torrance Inv. Corp. v. Bakery & Confectionery Workers' Union, 61 Cal.2d 766, 40 Cal. Rptr. 233, 394 P.2d 921 (1964).

10. 274 Cal. App.2d —, 78 Cal. Rptr. 853 (1969). Appeal dismissed, Cowgill v. California, — U.S. —, — L.Ed.2d —, 90 S.Ct. 613 (1970).

11. 394 U.S. 576, 22 L.Ed.2d 572, 89 S.Ct. 1354 (1969).

the flag as a means of expressing opinion, however, should be classified as a *speech-related* activity. Once it is looked upon as having First Amendment characteristics, it deserves different treatment.

The history of decisions concerning speech-related activities began in 1877, when the United States Supreme Court first said the "distribution" of a newspaper was part of freedom of the press.[12] Since that time, the Court has included many other activities, such as peaceful picketing, parading, demonstrating, sitting-in, and soliciting, within the classification of speech-related activities. In those cases, the Supreme Court has found that the activity itself contains a First Amendment characteristic. Thus, the Court has followed a pattern of accommodating both the speech factor and the need for regulating the activity factor.[13]

The burning or mutilating of a draft card or a flag contains no apparent speech factor. Thus, in the case of *United States v. O'Brien,*[14] the Court concluded that the act, i.e., the burning of a draft card, could be punished as conduct.

The dissenters in *Street* took the same position with regard to flag-burning—it was punishable as conduct.

What this approach overlooks, however, is that some "acts" that are punishable as such, may actually be a very effective method of expressing an opinion. It seems doubtful that Mr. O'Brien could have expressed his opinion of the draft as effectively as he did when he burned his draft card, or that Mr. Street could have expressed his concern over the shooting of Meredith in Mississippi in any better manner than the one he chose, i.e., burning the flag.

As long as the courts are unwilling to accept the fact that some *acts* do speak "powerfully loud," there will be more cases similar to the instant case.

Burning one's own flag is not the same as burning down a

12. Re Jackson, 96 U.S. 727, 24 L. Ed. 877 (1877).

13. Leahy, CONSTITUTIONAL LAW, *Cal Law—Trends and Developments 1969* p. 256.

14. 391 U.S. 367, 20 L.Ed.2d 672, 88 S.Ct. 1673 (1968).

schoolhouse, breaking windows, or destroying records. We have never had any problem of dealing legally with *acts* that cause evil, nor even with "pure speech" when that speech presents a clear and present danger of some substantive evil that the government has a right to prevent.

G. *Prima Facie Constitutionality of Obstructing Public Passageways Statute*

Defendant was being prosecuted on the charge of committing a public nuisance by unlawfully obstructing free passage and use of a public street. He sought a writ of prohibition on the ground that the statute, which characterized unlawful obstruction of a public street as a public nuisance, was unconstitutional in that it restricted the free dissemination of ideas. The Superior Court agreed, but the Court of Appeal reversed.[15]

This statute was attacked as being unconstitutional on its face. There was no evidence with regard to what the petitioner had actually done. If one starts from the premise that the government does have the power to regulate the use of the streets,[16] then, provided that the regulation is aimed simply at regulating the use thereof, the bare existence of this type of statute poses no constitutional issue. In order to be free from criminal penalties for violation of such a statute, the individual being prosecuted must show that the statute was being applied unconstitutionally as to him.[17]

The United States Supreme Court has on occasion struck down statutes as unconstitutional on their face, but in those cases, the statutes, upon examination, infringed some constitutional right.[18]

15. Pain v. Municipal Court of City and County of San Francisco, 268 Cal. App.2d 151, 73 Cal. Rptr. 862 (1968).

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

17. Gregory v. City of Chicago, 394 U.S. 111, 22 L.Ed.2d 134, 89 S.Ct. 946 (1969).

18. Aptheker v. Secretary of State, 378 U.S. 500, 12 L.Ed.2d 992, 84 S.Ct. 1659 (1964); Thornhill v. Alabama, 310 U.S. 88, 84 L.Ed. 1093, 60 S.Ct. 736 (1940).

H. *Freedom of Association and the Disclosure of Officers' Names*

After weighing the interest of the people in knowing how their elected officials conduct the public business against the First Amendment rights of an individual, the Court of Appeal upheld disclosure of the names of the officers of all student campus organizations functioning on the Berkeley campus of the University of California. In the case of *Eisen v. University of California,*[19] the Court affirmed a Superior Court's refusal to enjoin public inspection of records disclosing the names of officers and the stated purposes of all student organizations registered by the University. In reaching its decision, the Court concluded that even though there were statutes requiring public records to be made available to the public, this was a First Amendment case and had to be resolved within the framework of court decisions concerning First Amendment freedoms.

In attacking the problem, however, the Court mixed two distinct First Amendment concepts, only one of which is applicable to this case.

The Court discussed the right of association and the right to anonymity as if both were involved here, and as if the criteria used to test infringement on those rights were the same.[20]

19. 269 Cal. App.2d 696, 75 Cal. Rptr. 45 (1969).

20. In N.A.A.C.P. v. Alabama, 357 U.S. 449, 2 L.Ed.2d 1488, 78 S.Ct. 1163 (1958), the United States Supreme Court brought into being a First Amendment right of association. In that case, the Court wrote:
"It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the liberty assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." 357 U.S. 449 at 460, 2 L.Ed.2d 1488, 1498, 78 S.Ct. 1163, —.
In N.A.A.C.P, and in subsequent freedom of association cases, the Court has used a balancing of interests test to determine when the government can and when it cannot infringe upon that right. When the Court has concluded that the interest of the individual is greater than that of the government, the infringement by way of disclosure has not been permitted. Conversely, when a majority of the Court was of the opinion that the governmental interest was the greater, infringement in the nature of disclosure was required. Barenblatt v. United States, 360 U.S. 109, 3 L.Ed. 2d 1115, 79 S.Ct. 1081 (1959). Konigsberg v. State Bar, 366 U.S. 36, 6 L.Ed. 2d 105, 81 S.Ct. 997 (1961).

Eisen is a freedom of association case At issue was not the protection of anonymity in order to protect freedom of expression. Rather the issue was protection against disclosure in order to protect an individual with respect to his associations.

The statute under consideration, on its face, was not aimed at a First Amendment right, as was the case of *Talley v. California.*[1] The statute here was nothing more than a public-policy declaration that public records ought to be open to public inspection. Its application to the particular facts of this case brought it into conflict with the First Amendment. One test that could be used to determine whether the statute properly can be applied in a case of this kind is the balancing test used in *N.A.A.C.P. v. Alabama.*[2]

The Court acknowledged as much by stating:

> Impairments of First Amendment rights are 'balanced' by determining whether there is a reasonable relationship between the impairment and a subject of overriding and compelling state interest . . . .[3]

This statement, however, is too broad. Not all infringements on First Amendment rights are solved by the use of the balancing test. The *Talley* case is an indication of that.

The Court did balance in the *Eisen* case, and held that the public has a compelling interest, but it did not define the

The right to anonymity really came into being in Talley v. California, 362 U.S. 60, 4 L.Ed.2d 559, 80 S.Ct. 536 (1960). In that case the Court had before it an ordinance that prohibited the distribution of handbills that did not include information identifying the author and the person causing the distribution thereof. Of this requirement, the Court said:

"There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression." 362 U.S. 60 at 64, 4 L.Ed.2d 559, 562, 80 S.Ct. 536, —.

In striking down the ordinance, the Court found it objectionable because, by the overbreadth of its coverage, it restricted free expression. No balancing of interests test was used. Justice Black, who wrote the Talley opinion, has consistently objected to the Court's use of the balancing test. Konigsberg v. State Bar, 366 U.S. 36, 6 L.Ed.2d 105, 81 S.Ct. 997 (1961). See also, Leahy, CONSTITUTIONAL LAW, *Cal Law —Trends and Developments, 1969* pp. 272–274.

