

October 1966

Constitutional and Related Public Law Issues in the 1965 Term of the Supreme Court

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [Constitutional Law Commons](#), and the [First Amendment Commons](#)

Repository Citation

Constitutional and Related Public Law Issues in the 1965 Term of the Supreme Court, 8 Wm. & Mary L. Rev. 49 (1966), <https://scholarship.law.wm.edu/wmlr/vol8/iss1/3>

Copyright c 1966 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmlr>

CONSTITUTIONAL ISSUES IN THE 1965 TERM OF THE SUPREME COURT

EDITORIAL STAFF

INTRODUCTION

Thirty-nine cases in the 1965 term of the Supreme Court of the United States touched upon one or more constitutional issues—some of them minor and incidental to the main issues in *Adjudication*, but others contributing significantly to the ongoing dialogue on right of counsel, self-incrimination, First Amendment freedoms, civil liberties and due process.

Thus defined, the cases appearing in the following digest fall into three broad categories: (1) sixteen cases concerning questions of self-incrimination, right of counsel, and due process or jurisdictional questions in either civil or criminal law; (2) twelve cases relating to civil liberties and voting rights, integration and reapportionment; and (3) eleven cases touching upon personal freedoms generally.

In future editions of this annual summary, it is anticipated that the subjects covered will extend to include such related public law issues as anti-trust, trade regulation and interstate commerce; the general powers of government in reference to administrative processes, legislation and state-federal relations; and labor relations law. Tax law, for the most part, will be treated in another quarterly issue of the *Law Review* which is devoted exclusively to that specialty.

The purpose of the index-digest which follows is to provide the student or the practitioner with a summary of these cases as classified under the foregoing broad headings. The constitutional issue touched upon in each case is abstracted in proportion to its importance to the central issue of the case; where the specific case is the subject of an article or student comment elsewhere in the present issue, there is a cross-reference and a corresponding reduction in editorial treatment in the digest. The thirty-nine federal decisions thus treated will, it is hoped, help to give some perspective to the constitutional law of the United States as it has developed in the latest term of the Court.

1. *Self-Incrimination, Right of Counsel, Due Process and Jurisdictional Issues*

ALBERTSON AND PROCTOR v. SUBVERSIVE ACTIVITIES CONTROL BOARD, 382 U. S. 70, 86 S. Ct. 194, 15 L. Ed. 2d 165, 34 Law Wk. 4014. Docket No. 3. Nov. 15, 1965. Am. Civ. Lib. Union and Nat. Law. Guild, *amici curiae*. On certiorari to U. S. Ct. App. for D. C., 118 U.S. App. D. C. 117, 332 F. 2d 317 (1964). Brennan, J., for the Court; Black, Clark, JJ., concurring; White, J., did not participate in the decision.

The practical enforceability of the Subversive Activities Control Act of 1950, 50 U. S. S. C. § 787, has been called into question by this decision, which held (1) that to compel persons to register as members of the Communist Party, on forms which stipulated admission of membership, violated the Fifth Amendment guarantee against self-incrimination; and (2) that the purported immunity clauses of the Act, since they did not preclude use of the registry information, could not save the procedure from constitutional challenge. Although the Court in 1961 upheld the general purposes of the Act in *Communist Party v. United States*, 367 U. S. 1, the subsequent conviction of the party for failure to register under the Act was reversed in 1964, in *Communist Party of the United States v. United States*, 116 U. S. App. D. C. 61, 331 F. 2d 807.

The 1961 decision failed to consider the question of individual party members' liability to self-incrimination. At that time the Court held that the appeal was premature since specific individuals could not be definitely identified as being in constitutional jeopardy. Two of the five-to-four majority in 1961—Justice Frankfurter and Whittaker—are no longer on the bench, but the chief distinguishing element in the present case is the fact that the issue was now ripe for adjudication since specific individuals—Albertson and Proctor—were subject to "onerous and rapidly mounting penalties" without a decision on the merits of their claims of constitutional privilege. In his concurring opinion Justice Clark, a member of the 1961 majority, joined in the reversal because the current registration requirement "directly abridges the privilege . . . against self-incrimination."

Immunity statutes, including Section 4 (f) of the Act of 1950, are notoriously difficult to uphold in the face of a constitutional challenge. Since the 1892 case of *Counselman v. Hitchcock*, 142 U. S. 547, the Court has held that where such a statute "leaves the party or witness subject to prosecution after he answers the criminating question put to

him," it cannot supplant the privilege guaranteed by the Fifth Amendment. In the case of the 1950 Act, 50 U. S. C. § 783 (f), which stipulated that registration should not constitute evidence of a violation of this or any other criminal statute and was not to be received in evidence against such registrant, the Court in its opinion pointed out that this did not preclude use of the information as an investigatory lead, "a use which is barred by the privilege."

Taking the three cases—the two Communist Party cases of 1961 and 1964 and the present case—together, the nullification of any practical governmental capacity to enforce the registration features of the 1950 Act appears to be complete. In 1961 the Court, by the narrowest of majorities, affirmed the statute as a permissible exercise of legislative authority but held—in the opinion by Justice Frankfurter himself—that the question of constitutional privilege was premature so long as there was a possibility that the Communist Party would comply with the registration requirements and thus relieve its individual members or officers of the duty to register. In 1964, the Communist Party having ignored the final registration order, the United States Court of Appeals reversed the party's conviction and ruled that the government must prove that there were persons able and willing to register on behalf of the party. Now, in the *Albertson* case, the Supreme Court finds that such persons are barred from being required to register either on their own behalf or as agents for the party; an administrative finding by the Subversive Activities Control Board that they were in fact party members, for the purpose of compelling them to register for the party, the Court found would in itself seriously impair the constitutional immunity on which the individuals were entitled to rely.

BROOKHART v. JANIS, 382 U. S. 810, 86 S. Ct. 1245, 15 L. Ed. 2d 59, 34 Law Wk. 4221. Docket No. 657. Decided April 18, 1966. On certiorari to Supreme Court of Ohio, 2 Ohio St. 2d 36, 205 N. E. 2d 911 (1965). Black, J., for the Court; Harlan, J., dissenting in part.

There is a presumption against the waiver of constitutionally guaranteed rights, and when a defendant in a criminal case appears not to have intelligently and intentionally waived his right to confront and cross-examine witnesses, the trial court may not deny him this right. In this case, defendant had emphasized in open court that he was not pleading guilty; his counsel, however, advised the court that his client was agreeable to a "prima facie trial," which was a practical equivalent to a guilty

plea. Confrontation of witnesses is guaranteed by the Sixth Amendment and enforceable against the states through the Fourteenth, as asserted in the 1965 case of *Pointer v. Texas*, 380 U. S. 400.

Since the present case turned entirely upon the principle that defendant's counsel can not override his client's desire not to waive his rights, the Court left unanswered the question raised by the *Pointer* case, whether the constitutional principle limits the admissibility of out-of-court statements not subject to cross-examination. Justice Harlan expressed doubt as to whether the defendant, from the record before the Court, had in fact failed to understand the effect of his counsel's statement to the trial court; he conceded, however, that "general unfamiliarity . . . seems to exist with this Ohio 'prima facie' practice."

