Vanderbilt Law Review

Volume 20
Issue 6 *Issue 6 - November 1967*

Article 7

11-1967

Recent Cases

Law Review Staff

Follow this and additional works at: https://scholarship.law.vanderbilt.edu/vlr

Part of the Antitrust and Trade Regulation Commons, Civil Rights and Discrimination Commons, Constitutional Law Commons, and the Criminal Law Commons

Recommended Citation
Law Review Staff, Recent Cases, 20 *Vanderbilt Law Review* 1329 (1967)
Available at: https://scholarship.law.vanderbilt.edu/vlr/vol20/iss6/7

This Note is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Law Review by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

RECENT CASES

Antitrust—Labor Law—Exemption of Union from Antitrust Laws Is Lost When It Imposes Minimum Price Levels on a Member-Employer

Acting on their own initiative, the plaintiffs, union member[1] musicians, periodically[2] secured jobs through union controlled booking agents as orchestra leaders for single engagements.[3] The orchestras were staffed with musicians obtained from the union hiring hall, and plaintiffs exercised typical management functions with respect to these employees.[4] With virtual control of labor in the music industry,[5] the defendant union unilaterally established minimum prices which leaders were required to charge purchasers of orchestra services.[6] Plaintiffs brought suit alleging that this procedure[7] constituted a price-fixing conspiracy between the defendant union and non-labor

1. Subsequent to the filing of their suit, two of the plaintiffs were expelled from defendant union for various reasons, including failure to abide by the union wage scale. Carroll v. American Fed'n of Musicians, 241 F. Supp. 865, 870 (S.D.N.Y. 1965).

2. The term "periodically" is used here to denote the high degree of fluidity in this line of work: a few musicians acted solely as leaders; others aeted as leaders occasionally, some rarely, and most never. Thus, the average leader spent most of his time as a band musician, but occasionally he secured a club date (single engagement) as an orchestra leader. Carroll v. American Fed'n of Musicians, 372 F.2d 155 (2d Cir. 1967).

3. Single engagements characteristically last but one night. These are distinguished from "steady" engagements which extend for a longer period, usually a week. The latter are governed by collective bargaining agreements between the union and the purchasers. The former are not. However, both are subject to the same degree of union regulation—the latter by collective bargaining agreements and the former by unilateral union coercion. In both types of engagements the union regards the leader as an employee or personnel manager, and the purchaser as the employer. 372 F.2d at 160.

4. Among the responsibilities of the leaders are: collecting the fee, paying the musicians, supervising their performance and conduct, keeping records and withholding taxes. The instant court concluded that, since the leaders were no different from any other independent contractor, they were employers. 372 F.2d at 159.

5. 372 F.2d at 158. Unionization of the leaders has been a prime goal for several years. The high degree of success is reflected by the fact that unless the leader is a union member no union musicians may play for him.

6. All terms of employment and the details of working as a leader were unilaterally imposed by the union, and enforced by threats of expulsion. 372 F.2d at 160.

7. The minimum price consisted of the union wage-scale for members of the band and the leader. Plaintiffs objected to that portion which represented scale for leaders since it prevented them from bargaining with the purchaser for a lower total price.

groups in violation of the Sherman Act.[8] Defendant contended that such conduct was within labor's exemption from the antitrust laws; the district court upheld the defendants and dismissed the complaint.[9] On appeal to the Court of Appeals for the Second Circuit, *held,* reversed. A union which unilaterally imposes minimum prices upon employer-members and coerces them to charge such prices loses its exemption from the antitrust laws and engages in price-fixing in violation of the Sherman Act. *Carroll v. American Federation of Musicians,* 372 F.2d 155 (2d Cir. 1967), *cert. granted,* 36 U.S.L.W. 3143 (U.S. Oct. 10, 1967) (Nos. 309 & 310).

Although price fixing is a per se violation of the Sherman Act,[10] a prerequisite[11] for liability of a labor union under the Act is a finding that the union has acted outside of the broad exemption granted to labor by the Clayton[12] and Norris-LaGuardia[13] Acts. The Norris-LaGuardia Act provides immunity from injunctive proceedings in federal courts and from liability for substantive violations of the antitrust laws,[14] requiring only that the activity in issue arise in the context of a "labor dispute." The Act defines a "labor dispute" to include any controversy concerning efforts to negotiate, fix, maintain, or change the terms or conditions of employment.[15] Expanding upon this definition the Supreme Court has interpreted the exemption to

8. 15 U.S.C. §§ 1-2 (1964): Section 1: "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several states . . . is declared to be illegal . . . ." Section 2: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states . . . shall be deemed guilty of a misdemeanor. . . ."

9. 241 F. Supp. at 890-91.

10. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 212-14, 218 (1940) (rule of reason inapplicable and no further inquiry required where price-fixing involved); United States v. Trenton Potteries Co., 273 U.S. 392, 396-98 (1927) (reasonableness immaterial).

11. Local 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 691 (1965); Handler, *Recent Antitrust Development—1965,* 40 N.Y.U.L. Rev. 823, 830-33 (1965).

12. Clayton Act §§ 6, 20, 15 U.S.C. § 17, 29 U.S.C. § 52 (1964), provide that labor is not a commodity or article of commerce, and restrict the issuance of injunctions by federal courts. For the proposition that these statutory commands were ignored or diluted, see *e.g.,* Cox, *Labor and the Antitrust Laws—A Preliminary Analysis,* 104 U. Pa. L. Rev. 252 (1955); Note, *Collective Bargaining Under the Antitrust Laws,* 61 Nw. U.L. Rev. 156 (1966).

13. Norris-LaGuardia Act § 4, 29 U.S.C. § 104 (1964), restricts the jurisdiction of federal courts to issue injunctions in labor disputes.

14. The statute refers only to injunctive immunity, but the Supreme Court read the exemption from substantive violations into the law in United States v. Hutcheson, 312 U.S. 219 (1941).

15. 29 U.S.C. § 113(c) (1964). For general construction of the definition, *compare* Report of the Attorney General's Committee to Study the Antitrust Laws 295-99 (1955) [hereinafter cited as Att'y Gen. Antitrust Rep.], *with* Cox, *supra* note 12, at 267.

mean that if a union acts in its own self-interest and does not combine with non-labor groups, its activity will be exempt from the operation of the antitrust laws.[16] With these requirements for the immunity thus established,[17] the courts have focused their attention upon defining the scope of labor's exemption.[18] In *Teamsters Local 24 v. Oliver*,[19] the union compelled a trucking company to pay fixed amounts to union member independent truck owners who performed the same function as union member employee-drivers. In holding that a state's antitrust law could not be applied to this situation, the Supreme Court noted that the issue in dispute was a proper subject of collective bargaining between the carrier and the union. The Court stated that the union had a substantial interest in procuring such a term, since the independent owners were in job competition with the carrier's employee-drivers, and concluded that this practice constituted wage determination rather than price fixing.[20] However, in *Local 626, Meat Drivers Union v. United States*,[21] the absence of an "economic interrelationship" between self-employed grease peddlers who were union members and the unionized employees of the grease processors, led the Supreme Court to conclude that no labor dispute existed.[22] Accordingly, the Court found an illegal combination between the peddlers and the union to fix prices charged to the processors in restraint of trade. In the most recent of its efforts to accommodate the antitrust and labor laws, the Supreme Court in

16. Allen Bradley Co. v. Local 3, IBEW, 325 U.S. 797 (1945); United States v. Hutcheson, 312 U.S. 219, 234-35 (1941). *See generally*, Bernhardt, *The Allen Bradley Doctrine: An Accommodation of Conflicting Policies*, 110 U. PA. L. REV. 1094 (1962).

17. There is some question as to the existence of yet another requirement—whether the exemption is lost if one of the parties to the dispute is an "employer" or "independent contractor." *Compare* Taylor v. Local 7, Journeymen Horseshoers, 353 F.2d 593, 605-06 (4th Cir. 1965) (exemption does not apply to independent contractors), *cert. denied*, 384 U.S. 969 (1966), *and* Columbia River Packers Ass'n v. Hinton, 315 U.S. 143, 147 (1942) (dictum) (exemption does not apply), *with* 29 U.S.C. § 113(c) (1964), which states that a labor dispute exists "regardless of whether or not the disputants stand in the proximate relation of employer and employee." *See* note 27 *infra* for further discussion.

18. For a general discussion, see Comment, *Labor's Antitrust Exemption After Pennington and Jewel Tea*, 66 COLUM. L. REV. 742 (1966); Note, *Labor Law and Antitrust: "So Deceptive and Opaque Are the Elements of These Problems,"* 1966 DUKE L.J. 191.

19. 358 U.S. 283 (1959), *rev'g* 167 Ohio St. 299, 147 N.E.2d 856 (1958).

20. 358 U.S. at 294. It should be noted that there was no claim that any federal laws had been violated. *Id.* at 286.