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

2. 357 U.S. 449, 2 L. Ed.2d 1488, 78 S.Ct. 1163 (1958).

3. 269 Cal. App.2d 696, 706, 75 Cal. Rptr. 45, 52.

nature of that interest nor state why that interest is greater than the petitioner's freedom of association.

At one point in the opinion the Court says that the public interest is the right to know how elected officials conduct the public business. Further, in order to determine this "they are entitled to know the identity and responsible officers of organizations that are granted"[4] the right to campus recognition.

The public does have a valid interest in knowing how public officials perform their duties. And it can be argued that one way to accommodate this interest is to require disclosure of public records, in this case by the disclosure of the identity of organizations granted campus privileges. However, in order to supply the public with the information it needs to evaluate the performance of its public officials, it is not necessary to require disclosure of the names of the officers of these organizations. How the names of the officers are relevant to the fulfillment of the public's right to know is obscure. Furthermore, in view of the great amount of public indignation concerning campus disruptions, one wonders how "minimal" the infringement on freedom of associations is.

A better approach to the problem would have been to use the test enunciated in *Bagley v. Washington Township Hospital District*.[5] By paraphrasing that test to apply to the instant case, it would read:

> [W]e hold that a governmental agency which would require a waiver of constitutional rights as a condition . . . [of campus recognition] must demonstrate: (1) that the political restraints rationally relate to the enhancement of the public . . . [interest], (2) that the benefits which the public gains by the restraints outweigh the resulting impairment of constitutional rights, and (3) that no alternatives less subversive of constitutional rights are available.[6]

4. 269 Cal. App.2d 696, 703–705, 75 Cal. Rptr. 45, 50–51.

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

6. 65 Cal.2d 499, 501–502, 55 Cal. Rptr. 401, 403, 421 P.2d 409, 411.

The first part of the test seems satisfied by the application of the statute in the present case. However, the "impairment of constitutional rights" can be entirely avoided by adopting the "alternative" requiring that the names and purposes of the organizations be made public, but not the names of the officers or members.

I. *The Obscenity Problem*

A very important case in the area of obscenity is *In re Giannini*.[7] An entertainer who danced "topless" and the manager of the nightclub in which she performed were arrested and charged, respectively, with indecent exposure and solicitation of the performance of lewd or dissolute conduct in a public place.

Although the statutes under which the defendants were charged did not deal with obscenity as such, the trial court instructed the jury that the terms "lewd" and "dissolute" as used in the statutes were synonymous with the word "obscene," as that term is defined in section 311, of the Penal Code. On this point, the California Supreme Court agreed.

Not being able to cite case authority that a dance was a method of expression, the Court turned to encyclopedias for assistance and found support there. The Court also noted that some courts have held that motion pictures, plays, and shows were a form of expression. On that basis, the Court concluded that the performance of a dance was a medium of expression. A ballet, for example, while entertaining, also conveys ideas, impressions, and feelings.

A dance, then, can be regulated only to the extent that government can regulate other forms of expression. If the dance is obscene, it loses its First Amendment protection just as do obscene books, pictures, motion pictures, and plays.

The definition of obscenity has been codified in California in Penal Code section 311, as follows:

> Obscene means that to the average person, applying

7. 69 Cal.2d 563, 72 Cal. Rptr. 655, 446 P.2d 535 (1968).

> 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.

The full meaning of this statute had not been developed prior to this case. Unanswered was whether the test of "contemporary standards" applied equally to the phrases "prurient interest" and "customary limits of candor." The Court concluded in *Giannini* that the test of whether the "predominant appeal of the [dance] . . . is to prurient interest" should be judged by contemporary standards.[8]

The Court turned to the case of *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts*,[9] wherein three members of the United States Supreme Court agreed upon a new test of obscenity as follows:

> Under this definition, as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.[10]

Although it does not appear that this test has been accepted by a majority of the Court, the California Supreme Court in the instant case referred to part (b) of the test to support its decision that the contemporary standards test should also apply to determine whether the dance exceeded the "customary limits of candor."

8. Roth v. United States, 354 U.S. 476, 1 L.Ed.2d 1498, 77 S.Ct. 1304 (1957).

9. 383 U.S. 413, 16 L.Ed.2d 1, 86 S.Ct. 975 (1966).

10. 383 U.S. 413, 418, 16 L.Ed.2d 1, 5, 86 S.Ct. 975, —.

Having come this far in its analysis of the matter, two questions remained to be answered: Was it necessary that the prosecution introduce evidence of the contemporary standards? What is the relevant community whose standards are to be used to judge the matter—in this case, to judge the dance?

With regard to the first question, the Court found some authorities on both sides. Being concerned that jurors might use their own personal standards, the Court held that in this state, expert testimony would be required to establish the standards prevailing in the community.

> To sanction convictions without expert evidence of community standards encourages the jury to condemn as obscene such conduct or material as is personally distasteful or offensive to the particular juror.[11]

With regard to the question of the extent of the community to be used, the Court noted that while there was support in the cases for a national standard, a state standard, and a local standard, the United States Supreme Court had not established any standard by which lower courts were to be bound.

After weighing the arguments for and against each of the standards, the Court held that the community to be surveyed in determining contemporary standards would be the entire state of California.

This has one advantage in that the limits of the state are established, whereas if a "local" standard were to be used, the Court would be confronted with the problem of identifying the locality. Furthermore, adopting a local standard would make each piece of material distributed nationwide subject to as many standards as there are localities. At least the adopting of a statewide standard confines the number of possible standards to 51 (including the District of Columbia).

A statewide standard, however, does have one serious drawback, for, as the Court points out: "An appellate court

11. 69 Cal.2d 563, 574, 72 Cal. Rptr. 655, 663, 446 P.2d 535, 543.

must reach an independent decision as to the obscenity of the material."[12]

As long as the court that makes the final determination in the matter is the highest court of each state, it would appear that adopting a state standard is workable from the appellate point of view. But obscenity questions do not stop at this level. Although there has been no unanimity on the United States Supreme Court as to whether that Court is to have the last word, several justices have said that the Court must make the final decision as to whether the material is in fact obscene.[13] And that is what they have been doing.

The holding of the *Giannini* case to the effect that the community standard to be used in obscenity cases is that of the entire state, was used by the Court of Appeal in *People v. Cimber*[14] to reverse a denial of a motion to quash arrest and search warrants. The Court held that at the hearing on the motion, the trial court must receive evidence of the standards of the entire state, not just those of an isolated area within the county.

Subsequent to *In re Giannini,* the Court of Appeal had before it, in the case of *Dixon v. Municipal Court of City and County of San Francisco,*[15] the question of whether a simulated act of oral copulation within a play could be punished as a violation of the Penal Code, which makes it unlawful to "engage in lewd or dissolute conduct in any . . . place open to the public."[16]

Recognizing that while there was no statute that expressly makes unlawful a play that is obscene, the court nevertheless held that the performance of a lewd act within a play may in fact be obscene and, thus, illegal. The Court was of the opin-

12. 69 Cal.2d 563, 575, 72 Cal. Rptr. 655, 664, 446 P.2d 535, 544.

13. Jacobellis v. Ohio, 378 U.S. 184, 12 L.Ed.2d 793, 84 S.Ct. 1676 (1964); A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts, 383 U.S. 413, 16 L.Ed.2d 1, 86 S.Ct. 975 (1966); Ginzburg v. U.S., 383 U.S. 463, 16 L.Ed.2d 31, 86 S.Ct. 942, 86 S. Ct. 969 (1966).