DEGREGORY V. ATTORNEY GENERAL OF NEW HAMPSHIRE, 382 U. S. 877, 86 S. Ct. 1148, 15 L. Ed. 2d 118, 34 Law Wk. 4345. Docket No. 396. Decided April 4, 1966. On appeal from Supreme Court of New Hampshire, 106 N. H. 262, 209 A. 2d 712 (1966). Douglas, J., for the Court; Harlan, Stewart and White, JJ., dissenting.

That the First Amendment guarantees freedom of silence as well as freedom of speech was reaffirmed in this "third round" of the petitioner's struggle with the New Hampshire Subversive Activities Act of 1951, N. H. Rev. Stat. Ann. c. 533, as amended 1957. The amendment was precipitated by an earlier ruling of the Court that year, that the state's investigatory powers could not be extended to private activities which lacked a sufficient nexus with subversive activities; *Sweezy v. New Hampshire*, 354 U. S. 234. The following year, DeGregory brought the first of his three cases to the Supreme Court, where it was dismissed for want of a substantial Federal question. *DeGregory v. Wyman*, 360 U. S. 717. In 1961 the Court affirmed per curiam the New Hampshire Supreme Court's action upholding the use of the contempt power to compel answer to an inquiry as to present Communist Party membership; *DeGregory v. Attorney General*, 368 U. S. 19.

In the present case, the Court majority declared that when the inquiry extended to associations and activities more than ten years earlier—and substantially after the state six-year statute of limitations for prosecution had run—"the staleness of both the basis for the investigation and its subject matter" brought it into conflict with the First Amendment. The freedom from compulsory speech included in the guarantees of the First Amendment "prevents the Government from using the power to . . . probe at will and without relation to existing need."

Despite continued division of the Court in these cases—seven-to-two, five-to-four and six-to-three—the decisions buttress the fundamental rule that (1) there must be a rational and demonstrable relation between the subject of the public inquiry and the private associations or activities on which information is sought, and (2) the older the information the greater the burden on the investigator to establish its pertinence to present public interest and need. *Watkins v. United States*, 354 U.S. 178 launched this rule (with an eloquent dissent by Mr. Justice Clark) in 1956. In 1958 the Court held that immunity from state scrutiny of records was an enforceable constitutional right when it was fundamentally related to other constitutional rights which the individual was entitled to assert. *N. A. A. C. P. v. Alabama ex rel. Patterson*, 357 U. S. 449. The protection of the due process clause of the Fourteenth Amendment was specifically applied to this issue in *Bates v. Little Rock*, 361 U. S. 516 (1959). Particularly where the information sought is so stale that its only apparent use is to injure a cause which does not enjoy majority approval, it is beyond the reach of the investigatory power. *Gibson v. Florida Legis. Invest. Comm.*, 372 U. S. 539 (1953); and the power of investigation may be exercised by the states only in areas not preempted by the Federal government. *Comm. of Pennsylvania v. Nelson*, 350 U. S. 497 (1955).

DENNIS V. UNITED STATES, 383 U. S. —, 86 S. Ct. 1840, — L. Ed. —, 34 Law Week. 4556. No. 502. June 20, 1966. On certiorari to the U. S. Court of Appeals for District of Colorado, 346 F. 2d 10 (1965). Fortas, J., for the Court; Black and Douglas, JJ., dissenting in part.

The concern of the Court that constitutional safeguards be maintained to prevent criminal investigators from ensnaring the innocent with the culpable, is graphically illustrated in this case. Here the defendants were convicted of conspiracy fraudulently to obtain the services of the National Labor Relations Board. The convictions were upheld by the Court of Appeals and certiorari was limited to three questions: (1) whether the indictment properly stated the offense (affirmed), (2) whether the pertinent section of the Taft-Hartley Act, 29 U. S. C. § 504, is constitutional (affirmed), and (3) whether the trial court erred in denying petitioner's motion for production, for examination, of grand jury testimony of government witnesses (reversed).

While the Court upheld the government on the general constitutional issue—that one charged with misleading the government by false statements has no standing to challenge the constitutionality of the statute he was evading by his falsehood—the majority (including the dissenters, who concurred in the ruling on the third question) substantially bolstered the defendant's rights in its holding on the matter of providing him with full information on the charges he is required to meet. Recognizing "the growing realization that disclosure, rather than suppression, of relevant materials ordinarily promoted the proper administration of criminal justice," the Court upheld the contention that denial of this portion of the grand jury record was reversible error. Citing its 1939 opinion in *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, that "after the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it," the Court pointed to the Congressional enactment of the Jencks Act, 18 U. S. C. § 3500, meeting the issue propounded in *Jencks v. United States*, 353 U. S. 657 (1957), by making available to the defense trial witnesses' pre-trial statements insofar as they relate to his trial testimony. The Court, in its footnote 17, recites corroborating case law and professional commentary.

SCHMERBER v. CALIFORNIA, 383 U.S. —, 86 L. Ed. 1826, — L. Ed. —, No. 658. Decided June 20, 1966. On certiorari to Appellate Division of California Superior Court. Brennan, J., for the Court; Warren, C.J., Black, Douglas and Fortas, JJ., dissenting.

"The scope of the privilege against self-incrimination does not coincide with the complex of values it helps to protect," the Court admitted in affirming, by a five-to-four majority, a ruling that a blood test following an arrest on charge of drunken driving is not inadmissible as a violation of the Fifth Amendment. Two primary concerns of the majority in the present case were to restate the Court's position in the 1956 case of *Breithaupt v. Abram*, 352 U. S. 432, and to reconcile this with some of the implications in *Miranda v. Arizona*, decided the week before the present case (see *infra*). *Breithaupt* had rejected the Fifth Amendment plea by relying on the old case of *Twining v. New Jersey*, 211 U. S. 78 (1908) which had held that the protections of this Amendment did not extend to the states through the Fourteenth. Since this element of *Twining* had been superseded by *Malloy v. Hogan*, 378 U. S. 1 (1963) prohibiting the state from compelling a defendant to "provide

the state with evidence of a testimonial or communicative nature," the Court in *Schmerber* concluded that a blood test was not of this nature, and reaffirmed the rule in *Breithaupt*.

As for the sweeping propositions in *Miranda*, the Court in the present opinion cited Justice Holmes in the 1910 case of *Holt v. United States*, 218 U. S. 245; the Fifth Amendment guarantee against self-incrimination prohibits speech or behavior by the defendant which is compulsory, but did not contemplate "an exclusion of his body as evidence when it may be material." The Court also rejected a Fourth Amendment argument that taking the blood sample amounted to unreasonable search and seizure; the commonplace nature of blood tests in routine clinical examinations, military induction, marriage license applications and college admissions satisfied the majority that no constitutional right had been violated.

TEHAN V. UNITED STATES EX REL. SHOTT, 382 U. S. 406, 86 S. Ct. 459, 15 L. Ed. 2d 453, 34 Law Wk. 4095. No. 52. Decided January 19, 1966. State of California, *amicus curiae*. On certiorari to the U. S. Court of Appeals for Sixth Circuit, 337 F. 2d 990 (1964). Stewart, J., for the Court; Black and Douglas, JJ., dissenting; Warren, C.J., and Fortas, J., did not participate. Vacated and remanded.