21. 371 U.S. 94 (1962).

22. The union and the peddlers had admitted the violations charged. In finding no "economic interrelationship" between the peddlers and the processors' regular employees, the Court relied on an extensive stipulation of facts, which stated that no processor had ever substituted peddlers for employee-drivers, or had threatened to do so. 371 U.S. at 98. Under these circumstances it is not surprising that the Court held there was no labor dispute. *See generally*, Meltzer, *Labor Unions, Collective Bargaining, and the Antitrust Laws*, 32 U. CHI. L. REV. 659, 678-87 (1965).

Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.,[23] found no violation of the Sherman Act in a dispute concerning marketing hours. The Court was unable to agree on a majority opinion, but two groups of three Justices each concurred in the result. In the first opinion, Mr. Justice White indicated that since the matter in dispute was a subject *intimately related* to terms and conditions of employment, the union's insistence upon it did not violate the antitrust laws.[24] Concurring in the result, Mr. Justice Goldberg took issue with Mr. Justice White's "narrow confining view"[25] and proposed a broader test whereby all subjects of mandatory bargaining would be exempt from the operation of the antitrust laws. However, this broad exemption proposed by Mr. Justice Goldberg would not extend to price fixing because the union clearly lacks a "direct and overriding" interest[26] in such a subject.

In the instant case the court first examined the question of whether the union had lost its exemption from the antitrust laws. Referring to Mr. Justice Goldberg's test in *Jewel Tea*, the court stated that absent an illegal conspiracy, all subjects of mandatory collective bargaining possess immunity from antitrust violations. After finding no evidence of a conspiracy, the court held that the prices charged for orchestral engagements were not a subject of such "direct and overriding interest" to the union in its capacity as representative of the musicians to make it a subject of mandatory collective bargaining. The court reasoned that the establishment of minimum price floors could not be justified on the grounds that the union was also the representative of the leaders, since the court deemed the leaders to be employers.[27] Furthermore, the court rejected the union's contention that it was directly interested in the prices charged by the leaders due to the fact that the prices represented the limit of the wages which could be expected from an engagement. The court noted that giving effect to such an argument would interfere with management's prerogative of setting prices, and effectively "paralyze" the antitrust laws, since that same argument "would support union-instigated price-fixing in

23. 381 U.S. 676 (1965) (no opinion of the Court), *noted* in 18 Vand. L. Rev. 2027 (1965).

24. 381 U.S. at 689 (emphasis added).

25. 381 U.S. at 727.

26. 381 U.S. at 732-33.

27. It is submitted that the characterization of one party to the dispute as an "independent contractor," "businessman" or "entrepreneur" is but the ultimate label applied by the court when it finds that the union lacks a sufficient interest in the affairs of the party to impose terms upon him or combine with him to affect the market. *See* Local 626, Meat Drivers Union v. United States, 371 U.S. 94 (1962), where the party is characterized as a businessman after a finding of no interest by the union in his conduct, and the lack of an "economic interrelationship" between him and the union's members.

any industry."[28] In distinguishing the *Oliver*[29] case, the court stated that no "economic interrelationship" existed in the instant case since the leaders did not compete with the staff musicians for positions.[30] With the lack of the union's interest established, the court held that the union had unilaterally acted on a matter which was not a mandatory subject of bargaining, and had thus lost its exemption from the Sherman Act. The court then held that the establishment of these price floors was a per se violation of the Sherman Act.[31] In his dissent, Judge Friendly maintained that the majority had failed to take adequate account of the music trade with its "high degree of interchangeability in work functions and competition among union members for posts as leaders."[32] Noting that a different result might have been warranted had the union fixed the price high enough to insure a return of entrepreneurial profit, Judge Friendly concluded that the union had merely set a minimum price floor in order to protect proper union objectives.

Any assessment of the instant decision must be bottomed on a clear understanding of the policies sought to be achieved by Congress in the passage of the antitrust and labor laws. The antitrust laws seek to ensure a product market characterized by competition, with prices being determined by supply and demand. The labor laws, which include labor's exemption to the antitrust laws, seek to provide the conditions for unions to bargain on a rough parity with management, and recognize the probability that this goal can be reached only by permitting unions to achieve a kind of monopoly in the labor market.[33] The source of the court's difficulty in the instant case is this "fundamental conflict between the policies underlying labor and antitrust legislation."[34] Basic to the solution of the problems posed

28. 372 F.2d at 165.

29. 358 U.S. 283 (1959).

30. The court stated that the leaders frequently did not play with the orchestra, and thus they were not in competition with the musicians; moreover, when the leaders did play with the orchestra, their reputation often enhanced the demand for the group, thus creating more jobs.

31. The court failed to articulate which section of the Act had been violated. Two possibilities appear: (1) on a § 1 combination in restraint of trade, see V. CISE, UNDERSTANDING THE ANTITRUST LAWS 20-26 (1963); (2) for recent discussions of § 2 violations see United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966); Handler, *Some Misadventures in Antitrust Policymaking—Nineteenth Annual Review*, 76 YALE L.J. 92 (1966).

32. 372 F.2d at 168-69.

33. *See generally*, ATT'Y GEN. ANTITRUST REP. 5-12; CISE, *supra* note 31, at 2-14; Goldberg, *Unions and the Antitrust Laws*, 7 LAB. L.J. 178 (1956).

34. Allen Bradley Co. v. Local 3, IBEW, 325 U.S. 797, 808 (1945); Comment, *Labor's Antitrust Exemption After Pennington and Jewel Tea*, 66 COLUM. L. REV. 742 (1966). Cases in which the product and labor markets are identical clearly illustrate the unsatisfactory results which efforts at harmonization of these policies have produced. *See* Comment, *supra* note 18, at 759; Rubenstein, *The Emerging Antitrust*

by the instant case is the determination of which of these competing policies should prevail. Although both the union and the occasional entrepreneur have legitimate interests at stake, full protection of the union's interests, and those of its members, requires that some control of wages be permitted.[35] Since the union seeks to maintain its "wage" scale by preventing "auction block"[36] tactics by purchasers of services, the result of prohibiting the union from regulating this scale by "price" or "wage" fixing,[37] will be to induce competition between or among musicians who desire to be leaders. The effect of this will be to force such competitors out of the union and to reduce the economic resources available for payment of wages, both of which will reduce the number of unionized musicians utilized in orchestras. Thus, the ultimate impact is a severe weakening of the unions.[38] The fundamental factor in this case, and in similar situations in many other

---

Implications of Mandatory Bargaining, 50 Marq. L. Rev. 50 (1966); Note, *supra* note 18, 191. But in spite of the morass of conflict contained in the cases, the *Jewel Tea* opinions may produce some agreement. Mr. Justice White, while proposing that immunity exists only where the matter in dispute is *intimately related* to terms and conditions of employment, evidently would not include *all* subjects of mandatory bargaining within his view of the exemption. However, he did approve of the result in *Oliver* where the Court found the dispute to be a proper subject of collective bargaining because there existed an economic interrelationship. Mr. Justice Goldberg's broader view of the exemption would encompass all subjects of mandatory bargaining, which indirectly must approve of the holding in *Oliver*. Thus one can contend that the sole task of the court in *Carroll* was to determine the existence or non-existence of an economic interrelationship between the leaders and the musicians. If this view of the law is adopted, such a relationship seems clearly to have existed. If a leader secures an engagement for his orchestra, another musician is preempted from doing so. If the leader then performs with his orchestra, one less musician is required. If in seeking engagements the leader is not bound by a union-determined minimum price or wage, then other musicians must sell their services for less in order to compete.

35. Similarly, there are public interests to be served by sustaining the result in the instant case. Individuals will be encouraged to seek out opportunities for themselves, and competition within labor groups will force wages, and therefore prices, downward (assuming the lowering of wages is in the public interest). Additionally, by prohibiting union domination of prices, employers are denied the benefit of labor's exemption from the antitrust laws. Otherwise, the leaders would be permitted to do something in the name of union "interest" which they could not do among themselves.

36. Bernhardt, *supra* note 16, at 1106 & n.54.

37. The *Carroll* court stressed statements by Justices White and Goldberg in *Jewel Tea* which refer to price fixing as violative of the antitrust laws. *See* 381 U.S. at 689 & 733 for the statements. These generalizations become significant, however, only after the activity is characterized as *price* rather than *wage*-fixing. It is suggested that even the more restrictive view of Mr. Justice White would not have labelled the conduct here as price-fixing. As he stated in *Jewel Tea*, "[t]he crucial determinant is not the form of the agreement—*e.g.*, prices or wages—but its relative impact on the product market and the interests of union members." 381 U.S. at 690 n.5.