14. 271 Cal. App.2d 867, 76 Cal. Rptr. 382 (1969).

15. 267 Cal. App.2d 789, 73 Cal. Rptr. 587 (1968).

16. Penal Code § 647(a).

ion that the simulated act of oral copulation, even though it took place during the performance of a play, might be found to be obscene by the trier of fact applying First Amendment standards.

The Court therefore held that the defendants could be prosecuted and that in judging whether the alleged act is in fact obscene, it must be "taken in context with the whole performance, and judged by standards of the State of California as a whole, upon consideration of expert testimony . . . ."[17]

J. *An Unusual Loyalty Oath Case*

An unusual loyalty oath case was before the Court of Appeal in *Smith v. County Engineer of San Diego County*.[18] The petitioner obtained employment as a draftsman in the San Diego County Engineering Department in 1965. Upon assuming this position, he was asked to sign the loyalty oath required by the California State Constitution, Art. XX. Section 3. Before signing, he struck out some of the words. The oath that he then signed read as follows:

> I, ————, do solemnly swear (or affirm) that I will support and defend ~~the Constitution of~~ the United States and ~~the Constitution of~~ the State of California against all enemies, foreign and domestic; that I will bear true faith and allegiance to ~~the Constitution of~~ the United States and ~~the Constitution of~~ the State of California. . . .[19]

It was not until 1967, when the employees were requested to execute a new oath, that the petitioner's 1965 oath was discovered to have been altered. When he was asked to sign an oath in its unaltered form, he refused unless he could append a statement to it. This request was refused, and because he would not sign it in its unaltered form, he was dis-

17. 267 Cal. App.2d 789, 794, 73 Cal. Rptr. 587, 590.

18. 266 Cal. App.2d 645, 72 Cal. Rptr. 501 (1968).

19. 266 Cal. App.2d 645, 647, 72 Cal. Rptr. 501, 503.

Published by GGU Law Digital Commons, 1970

missed. The statement he wished to append to the oath, reads as follows:

> I take this oath, pledging my loyalty and allegiance to my country, but declaring my supreme allegiance to the Lord Jesus Christ whom Almighty God has appointed ruler of Nations, and expressing my dissent from the failure of the Constitution to recognize Christ and to acknowledge the Divine institution of civil government.[20]

The petitioner was given a hearing upon his dismissal, but the dismissal was upheld. He then sought a writ of mandate to compel reinstatement, which was denied by the Superior Court and affirmed by the Court of Appeal.

Justice Lazar, writing for the Court of Appeal, held that petitioner had never been a de jure employee of San Diego County because of his failure to take the oath in its prescribed form; that petitioner was not entitled to sign a valid oath form in 1967, when the deficient oath was discovered; and that the county was not required to accept the petitioner's proposal to sign the oath with the quoted statement attached.

With regard to the requirement of taking the oath, the Court recognized that although public employment is not a right, it cannot be conditioned upon any terms that the government may attempt to impose, and that the government bears the burden of demonstrating the necessity of any limitation on an employee's constitutional rights that is a condition to such employment.

Also recognized by the Court was the right of the government to assure itself of the substantial loyalty of those whose services it seeks.

What makes this an unusual loyalty oath case is that the petitioner's loyalty to the United States and the state is *not* involved. What is involved is whether the petitioner is to be required to pledge his loyalty in the form required by the government in order to work for the government, or whether he can pledge his loyalty in a manner compatible with his reli-

20. 266 Cal. App.2d 645, 647, 72 Cal. Rptr. 501, 503.

http://digitalcommons.law.ggu.edu/callaw/vol1970/iss1/6

gious beliefs. Justice Lazar was of the opinion that only the first was acceptable, for he wrote:

> Reason and experience teach us that improvements in any institution is brought about in the final analysis by those who believe in the institution and if the *ideals* and purpose of constitutional government are to be maintained and furthered it will be the result in good part of the efforts of personnel who are willing to support those *ideals* and purposes.[1] (emphasis added)

One of the *ideals* of *this* constitutional government is freedom of belief. That ideal forbids the government from conditioning government employment upon one's religious beliefs.[2] Yet that is exactly what the *Smith* case does.

The Constitution, which the Court says he must swear to uphold, grants him the right to believe and to abide by his beliefs when those beliefs and the support and defense of the Constitution do not square. It must be kept in mind that this is not a case where the government is presently asking the individual to do any *act* that is necessary to the defense of the Constitutions. In this case, the government is merely seeking a pledge that the individual *will* support these Constitutions in the future. The petitioner is willing to agree to do that until such time as he may be asked to do something that his religious beliefs forbid him to do. When the time comes that he is asked to do something in defense of the Constitutions and he then refuses to do so, the decision can then be made whether the request is one that the government has a right to demand. If it does, then his employment can be terminated.

It is no answer to say that the petitioner can "join those who serve themselves in the ranks of private employment."[3] As a citizen of this country he has as much right to public employment as does any other citizen. Approaching the problem as the Court does in this case places him on an uneven footing

1. 266 Cal. App.2d 645, 650, 72 Cal. Rptr. 501, 505.

2. United Public Workers v. Mitchell, 330 U.S. 75, 100, 91 L.Ed. 754, 67 S.Ct. 556 (1947); Torcaso v. Watkins, 367 U.S. 488, 6 L.Ed.2d 982, 81 S.Ct. 1680 (1961).

3. 266 Cal. App.2d 645, 652, 72 Cal. Rptr. 501, 506.

with others, not because he is disloyal, not because he is not qualified, but simply because he wants to make sure that if he is called upon to defend his country, he will not be forced to do anything forbidden by his religious beliefs.

What is disturbing about this approach is that there are certainly other public employees who have strong religious beliefs, who, when asked to do something in defense of the Constitutions, may refuse to do so. When that time occurs, the government will have to justify its demand. If its demand is justifiable, the employment may be terminated. These people, however, simply by signing the oath in its proffered form, become public employees. The petitioner, to be true to his conscience, wants it on record that he will do the same thing. No doubt there are people of the Quaker faith, working for the government, who, if called upon to take up arms, might not be able to do so because of their religious convictions. Yet these people serve as public employees, with no threat to our security whatever, simply because they see nothing incompatible with *taking the oath* and the maintenance of their religious beliefs.

Twenty years ago, Justice Murphy wrote:

> It is disheartening to find so much that is right in this opinion which seems to me so fundamentally wrong.[4]

That statement applies to the *Smith* case. What is *right* in the opinion is that government employment cannot be conditioned upon any terms the government may choose. "When [the] government seeks to require a limitation of constitutional rights as a condition for public employment, it bears the heavy burden of demonstrating the practical necessity for the limitation," and restrictions on cherished freedoms "must be drawn with narrow specificity."[5] "First Amendment freedoms are delicate and vulnerable and must be protected wherever possible."[6]

4. Wolf v. Colorado, 338 U.S. 25, 93 L.Ed. 1782, 69 S.Ct. 1359 (1949) *overruled:* 367 U.S. 655, 6 L.Ed.2d 1089, 81 S.Ct. 1691.

5. 266 Cal. App.2d 645, 649, 72 Cal. Rptr. 501, 504.

6. 266 Cal. App.2d 645, 649–650, 72 Cal. Rptr. 501, 504–505.

But what is *wrong* with the result is that it punishes the petitioner for his religious beliefs without any legitimate reason for doing so. The legitimate governmental interest is in having loyal employees. There is not one iota of evidence that petitioner did not fully meet that qualification.