Adverse comment by prosecutor or trial judge in defendant's failure to testify in a state criminal proceeding violates federal guarantees against self-incrimination. But this rule is not to be given retroactive application; the Court concluded, thus settling the question raised in *Griffin v. California*, 380 U. S. 609 (1965). The *Griffin* case had struck down a California practice permitting such comment, which had been followed in that state since its 1934 constitution. California, accordingly, filed its amicus brief pointing to the "thousands of convictions" which would be overturned if the *Griffin* rule were to become indefinitely retroactive as suggested by Shott.

The "complex of values" represented broadly by the privilege against self-incrimination was again alluded to by the Court in this opinion (see its footnote 12), and was summarized in the *Griffin* case as the requirement that government, either federal or state, be "compelled to establish guilt by evidence independently and freely secured, and . . . not by coercion." Balancing this, as in *Linkletter v. Walker*, 381 U. S. 618 (1964), the Court held that constitutional law does not automatically

invest with retroactivity a decision which overturns previously established legal doctrine. In the words of Chief Justice Hughes, "the past cannot always be erased by a new judicial declaration." Cf. *Chicot County Drainage District v. Baxter State Bank*, 308 U. S. 371 (1939). The new judicial declarations have come in rapid succession in this subject-area: In 1964 *Malloy v. Hogan*, 378 U. S. 1 overturned a rule in *Twining v. New Jersey*, 338 U. S. 25 (1908) and applied the Fifth Amendment's privilege against self-incrimination to the states through the Fourteenth. In 1961 *Mapp v. Ohio*, 367 U. S. 643 overturned *Wolf v. Colorado*, 338 U.S. 25 (1949) and held inadmissible evidence which was obtained by unconstitutional seizure. *Linkletter* thereafter limited the *Mapp* doctrine as to retroactivity, and *Tehan* now limits the *Griffin* doctrine in the same respect.

See also *Johnson and Cassidy v. New Jersey*, *infra*.

BAXSTROM v. HEROLD, 383 U. S. 107, 86 S. Ct. 760, 15 L. Ed. 2d 620, 34 Law Wk. 4158. No. 219. Decided February 23, 1966. On certiorari to the Court of Appeals of New York, 253 N. Y. S. 2d 1028, 202 N. E. 2d 159 (19). Warren, C.J., for the Court; Black, J., concurring. Reversed and remanded.

Equal protection of the laws, under the Fourteenth Amendment, insures a jury trial for a mentally ill criminal defendant on the question of his sanity, a unanimous Court held in this case. Thus the Court opened a new area of constitutional dialogue concerning guarantees affecting the insane and other incompetents—an almost predictable next step in the steady extension of recent decisions insisting upon full accommodation of the individual's rights in both civil and criminal proceedings.

Petitioner here had been declared mentally ill while serving his sentence following a criminal conviction. As his sentence term was approaching completion, state authorities undertook to insure his continued detention in the hospital to which he had been transferred. Petitioner contended he was denied equal protection of the laws in that he was not afforded a jury review of the question of his sanity as was provided for others in instances of civil commitment to a mental institution. He also insisted that he was entitled to a hearing on the question of the degree of mental illness—i. e., whether it warranted his remaining in a prison hospital—as was accorded to others in like circumstances. On both of these issues the Court sustained the petitioner: "Equal protection does

not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification was made."

The emphasis with which the Court expressed this sweeping constitutional guarantee, coming at the time of the opinions in the *Miranda* and related cases which follow, indicates that the constitutional protection of individual rights will continue to be enlarged in subject-matter, however they may be limited in retroactive effect.

See also *Pate v. Robinson*, *infra*.

JOHNSON AND CASSIDY V. NEW JERSEY, U. S. 86 S. Ct. 1772, L. Ed. Law Wk. No. 762. Decided June 20, 1966. On certiorari to the New Jersey Supreme Court. Nat. Dist. Attys. Assn., *amicus curiae*. Warren, C.J., for the Court; Black and Douglas, JJ., dissenting. Affirmed.

Taken with the "second round *Escobedo*" cases cited below, this decision substantially rounds out the right to counsel issue by holding the *Escobedo* doctrine to be prospective only. These related cases will be the subject of a professional study in the next issue of the *William and Mary Law Review*.

MIRANDA V. ARIZONA, VIGNERA V. NEW YORK, WESTOVER V. UNITED STATES, CALIFORNIA V. STEWART, U. S. , 86 S. Ct. 1602, L. Ed. Law Wk. Nos. 759-761, 584. Decided June 13, 1966. On certiorari to the Supreme Court of Arizona, 98 Ariz. 18, 401 P. 2d 721 (19); to the Court of Appeals of New York, 259 N. Y. S. 2d 857, 207 N. E. 2d 527 (19); to the U. S. Court of Appeals for the Ninth Circuit, 342 F. 2d 684 (19); and to the Supreme Court of California, 62 Calif. 2d 571, 400 P. 2d 97 (19). State of New York and Nat. Dist. Attys. Assn., *amici curiae*. Warren, C.J., for the Court; Harlan, Stewart and White, JJ., dissenting and Clark, J., dissenting in part. Reversed as to the first three cases and affirmed as to the fourth.

The "second round *Escobedo*" decisions, expanding the Court's rule that evidence obtained by incommunicado interrogation of defendants is inadmissible under the self-incrimination prohibition of the Fifth Amendment, is reviewed at length in the article to which reference is made in the preceding case.

RINALDI V. YEAGER, 383 U.S. —, 86 S. Ct. 1497, 15 L. Ed. 2d —. No

940. Decided May 31, 1966. On appeal from three-judge U. S. District Court for District of New Jersey, 238 F. S. 960 (1965). Stewart, J., for the Court; Harlan, J., dissenting. Reversed and remanded.

The equal protection clause prohibits discrimination between indigent defendants whose appeals are unsuccessful and those who receive suspended sentences, in the matter of liability to reimburse the county from institutional earnings. The Court in this case found the New Jersey statute on the subject, N. J. S. A. 2A: 152-18 in conflict with the Fourteenth Amendment. While the state argued that the legislation applied to all unsuccessful appellants in criminal convictions, the Court declared: "The Equal Protection clause requires more of a state law than non-discriminatory application within the class it establishes. . . It also imposes a requirement of some rationality in the nature of the class singled out." Cf. *Baxstrom v. Herold*, *supra*. See also *Giaccio v. Pennsylvania*, *infra*.

UNITED STATES v. ROMANO, 382 U.S. 136, 86 S. Ct. 279, 15 L. Ed. 2d 210, 34 Law Wk. 4022. No. 2. Decided November 22, 1965. On certiorari to the U. S. Court of Appeals for the Second Circuit, 330 F. 2d 566 (1964). White, J., for the Court; Black, Douglas and Fortas, JJ., concurring. Affirmed.

A statutory inference of guilt—i. e., legislative formula whereby proof of one set of facts is sufficient evidence of the ultimate fact on which guilt is predicated—violates the guarantees of the Fifth Amendment. See COMMENT, *infra*, this issue.

DAVIS v. NORTH CAROLINA, 383 U. S. —, 86 S. Ct. 1761, 15 L. Ed. 2d —. No. 815. Decided June 20, 1966. On certiorari to U. S. Court of Appeals for Fourth Circuit, 339 F. 2d 770 (1964). Warren, C. J., for the Court; Black, J., concurring; Clark and Harlan, JJ., dissenting. Reversed and remanded.