38. *See* the Supreme Court's discussion in the *Oliver* case, 358 U.S. at 292-94.

trade unions,[39] is that the objecting individuals have more attributes of "workers" than "employers." Thus the union is seeking to impose the minimum amount that can be charged by a unionized worker who temporarily and irregularly divorces himself from the ranks of the worker and becomes an "employer."[40] It is suggested that so long as the interests of this quasi-employer are primarily united with those of the union and its members, the national labor policy is promoted by allowing the union to control his wages. When, however, a worker reaches the point where his basic sympathies and interests do not lie with the union and its objectives, but with the entrepreneurial aspects of individual enterprise, then the union should no longer be permitted to dictate the price that he must charge for his services.[41] Rather than first considering the employment relationship of the leaders to their musicians, and then applying a label which controls the result, the suggested approach would be to first consider the relation of the leaders to the union and its interests. The fact that the leaders were acting as entrepreneurs should have been considered only in determining the unity of interest of the leaders and the union, rather than being given controlling effect. A broad application of the approach taken by the court in the instant case

---

39. *See generally*, Taylor v. Local 7, Journeymen Horseshoers, 353 F.2d 593 (1965); Note, *Employee Bargaining Power Under the Norris-LaGuardia Act: The Independent Contractor Problem*, 67 YALE L.J. 98 (1957) (independent contractors generally); Comment, 24 U. CHI. L. REV. 733 (1957) (barbers).

40. It is doubtful that the unions would have permitted continued employment of the plaintiffs as musicians in the instant case without compliance by them with the union's wage or price-fixing proposals. The union would probably have sought to force unionized employers to hire only union recommended labor, which they could do under the NLRA. The same is true in *Oliver*. *See* Orange Belt Dist. Council No. 48 v. NLRB, 328 F.2d 534, 538 (D.C. Cir. 1964) (clauses limiting subcontracting to employers meeting union standards upheld). *Cf.* Meat & Highway Drivers (Swift & Co.), 143 N.L.R.B. 1221, 1229-30 (1963), *enforced in part*, Teamsters Local 710 v. NLRB, 335 F.2d 709, 714 (D.C. Cir. 1964), which restricted the union's power to protecting jobs formerly held by members.

41. This is not to suggest that a union be permitted to impose selling prices on a merchant. "In such a case, the restraint on the product market is direct and immediate, is of the type characteristically deemed unreasonable under the Sherman Act and the union gets from the promise nothing more concrete than a hope for better wages to come." 381 U.S. at 663 (White, J.). Such a situation obviously defeats the purposes of the Sherman Act without corresponding furtherance of the Norris-LaGuardia policy of exempting unions when they are attempting to create a monopoly of labor within their labor market. Applied to the instant case the approach suggested would no longer subject to union control the two leaders who have left the union and now devote full time to orchestra leading. The other two would be subject to such control. *Compare* Cox, *supra* note 12, at 272-74, *with* Summers, *Labor Law in the Supreme Court: 1964 Term*, 75 YALE L.J. 59, 80 (1965); *see* Note, *Employee Bargaining Power Under the Norris-LaGuardia Act: The Independent Contractor Problem*, 67 YALE L.J. 98, 104 (1957) (price-fixing should not be allowed to extend to fixing a profit).

will render many trade unions impotent.[42] Congressional policies require that this approach be quickly abandoned, either by legislative response or reversal by the Supreme Court. With the passage of two years since *Jewel Tea,* and a change in the composition of the Court, perhaps a more definitive statement will greet the next case which presents antitrust-labor law questions.

Civil Rights—Desegregation—School Authoritics Have Affirmative Duty To Integrate School System

Negro children in six Louisiana and three Alabama school systems brought class actions[1] in the appropriate federal district courts attacking state-imposed de jure segregation based upon dual attendance zones for white and Negro students.[2] In each case a court order was entered against the defendant school authorities which directed the implementation of a gradual desegregation plan. The cases were consolidated on appeal by the plaintiffs to the Fifth Circuit Court of Appeals.[3] A three judge panel, applying as a minimum standard guidelines promulgated by the Department of Health, Education and Welfare, reversed the orders of the district courts,[4] enjoined the defendants from practicing racial discrimination in the operation of their schools, and ordered them to take appropriate action to desegregate the public schools by the school year 1967-68, by implementing a

42. For example, the union will be unable to control the member who as an electrician occasionally secures a job as a subcontractor, or the businessman-plumber who works alongside his workers.

1. The United States joined in most of these cases as party plaintiff after suit was filed.

2. Seven of the nine school districts involved had a combined school population of 155,782, of which 59,361 were Negro in 1965. Yet only 0.019 per cent of the Negro school population attended formerly "white" schools in 1965. United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 853 (5th Cir. 1966).

3. The defendants contended that neither the fourteenth amendment nor the Civil Rights Act of 1964, 42 U.S.C. §§ 2000c-2000c(9), 2000d-2000d(4), imposed upon school authorities an affirmative duty to achieve public school integration, and that freedom of choice plans were adequate.

4. In a 2-1 decision the court held that standards for court supervised desegregation should not be lower than the standard set by the Department of Health, Education and Welfare, 45 C.F.R. § 80 (1964); U.S. Office of Educ., HEW, General Statement of Policies Under Title VI of the Civil Rights Act of 1964 Respecting Desegregation of Elementary and Secondary Schools (April 1965) (hereinafter cited as HEW 1965 Statement); U.S. Office of Educ., HEW, Revised Statement of Policies for School Desegregation Plans Under Title VI of the Civil Rights Act of 1964 (March 1966) (hereinafter cited as HEW Revised Statement), under the Civil Rights Act of 1964. In addition, the court held that school authorities were under an affirmative duty to integrate. United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966).

mandatory freedom of choice plan. On petition by the defendants for a rehearing, the Fifth Circuit Court of Appeals sitting en banc, *held,* affirmed.[5] State school authorities have an affirmative duty under the fourteenth amendment to integrate facilities, faculties, activities, and students of public schools formerly segregated on a de jure[6] basis and the minimum standard to be applied by the courts in achieving integration is the HEW guidelines. *United States v. Jefferson County Board of Education,* 380 F.2d 385 (5th Cir. 1967).

In *Brown v. Board of Education,*[7] the Supreme Court held that racial discrimination in public schools is unconstitutional and that the primary responsibility for assessing and solving the problems inherent in desegregating public schools is upon the school authorities. Notwithstanding this constitutional mandate, nine years later only token progress had been made toward the desegregation of public schools in many areas of the South.[8] This situation contributed to the enactment of Titles IV and VI of the Civil Rights Act of 1964,[9] which were intended to expedite desegregation. To make Title VI effective, the

5. The previous opinion was adopted with a few clarifying statements and slight modifications were made in the decree. The decree provided in essence that all grades would be desegregated by the school year of 1967-68 and that all students or their parents were to exercise a mandatory annual free choice specifying the school they choose to attend and that no choice is to be denied for any reason other than overcrowding, in which case students who lived closer to the chosen school would be given preference. No preference is to be given for prior attendance at any school, and all services, facilities, faculties, and activities must be operated without discrimination. Transportation is to be provided to serve each student choosing any school in the system. Any student shall have a right to transfer to any school to which he was or would be excluded upon the basis of race. At no time is any official or employee of the school system to influence any student or parent in the exercise of a choice or impose a penalty or grant favors because of any choice made. In addition any formerly Negro school which is not made equal to formerly white schools in physical facilities, faculties and course of instruction is to be closed.

6. The court distinguishes between de jure and de facto segregation. At the initial hearing of the case the court states: "In this circuit . . . the location of Negro schools with Negro faculties in Negro neighborhoods and white schools in white neighborhoods cannot be described as unfortunate fortuity: It came into existence as state action and continues to exist as racial gerrymandering, made possible by the dual system. Segregation resulting from racially motivated gerrymandering is properly characterized as 'de jure' segregation." United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 876 (5th Cir. 1966). In regard to de facto segregation the court noted, "[D]e facto segregation . . . [is] . . . racial imbalance resulting fortuitously in a school system based on a single neighborhood school serving all white and Negro children in a certain attendance area or neighborhood." *Id.* at 852.

7. 349 U.S. 294 (1955).

8. In the school year of 1963-64 only 1.17 percent of the Negro children in the South were attending school with white children. United States v. Jefferson County Bd. of Educ., 372 F.2d 836, app. B (5th Cir. 1966).