The case of *In re Summers*[7] supports the Court's position in the *Smith* case. In that case, the United States Supreme Court upheld the State of Illinois' refusal to admit an applicant to the Bar because his religious beliefs against bearing arms prevented his taking an oath to support Constitution. It is this writer's opinion that the minority opinion in *Summers* is a far better way to accommodate both the interests of the government and those of the individual. As Justice Black wrote for the minority in that case:

> Under our Constitution men are punished for what they do or fail to do and not for what they think and believe. Freedom to think, to believe, and to worship, has too exalted a position in our country to be penalized on such an illusory basis.[8]

Yet penalizing Summers and Smith on an "illusory basis" is exactly what these two cases do. Results in cases like these indicate that our *ideals* and our *practices* are not the same.

K. *Fortune-Telling, Marijuana, and the Free Exercise of Religion*

Two cases involving alleged governmental infringement upon free exercise of religion were before the Court of Appeal this past year. In *Allinger v. City of Los Angeles*,[9] after a charge of engaging in fortune-telling had been dismissed, the Los Angeles Police Department had written petitioner that she would be subject to arrest again if she engaged in any further fortune-telling activity.

The petitioner sought declaratory relief to restrain the

7. 325 U.S. 561, 89 L.Ed. 1795, 65 S.Ct. 1307 (1945).

8. 325 U.S. 561, 578, 89 L.Ed. 1795, 1806, 65 S.Ct. 1307, —. See also Antieu, *Modern Constitutional Law* § 1:58, pp. 89–90.

9. 272 Cal. App.2d 391, 77 Cal. Rptr. 257 (1969).

police from interfering with her ministry in the Universal Church of the Master. She claimed that giving prophecies was part of the religious services that she conducted.

During the trial, however, she admitted that if a fee were charged for a prophecy, it would be against the teachings of her church. Thus, the Court was able to conclude that "fortune-telling for a fee" was not a part of her religion and, therefore, not protected by the First Amendment.

In this case, the petitioner claimed that two sections of the Los Angeles City Ordinances were unconstitutional. Section 43.30, makes fortune-telling illegal. Section 43.31, provides that section 43.30, is not to be construed as prohibiting or interfering with the exercise of any religious or spiritual function of any bona fide church. The petitioner argued that these sections granted a monopoly of fortune-telling to religious organizations. To this the Court replied that section 43.31, does not purport to permit anyone to engage in fortune-telling, but merely states that section 43.30, shall not be construed as interfering with religious services of a church that has as one of its tenets a belief in the ability to prophesy.

In *People v. Collins*,[10] it was stipulated that the defendant held a good faith belief in the use of marijuana for religious purposes. However, he testified that he used marijuana in order to extend and intensify his ability to engage in meditative communication with the Supreme Being. The Court thus concluded that the defendant did not worship or sanctify marijuana as was the case with the use of peyote in Peyotism.[11] Therefore, there was no interference with a religious belief and no First Amendment issue.

In neither of these cases was the Court presented squarely with a Free Exercise issue because the practices involved were not part of the religious beliefs of the participants.

10. 273 Cal. App.2d —, 78 Cal. Rptr. 151 (1969).

11. People v. Woody, 61 Cal.2d 716, 40 Cal. Rptr. 69, 394 P.2d 813 (1964).

III. Due Process

A. *Bad Moral Character and the Right To Work*

In 1969, Cal Law—Trends and Developments, p. 279, I reviewed the case of *Burton v. Municipal Court of Los Angeles Judicial Dist.*[12] In that case, the California Supreme Court held that the legislative standards used in licensing theatres were too broad. Among the standards found overly broad was the phrase "good moral character." In the review of that case, I pointed out that the phrase "good moral character" was a basic standard for licensing a great variety of occupations in this state. I then raised the question: If the standard was too broad for licensing theatres, why is it not also too broad for licensing other occupations?

The case of *Saunders v. City of Los Angeles*[13] gives one reviewing court's answer. In this case, the operator of an automobile repair business was denied a renewal license upon various grounds, including a finding of "bad moral character," which was a legal ground for disciplinary action. The petitioner sought refuge in the *Burton* case, contending that the ordinance was so indefinite and so vague as to vest the board with uncontrolled discretion. The Court of Appeal replied that *Burton* applied only to situations involving the First Amendment and therefore was not applicable to a case where the renewal of an automobile repair license was at issue.

As I pointed out in the review of *Burton*, " To engage in an occupation or profession of one's choice is a constitutional right."[14] And while it is true that the First Amendment has been given a preferred position, this does not justify there being no similar consideration being given to other constitutional rights.[15]

At stake in First Amendment cases is one's freedom of ex-

12. 68 Cal.2d 684, 68 Cal. Rptr. 721, 441 P.2d 281 (1968).

13. 273 Cal. App.2d —, 78 Cal. Rptr. 236 (1969). For further discussion of this case, see Manuel, ADMINISTRATIVE LAW, in this volume.

14. Leahy, CONSTITUTIONAL LAW, *Cal Law—Trends and Developments 1969*, p. 280.

15. McKay, *The Preference for Freedom*, 34 N.Y.U. L. Rev. 1182 (1959).

Published by GGU Law Digital Commons, 1970

pression, which is a right we highly cherish. But the right to work in the occupation of one's choice is also an important right and ought also to be protected from "overly broad standards [which] are fraught with the hazard that an applicant will be denied his rights . . . ."[16]

B. *Liberty: The Right To Choose Whether To Bear Children*

Although *People v. Belous*[17] is a criminal case, involving an alleged violation of Penal Code sections relating to abortions,[18] the case should be discussed from a general constitutional law viewpoint because of the following statement made by the Court:

> The rights involved in the instant case are the woman's rights to life and to choose whether to bear children . . . . The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's repeated acknowledgement of a 'right of privacy' or 'liberty' in matters related to marriage, family, and sex.[19]

The Court acknowledges that the right referred to is not contained in either the United States or California Constitutions. In support of its statement, however, the Court cites a number of cases involving "privacy" and "liberty," none of which directly supports the existence of the right as enunciated by the Court. In *Skinner v. Oklahoma,*[20] the United States Supreme Court recognized a right to procreation when, in commenting upon an Oklahoma sterilization statute, it wrote:

> Oklahoma deprives certain individuals of a right which is basic to the perpetuation of a race—the right to have offspring.[1]

16. 68 Cal.2d 684, 692, 68 Cal. Rptr. 721, 726, 441 P.2d 281, 286.

17. 71 Cal.2d —, 80 Cal. Rptr. 354, 458 P.2d 194 (1969). Petition for certiorari to the United States Supreme Court pending. (See Appellate Docket Case No. 971, filed Dec. 19, 1969.

18. Penal Code §§ 182, 274.

19. 71 Cal.2d —, —, 80 Cal. Rptr. 354, 359, 458 P.2d 194, 199.

20. 316 U.S. 535, 86 L.Ed. 1655, 62 S.Ct. 1110 (1942).

1. 316 U.S. 535, 536, 86 L.Ed. 1655, 1657, 62 S.Ct. 1110, —.

http://digitalcommons.law.ggu.edu/callaw/vol1970/iss1/6

At another point the Court noted:

> We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race.[2]

Even though the right to procreation is considered as one of the "basic rights of man," the law does not treat it as absolute. Through the use of sterilization statutes, the law completely takes away the right prior to conception. Strong arguments have been made that compulsory sterilization is a violation of due process, in spite of *Buck v. Bell,*[3] which, in 1927, upheld a Virginia compulsory sterilization statute.

The right is not absolute after conception either, because by the use of abortion statutes the law *requires* a woman to give birth to the child except when there is a substantial risk to her health or where the pregnancy results from rape or incest.[4]

Recognizing that the right to bear a child does exist, and at the same time concluding that the right is not absolute, courts have the problem of determining the extent to which the government may be permitted to infringe upon that right.

In *Belous*, the Court held that the phrase "necessary to preserve her life" in Penal Code section 274, which makes abortion a crime, was not sufficiently definite to satisfy due process requirements. Section 274, therefore, was held to be unconstitutional and the indictment for violation of the statute was dismissed.