Confessions not made voluntarily, whether true or false, are constitutionally inadmissible as evidence, the Court here reiterated. To determine the fact of voluntariness, the Court asserted its obligation to examine the entire record, and emphasized that its ruling in *Miranda v. Arizona* was to be broadly applied. But note also Justice Clark's protest that the rule in *Johnson and Cassidy v. New Jersey*, *supra*, against

retroactivity of the *Miranda* doctrine should apply to the instant case. The majority opinion is also compelled to face the pragmatic fact that defendant, as an escapee, would normally be kept under maximum security; it nevertheless holds that any interrogation about another crime, while defendant is in isolated detention for escape, is unconstitutionally coercive. The dissent questions whether the Court can or has properly distinguished between detention of an escapee and detention of a suspect, particularly where the record indicates that the present defendant was only occasionally questioned and was not actually incommunicado.

However, the majority opinion is consistent with the general tenor of recent constitutional decisions, which insist that whatever rights the individual may claim under the Constitution are to be preserved to him in all circumstances and at all times.

GIACCIO V. PENNSYLVANIA, 382 U. S. 399, 86 S. Ct. 518, 15 L. Ed. 2d 447, 34 Law Wk. 4099. No. 47. Decided January 19, 1966. On appeal from the Supreme Court of Pennsylvania, Eastern District, 415 Pa. 139, 202 A. 2d 55 (1964). Black, J., for the Court; Fortas and Stewart, JJ., concurring. Reversed and remanded.

A state statute permitting court to assess costs of criminal prosecution to a successful defendant violates the due process clause of the Fourteenth Amendment. A Pennsylvania statute of 1860, Pa. Stat. Ann. Tit. 19 § 1222 (1963) authorized the taxing of costs to defendants even when acquitted under a "sentence to that effect." The Supreme Court unanimously—although somewhat belatedly—voided the statute; in the concurring opinion of Justice Stewart, it "violates the most rudimentary concept of due process of law." This is more affirmative than the majority opinion which simply finds the statute void for vagueness and thereby enabling the state to implement "a procedure for depriving an acquitted defendant of his liberty and his property."

The state contended, and the original legislation apparently was founded on the proposition, that the statute was analogous to the provisions of collecting costs in civil cases. The majority dismissed this argument with the observation that the Fourteenth Amendment protects the individual "against any state deprivation which does not meet the standards of due process." It might have struck down the issue yet more vigorously by observing that in most jurisdictions the costs of litigation are taxed to the losing party only. But the more objectionable

effect of the statute, the majority noted, was that it enabled a jury to levy a pecuniary penalty upon a defendant where, in the words of the charge to the jury, "he has been guilty of some misconduct less than the offense which is charged but nevertheless misconduct of some kind. . . ." The Court found this a flaw deriving from the vagueness of the statutory procedure; it might have added that the statute as a whole, as appellant's brief expressed it, gave a jury virtually a free hand to substitute any penalty it wanted to as a penalty for any behavior of the accused which it did not like, even if the behavior was constitutionally protected.

JAMES V. LOUISIANA, 382 U. S. 36, 86 S. Ct. 151, 15 L. Ed. 2d 30, 34 Law Wk. —. No. 23, Misc. Decided October 18, 1965. On certiorari to the Supreme Court of Louisiana, 246 La. 1033, 169 S. 2d 89 (19). Per curiam. Reversed and remanded.

Search of accused's home is not an incident of his arrest two blocks away, and evidence gathered in this search is constitutionally inadmissible. The Court in this brief opinion made clear that it stands by the doctrine of illegal search in *Mapp v. Ohio*, 367 U. S. 643 (1961) and *Ker v. California*, 374 U. S. 23 (1963). Specifically, it reiterated the stipulation in *Stoner v. California*, 376 U. S. 483 (1963) that search incidental to arrest must be "substantially contemporaneous" and "confined to the immediate vicinity of the arrest." Whether compliance with these conditions will be the test of the validity of the new "stop and frisk" laws as they may be admitted to review, is presently only an interesting speculation.

PATE V. ROBINSON, 383 U. S. 375, 86 S. Ct. 836, 15 L. Ed. 2d 815, 34 Law Wk. 4185. No. 382. Decided March 7, 1966. On certiorari to the U. S. Court of Appeals for the Seventh Circuit, 345 F. 2d 691 (1965). Clark, J., for the Court; Black and Harlan, JJ., dissenting. Affirmed and remanded.

Where defendant has not waived the question of his competence to stand trial, failure of the trial court to hold hearing on that question violates the due process clause of the Fourteenth Amendment. And upon determination that defendant's rights were thus abridged, a writ of habeas corpus will issue and the defendant must be discharged by the state unless given a new trial within a reasonable time. The Court

observed that "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial."

In remanding the case, the Court reiterated its doctrine in *Rogers v. Richmond*, 365 U. S. 534 (1961) which laid down that a defendant had a right "to have all issues which may be determinative of his guilt tried . . . under appropriate state procedures which conform to the requirements of the Fourteenth Amendment." However, it significantly differentiated *Jackson v. Denno*, 378 U. S. 368 (1964) which imposed upon the state the obligation to accord the accused a separate hearing on the voluntariness of his confession. The obligation is concurrent with the original trial, the Court said in *Pate*; where a substantial span of years has intervened before habeas corpus issues, "the difficulty of retrospectively determining an accused's competence to stand trial" virtually insures his discharge.

Compare *Sheppard v. Maxwell*, *infra*.

UNITED STATES V. EWELL AND DENNIS, 383 U. S. 116, 86 S. Ct. 773, 15 L. Ed. 2d 627, 34 Law Wk. 4154. No. 29. Decided February 23, 1966. On appeal from the United States District Court for Southern District of Indiana, 242 F. S. 166 and 451 (1964). White, J., for the Court; Brennan, J., concurring; Douglas and Fortas, JJ., dissenting.

The right to a speedy trial, under the Sixth Amendment, does not mean that criminal procedure should not be at a deliberate pace; indeed, this pace itself is part of the safeguarding of the rights of the accused. Nor does double jeopardy arise from successive prosecutions for two offenses which are not the same. Thus the Court denied contentions of defendants where they had been convicted and sentenced under an indictment believed valid, released upon finding of the indictment's invalidity, and promptly rearrested and reindicted for a related offense. The majority opinion stresses that the speedy trial clause may under certain circumstances contribute to double jeopardy, and that any prosecution within the limits of the applicable statute of limitations would normally satisfy the former clause. Absent any showing of disappearance of evidence or witnesses, defendants cannot be heard to allege that a reasonable time interval between original arrest and present trial has prejudiced a constitutional guarantee.

2. *Civil Liberties, Integration, Reapportionment.*

BRADLEY V. SCHOOL BOARD OF RICHMOND. GILLIAM V. SCHOOL BOARD OF HOPEWELL, 382 U. S. 103, 86 S. Ct. 224, 15 L. Ed. 2d 187. Docket Nos. 415, 416. Decided November 15, 1965. On certiorari to the United States Court of Appeals for the Fourth Circuit, 345 F. 2d 310, 325 (1965). Per curiam. Vacated and remanded.