9. 42 U.S.C. §§ 2000c, 2000d–2000d(4). Title IV authorizes the Office of Education to give technical and financial assistance to schools attempting to desegregate; Title VI provides that federal aid and assistance shall be denied to school systems practicing racial discrimination. Seetion 2000d states: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in,

Department of Health, Education and Welfare promulgated regulations which conditioned a state's eligibility for federal funds upon compliance with provisions of the Act.[10] State school authorities could satisfy this condition by obtaining a federal court order providing a plan for desegregation or, in the alternative, by submitting an acceptable desegregation plan to the Commissioner of Education. Pursuant to this regulation, the Office of Education in April 1965[11] and in March 1962[12] issued guidelines promulgating a standard of desegregation which established the fall of 1967 as the target date for total desegregation. To avoid having to implement the guidelines many school boards sought refuge in the federal courts,[13] and obtained orders providing for desegregation plans which occasionally differed significantly from the guidelines. However, in *Singleton v. Jackson Municipal Separate School Districts*,[14] the Fifth Circuit Court of Appeals held that the HEW guidelines are only the minimum standard to be applied by the federal courts in evaluating school board desegregation plans, and that school authorities "are under the constitutional compulsion of furnishing a single, integrated school system."[15] But, there still remained some doubt as to whether school authorities operating under court-approved freedom of choice plans had an affirmative duty to achieve integration,[16] even though in cases in-

be denied the benefits of. or be subjected to discrimination under any program or activity receiving Federal financial assistance." Section 2000d-1 states: "Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity . . . is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such programs or activity by issuing rules, regulations, or orders of federal applicability which shall be consistent with achievement of the objeetives of the statute authorizing the financial assistance in connection with which the action is taken . . . ."

10. 45 C.F.R. § 80.4(a)(1) (1964): "Every application for federal financial assistance to carry out a program to which this part applies . . . shall, as a condition to its approval . . . contain or be accompanied by an assurance that the program will be conducted or the facility operated in compliance with all requirements imposed by or pursuant to this part." There are various programs to which this part applies.

11. HEW 1965 Statement.

12. HEW Revised Statement.

13. United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 859 (5th Cir. 1966): "The announcement in HEW regulations that the Commissioner would accept a final school desegregation order as proof of the school's eligibility for federal aid prompted a number of schools to seek refuge in the federal courts. In Louisiana alone twenty school boards obtained quick decrees providing for desegregation according to plans greatly at variance with the Guidelines." *See* Price v. Denison Independent School Dist. Bd. of Educ., 348 F.2d 1010 (5th Cir. 1965); Singleton v. Jackson Municipal Separate School Dist., 355 F.2d 865 (5th Cir. 1966).

14. Singleton v. Jackson Municipal Separate School Dist., 355 F.2d 865 (5th Cir. 1966). *See* Kemp v. Beasley, 352 F.2d 14 (8th Cir. 1965); Smith v. Board of Educ. of Morrilton School Dist. No. 32, 365 F.2d 770 (8th Cir. 1966); *cf.* Price v. Denison Independent School Dist. Bd. of Educ., 348 F.2d 1010 (5th Cir. 1965).

15. Singleton v. Jackson Municipal Separate School Dist., 355 F.2d 865, 869 (5th Cir. 1966).

16. United States v. Jefferson County Bd. of Educ., 380 F.2d 385 (5th Cir. 1967).

volving de jure segregation, other courts had previously recognized a duty to desegregate.[17]

Recognizing that other courts have held that school authorities have no affirmative duty to integrate in situations where segregation is de facto,[18] the court in the instant case limited its consideration to the duty of the state to eliminate de jure segregation. The court noted that freedom of choice plans are frequently ineffective in eliminating segregation, and that consequently schools operating under these plans generally retained their racial identification. The majority concluded that this failure resulted from a lack of transfers by white students to Negro schools, from the requirement in these plans that affirmative action be taken by parents and pupils to disestablish the existing segregated system and from diminished Negro motivation to transfer because of construction of and improvements to Negro schools. In response to the defendants' contention[19] that the Constitution merely prohibits compulsory segregation and does not require integration, the majority rejected this distinction and held that school authorities have an affirmative duty to convert former de jure dual systems into a single integrated, unitary system. The court then noted that freedom of choice plans offer only one means of accomplishing desegregation and that if in any individual case it does not produce substantial integration, school officials will be required to employ other methods. The court concluded that in effecting a unitary system the courts should cooperate with the coordinate branches of government and as a minimum standard apply the HEW guidelines. The court was careful to point out, however, that judicial responsibility was not being shirked, since the HEW guidelines are consistent with the Civil Rights Act of 1964 and satisfy the requirements of the United States Constitution.[20]

---

17. Taylor v. Board of Educ., 191 F. Supp. 181 (S.D.N.Y.), *aff'd*, 294 F.2d 36 (2d Cir.), *cert. denied*, 368 U.S. 940 (1961); *see* Dowell v. School Bd. of Okla., 244 F. Supp. 971, 981 (W.D. Okla. 1965): "The duty to disestablish segregation is clear . . . , where such school segregation policies were in force and their effects have not been corrected."

18. *See* Downs v. Board of Educ., 336 F.2d 988 (10th Cir.), *cert. denied*, 380 U.S. 914 (1964); Bell v. School City, 213 F. Supp. 819 (N.D. Ind. 1963), *aff'd*, 324 F.2d 209 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1964).

19. The defendants relied on a dictum in Briggs v. Elliot, 132 F. Supp. 776, 777 (E.D.S.C. 1955) where the court stated: "The Constitution, in other words does not require integration. It merely forbids discrimination."

20. A slightly modified decree was attached to the opinion. Note 5 *supra*. Judge Coleman wrote a separate concurring opinion in which he asserted that "the true answer remains [in disestablishing segregation], give him [the Negro student] absolute freedom of choice and see to it that he gets that choice in absolute good faith." United States v. Jefferson County Bd. of Educ., 380 F.2d 385 (5th Cir. 1967). Three judges dissented, in separate opinions, taking the position that the de facto-de jure distinction is improperly made, that genuine freedom of choice is

Although it may be said that the instant case is far reaching in its result, a close analysis suggests that this may not be the actual effect. The *Singleton*[21] case had already established the HEW guidelines as the minimum standard for courts to apply in evaluating school desegregation plans and indicated that more stringent measures may be required if necessary to vindicate constitutional rights. Certainly a similar announcement by the present decision should come as no great surprise. The holding that school authorities have an affirmative duty to achieve integration is not new when applied to instances of de jure segregation,[22] although it is true that contrary holdings have been announced in other circuits in cases of de facto segregation.[23] To the extent that the de facto-de jure distinction is accepted the decision seems to have added nothing new to the law regarding school desegregation. However, if the distinction proves to have been improperly made, then a double constitutional standard will indeed apply in various parts of the country.[24] As pointed out by Judge Coleman in his concurring opinion,[25] the decision might also be criticized for imposing an affirmative duty on school officials to integrate and at the same time preventing them from influencing a student's free exercise of choice. However, this interpretation seems to overlook the majority's point that the official's duty is not necessarily to make a freedom of choice plan produce integration, but that it is to employ some other method if the choice system fails to bring that result. It is in this sense that the decision is significant. Thus school authorities cannot satisfy constitutional requirements by implementation of an ineffective freedom of choice plan. Officials must insure that dual systems are abolished either by removing all impediments which obstruct the making of a truly free choice or by employing some other method to achieve integration. The majority noted that

---

the proper solution to end racial discrimination and not compulsory integration, that the applicability of the HEW guidelines in all cases is questionable, and that district judges are left with too little discretion to formulate standards. Judge Gewin stated: "The Negro children in Cleveland, Chicago, Los Angeles, Boston, New York, or in any other area of the nation which the opinion classifies under *de facto* segregation, would receive little comfort from the assertion that the racial makeup of their school system does not violate their constitutional rights because they were born into a *de facto* society, while the exact same racial makeup of the school system in the 17 Southern and border states violates the constitutional rights of their counterparts, or even their blood brothers, because they were born in a *de jure* society . . . . Basically, all of them must be given the same constitutional protection."

21. Singleton v. Jackson Municipal Separate School Dist., 355 F.2d 865 (5th Cir. 1966).

22. Cases cited note 17 *supra.*

23. Cases cited note 18 *supra.*

24. *Id.* In both cases cited the Supreme Court denied certiorari, and on April 17, 1967, refused to delay enforcement of the decree of the Court of Appeals in the present case. The decision was handed down without explanation.

25. United States v. Jefferson County Bd. of Educ., 380 F.2d 385 (5th Cir. 1967).

"a freedom of choice plan is but one of the tools available to school officials *at this stage* of the process of converting the dual system of separate schools for Negroes and whites into a unitary system."[26] Certainly this language foreshadows a changing process of public school integration. It is possible that future desegregation plans will be based entirely on geographical attendance areas, with public school students having no choice but to attend the school nearest their place of residence. The drawing of school district boundaries would have to be accomplished upon some fair and impartial basis to avoid re-segregation of the races. This appears to be the obvious solution in cases of de jure segregation.[27]

Constitutional Law–Citizenship–Stripping Congress of Its Right To Expatriate

In 1950 petitioner, a naturalized American citizen,[1] traveled to Israel where he voluntarily voted in a 1951 election for the Israeli Knesset.[2] The Department of State thereafter refused to grant a renewal of his United States passport on the ground that he had lost his American citizenship by virtue of section 401(e) of the Nationality Act of 1940 which provides that a United States citizen shall "lose" his citizenship if he votes "in a political election in a foreign state."[3] Petitioner brought an action for declaratory judgment alleging that section 401(e) violated the due process clause of the fifth amendment and the citizenship clause of the fourteenth amendment.[4] The District Court[5] granted summary judgment for the government and the Court of Appeals for the Second Circuit[6] affirmed. On writ of certiorari the United States Supreme Court, *held*, reversed. Under the fourteenth

26. *Id.*

27. It is interesting to note that the Fourth Circuit recently directed its district courts to take notice of the present holding in regard to faculty integration. Bowman v. County School Bd. ____ F.2d ____ (4th Cir. 1967).