In 1967, the California Legislature enacted a new abortion law, the key phrase of which permits an abortion when "[t]here is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother."[5] It remains to be seen whether the new law will sur-

2. 316 U.S. 535, 541, 86 L.Ed. 1655, 1660, 62 S.Ct. 1110, —.

3. Buck v. Bell, 274 U.S. 200, 71 L.Ed. 1000, 47 S.Ct. 584 (1927); see Comment, *Compulsory Eugenic Sterilization: For Whom Does Bell Toll?* 6 Duquesne Univ. L. Rev. 145 (1967–68).

4. Health & Safety Code § 25951.

5. Health & Safety Code § 25951.

Published by GGU Law Digital Commons, 1970

vive the test of definiteness required by due process when dealing with constitutional rights.

C. *Liberty: Constitutional Protection of Long Hair*

The Court of Appeal equated wearing long hair with the right to wear a beard, and concluded that the wearing of long hair was entitled to the same protection. The petitioner in *Myers v. Arcata Union High School Dist.*[6] was suspended from attendance at the school because school officials concluded that the length of his hair violated the school policy against "extremes of hair styles."

Having concluded that the wearing of long hair was a constitutional right, the court applied the three-part test enunciated in *Bagley v. Washington Township Hospital Dist.*[7] The Court of Appeal set forth the test in these words:

> . . . the restraint imposed by its regulations must [1] rationally relate to the enhancement of the educational function, [2] the public benefits produced must outweigh the consequent impairment of the student's constitutional rights, and [3] there can be no alternatives 'less subversive' of those rights.[8]

The Court found that the first two parts were satisfied by the school's regulations concerning hair styles, but that these regulations did not meet the third part of the test. There were, in the Court's opinion, alternatives "less subversive" to the student's right to wear long hair.

The regulations failed the third part of the test because the only criterion used to judge whether the hair was too long was the regulation against "extremes of hair styles." This regulation was too vague and uncertain.

The Court also considered the wearing of long hair as a mode of expression under the First and Fourteenth Amend-

6. 269 Cal. App.2d 549, 75 Cal. Rptr. 68 (1969). For further discussion of this case, see Hecht, JUVENILE LAW, in this volume.

7. 65 Cal.2d 499, 55 Cal. Rptr. 401, 421 P.2d 409 (1966).

8. 269 Cal. App. 2d 549, 559, 75 Cal. Rptr. 68, 74.

http://digitalcommons.law.ggu.edu/callaw/vol1970/iss1/6

ments. In this area, the Court held the "government can regulate only 'with narrow specificity.' "[9]

While the *Myers* case appears to be in line with *Bagley* and follows the beard cases, the Court does confuse the issue by resorting to the First Amendment. The right to wear a beard was held to be a due process right of liberty in *Finot v. Pasadena City Board of Education.*[10] The "void for vagueness" test is a due process test. And the Court of Appeal recognizes this in its citation of *Giaccio v. Pennsylvania.*[11] The reference to the First Amendment therefore was unnecessary to the solution of this case.

D. *Notice and Hearing Prior to Assessment of Penalty*

Section 4110, of the Government Code allows a governmental agency to levy a penalty against a party contracting with it when the contracting party has violated certain other sections of the code. The penalty in the terms of the statute can be

> (1) canceling . . . [the prime contract] or (2) assessing the prime contractor a penalty in an amount not more than 10 percent of the amount of the subcontract involved . . . , or (3) both canceling and assessing the penalty.[12]

In *Merco Construction Engineers, Inc. v. Los Angeles Unified School Dist.,*[13] the Court of Appeal held section 4110, unconstitutional because it did not provide for notice and a hear-

9. 269 Cal. App. 2d 549, 559, 75 Cal. Rptr. 68, 74.

10. 250 Cal. App.2d 189, 58 Cal. Rptr. 520 (1967); see Leahy, CONSTITUTIONAL LAW, *Cal Law—Trends and Developments 1967,* pp. 345–346; Akin v. Board of Education of Riverside Unified School Dist., 262 Cal. App.2d 161, 68 Cal. Rptr. 557 (1968). See, Leahy, CONSTITUTIONAL LAW, *Cal Law — Trends and Developments 1969,* pp. 288–289.

11. 382 U.S. 399, 15 L.Ed.2d 447, 86 S.Ct. 518 (1966).

12. However, see the 1969 Amendment to § 4110, in Stats. 1969, Ch. 332, § 2, approved one month after the Merco case, infra, which deleted subsection 3 granting the option of both canceling the contract and assessing the penalty, and added a notice and hearing requirement.

13. 274 Cal. App.2d —, 79 Cal. Rptr. 23 (1969).

Published by GGU Law Digital Commons, 1970

ing prior to assessment of the penalty, thus denying due process of law. The Court wrote:

> We deal with a law which, on its face, gives the awarding authority a very wide discretion, but provides no opportunity to the party most affected, the contractor, to present any facts or arguments on which the exercise of that discretion might be predicated.[14]

In support of its position, the Court quoted at length from *People v. Broad,*[15] to the effect that in the taking of property, except in those instances where public health and safety are involved (e. g., diseased meat), the owner must be afforded a fair opportunity to be heard.

People v. Broad was a 1932 case involving a forfeiture of an automobile used to transport narcotics. There is little doubt that in such cases, notice and an opportunity to be heard are an essential part of due process.[16]

A penalty, however, is not necessarily the same as a forfeiture, although a forfeiture is a penalty.

> [A] forfeiture is in its strict sense a divesture of property without compensation, in consequence of a default or offense.[17]

Clearly, a penalty such as is allowed by section 4110, is not a taking of property in the usual sense. Nor is it a fine for the violation of a penal statute, of which there are many in the code.[18] If it were penal in nature, the constitutional requirements of notice and opportunity to be heard would apply.

Section 4110 is a legislative declaration that on the breach of certain provisions of the code relating to public contracts, the governmental agency shall have certain authority, including assessing the penalty and canceling the contract.

14. 274 Cal. App.2d —, —, 79 Cal. Rptr. 23, 30.

15. 216 Cal. 1, 12 P.2d 941 (1932).

16. Walker v. McLoud, 204 U.S. 302, 51 L.Ed. 495, 27 S.Ct. 293 (1907); People v. Grant, 52 Cal. App.2d 794, 127 P.2d 19 (1942).

17. See 36 Am. Jur.2d, FORFEITURE AND PENALTY § 3.

18. See, for example, Agriculture Code § 54461.

What seemed to bother the Court most was that the agency had such a wide discretion in its choice of remedies, and that it could secure the amount of the penalty simply by subtracting the 10% from the amount payable under the contract to the contractor.

Under the predecessor statute to section 4110, former section 4106, a breach of the statutory requirements called for a mandatory penalty of a flat 20%, and in addition, the agency had the right to terminate the contract. The Court did not answer the question whether such a statute would also be unconstitutional, were the legislature to return to that type of a penalty.

This case is an unusual application of the due process requirement of notice and hearing. In the usual notice and hearing cases, there is some valuable interest at stake and the government seeks to take some action to eliminate or infringe upon that interest. Whether it can do so depends on the existence of facts that must be found through the notice and hearing process. Certainly, the payment of money qualifies as a valuable interest. The only fact to be found, however, would be whether the contractor had violated the terms of the statute. It was clear that in the instant case he had.

Once notice and hearing is granted and it has been established that there was a violation for which the penalty should be assessed, under due process the matter would be reviewable in the courts. But what issues would the court review? The amount of the penalty is in the discretion of the agency, as is its decision to cancel the contract. Questions of whether the contractor had in fact violated the statutes in the performance of the contract might be at issue.