Faculty desegregation follows logically upon pupil desegregation, ruled the Court in adding this latest judicial dimension in the dozen years since *Brown v. Board of Education*, 347 U. S. 483 (1954). Plans in two Virginia cities—Richmond and Hopewell—were challenged by parents and pupils contending that faculty allocation on an alleged racial basis rendered inadequate the District Court-approved program of school desegregation. Without passing at this time on the merits of the program itself, the Supreme Court found the petitioners entitled to a full evidentiary hearing on this question.

BROWN ET AL. V. STATE OF LOUISIANA, 383 U. S. 131, 86 S. Ct. 719, 15 L. Ed. 2d 637, 34 Law Wk. 4143. Docket No. 41. Decided February 23, 1966. On certiorari to the Supreme Court of Louisiana, 246 La. 878, 168 S. 2d 104 (19). Fortas, J., for the Court; Brennan and White, JJ., concurring; Black, Clark, Harlan and Stewart, JJ., dissenting. Reversed.

By a 3-1-1-4 distribution of opinions, the Court in this case narrowly overturned a state breach of the peace statute by a constitutional rationale which, in Mr. Justice Black's phrase, inhibits the states in their efforts to control demonstrations of protest against state public policies. The case follows on the heels of a group of sit-in cases which tested the public accommodations guarantees of various civil rights laws; its primary distinction is that it involved a public library rather than a privately operated business. Thus, from Louisiana alone, have come earlier cases involving Negro sit-ins at lunch counters adjudicated in *Garner v. State of Louisiana*, 368 U. S. 157 (1961), Negro sit-ins in a bus depot segregated waiting room, supported in *Taylor v. State of Louisiana*, 370 U.S. 154 (1961), and the use of public streets for demonstration purposes, protected by *Cox v. State of Louisiana*, 379 U. S. 536 (1964).

The *Cox* case involved the same state statute as did the current case, and the Court in three of the four separate opinions went to considerable lengths to elaborate upon or distinguish from the earlier decision. The opinion of the Court read by Mr. Justice Fortas insisted that a breach of peace must be actual—reminiscent of the “overt act” doctrine enunciated almost thirty years ago in *DeJonge v. Oregon*, 299 U. S. 353 (1937) and more recently asserted in contemporary context in *Edwards v. South Carolina*, 372 U. S. 229 (1963)—and that “protest by silent and reproachful presence” cannot be held to be lawless wherever it occurs. Mr. Justice Brennan’s concurring opinion struck at the “overbreadth” or sweeping inclusiveness of the breach of peace statute as empowering the enforcing officers to find an overt act in any conduct which tends “to arouse from a state of repose” or “to disquiet” the party toward whom the protest is directed.

Mr. Justice Black, speaking for the four dissenters, declared it was “high time to challenge the assumption in which too many people have too long acquiesced, that groups that think they have been mistreated or that have actually been mistreated have a constitutional right to use the public’s streets, buildings and property to protest whatever, wherever, whenever they want, without regard to whom it may disturb.” The First Amendment, declared the Justice who has been its most zealous advocate, ought not to be held to authorize the use of private or public property, dedicated to other purposes, “as a stage to express dissident ideas.” Negroes as an exploited group “which more than any other has needed a government of equal laws and equal justice,” are encouraged by the majority opinion, says the dissent, to take into the group’s hands the law as to the time and place of protest.

In view of the divided majority and the cogent critique of the Court’s most convinced and dedicated liberal constructionist, *Brown v. State of Louisiana* may mark the extreme in a pendulum swing of judicial persuasion.

EVANS v. NEWTON, 382 U. S. 296, 86 S. Ct. 486, 15 L. Ed. 2d 373, 34 Law Wk. 4078. Docket No. 61. Decided January 17, 1966. On certiorari to the Supreme Court of Georgia, 220 Ga. 280, 138 S. E. 2d 573 (1964). United States as *amicus curiae*. Douglas, J., for the Court; White, J., concurring; Black, Harlan and Stewart, JJ., dissenting. Reversed.

Extending the doctrine that the equal protection clause may override discriminatory terms in a charitable trust, where the subject of the

trust is "entwined with governmental policies or . . . impregnated with a governmental character", the Court majority here held that a city could not divest itself of responsibility for nondiscrimination by removing itself as trustee. See COMMENT, *infra*.

ROGERS v. PAUL, 382 U. S. 198, 86 S. Ct. 358, 15 L. Ed. 2d 265. Docket No. 532. Decided December 6, 1965. On certiorari to the Court of Appeals for the Eighth Circuit, 345 F. 2d 117 (19). Per curiam; Clark, Fortas, Harlan and White, JJ., for argument and plenary consideration. Vacated and remanded.

Another of the desegregation cases of the 1965 term, the present litigation affirmed the standing of students in segregated schools to challenge racial allocation of faculty which tended to deny them equal opportunity for education. The principal doctrine in this case is that where an otherwise acceptable program of progressive desegregation denies a constitutional right to parties in still-segregated schools, they have a right to immediate relief. As in the *Bradley* case, *supra*, the Court is manifestly concerned at the states' reliance on "deliberate" rather than on "speed" in the "all deliberate speed" rule of desegregation handed down in the second review of *Brown v. Board of Education*, 349 U. S. 294 (1955).

SHUTTLESWORTH v. BIRMINGHAM, 382 U. S. 87, 86 S. Ct. 211, 15 L. Ed. 2d 176, 39 Law Wk. 4009. No. 5. Decided November 5, 1965. On certiorari to the Court of Appeals of Alabama, 42 Ala. App. 296, 161 S. 2d 796. Stewart, J., for the Court, Brennan, Douglas and Fortas, JJ., and Warren, C. J., concurring. Reversed and remanded.

In another of the local laws challenged by civil rights demonstrators as being construed to obstruct them in the exercise of their constitutional rights, an Alabama municipal ordinance against loitering in public ways was tested by this case. The Court, without dissent but with four concurring opinions which dilute the impact of the holding, found that the Fourteenth Amendment protected one exercising his right to protest in the public way. In distinguishing between an order to move from the public way because of the unpopularity of the protest, and an order to move because of obstructing traffic—the first to be disregarded because unconstitutional, the second to be obeyed if no reasonable doubt enters into the factual situation. Just how, in the heat of emotion on the spot, this distinction is to be made and validated, remains to be seen.

Cf. *Brown v. Louisiana*, *supra*.

HARPER v. VIRGINIA BOARD OF ELECTIONS, BUTTS v. HARRISON. 383 U. S. 663, 86 S. Ct. 1079, — L. Ed. —, 34 Law Wk. 4305. Docket Nos. 48, 655. Decided March 24, 1966. On appeal from the U. S. District Court for the Eastern District of Virginia, United States as *amicus curiae*. Douglas, J., for the Court; Black, Harlan and Stewart, JJ., dissenting. Reversed.

The *coup de grace* to state poll taxes was applied in this opinion holding such taxes to violate the equal protection clause of the Fourteenth Amendment, when made a prerequisite for voting. See CURRENT DECISIONS, *infra*.

KATZENBACH v. MORGAN. NEW YORK BOARD OF ELECTIONS v. MORGAN. 383 U. S. —, 86 S. Ct. 1717, 15 L. Ed 2d —. Docket Nos. 847, 877. Decided June 13, 1966. On appeal from the statutory three-judge District Court for the District of Columbia, 247 F. S. 196 (1965). Commonwealth of Puerto Rico and State of New York, *amici curiae*. Brennan, J., for the Court; Douglas, J., concurring in part; Harlan and Stewart, JJ., dissenting. Reversed.