1. Petitioner was born in Poland in 1893, emigrated to the United States in 1912, and became a naturalized citizen in 1926.

2. The legislative body of Israel.

3. The Act states in relevant part: "A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by: . . . (e) Voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory." 54 Stat. 1168 (1940) (now Immigration and Nationality Act of 1952, 8 U.S.C. § 1481 (1964)).

4. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States . . . ."

5. 250 F. Supp. 686 (S.D.N.Y. 1966).

6. 361 F.2d 102 (2d Cir. 1966).

amendment the federal government has no power to expatriate a person without his consent by means of a statute providing that a citizen should lose his citizenship for voting in a political election in a foreign state. *Afroyim v. Rusk,* 387 U.S. 253 (1967).

In 1940 Congress enacted a sweeping revision of the nationality laws,[7] and expanded the provisions for expatriation[8] by specifying certain acts which, if performed voluntarily, would result in loss of citizenship. The Supreme Court upheld the validity of section 401(e) of the 1940 Act in *Perez v. Brownell,*[9] stating that withdrawal of citizenship is "reasonably calculated to effect the end that is within the power of Congress to achieve."[10] The Court reasoned as follows: Congress has implied power to deal with foreign affairs as an indispensable attribute of sovereignty; this implied power, plus the necessary and proper clause, empowers Congress to regulate voting by American citizens in foreign elections; and, involuntary expatriation is within the "ample scope" of "appropriate modes" Congress can adopt to effectuate its general regulatory powers.[11] Dissenting from the *Perez* decision, Mr. Chief Justice Warren argued that, although the citizen has the right voluntarily to renounce his citizenship, the government was born of its citizens, and is without power to sever the relationship that gives rise to its existence.[12] In a companion case, *Trop v. Dulles,*[13] which dealt with the war power of Congress to expatriate military deserters, the Court held section 401(g) of the Nationality Act of 1940[14] unconstitutional. There was no majority opinion in *Trop* but the four justices who dissented in *Perez* agreed that the government is without the power to take one's citizenship away, and that deprivation of citizenship

7. Nationality Act of 1940. This Act has been modified and re-enacted as the Immigration and Nationality Act of 1952, 8 U.S.C. § 1481 (1964).

8. Act of March 3, 1865, ch. 79, § 21, 13 Stat. 490; Citizenship Act of 1907, ch. 2534, §§ 2-3, 34 Stat. 1228.

9. 356 U.S. 44 (1958) (5-4 decision).

10. *Id.* at 60.

11. *Id.* at 57-60.

12. *Id.* at 64-66 (dissenting opinion). Chief Justice Warren also acknowledged that "actions in derogation of undivided allegiance to this country" have "long been recognized" to result in expatriation. "Any action by which a citizen manifests allegiance to a foreign state may be so inconsistent with the retention of citizenship as to result in the loss of that status." *Id.* at 68. He argued, however, that the connection between voting in a foreign political election and abandonment of citizenship was not sufficient to support a presumption that the citizen had renounced his nationality. *Id.* at 76.

13. 356 U.S. 86 (1958) (5-4 decision).

14. "A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by: . . . (g) Deserting the military or naval service of the United States in time of war, provided he is convicted thereof by a court martial." (now § 349(8) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1481 (1964)).

in this situation is a "cruel and unusual" punishment in violation of the eighth amendment.[15] Since 1958 the Court has consistently invalidated on a case-by-case basis various other statutory sections providing for involuntary expatriation, but on each occasion it has failed to define Congress' constitutional power in this area. In the first instance the Court avoided the question of Congressional power and based its decision on the ground that expatriation is a punishment and the defendant had not been afforded the procedural safeguards guaranteed by the fifth and sixth amendments.[16] In the second case the Court recognized the power of Congress to expatriate but declared that in this instance withdrawal of citizenship was not reasonably calculated to effect the end that is within the power of Congress to achieve.[17] In a 1964 decision an equally divided Court upheld a statute which expatriated a citizen who served in the armed forces of a foreign state.[18]

In the instant case the Court overruled *Perez*[19] and appeared to adopt the view set forth in Mr. Chief Justice Warren's dissent in that case.[20] The Court declared that "in our country the people are sovereign and the government cannot sever its relationship to the people by taking away their citizenship."[21] Aside from the fourteenth amendment, "the Constitution . . . grants Congress no express power to strip people of their citizenship, whether in the exercise of the implied power to regulate foreign affairs or in the exercise of any specifically granted power."[22] In addition, the Court noted that, before the adoption of the fourteenth amendment, views were ex-

15. The difference in result in this case was due to Mr. Justice Brennan's concurring opinion in which he stated that war power, unlike foreign affairs power, did not justify a deprivation of citizenship.

16. Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), which invalidated § 401(j) of the Nationality Act of 1940 and § 349(a)(10) of the Immigration and Nationality Act of 1952 providing for denationalization of persons who leave the country in time of war or national emergency in order to evade the draft.

17. Schneider v. Rusk, 377 U.S. 163 (1964), which invalidated § 352(a)(1) of the Immigration and Nationality Act of 1952 providing for denationalization of a naturalized citizen who returns to the country of his origin and remains for more than three years.

18. Marks v. Esperdy, 315 F.2d 673 (2d Cir. 1963), *aff'd per curiam*, 377 U.S. 214 (1964) (Mr. Justice Brennan took no part in decision).

19. As the dissent noted, the Court failed almost entirely to dispute the reasoning in *Perez*. Afroyim v. Rusk, 387 U.S. 253, 268 (1967) (dissenting opinion) (5-4 decision).

20. The Court intimated, but did not expressly declare, that it adopted the reasoning of the dissent of the Chief Justice in *Perez*. 387 U.S. at 267. *See* Perez v. Brownell, 356 U.S. 44, 79 (dissenting opinion of Mr. Justice Douglas); Trop v. Dulles, 356 U.S. 86, 91 (part I of the Court's opinion); Nishikawa v. Dulles, 356 U.S. 129, 138 (concurring opinion of Mr. Justice Black).

21. 387 U.S. at 257.

22. *Id.*

pressed in Congress[23] and by the Supreme Court[24] that under the Constitution the government had no power to specify acts which, if performed voluntarily, would result in the loss of citizenship. Although aware that these legislative and judicial statements might be regarded as inconclusive and must be considered in their historical context, the Court determined that any doubt as to the power of Congress prior to the passage of the fourteenth amendment should have been removed by the unequivocal terms of the amendment itself. Recognizing that the undeniable purpose of the fourteenth amendment was to make citizenship of Negroes permanent and secure, the Court stated that this purpose would be frustrated by holding that the government could expatriate a citizen without his consent by simply proceeding to act under an implied general power to regulate foreign affairs. The Court, therefore, declared that the fourteenth amendment defined "a citizenship which a citizen keeps unless he voluntarily relinquishes it,"[25] and concluded that section 401(e) of the Nationality Act of 1940 was unconstitutional.

In this case the Court not only invalidated section 401(e) of the 1940 Act but also took the opportunity afforded by the case to declare in broad terms the limits on Congress' constitutional powers to expatriate a citizen. By adopting the viewpoint that the withdrawal of citizenship was not reasonably calculated to effect the end which was in the power of Congress to achieve[26] the Court could have nullified section 401(e) and left the remainder of the Act intact. Instead, the decision has effectually invalidated all but section 401(f) of the Nationality Act of 1940 (which provided that a citizen shall "lose" his nationality by "making a formal renunciation" of it).[27] Although the opinion states that a citizen has "a constitutional right

23. On three occasions, in 1795, 1797 and 1818, Congress considered and rejected proposals to enact laws which would describe certain conduct as resulting in expatriation. *Id.* at 257. The Court, however, made little mention of a proposed thirteenth amendment in 1810 which was accepted by both Houses, and subsequently obtained the approval of all but one of the requisite number of states. It provided that any citizen who accepted a title of nobility, pension, or emolument from a foreign state, or who married a person of royal blood, should "cease to be a citizen of the United States." Roche, *The Expatriation Cases,* 1963 Sup. Ct. Rev. 325, 335. Also no mention was made of § 14 of the Wade-Davis bill, 6 Richardson, Messages and Papers of the Presidents 226 (1899), or the Enrollment Act of 1865, 13 Stat. 490, which specified acts which if performed voluntarily would result in expatriation. The former was passed by both Houses; but not signed by President Lincoln before the adjournment of Congress, and thus failed to become law.

24. Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 827 (1824) (dictum).

25. 387 U.S. at 262.

26. Schneider v. Rusk, *supra* note 17.

27. "A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by: . . . (f) Making a formal renunciation of nationality before a diplomatic or consular officer of the United States in foreign state, in such form as may be prescribed by the Secretary of State." (now §§ 349(6)-(7) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1481 (1964)).

to remain a citizen in a free country unless he voluntarily relinquishes that citizenship,"[28] it does not articulate standards for determining what constitutes voluntary renunciation. The term "voluntary" has been employed to describe both a specific intent to renounce citizenship[29] and the uncoerced commission of an act conclusively deemed by law to be relinquishment of citizenship.[30] In the first instance the right may be voluntarily relinquished or abandoned only by express language or by language and conduct that conclusively show a subjective intent to renounce citizenship. Under the latter view a competent adult may lose his citizenship by voluntarily and knowingly performing a specific overt act, with notice of the resulting loss, regardless of the undisclosed intention of the person doing it. Although it has not stated this explicitly, the Court appears to have rejected the objective view. Whether the right has been voluntarily relinquished is now a question which must be determined on the facts of each case after a judicial trial in full conformity with the Bill of Rights. Although Congress may provide rules of evidence for such trials, it cannot declare that such equivocal acts as service in a foreign army, participation in a foreign election or desertion from our armed forces, establish conclusively an intention to throw off American nationality.[31] In essence the test to be applied becomes subjective, with the practical result being that a citizen cannot lose his citizenship unless he actually desires to give it up.

The step taken by the Court might seem shocking in a country where citizens are quick to protest actively governmental action, especially in the area of foreign affairs. It will permit a citizen to participate in the affairs of a foreign state, either internally or externally. More importantly it means that a citizen who commits an act of treason against or attempts by force to overthrow the United States may, despite his actions, retain his citizenship. The ultimate effect, however, should not prove unsettling, for the government still retains other methods by which to regulate the areas over which it was given control. For example, at present expatriation is only an additional penalty given to a person, who is convicted by court martial or by a court of competent jurisdiction of desertion during time of war, leaving the country to avoid the draft, or treason.[32] This decision strips the government only of the power to deprive the citizen of the basic right from which his constitutional rights are derived.

28. 387 U.S. at 268.

29. Nishikawa v. Dulles, 356 U.S. 129, 139 (1958).

30. Savorgnan v. United States, 338 U.S. 491, 497, 499-500 (1950); MacKenzie v. Hare, 239 U.S. 299, 311-12 (1915).

31. Of course such conduct may be highly persuasive evidence in the particular case of an intent to abandon citizenship.

32. Expatriation, however, was the sole consequeuce of performing such acts as entering or serving in the armed forces of a foreign state or voting in a political election in a foreign state.

Constitutional Law–State Constitutional Amendment Guaranteeing Discretion to Seller of Real Estate Violates Fourteenth Amendment

The California Constitution was amended in 1964 by an initiated measure submitted to the people as Proposition 14, and passed by a two-thirds majority.[1] The amendment became article I, section 26 of the state constitution, and provided in part that, with an exception for state owned property, "[n]either the state nor any subdivision or agency thereof shall deny, limit, or abridge . . . the right of any person . . . to decline to sell, lease or rent [his real] property to such person or persons as he, in his absolute discretion, chooses."[2] The amendment in effect repealed the Unruh[3] and Rumford[4] Acts, which had prohibited private discrimination in housing. Respondent, a Negro, sought an injunction and damages against petitioner, a landlord, for the latter's refusal to rent him an apartment solely on the basis of his race. The trial court granted petitioner's motion for summary judgment on the ground that the Unruh Act, upon which respondent relied, was rendered null and void by the adoption of the new amendment. The Supreme Court of California reversed[5] on the ground that section 26 was void as contrary to the equal protection clause of the fourteenth amendment to the United States Constitution.[6] On certiorari to the United States Supreme Court, *held,* affirmed. A state constitutional amendment which, in effect, repeals laws prohibiting

---

1. The vote was 4,526,460 to 2,395,747. Mulkey v. Reitman, 64 Cal. 2d 529, 545, 413 P.2d 825, 836, 50 Cal. Rptr. 881, 892 (1966).

2. The amendment goes on to define "person," excluding any state agency; "property," excluding public accommodations such as hotels, motels, or other establishments catering to transient guests; and it concludes with a severability clause. This severability clause was deemed inadequate to rescue the amendment. *Id.* at 544-45, 413 P.2d at 835-36, 50 Cal. Rptr. at 891-92.

3. Cal. Civ. Code §§ 51-52 (West Supp. 1966), reads in relevant part as follows: "All persons within the jurisdiction of this state are free and equal, and no matter what their race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." Section 52 prescribes criminal penalties for violations of the preceding section.

4. Rumford Fair Housing Act, Cal. Health & Saf. Code §§ 35700-44 (West 1967), prohibiting racial discrimination in the sale or rental of any private dwelling containing more than four units, superseding the Hawkins Act, Cal. Health & Saf. Code §§ 35700-41 (1959), prohibiting racial discrimination in publicly assisted housing.

5. Mulkey v. Reitman, 64 Cal. 2d 529, 413 P.2d 825, 50 Cal. Rptr. 881 (1966).

6. The California court held that tested by the milieu in which it would operate and by its "immediate objective," "ultimate impact," and "historical context," the amendment tended to encourage racial discrimination in violation of the fourteenth amendment. In finding the requisite presence of state action, the California court held that although the amendment was adopted by the people through an initiated ballot, the people were no less a state agency than the legislature or the courts in this case. *Id.*

private discrimination in housing, and thereby places the state in an ostensibly neutral position regarding such discrimination, constitutes a sufficient authorization by the state of such discrimination to violate the equal protection clause of the fourteenth amendment. *Reitman v. Mulkey,* 387 U.S. 369 (1967).

The fourteenth amendment prohibits racial discrimination only when enforced by the state.[7] The primary questions to be decided are thus the definition of state action and whether state action is present in a given situation. Early cases, such as *McCabe v. Atchison, T. & S.F. Ry.*[8] and *Nixon v. Condon,*[9] involved situations in which it was readily apparent that the states, through legislative enactment, had authorized discrimination in violation of the fourteenth amendment. In *Shelley v. Kraemer*[10] the Supreme Court declared that state judicial enforcement of otherwise private discrimination also constituted state involvement. However, in cases in which state involvement was not so readily apparent the Court has noted that the formulation of a test by which to measure the "non-obvious involvement of the State"[11] is an "impossible task"[12] and that determinations must be made on an ad hoc basis. In *Burton v. Wilmington Parking Authority*[13] the State of Delaware had allowed its private lessee to practice discrimination. The Court there found a significant state involvement, holding that the state had "abdicat[ed] its responsibilities"[14] under the fourteenth amendment "by ignoring them or . . . failing to discharge them."[15] *Burton,* and later *Peterson v. City of Greenville*[16] and *Robinson v. Florida,*[17] took a subtle shift away from the earlier authorities in

---

7. Civil Rights Cases, 109 U.S. 1 (1883).

8. 235 U.S. 151 (1914). In this case the Court held that state statutes authorizing interstate railroads to provide separate and unequal facilities for white and Negro passengers violated the equal protection clause.

9. 286 U.S. 73 (1932). A Texas statute authorizing a political party executive committee to determine voting qualifications in state primary elections was held unconstitutional.

10. 334 U.S. 1 (1948) (state judicial enforcement of racially restrictive covenant violates equal protection clause).

11. Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961).

12. *Id.*

13. 365 U.S. 715 (1961).

14. *Id.* at 725.

15. *Id.*

16. 373 U.S. 244 (1963). In this case, reversing the trespass convictions of Negro civil rights demonstrators, the Court held that since it could not be determined whether a private owner's request to Negroes to leave his property was based on personal choice or on the compulsion of a city ordinance, the state was substantially involved, and had removed the decision for or against segregation from the sphere of private choice.

17. 378 U.S. 153 (1964). Reversing criminal trespass convictions of Negro demonstrators, the Court held that a state policy requiring separate rest room facilities in restaurants catering to both races evidenced a state regulation and involvement sufficient to violate the equal protection clause.

finding an authorization of discrimination, not by affirmative act, but by refusal to act. Thus in *Lombard v. Louisiana*,[18] the city's failure to renounce unofficial statements of city officials concerning their intent to bar integration led the Court to find that the city was affirmatively involved in discrimination. Although the fourteenth amendment does not expressly require the states to seek out and eliminate private discrimination,[19] but rather forbids the states affirmatively to involve themselves, it is clear that the Court has found implied involvement in situations such as *Burton* and *Lombard*. Thus the prohibition placed upon the states by the fourteenth amendment has grown increasingly broad in discrimination cases, moving from affirmative action to the lack of affirmative action in cases where a failure to act amounts to a tacit approval by the state.