E. *Notice and Hearing: Suspension of Outpatient Status of Narcotic Addict*

Due process does not require notice and an opportunity to be heard when the Narcotic Addict Evaluation Authority (NAEA) suspends the outpatient status of an addict. This is the decision of the California Supreme Court in *In re*

Published by GGU Law Digital Commons, 1970

Marks.[19] As long as the United States Supreme Court adheres to the view, expressed in *Escoe v. Zerbst*,[20] that "[p]robation or suspension of sentence comes as an act of grace to one convicted of a crime,"[1] decisions such as *In re Marks* are constitutionally permissible.

In *Marks*, the Court indicates that two policies are served by revocation of conditional release without a hearing. First, the individual is quickly returned to custody, thus eliminating the possibility that he would go into hiding or, if a narcotic addict, that he would revert to use again.

While this policy is served by not granting the hearing before the individual is returned to custody, it is no reason for denying a hearing thereafter. Summary suspension of licenses, and of the exercise of basic rights, has been allowed where either the administrative or judicial process provides adequate review.[2]

The second policy served by summary suspension of the outpatient status is:

> . . . to hold such a hearing every time a release is suspended, for whatever cause, would impose an excessive burden on the machinery of the administration of justice far outweighing any speculative benefit.[3]

While the practical results of constitutional adjudication need to be considered, care must be taken that the rights of the individual are not forfeited simply in the interest of a completely efficient system.

F. *Notice and Hearing: in General*

When an administrative officer without notice and hearing issues an order that adversely affects a valuable property right,

19. 71 Cal.2d —, 77 Cal. Rptr. 1, 453 P.2d 441 (1969).

20. 295 U.S. 490, 79 L.Ed. 1566, 55 S.Ct. 818 (1935).

1. 295 U.S. 490, 492, 79 L.Ed. 1566, 1568, 55 S.Ct. 818, —. See also Note, *Control and Treatment of Narcotic Addicts: Civil Commitment in California*, 6 San Diego L. Rev. 35 at 46–49 (1969).

2. See, for example, Orr v. Superior Court of City & Co. of San Francisco, 71 Cal.2d —, 77 Cal. Rptr. 816, 454 P. 2d 712 (1969).

3. 71 Cal.2d —, —, 77 Cal. Rptr. 1, 13, 453 P.2d 441, 453.

due process requires that the possessor of the right be given a full and fair hearing. This was the decision in *Alta-Dena Dairy v. County of San Diego.*[4]

The San Diego County health officer wrote the Alta-Dena Dairy that it could not sell raw milk in San Diego County until it was free of "pathogenic organisms." The dairy sought relief from the order in an action for writs of mandate, certiorari and prohibition. The Court held that the writs of certiorari and prohibition would not lie, but that mandamus was the correct writ, and that due process required that the dairy be given a trial de novo in the Superior Court.

Although a license in the literal sense was not at issue in this case, the principle enunciated in the license cases is applicable here, i. e., summary action is permitted when judicial review is available thereafter.[5]

In *Orr v. Superior Court of City & Co. of San Francisco,*[6] the Supreme Court affirmed its decision in *Escobedo v. State of California,*[7] in which the Court had upheld suspension of a driver's license under the financial-responsibility law[8] without a prior hearing as long as there was opportunity to secure a judicial review. The Court, in *Orr*, also held that because the statute required the DMV to consider the culpability of the driver before ordering compliance with the statute, it was not required to determine the constitutionality of a statute that did not require the DMV to consider fault.

In *California Grape & Tree Fruit League v. Industrial Welfare Com.,*[9] after investigating wage conditions in the fruit industry, the commission set a minimum wage. Among the questions raised by the growers' league was what kind of hearing the commission was required to hold prior to making its decision. The Court held that because determination of min-

4. 271 Cal. App.2d 66, 76 Cal. Rptr. 510 (1969).

5. Leahy, CONSTITUTIONAL LAW, *Cal Law—Trends and Developments 1969*, pp. 290–292.

6. 71 Cal.2d —, 77 Cal. Rptr. 816, 454 P.2d 712 (1969).

7. 35 Cal.2d 870, 222 P.2d 1 (1950). For further discussion of this case, see Manuel, ADMINISTRATIVE LAW, in this volume.

8. Vehicle Code §§ 16000–16084.

9. 268 Cal. App.2d 692, 74 Cal. Rptr. 313 (1969). For further discussion of this case, see Manuel, ADMINISTRATIVE LAW, in this volume.

Published by GGU Law Digital Commons, 1970

imum wages is a legislative matter, and because this matter had been properly delegated to the commission, a judicial type of hearing was not necessary. The commission was actually acting in a quasi-legislative capacity and, therefore, its procedure was not unconstitutional.

Due process does not require the establishment of a *statutory* method of review of administrative action; such was the decision in *Jones v. Oxnard School District*.[10]

If a person is aggrieved by the action of an administrative body, the common-law remedies of prohibition and/or mandamus are available as methods of securing a review of the action.

IV. Equal Protection

A. *Federal and State Constitutions: Equivalent but Independent Protections*

Article 1 of the California Constitution contains two sections that relate to the concept of equal protection. They are:

> Sec. 11: "All laws of a general nature shall have a uniform operation."
>
> Sec. 21: "No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature; nor shall any citizen or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens."

The Fourteenth Amendment to the United States Constitution contains an express provision relating to equal protection. It reads in part as follows:

> No state shall . . . deny to any person within its jurisdiction the equal protection of the law.

In considering the state Constitution together with the Fourteenth Amendment, the California Supreme Court wrote

10. 270 Cal. App.2d 587, 75 Cal. Rptr. 836 (1969). For further discussion of this case, see Manuel, ADMINISTRATIVE LAW, in this volume.

that sections 11 and 21 and the Fourteenth Amendment "provide generally equivalent but independent protections in their respective jurisdictions."[11]

Although it is not always clear whether a court is relying on the state or Federal Constitution, the test the court uses to determine whether there has been a violation of the equal protection sections seems to be the same, and gives great latitude to the legislature in making classifications.

In 1942, without distinguishing between the state Constitution and the Fourteenth Amendment, the Supreme Court of California wrote:

> [T]he decision of the Legislature as to what is a sufficient distinction to warrant the classification will not be overthrown by the courts unless it is palpably arbitrary and beyond rational doubt erroneous.[12]

In *Patton v. La Bree*,[13] the Court added the phrase, "and no set of facts reasonably can be conceived that would sustain it."[14]

Given these criteria, it was predictable that the legislative classifications established by the Winton Act of 1965,[15] would be upheld against an attack based on sections 11 and 21. The act provides for separate treatment of public school system employees and employers with respect to employment relations. Unlike other legislation enacted for the purpose of regulating the employment relations of public employees, the Winton Act requires the formation of a negotiating council composed of representatives from rival employee organizations, where two or more such organizations exist in any one school district. The statute exempted employees of state educational institutions and noncertificated employees (maintenance personnel, for example) from this requirement.

11. Department of Mental Hygiene v. Kirchner, 62 Cal.2d 586 587, 43 Cal. Rptr. 329, 330, 400 P.2d 321, 322 (1965).

12. Sacramento Municipal Utilities Dist. v. Pacific Gas & Elec. Co., 20 Cal. 2d 684, 693, 128 P.2d 529, 534 (1942).

13. 60 Cal.2d 606, 35 Cal. Rptr. 622, 387 P.2d 398 (1963).

14. 60 Cal.2d 606, 608, 35 Cal. Rptr. 622, 624, 387 P.2d 398, 400.