Federal guarantees of voting rights extend to qualified non-English speaking citizens, the Court ruled in this and the companion case of *Cardona v. Power*, 383 U. S. — uphold Section 4 (e) of the Voting Rights Act of 1965, 79 Stat. 437, 42 U. S. C. 1973b (e). Accordingly, a state law requiring proof of literacy in English was held to be unenforceable insofar as it might be inconsistent with the Federal Act, thus opening the polls to several hundred thousand Spanish-speaking persons who had migrated from Puerto Rico and who were otherwise qualified as citizens.

The majority opinion embodies an unusually detailed review of constitutional theory, in reply to the argument of counsel for New York that under § 5 of the Fourteenth Amendment ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article") there must be judicial determination of the "appropriateness" of the legislation. Mr. Justice Brennan in his opinion equated § 5 with the "necessary and proper" clause of Article I, § 8 of the Constitution and then defined the scope of the latter by quoting Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 315 (1819): "Let the end be appropriate, . . . and all means which are . . . plainly adapted to that

end . . . are constitutional." Citing the Congressional history of the Voting Rights Act to show that Section 4 (e) was "plainly adapted" to enforcing the equal protection clause of the Fourteenth Amendment, the opinion has no difficulty in finding that "the end [is] legitimate," i. e., its objective is to enforce the constitutional rights of Spanish-speaking citizens to participate in elections.

The practical difficulty of applying this formula is demonstrated in the companion *Cardona* case, where the majority opinion, again by Mr. Justice Brennan, rested upon the evidence (or rather the lack of evidence) that the prospective voter-plaintiff had failed to allege successful completion of a sixth-grade education in a Puerto Rican Spanish-language school. In this case Justices Douglas and Fortas joined Justices Harlan and Stewart in dissent; the learned disquisition on "appropriateness" and "adaptation" of Congressional legislation within the constitutional orbit, said the dissent, is beside the point. The basic issue—a constitutional one?—said the dissenters, was whether literacy is actually a prerequisite for exercise of the electoral franchise. By adding Spanish (or any foreign language) to English as a test of voting competence, the Court has added a larger bloc of individuals to the electorate; whether literacy in any language is a proper limitation upon the equal protection clause in this context remains unanswered.

SOUTH CAROLINA v. KATZENBACH, 383 U. S. 301, 86 S. Ct. 807, 15 L. Ed. 2d 769, 34 Law Wk. 4207. Docket No. 22. Decided March 7, 1966. Original bill in equity. Alabama, California, Georgia, Illinois, Louisiana, Massachusetts (joined with Hawaii, Indiana, Iowa, Kansas, Maine, Maryland, Michigan, Montana, New Jersey, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Vermont, West Virginia and Wisconsin), Mississippi and Virginia, *amici curiae*. Warren, C. J., for the Court; Black, J., dissenting in part. Dismissed.

The constitutionality of certain provisions of the Voting Rights Act of 1965—suspension of eligibility tests, review of proposed changes in voting procedures, appointment of federal voting examiners and enforcement proceedings in criminal contempt, inter alia—was tested in this original action and upheld. See CURRENT DECISIONS, *infra*.

BURNS v. RICHARDSON. CRAVALHO v. RICHARDSON. ABE v. RICHARDSON. 382 U. S. 807, 86 S. Ct. 1286, 15 L. Ed. 2d —, 34 Law Wk. 4365.

Docket Nos. 318, 323, 409. Decided April 25, 1966. On appeal from a three-judge panel of the District Court for the District of Hawaii, 238 F. S. 468 (1965), 240 F. S. 724 (1965). Brennan, J., for the Court; Harlan and Stewart, JJ., concurring in the result. Fortas, J., took no part in this case. Vacated and remanded.

The only reapportionment case in the 1965 term involved the question first raised in the Georgia case of *Fortson v. Dorsey*, 379 U. S. 433 (1965), concerning the validity of multi-member electoral districts. Affirming, as in *Fortson*, the creation of multi-member districts in principle while reiterating that they would be invalid where they could be shown to cancel out the voting strength of minority groups, the Court upheld the interim reapportionment plan for the Hawaiian senate. The Court also settled a new issue in the reapportionment question by holding that Hawaii could base its plan on the number of registered voters in a district rather than on total population—again with a qualification, that the results in representation are substantially the same. The Court pointed out that special circumstances in Hawaii—i. e., large numbers of transient tourists and military personnel—tended to distort statistics on the true distribution of state citizenry.

Within these laboriously circumscribed areas, the *Burns* decision indicates a disposition of the Supreme Court to permit the individual states to work out their specific reapportionment procedures with reasonable variations. The fact that in *Burns* an interim plan was involved further accounts for the willingness of the Court to give the state the benefit of the doubt. Until it can be established that a state is guilty of undue delay in drafting an acceptable reapportionment plan, or that the plan in whole or in part violates the guidelines set down in the progression of cases from *Baker v. Carr*, U. S. (19) through *Reynolds v. Sims*, 377 U. S. 533 (19) to *Davis v. Mann*, 377 U. S. 678 (1964) and related cases, the present opinion appears to invite judicial restraint in this subject-area. In short, the Court encourages reapportionment by state legislative action rather than by Federal judiciary.

GEORGIA V. RACHEL, 383 U. S. —, 86 S. Ct. 1783, 15 L. Ed. 2d —, 34 Law Wk. 4563. Docket No. 147. Decided June 20, 1966. On certiorari to the Court of Appeals for the Fifth Circuit, 342 F. 2d 336, 909 (1965). Stewart, J., for the Court; Warren, C. J., Brennan, Douglas and Fortas concurring. Affirmed.

Where individuals are threatened with prosecution in state courts for peaceable efforts to assert Federally protected rights, they are entitled to have the cause removed to a Federal court, under the provisions of the Civil Rights Act of 1964, §§ 201 (a), 203, 42 U. S. C. §§ 2000a (a), 2000a-2. The fundamental requisite, as the Court was at pains to emphasize in this case and the *Peacock* case, *infra*, is that there must be a factual basis for the prediction that a state court proceeding will preclude the assertion of Federally protected rights. In the present case the Court satisfied itself that under the Georgia trespass statute, Ga. Code Ann. § 26-3005 (1965 Cum. Supp.), petitioners would be denied constitutional rights by virtue of local statute and custom, and that the acts (sit-ins in privately owned restaurants) were done under color of authority of the Constitution.

The majority opinion reviews in some detail the development of civil rights and removal statutes in Congress, from 1863 to 1964. The concurring opinion emphasizes that the right to be protected is the right to be free from prosecution when asserting a constitutional guarantee—not the right to have a trespass conviction reversed. Thus it follows that the cause must be insulated from the state's criminal process if it is to be wholly vindicated.

GREENWOOD, MISS. v. PEACOCK. PEACOCK v. GREENWOOD, MISS. 383 U. S. —, 86 S. Ct. 1800, 15 L. Ed. 2d —, 34 Law Wk. 4572. Docket Nos. 471, 649. Decided June 20, 1966. United States as *amicus curiae*. On certiorari to the Court of Appeals for the Fifth Circuit, 347 F. 2d 679, 986 (1965). Stewart, J., for the Court; Warren, C.J., and Brennan, Douglas and Fortas, JJ., dissenting. Reversed.