Addressing itself to the problems of defining and discovering state involvement in the instant case, the Court noted at the outset that the states are not required to enact sanctions prohibiting private racial discrimination.[20] It further observed that a state which has enacted such legislation may repeal it without violating the fourteenth amendment.[21] However, in underlining the gravity of the amendment's effect, the Court marked a distinction between a legislative repealer and a constitutional amendment with the effect of a repealer. The Court stated that although section 26 is neutral on its face, when viewed in conjunction with its purpose and effect, it has a "wider impact than the mere repealing of the statutes." Rather than erasing a constitutionally optional statute, and thus returning the status quo, the amendment instead was held to announce "[t]he right to discriminate, including the right to discriminate on racial grounds, . . . embodied in the state's basic charter, immune from legislative, executive, or judicial regulation at any level of the state government."[22] In support of its definition of state involvement, the Court approved without comment the California court's finding of no distinction between an act of the legislature and an initiated measure submitted to and passed by the people, holding that the people of the state are as much a state agency as the legislature or the courts.[23] Thus the majority concluded first that, consid-

18. 373 U.S. 273 (1963).

19. *See, e.g.*, Williams v. Howard Johnsons, Inc., 323 F.2d 102 (4th Cir. 1963), in which the court dismissed the damages action of a Negro denied service by the defendant restaurant, stating that "to accept plaintiff's proposition that the failure of the state to provide a remedy for the redress of complaints of deprivation of the equal protection of the law would be totally to emasculate existing case law." *Id.* at 106.

20. 387 U.S. at 374-75.

21. *Id.* at 376.

22. *Id.* at 377.

23. Although the Court did not expressly adopt the reasoning of the California court on this point, the decision could have been reached by no other means. Shelley v.

ering the weight which a constitutional amendment carries, in contrast to that of a statute, and the practical roadblocks to its repeal, the adoption of section 26 imputes to the state "affirmative action designed to make private discrimination legally possible."[24] In addition, the Court concluded that although the amendment was neutral on its face, weight must be given to its effect, as determined by the surrounding circumstances, and that, viewed in this light, section 26 would tend to "encourage and significantly involve the state in private discrimination."[25] Justice Harlan, dissenting,[26] argued that there was no distinction between legislative and constitutional repeal of optional statutes, and that there was especially no basis for such a distinction here, since section 26 was neutral on its face. The dissent further took issue with the majority's approach, by which it examined not the existing laws alone, but the ultimate impact of section 26 on the California environment, supported in the record only by facts "found"[27] by the California Supreme Court.

The instant decision represents a significant extension of the state involvement principle to the passage of a state constitutional amendment which, rather than affirmatively encouraging discrimination, makes private discrimination legally possible. In finding the requisite state involvement, it is particularly significant that the Court chose to adopt the reasoning of the California court in which the overall character of the California political and sociological climate[28] was examined in determining that section 26 would, and was

---

Kraemer, 334 U.S. 1 (1948), which could easily have been held dispositive of the instant case, was not relied on at all. The logical implication of that decision is to allow relief from any private discrimination merely by attacking it in a state court; once on record as approving private discrimination, the state court has placed the state's authority behind the decision, just as § 26 places the state's authority behind the right therein set out. However, since the Court refused to follow *Shelley*, they must have accepted the California Supreme Court's definition of the state agency involved in the instant case to support their further reasoning as to the effect of the amendment.

24. 387 U.S. at 375. The Court referred to Hill v. Miller, 64 Cal. 2d 757, 413 P.2d 852, 50 Cal. Rptr. 908 (1966), decided the same day as Mulkey v. Reitman, 64 Cal. 2d 529, 413 P.2d 825, 50 Cal. Rptr. 881 (1966), to illustrate the discriminatory effect of § 26, regardless of its apparent neutrality. In that case a Negro tenant sued to restrain an eviction from a leased, single family dwelling. The notice to quit served on him by the owner expressly recited: "The sole reason for this notice is that I have decided to exercise the right conferred on me by Article I, Section 26, California Constitution, to rent said premises to members of the Caucasian race."

25. 387 U.S. at 376.

26. Justice Harlan was joined by Justices Black, Clark and Stewart.

27. 387 U.S. at 387.

28. "A state enactment cannot be construed for purposes of constitutional analysis without concern for its immediate objective . . . and for its ultimate effeet. . . . To determine [its] validity . . . it must be viewed in light of its historieal eontext and the conditions existing prior to its enactment." 64 Cal. 2d at 533-34, 413 P.2d at 828, 50 Cal. Rptr. at 884. Among sueh prior conditions, of course, was the existence of the Rumford and Unruh Aets.

intended to, create an atmosphere conducive to discrimination. Although there was certainly state action in the mechanics of the electoral process, in which the state provided ballots and polling places and certified the votes, the Court chose rather to find state involvement primarily in the potentially discriminatory effect of the amendment. It is significant that the Court considered the *prospective effect* of an amendment neutral on its face in order to discover state involvement in private discriminatory conduct. Tenuous as this ground for the holding may be, this is not to suggest that the Court has overstepped its bounds, but rather that it has chosen to face more realistically the operative facts of the case.[29] Section 26 is certainly ambiguous, and could be interpreted as either a mere reiteration of the privilege to discriminate privately or as an affirmative announcement that the state will not interfere in, and thus will encourage discrimination.[30] However, even the former interpretation, when viewed in light of the use to which the Court finds the measure will be put, presents state involvement by placing the power of the state behind those who would discriminate under it.

Criminal Law–The "Mere Evidence" Rule Is Expressly Abolished

In "hot pursuit" of an armed robber, police entered, with permission, the residence of the defendant.[1] While searching the basement for the suspect one officer discovered a jacket and trousers which fit the description given by witnesses of the clothes worn by the robber. The clothes were seized and introduced into evidence against the defendant and he was convicted. Defendant contended that the seized clothing was improperly admitted in evidence because the items had

29. On this point Mr. Justice Douglas, in his concurring opinion, quoted from 5 WRITINGS OF JAMES MADISON 272 (Hunt ed. 1904): "In our Government the real power lies in the majority of the Community, and the invasion of private rights is *chiefly* to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is a mere instrument of the major number of the Constituents." 387 U.S. at 387.

30. In support of the Court's finding that section 26 would tend to promote discrimination, it is interesting to note the word "decline" in the amendment, thereby comprehending the discriminatory corollary of free choice on its face, rather than attempting to avoid the issue by omitting the word, and leaving the amendment more arguably neutral, while accomplishing the same purpose.

1. These are the circumstances from which the Court found a "hot pursuit" situation: Two cab drivers, attracted by shouts of "holdup," followed the defendant to his residence. This information was relayed to the police who were proceeding to the scene of the robbery. Within minutes police arrived at the house in a number of patrol cars. An officer knocked and announced their presence. The wife of the defendant answered and offered no objection to their request to search the house.

"evidential value only" and therefore were not lawfully subject to seizure.[2] After unsuccessful state court proceedings,[3] the defendant was denied federal habeas corpus relief in the United States District Court of Maryland. The Court of Appeals for the Fourth Circuit followed the "mere evidence" rule[4] and reversed, though recognizing the validity of the search.[5] On certiorari to the United States Supreme Court, *held*, reversed. The fourth amendment[6] is not violated by the seizure of items of "evidential value only" when there is probable cause to conduct a search and it is reasonable to believe that such evidence will result in conviction of the suspect. *Warden v. Hayden*, 387 U.S. 294 (1967).

In *Gouled v. United States*[7] the Supreme Court established the "mere evidence" rule, holding that search warrants "may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding. . . ."[8] In setting out the rule the Court relied primarily on the fourth amendment, but declared that the admission in evidence of a paper so obtained compelled a person to be a witness against himself in violation of the fifth amendment. The Court held the seizure of the defendant's papers to be unreasonable because of the purpose for which they were seized (mere evidence) and concluded that to permit their use in evidence would compel the defendant to become a witness against himself. This intertwining of the protections of the fourth and fifth amendments to establish a rule against the seizure of merely evidentiary material evolved from *Boyd v. United States*.[9] In *Boyd* the Court recognized

2. Defendant's claim is based on what is generally referred to as the "mere evidence" rule. Essentially, the rule is that during a search items may not be seized from an individual "solely for use as evidence of crime." United States v. Lefkowitz, 285 U.S. 452, 464 (1932).

3. Defendant did not appeal from his conviction. He first sought relief by an application under the Maryland Post Conviction Procedure Act which was denied without hearing. The Maryland Court of Appeals reversed and remanded for a hearing. Hayden v. Warden, 233 Md. 613, 195 A.2d 692 (1963). The trial court denied relief after the hearing, concluding "that the search of his home and seizure of the articles in question were proper." 387 U.S. at 296 n.2.