15. Ed. Code §§ 13080 et seq.; Govt. Code § 3501.

The reviewing court in its decision in *California Federation of Teachers v. Oxnard Elementary Schools*[16] held there was no denial of equal protection in thus distinguishing employees of public school systems from the general category of public agency employees, or in the further distinction between certificated and noncertificated public school employees. The court emphasized the breadth of the legislature's discretion in classifying citizens to facilitate the enactment of legislation beneficial to the community as a whole. Whether there is a denial of equal protection depends in part on the court's estimate of the benefit to be derived by the community from the statute.

In *In re Adoption of Runyon*,[17] the foster parents of an agency child urged that the statute denied them equal protection of the law in preventing them from adopting a child. Rejecting this argument, the Court held, without distinguishing the state Constitution and the Fourteenth Amendment, that there was a reasonable basis for distinguishing prospective adoptive parents from foster parents. The Court cited the necessity of preserving the freedom of the agency to determine the suitability of a home for the child. The purposes of the adopting agencies would be frustrated, the Court said, if persons not approved by the agency as prospective adoptive parents were allowed to file petitions of adoption.

A municipal ordinance imposing a license tax on the business of operating an apartment house was attacked unsuccessfully in *Clark v. City of San Pablo*[18] on the grounds that it was invalid as a violation of equal protection. For purposes of the license tax, the ordinance discriminated between apartment houses consisting of 4 or more units, which were subject to the tax, and single family, duplex, and triplex rental units, which were exempted. To the argument that this distinction was arbitrary and violative of equal protection mandates, the Court replied that facts reasonably could be conceived that

16. 272 Cal. App.2d 514, 77 Cal. Rptr. 497 (1969).

17. 268 Cal. App.2d 918, 74 Cal. Rptr 514 (1969).

18. 270 Cal. App.2d 121, 75 Cal. Rptr. 726 (1969).

would sustain it. The Court noted that the size of the operation, for example, was a valid criterion inasmuch as the city council might have recognized that 4 or more units impose significantly greater burdens on community resources. As to what is arbitrary and discriminatory, the Court held that such a determination must depend upon the facts in each case ". . . and the predilections of the reviewing tribunal as to what is arbitrary and discriminatory."[19]

At the November 8, 1966, general election, California voters ratified a new constitutional provision on legislative salaries. The provision validated a 1966 statute increasing these salaries, and included an exclusionary clause to prevent the higher salary from being used in calculating retirement allowances of legislators retired before 1967, and of their widows. In *Lyon v. Flournoy,*[20] the reviewing court declared that the widow of a legislator who retired before 1967, was not denied equal protection of the law by this exclusionary clause. The Court did not identify the source of the equal protection that it was alleged the classification violated. The Court noted that legislators who served prior to 1967, had paid pension fund contributions based on lower salaries, while legislators serving thereafter would be required to pay contributions based on higher salaries. This fact provided the reasonable basis for distinguishing between the two classes.

Two cases in which the state Supreme Court found a violation of equal protection are *Montgomery Ward & Co. v. State Board of Equalization*[1] and *Purdy & Fitzpatrick v. State.*[2] Both of these cases are discussed hereafter under a different section of this review because of other issues decided therein.

In the *Montgomery Ward* case, the Court relied on both the United States and state Constitutions. In *Purdy & Fitzpatrick,* however, only the Fourteenth Amendment was used.

19. 270 Cal. App.2d 121, 128, 75 Cal. Rptr. 726, 730.

20. 271 Cal. App.2d 774, 76 Cal. Rptr. 869 (1969).

1. 272 Cal. App. 728, 78 Cal. Rptr. 373 (1969). Certiorari denied 90 S.Ct. — (1970).

2. 71 Cal.2d —, 79 Cal. Rptr 77, 456 P.2d 645 (1969).

V. Federal Supremacy

A. *Aliens and Public Works Projects*

Purdy & Fitzpatrick v. State, supra, is a case involving a conflict between a state statute and the congressional power over immigration and naturalization. The statute in question was section 1850, of the Labor Code, which, in general, prohibits employment of aliens on public works projects.

In determining that the code section was unconstitutional, the California Supreme Court noted that the United States Supreme Court has voided state laws relating to immigration when those laws:

> (1) . . . attempt to regulate or control immigration as such . . . (2) [burden] the general congressional power to admit aliens . . . (3) [w]hen the Congress has enacted a comprehensive scheme for the regulation of a particular aspect of immigration and naturalization . . .[3]

The Court concluded that section 1850, violated (3) above, because Congress had enacted a very comprehensive scheme of dealing with the admission of aliens who seek to enter the labor market in the United States.

In reaching this conclusion, the Court found itself confronted with the case of *Heim v. McCall,*[4] wherein the United States Supreme Court upheld a New York statute almost identical to section 1850. As the California Supreme Court notes, however, *Heim* did not involve a question of conflict with any specific congressional legislation.

The Court also found that section 1850, violated the Equal Protection Clause of the Fourteenth Amendment. Noting that the Fourteenth Amendment guarantees aliens equal protection of the law, it was not necessary for the Court to plow new ground in holding that the discrimination involved in the statute constituted an arbitrary denial of equal protection to certain persons merely because of their status as aliens. The

3. 71 Cal.2d —, —, 79 Cal. Rptr. 77, 82, 456 P.2d 645, 650.

4. 239 U.S. 175, 60 L.Ed. 206, 36 S. Ct. 78 (1915).

http://digitalcommons.law.ggu.edu/callaw/vol1970/iss1/6

objective of favoring United States citizens over citizens of other countries is inadequate to sustain this discrimination on the ground that it promotes a legitimate state interest. Similarly, although the statute allegedly seeks to promote the establishment of acceptable wages and working conditions in the contract construction industry, ". . . [t]he classification does not reasonably relate to the permissible legislative goal of the protection of the labor market in the contract construction field."[5] The Court emphasized that it would review strictly any state law that classified persons on the basis of alienage.[6]

B. *Unconstitutionality of California Buy America Act*

Sections 4300–4305, of the Government Code are known as the California Buy American Act. This act requires that contracts for public works be awarded only to those who agree to use materials manufactured in the United States.

In *Bethlehem Steel Corp. v. Board of Comrs. of Dept. of Water and Power*,[7] Bethlehem sought to prevent the Department of Water and Power of Los Angeles from awarding a construction contract to another company who proposed to use foreign-made steel. The Court of Appeal in affirming the lower court held that the act was unconstitutional because it encroached "upon the federal government's exclusive power over foreign affairs, and constitutes an undue interference with the United States' conduct of foreign relations."[8]

Commenting on this legislation, the Court wrote, "The present legislation is an impermissible attempt by the state to

5. 71 Cal.2d —, —, 79 Cal. Rptr. 77, 87, 456 P.2d 645, 655.

6. This follows from previous United States Supreme Court decisions, which the court in the instant case summarizes as follows:
"In cases involving 'suspect classifications' or 'fundamental interests' of those suffering discrimination, the United States Supreme Court prescribes a strict standard for reviewing the particular enactment under the equal protection clause. Not only must the classification reasonably relate to the purposes of the law, but also the state must bear the burden of establishing that the classification constitutes a necessary means of accomplishing a legitimate state interest, and that the law serves to promote a compelling state interest." 71 Cal.2d —, — – —, 79 Cal. Rptr. 77, 85–86, 456 P.2d 645, 653–654.

7. 276 Cal. App.2d —, 80 Cal. Rptr. 800 (1969).

8. 276 Cal. App. 2d —, —, 80 Cal. Rptr. 800, 802.

structure national foreign policy to conform to its own domestic policies."[9]

VI. Separation of Powers

There has been a "long established rule that in passing on the legality of acts of legislative bodies, the courts cannot inquire into the motives behind such acts," according to the Court of Appeal in *Trujillo v. City of Los Angeles*.[10]

The issue arises in cases where a governmental body abolishes a position and discharges the person who held it. This was the situation in the *Trujillo* case. Trujillo had been the manager of the city's harbor real estate department. In order to terminate his employment, the harbor commissioners enacted a plan of reorganization of the department upon the stated grounds of economy and efficiency.