The concurring opinion of the *Rachel* case, *supra*, becomes a dissent in this case, and accordingly underlines the narrow dividing line between the constitutional privilege and the presumption that the privilege will be denied. The majority opinion, written in both cases by Mr. Justice Stewart, sees the *Peacock* issue as "far different" from that in *Rachel*; the dissent—written in both cases by Mr. Justice Douglas—finds a difference only in the "narrow, cramped meaning" ascribed by the majority to the statutory construction. The difference, according to the majority, is that in *Rachel* the defendants relied on a specific provision in a preemptive Federal law, the Civil Rights Act of 1964 (*supra*), whereas in *Peacock* the defendants could cite no Federal statute vesting an absolute constitutional privilege in them and inhibiting the states from

prosecution. To block the public streets, as the defendants were charged with doing, is an offense properly within the police power of the state, and the denial of a constitutional right, if any, arises from evidence that any conviction on these charges was a result of racial prejudice.

3. *Personal Liberties Generally*

ELFBRANDT v. RUSSELL, 383 U. S. , 86 S. Ct. 1238, 15 L. Ed. 2d , 34 Law Wk. 4347. No. 656. Decided April 18, 1966. On certiorari to the Supreme Court of Arizona, 97 Ariz. 140, 377 P. 2d 944 (19). Douglas, J., for the Court; White, Clark, Harlan and Stewart, JJ., dissenting. Reversed.

Again the doctrine of impermissible overbreadth in state laws which tend to limit constitutionally guaranteed rights was applied by the Court majority in this case involving a teacher's loyalty oath. The overbreadth derived from a sweeping revision in 1961 of the Arizona Communist Control Act, A. R. S. § 38-231, which greatly enlarged a statute in existence since 1901, which in turn had been made applicable to teachers in 1935. A. R. S. § 15-231. The 1961 revision was challenged by the present petitioner, 94 Ariz. 1, 381 P. 2d 554 (1963), certiorari then granted and case remanded by the Supreme Court, 378 U. S. 127 (1964) in the light of the Court's ruling against a Washington state loyalty oath law as void for vagueness. *Baggett v. Bullitt*, 377 U. S. 360 (1964). Finding no vagueness in its own statute, the Arizona court reaffirmed its former position and set the stage for the Supreme Court this time to apply the "overbreadth" doctrine.

A statute potentially touching protected rights must be narrowly drawn to reach only conduct which the state has a right to penalize and to avoid jeopardizing the rights which are guaranteed to the individual, the Court declared, reiterating its position in *Cantrell v. State of Connecticut*, 310 U. S. 296 (19). By attempting to confine its own adjudication in the present case to this proposition, the Court apparently hoped—and probably without success—to avoid the implication that *Elfbrandt* (1966) nullifies much of the decisional law of the postwar Vinson Court in this area which sustained state loyalty oaths. Cf. *Garner v. Los Angeles Bd. of Supervisors*, 341 U. S. 716 (19),

Gerende v. Bd. of Supervisors, 341 U. S. 46 (1953) and *Adler v. Bd. of Education*, 342 U. S. 485 (1953). In view of the majority observation that individuals "who join an organization but do not share its unlawful purposes . . . pose no threat, either as citizens or as public employees," the present case has reduced the test to the "specific intent" rule set out in *Apteker v. Sec. of State*, 378 U. S. 500 (1964), which in turn is a variant of the "overt act" test of the pre-Vinson Court enunciated in *DeJonge v. Oregon*, 299 U. S. 353 (1937). Between *Elfbrandt* and *Baggett*, therefore, the jurisprudence of loyalty oath legislation seems to have come full circle.

A BOOK NAMED "JOHN CLELAND'S MEMOIRS OF A WOMAN OF PLEASURE" V. ATTORNEY GENERAL OF MASSACHUSETTS. U. S. , 86 S. Ct. 975, 15 L. Ed. 2d , No. 368. Decided March 21, 1966. Brennan, J., for the Court; Black, Douglas and Stewart, JJ., concurring; Clark, Harlan and White, JJ., dissenting. Reversed.

While not turning upon a specific constitutional issue, the so-called "Fanny Hill" obscenity case is closely identified with the rationale in the *Ginzburg* and *Mishkin* cases which follow. All three in turn confronted the Court with the need to clarify (or retreat from) its doctrine in *Roth v. United States*, 354 U. S. 476 (1957) which established that obscenity is "not within the area of constitutionally protected speech and press." It remained, after *Roth*, to define obscenity within the framework of various factual situations and with reference to the general constitutional privilege adjudicated under the First Amendment. Two of the cases—*Ginzburg* and *Mishkin*—found the factual situation to support a determination of obscenity; the present case, involving publication of a 1750 novel, found insufficient evidence of obscenity. The test in *Roth*—a threefold requirement that the "dominant theme of the material taken as a whole" appeals to prurient interests in sex, that it offends contemporary community standards and that it is utterly devoid of redeeming social value—must be met in all dimensions, said the Court.

Having asserted this much, however, the majority opinion appears to hedge against the arguments of the dissent as well as against the contrary holdings in the other two obscenity cases: Evidence that the purveyor of the challenged publication was exploiting its sale through "prurient appeal, to the exclusion of all other values," might justify a court in accepting the purveyor's own evaluation of the work. The constitutional protection of expression and publication would be ac-

commodated, the majority opinion suggests, because the defendant in a criminal prosecution for obscenity would be chargeable not for what he said or believed but for what he did. The line of differentiation is an obviously narrow one, if it exists at all; the fact that "Fanny Hill" was reprinted by an established publisher and sold to a number of libraries and educational institutions reasonably raises a question of credibility in purveyor motivations which may make the "Fanny Hill" case difficult to follow in the future.

GINZBURG v. UNITED STATES, U. S. , 86 S. Ct. 942, 15 L. Ed. 2d , 34 Law Wk. No. 42. Decided March 21, 1966. On certiorari to U. S. Court of Appeals for Third Circuit, 338 F. 2d 12 (19). Brennan, J., for the Court; Douglas, Black, Harlan and Stewart, JJ., dissenting. Affirmed.

The majority in this case, applying the same general criteria set out in the "Fanny Hill" case *supra*, found the record sufficient to sustain defendant's conviction on pandering to prurient interests in publication, publicity and sale of his periodicals. Cf. *Note, infra*.

MILLS v. ALABAMA, U. S., , 86 S. Ct. 1434, 15 L. Ed. 2d , 34 Law Wk. 4418. No. 597. Decided May 23, 1966. On appeal from the Supreme Court of Alabama, 278 Ala. 188, 176 S. 2d 884 (19). Black, J., for the Court; Douglas and Brennan, JJ., concurring. Reversed and remanded.

A rather astonishingly elemental issue of press freedom was presented in this case, where the Alabama Corrupt Practices Act, Code Ala. 1940, Tit. 17, §§ 268-286, was invoked against a newspaper which published an editorial on election day urging voters to vote a certain way. The attempted prosecution was based on a clause in the statute prohibiting electioneering or soliciting of votes on the day of an election. Since, as the Court pointed out, the fundamental objective of the First Amendment was "to protect the free discussion of governmental affairs," there was no merit to the state's contention that the admitted restraint upon the press was "within the field of reasonableness."