4. *See* note 2 *supra*.

5. The Court of Appeals believed Harris v. United States, 331 U.S. 145 (1947), sustained the validity of the search. There the Court upheld an intensive five-hour search (subsequent to arrest) which turned up "instrumentalities of crime" (draft cards, the possession of which was a federal offense) as a proper search incidental to an arrest.

6. U.S. CONST. amend. IV: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

7. 255 U.S. 298 (1921).

8. *Id.* at 309.

9. 116 U.S. 616 (1886).

that the constitutional privilege against self-incrimination had been denied the defendant when he was compelled to produce invoices showing the quantity and value of glass allegedly fraudulently imported into the United States. The opinion, however, made reference to the violation of both the fourth and fifth amendments,[10] enabling the Court in *Gouled* to use *Boyd's* fourth amendment rationale to establish the "mere evidence" rule. In *Harris v. United States*[11] Mr. Chief Justice Vinson delineated the boundaries of the rule in distinguishing between merely evidentiary materials which may not be seized and instrumentalities of crime, fruits of crime, weapons to aid escape and contraband which may be seized.[12] Blood was the subject of the search in *Schmerber v. California*.[13] There the Court held that the fifth amendment privilege ". . . protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature, and that the withdrawal of blood and use of the analysis in question in this case did not involve compulsion to these ends."[14] The evidence (blood) did not fit the technical classifications of fruits or instrumentalities of crime or contraband. By recognizing that the blood was taken only for its evidential value, and by finding that the taking of the blood involved a search and seizure within the meaning of the fourth amendment, the Court thus removed fourth amendment support for the "mere evidence" rule. By finding blood non-testimonial or non-communicative the Court, in effect, withdrew fifth amendment support for the rule as well, at least as applied to cases involving an intrusion on the physical body. Clothing was dealt with in *Holt v. United States*,[15] where a prisoner was forced to put on a blouse to see if it fit him. The Court reeognized that the fifth amendment privilege against self-incrimination was limited to evidence of a communicative or testimonial nature, Mr. Justice Holmes stating that "the prohibition . . . is . . . of the use of physical or moral compulsion to extort communications from . . . [the defendant], not an exclusion

10. "Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment. In this regard the Fourth and Fifth amendments run almost into each other." *Id.* at 630. "And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself." *Id.* at 633.

11. 331 U.S. 145 (1947).

12. *Id.* at 154. The rule is often stated fruits, instrumentalitics and contraband, including weapons in the category of instrumentalities.

13. 384 U.S. 757 (1966).

14. *Id.* at 761.

15. 218 U.S. 245 (1910).

of his body as evidence when it may be material."[16] However, no unanimity of opinion has prevailed regarding the classification of articles of clothing; cases have inconsistently held clothing to constitute mere evidence of criminal activity[17] or instrumentalities of the crime.[18]

The Court in the instant case found that the circumstances created a "hot pursuit" situation which made possible a valid search without a warrant.[19] By determining that clothing was not "testimonial" or "communicative" in nature, the Court concluded that the fifth amendment did not apply. Pointing out that there is nothing in the language of the fourth amendment to support a distinction between "mere evidence" and instrumentalities, fruits of crime or contraband, the Court reasoned that privacy is disturbed no more by a search directed to a purely evidentiary object than it is by a search directed to an instrumentality, fruit or contraband. But, "[t]here must, of course, be a nexus . . . between the item to be seized and criminal behavior."[20] The Court said that *Schmerber* settled the proposition that it is reasonable, within the terms of the fourth amendment, to conduct otherwise constitutionally permissible searches for the purpose of obtaining evidence which would aid in apprehending and convicting criminals. The majority felt the probable cause and particularity requirements of the fourth amendment and the intervention of a "neutral and detached magistrate . . ."[21] would provide adequate protection from intrusions upon privacy. In a separate opinion Mr. Justice Fortas opposed repudiation of the "mere evidence" rule, believing it was needed to protect fourth amendment prohibition against general searches, but concurred in the decision on the ground that identifying clothing worn in commission of a crime and seized during "hot pursuit" is within the principle and spirit of the "hot pursuit" exception to the search warrant requirement.[22]

16. *Id.* at 252-53.

17. In United States v. Richmond, 57 F. Supp. 903, 907 (S.D.W. Va. 1944), the seizure of articles of clothing was held improper because they were "innocent" in nature and lawfully in defendant's possession. In La Rue v. State, 149 Tex. Crim. 598, 197 S.W.2d 570 (1946), blood spattered clothing was held to be mere evidence of criminal activity, and therefore inadmissible.

18. In United States v. Guido, 251 F.2d 1 (7th Cir.), *cert. denied*, 356 U.S. 950 (1958), shoes were held to be instrumentalities since they facilitate escape. In Morton v. United States, 147 F.2d 28 (D.C. Cir.), *cert. denied*, 324 U.S. 875 (1945), blood stained clothing was allowed to be taken from accused's closet and introduced in evidence at a murder trial.

19. McDonald v. United States, 335 U.S. 451 (1948). ". . . the exigencies of the situation made that course imperative." *Id.* at 456.

20. 387 U.S. at 307.

21. Johnson v. United States, 333 U.S. 10, 14 (1948).

22. Mr. Justice Douglas, in a lengthy dissent, renewed his opposition to the *Schmerber* decision by reiterating that "[t]hat which is taken from a person without his consent and used as testimonial evideuce violates the fifth amendment." 387 U.S. at 320.

The Court's abolishment of the "mere evidence" rule should boost the effectiveness of law enforcement without any concomitant sacrifice of the individual's right to privacy. So long as the search is reasonable, which the fourth amendment requires regardless of what is found, a person's privacy is invaded no more by the discovery of clothing than by the discovery of "fruits, instrumentalities or contraband."[23] In short, the "mere evidence" rule afforded no protection against exploratory searches by police and served as nothing more than an illogical impediment to the gathering and use of relevant evidence,[24] reasonably seized, which was not barred if a "fruit, instrumentality or contraband," but was barred if of "evidential value only." Consequently, courts now will be relieved of the necessity of fitting items of material evidence into one of these previously excepted categories. With this enlargement of the scope of what may be searched for, the probable cause[25] and particularity requirements assume increasingly important roles, especially in "hot pursuit" situations. Since the officer in a "hot pursuit" search and seizure has not identified with particularity the items for which he will search and seize, and thus is not restricted by a warrant, the probable cause and particularity requirements must, in retrospect, be stringently applied to prevent police officers from rummaging through a suspect's home and personal belongings merely in hopes of finding incriminating evidence.[26] The holding here eliminates a source of much confusion and inconsistency, and, in effect, removes from the courts a sanctuary for the guilty. But the decision must be viewed with cautious alarm. Now, it appears, an officer acting legitimately without a warrant will have a broader capacity to search and seize than if he had a warrant, since in order to satisfy the fourth amendment an officer acting with a warrant must describe with particularity what he intends to seize. This is in direct opposition to the Court's traditional position of looking with disfavor upon warrant-

23. "The rationale most frequently suggested for the rule preventing the seizure of evidence is that 'limitations upon the fruit to be gathered tend to limit the quest itself.' . . . But privacy 'would be just as well served by a restriction on search to the even-numbered days of the month . . . And it would have the extra advantage of avoiding hair-splitting questions . . . .'" *Id.* at 309.

24. The accused himself established the relevancy of the clothing in this case by taking them off and putting them in the washing machine in the basement.

25. "[I]n the case of 'mere evidence' probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction. In so doing, consideration of police purposes will be required. *Cf.* Kreman v. United States, 353 U.S. 346 [1957]. [Here] . . . police . . . could reasonably believe that the items would aid in identification of the culprit." 387 U.S. at 307.

26. Albert R. Turnbull, counsel for the defendant, believed the readiness of the Court to create a "hot pursuit" search from the facts here may in the long run prove to be the most important aspect of the case. Letter from Albert R. Turnbull to VANDERBILT LAW REVIEW, June 29, 1967.

less searches.[27] Such approval of a more or less general search and seizure, plus the Court's readiness to identify the factual situation here as "hot pursuit," may be an indication of a new willingness on the part of the Court to come to the assistance of "good faith" law enforcement.

27. "In Jones v. United States, 362 U.S. 257, 270 [(1960)], this Court, strongly supporting the preference to be accorded searches under a warraut, indicated in a doubtful or marginal case a search under a warraut may be sustainable where without one it would fall. In Johnson v. United States, 333 U.S. 10 [(1948)], and Chapman v. United States, 365 U.S. 610 [(1961)], the Court, in condemning searches by officers who invaded premises without a warrant, plainly intimated that had the proper course of obtaining a warrant from a magistrate been followed and had the magistrate on the same evidence available to the police made a finding of probable cause, the search under the warraut would have been sustained." United States v. Ventresca, 380 U.S. 102, 106 (1965).