Trujillo sought a writ of mandamus to compel the commissioners to reinstate him, contending that they had acted in bad faith. The trial court permitted the introduction of evidence as to the motives of the commissioners. The Court of Appeal agreed.

The Court pointed out that the long-established rule is subject to exceptions:

> Where the law, ordinance or resolution shows on its face or in its results an improper purpose, motive or intent, thereby causing damage to a person, courts may intervene.[11]

VII. Interstate Commerce

A. *Trains and Dirty Smoke*

Diesel engines emit black smoke when they start moving from a standstill position. Because of this, the railroad in

9. 276 Cal. App.2d —, —, 80 Cal. Rptr. 800, 805.

10. 276 Cal. App.2d — —, 81 Cal. Rptr. 146, 149 (1969). In support of this statement, the Court cites Stahm v. Klein, 179 Cal. App.2d 512, 4 Cal. Rptr. 137, wherein the question was reviewed at some length.

11. 276 Cal. App.2d —, —, 81 Cal. Rptr. 146, 149.

People v. Atchison, Topeka & Santa Fe Railway Company,[12] was charged with a violation of Health and Safety Code section 24242, which prohibits contamination of the air. The railroad defended on the ground that there was no known way to prevent the black smoke when the engine starts from a standstill. The Court of Appeal therefore held that the statute as applied to the railroad constituted an unreasonable burden upon interstate commerce, and that the defendant could not be convicted under the clean air statute.

VIII. State Taxation

A very thorough analysis of the Due Process, Equal Protection, and Commerce Clauses as they apply to sales and use taxes was made by the Court of Appeal in *Montgomery Ward & Co. v. State Board of Equalization*.[13]

The petitioner, Montgomery Ward, operates stores in Klamath Falls, Oregon, and Reno, Nevada, as well as in a number of cities in California. Many Californians trade at the Oregon and Nevada stores making both cash and credit purchases. Because the petitioner maintains stores in California, the State Board of Equalization required the petitioner to collect and remit the California use tax on all credit sales made to California residents at its stores in Klamath Falls and Reno.[14]

The petitioner paid the tax and brought action for a refund. The trial court entered judgment for the petitioner and the board appealed. The Court of Appeal affirmed, holding that requiring the petitioner to collect and remit the use tax under the circumstances of this case violated the Due Process, Commerce, and Equal Protection Clauses.

All of these clauses have a bearing on the ultimate resolution of questions of this kind. If a particular tax collides with any one of the clauses, it will fall, even though it may satisfy the requirements of the other two.

12. 268 Cal. App.2d 501, 74 Cal. Rptr. 222 (1968).

13. 272 Cal. App.2d 728, 78 Cal. Rptr. 373 (1969). Certiorari denied, 90 S.Ct. — (1970).

14. The retailer, under §§ 6203–6204 of the Revenue and Taxation Code, is obligated to remit the amount of the tax whether he collects it or not.

The Due Process Clause requires "some minimum connection between a [taxing] state and the person, property or transaction it seeks to tax."[15]

The Commerce Clause requires that state taxes not be, (1) discriminatory,[16] (2) an undue burden on interstate commerce,[17] (3) nor be a tax on the privilege of doing business in interstate commerce.[18] Although equal protection allows classifications in tax laws, they must be neither arbitrary nor discriminatory.[19]

In the instant case, however, the use tax is not a tax on the petitioner. It is a tax on the use in California of a product purchased in Oregon or Nevada. The petitioner becomes involved because of the requirement that it collect the tax, and even if it does not do so, it is required to remit the amount it should have collected to California.

The United States Supreme Court has permitted a state to require a vendor who is doing business within the state to collect the use tax on items purchased from the vendor out of state: (1) when the vendor maintains stores within the taxing state;[20] (2) when the orders are solicited by salesmen within the state and sent to the vendor outside the state;[1] and (3) when the vendor does business through independent brokers who solicit sales of the vendor's products within the taxing state.[2]

On the other hand, in the recent case of *National Bellas Hess v. Department of Revenue*,[3] the Court held that where the vendor has no direct contact with the taxing state, it can-

15. Miller Bros. Co. v. Maryland, 347 U.S. 340, 345, 98 L. Ed. 744, 748, 74 S.Ct. 535, — (1954).

16. Nippert v. Richmond, 327 U.S. 416, 90 L.Ed. 760, 66 S.Ct. 586, 162 A.L.R. 844 (1946).

17. Joseph v. Carter & Weekes Stevedoring Co., 330 U.S. 422, 91 L. Ed. 993, 67 S.Ct. 815 (1947).

18. Spector Motor Service v. O'Connor, 340 U.S. 602, 95 L.Ed. 573, 71 S.Ct. 508 (1951).

19. Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 526–528, 3 L. Ed.2d 480, 484–485, 79 S.Ct. 437, — - — (1959).

20. Nelson v. Sears, Roebuck & Co., 312 U.S. 359, 85 L.Ed. 888, 61 S.Ct. 586, 132 A.L.R. 475 (1941).

1. General Trading Co. v. Tax Com., 322 U.S. 335, 88 L.Ed. 1309, 64 S.Ct. 1028 (1944).

2. Scripto v. Carson 362 U.S. 207, 4 L.Ed.2d 660, 80 S.Ct. 619 (1960).

3. 386 U.S. 753, 18 L.Ed.2d 505, 87 S.Ct. 1389 (1967).

not be made a tax collector even though it does a large volume of business with residents thereof through catalog sales.

In *Miller Bros. Co. v. Maryland,*[4] the Court held that a store could not be forced to collect the Maryland use tax where the only contact it had with Maryland was the delivery of goods into Maryland that had been purchased in Delaware. In this case, the Delaware store did solicit Maryland residents by radio, newspaper, and direct mail, but the actual purchases were made in Delaware. The basis for this decision was that it would be a violation of due process to make the Delaware store a tax collector under these facts.

With this background, the Court of Appeal approached the instant case, and concluded that insofar as due process was concerned, "[s]ince there is no relationship between the retailer's general activities in California, and the generation of sales by its border stores, the suggestion that mere presence in California is sufficient to authorize a burden on the out-of-state delivered sales is rejected."[5] Therefore, there not being any other connection between the out-of-state stores and California, the rationale of *Miller Bros.* applies.

The Court went on, however, to discuss whether this might also be a burden on interstate commerce. The Court found two objections to making the vendor here the tax collector, on Commerce Clause grounds. First, the court noted that insofar as the sales were made out-of-state, California gave nothing in return for its asking the vendor to collect the tax, thus burdening interstate commerce. Second, during the years for which the tax was being assessed, California did not give a credit for sales taxes paid out of state. Thus, the taxpayer would have been required to pay a sales tax in Nevada plus use tax to California. This, the Court believed, would discriminate in favor of California, because potential California purchasers would be inclined to buy at home rather than go to Nevada and pay both taxes.

The vendor also raised an equal protection issue by claiming that if it is required to collect the tax, it will be placed in

4. 347 U.S. 340, 98 L.Ed. 744, 74 S.Ct. 535 (1954).

5. 272 Cal. App.2d 728, —, 78 Cal. Rptr. 373, 386.

a disadvantageous position in relation to its Nevada (and Oregon) competitors. Because they have no contact with California, they could not be made to collect the California use tax. The Court agreed, concluding that since "the use tax as administered in this case [imposes] upon the retailer a greater burden than is imposed upon those engaged in similar business, the retailer has been denied equal protection and uniform operation of the law as provided in the United States and State Constitutions."[6]

6. 272 Cal. App.2d 728, —, 78 Cal. Rptr. 323, 396.