MISHKIN v. NEW YORK, 382 U. S. , 56 S. Ct. 959, 15 L. Ed. 2d , 34 Law Wk. 4250. No. 49. Decided March 21, 1966. On appeal from the New York Court of Appeals, 15 N. Y. 2d 724, 256 N. Y. S. 2d 936, 205 N. E. 2d 201 (19). Brennan, J., for the Court; Black, Douglas and Stewart, JJ., dissenting. Affirmed.

This case completes the trilogy on obscenity developed *supra* in the "Fanny Hill" and *Ginzburg*. Again, as in *Ginzburg*, the majority was satisfied that a state finding of pandering to prurient interests by editorial and advertising methods was within the expanded definition of the *Roth* rule. The first two cases of the trilogy thus appear to be almost in juxtaposition to each other, with a conviction to be upheld if the court is convinced that the purveyor's acts demonstrate an overriding concern with attracting or arousing the prurient interest, but to be set aside if the behavior of the purveyor is not so blatant as to subordinate the tests of contemporary community standards and possible residual social value.

Mishkin in this perspective may be described as a gloss upon *Ginzburg*; where the Court is satisfied that the record demonstrates the purveyor's appeal to deviant sex interests, *ipso facto* this appeal cannot be found to conform with contemporary tolerances of the public in general. Moreover, added the Court in the present case, scienter may properly be attributed to the purveyor where the record shows his detailed instructions to his commissioned writers and artists in preparing the material.

ROSENBLATT V. BAER, 383 U. S. 75, 86 S. Ct. 669, 15 L. Ed. 2d 547, 34 Law Wk. 4111. No. 38. Decided February 21, 1966. On certiorari to the Supreme Court of New Hampshire, 106 N. H. 26, 103 A. 2d 773 (19). Brennan, J., for the Court; Stewart, J., concurring and Black, Douglas and Harlan, JJ., concurring in part; Fortas, J., dissenting. Reversed and remanded.

The shadow of *Sullivan v. New York Times*, 376 U. S. 254 (1964) hung over this case and obviously accounted for the confusions of tongues in the prevailing majority for the defendant in this libel suit. Justices Harland and Stewart, as well as Justice Fortas, stressed in their respective separate opinions that, the so-called *New York Times* rule, not having been pronounced in the trial stages of this case, the petition should have been dismissed as improvidently lodged. The four who supported the formal opinion of the Court read by Justice Brennan in effect reiterated and expanded the *New York Times* rule in applying it to this case: An editorial attack upon a public official in his official function cannot support an action of libel. Without specifically finding that the plaintiff in this case, the manager of a public proprietary activity (ski lift and recreation area), came within the public official

designation, the Court set out as its criterion the proposition that "criticism of those responsible for government operations must be free, lest criticism of government itself be penalized." The result is to suggest that the *New York Times* rule, which greatly enlarged the defense of fair criticism as a defense to libel under the freedom of the press guarantees, is to be applied broadly rather than narrowly.

SHEPPARD V. MAXWELL, 383 U. S. , 86 S. Ct. 1507, 15 L. Ed. 2d , 34 Law Wk. No. 490. Decided June 6, 1966. On certiorari to the U. S. Court of Appeals for the Sixth Circuit, 346 F. 2d 707 (19). Clark, J., for the Court; Black, J., dissenting. Reversed and remanded.

Blatant "trial by newspaper" is another dimension of press law within the framework of the First Amendment which was significantly defined in this case, upholding an original U. S. District Court finding that the defendant's conviction was void for failure of the trial court to protect the defendant from prejudicial publicity and disruptive courtroom practices.

UNITED STATES V. JOHNSON, 383 U. S. 169, 86 S. Ct. 749, 15 L. Ed. 2d 681, 34 Law Wk. 4161. No. 25. Decided Feb. 24, 1966. On certiorari to the U. S. Court of Appeals for the Fourth Circuit, 337 F. 2d 180 (19). Harlan, J., for the Court; Warren, C.J., and Brennan and Douglas, JJ., concurring in part and dissenting in part; Black and White, JJ., took no part in the case. Affirmed and remanded.

In the jurisprudence of free speech, the question presented in this case was one of first impression: Is the absolute privilege accorded to speeches on the floor of Congress dissipated by the accepting of money directly or indirectly related to the speech? The defendant, a former congressman, was alleged to have made a speech favorable to private interests and to have sought to dissuade the government from instituting a criminal proceeding against these interests. A contribution to the congressman by the interests was applied to his campaign expenses. The Court found that the immunity granted in Article I, sec. 6 of the Constitution is absolute, tracing it back to the Parliamentary revolution in seventeenth-century England. This interpretation would thus bar inquiry by the judiciary into motives and influences which might lie behind privileged communications. The defense of privilege, accordingly, is significantly strengthened and thus complements the fair comment defense already reinforced by the *New York Times* and *Rosenblatt* decisions (*supra*).

UNITED STEEL WORKERS v. BOULIGNY, 382 U. S. 145, 86 S. Ct., 272, 15 L. Ed. 2d 217, 34 Law Wk. 4019. No. 19. Decided November 22, 1965. On certiorari to the U. S. Court of Appeals for the Fourth Circuit, 336 F. 2d 160 (19). Fortas, J., for the Court. Affirmed.

A final libel issue in this term of the Court was actually only the setting for a procedural question on diversity jurisdiction, and its applicability to an unincorporated labor union seeking to get into the Federal courts. The plaintiff was a North Carolina employer who brought his action in the state court; the union sought removal to the Federal court on the plea that it was an entity with citizenship in Pennsylvania where its headquarters were situated. The U. S. District Court for the Western District of North Carolina denied plaintiff's motion to remand to the state court, but on an interlocutory appeal the U. S. Court of Appeals reversed. Certiorari then was granted by the Supreme Court to determine the diversity issue.

In affirming the appellate court's ruling and thus remanding the case to the state courts, the unanimous opinion urged that the question required legislative rather than judicial remedy. So far as libel law is concerned, the opinion would tend to encourage the limitation of jurisdiction of the subject matter to state courts when the members of an unincorporated group can be found to be residents of that state. So far as the specific litigation in this instance was concerned, the decision left open the question whether a state court proceeding may be superceded by the jurisdiction of the National Labor Relations Board.

CHEFF v. SCHNACKENBERG, 383 U. S. , 86 S. Ct. 1523, 15 L. Ed. 2d , 34 Law Wk. 4462. No. 67. Decided June 6, 1966. On certiorari to the U. S. Court of Appeals for the Seventh Circuit, 341 F. 2d 548. Clark, J., for the Court; Harlan, J., concurring; Douglas and Black, JJ., dissenting. White, J., took no part in the case. Affirmed.

SHILLITANI v. UNITED STATES. PAPPALIO v. UNITED STATES. 383 U. S. , 86 L. Ed. 1531, 15 L. Ed. 2d , 34 Law Wk. 4460. Nos. 412, 442. Decided June 6, 1966. On certiorari to the U. S. Court of Appeals for the Second Circuit, 346 F. 2d 5. Clark, J., for the Court; Black, J., concurring. White, J. took no part in the case. Judgments vacated and cases remanded for dismissal.

See NOTE beginning p. 76 *infra*.