CONGRESSIONAL REPRESENTATION FOR THE DISTRICT OF COLUMBIA: A CONSTITUTIONAL ANALYSIS

PETER RAVEN-HANSEN*

Introduction

At the end of a decade marked by congressional and judicial activism in extending the franchise, it seems to many ironic that Congress and the Supreme Court should sit amidst several hundred thousand American citizens who are denied representation in the national legislature. Efforts to gain congressional representation for the District of Columbia have been made intermittently since 1803,[1] but always without success. While other reasons for their failure have been advanced,[2] the principal factor perpetuating the District's non-representation over the years has been the inaccessibility of the sole apparent remedy: constitutional amendment.

Proponents and opponents alike have assumed that District representation requires a constitutional amendment.[3] The con-

---

*Member of the Massachusetts Bar. A.B., 1968, J.D., 1974, Harvard University.

1 *See* 12 ANNALS OF CONG. 502-05 (1803); Library of Congress Legislative Reference Service, *Proposed Amendments to the Constitution of the United States for National Representation for the District of Columbia*, in *Hearings on S.J. Res. 136 Before a Subcomm. of the Senate Comm. on the Judiciary*, 83d Cong., 2d Sess. 4 (1954). A recent attempt to tack a District representation provision onto the bill for the eighteen-year-old voting amendment failed, notwithstanding the support of Senate liberals and the apparent blessing of President Nixon. *See* 117 CONG. REC. 5340 (1971); MESSAGE FROM THE PRESIDENT, H.R. DOC. No. 91-108, 91st Cong., 1st Sess. (1969).

2 Some have suggested that opposition to D.C. representation may be motivated by covert racial prejudice. *See* 117 CONG. REC. 5338 (1971) (remarks of Senator Kennedy). More apparent is the lack of congressional enthusiasm for District concerns, since therein lie no political benefits for congressmen. *See* 116 CONG. REC. 8087 (1970) (remarks of Representative Nelson).

3 *See, e.g., Hearings on H.J. Res. 396 Before the House Comm. on the Judiciary*, 90th Cong., 1st Sess., ser. 6, at 95 (testimony of Ramsey Clark) & 156 (testimony of Sturgis Warner) (1967); *Hearings on H.J. Res. 529 Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 86th Cong., 2d Sess., ser. 18, at 128 (statement of Senator Jennings Randolph) (1966).

ventional analysis argues that the Constitution grants seats in Congress only to states, so the District, not being a state, is not entitled to representation.[4] Article I, section 2 states that the House "shall be composed of Members chosen . . . by the People of the Several States,"[5] and the Senate "composed of two Senators from each State."[6] The electoral machinery for filling and allocating congressional seats is also established exclusively through the states.[7] Moreover, clause 17 of article I, section 8 vests in Congress exclusive legislative authority over the District. *Ipse dixit,* it is said that continued District disfranchisement is constitutionally compelled because of an asserted incompatibility of local representation and exclusive legislative authority of the national Congress.[8]

It is the purpose of this article to challenge the hitherto unchallenged assumption that the Constitution denies citizens of the District congressional representation. Part I reviews the historical origins of clause 17 and the creation of the District itself to show that neither the framers nor the Congress which accepted the cession of the District's lands from Virginia and Maryland intended to leave District residents without representation in Congress. Part II questions the conventional assumption that the word "state," as used in the Constitution, has some frozen meaning always excluding the District. The theory of "nominal state-

4 *See, e.g.,* H.R. REP. No. 91-1385, 91st Cong., 2d Sess. 15 (1970); *Hearings on Congressional Representation for the District of Columbia Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary,* 87th Cong., 2d Sess. 37 (1962).

5 U.S. CONST. art. I, § 2.

6 U.S. CONST. amend. XVII.

7 U.S. CONST. art. I, §§ 2 & 3.

8 *See Hearings on H.J. Res. 529 Before Subcomm. No. 5 of the House Comm. on the Judiciary,* 86th Cong., 2d Sess., ser. 18, at 170 (1960). Thus, the House report accompanying what became the 23d amendment, granting the District representation in the electoral college, quoted approvingly a former D.C. Commissioner who had testified:

> In the ordinary course of government in this country, people in each jurisdiction are governed by legislators whom they elect.
>
> This general principle of representation is suspended in the District of Columbia because the nature of the District requires it to be ruled for and in the interests of all the people of the country.

H.R. REP. No. 91-1385, 91st Cong., 2d Sess. 15 (1970). The same report concluded from the long history of disfranchisement that "the constitutional grant of exclusive power over the District to the Congress, has been more persuasive than any other reason or logic or emotion" in impeding enfranchisement. *Id.* at 30.

hood" is introduced, *i.e.*, the proposition that the word "state" should be interpreted to include the District in some constitutional contexts. Part III attempts to demonstrate that the intent of the framers and the broad purposes of the Constitution would best be served by interpreting "state," as it is used in article I, section 2 and in the 17th amendment, to include the District.

I. Origin and Purpose of the District of Columbia

A. *The Drafting and Ratification of Clause 17: "Exclusive Legislation"*

The conferees at the Federal Constitutional Convention of 1787 were well aware of the need for a territorially distinct seat of government for the United States. Just four years before the convention, with some eighty mutinous soldiers "occasionally uttering offensive words and wantonly pointing their muskets to the windows of the hall of congress," the city of Philadelphia had refused to lend its protection to the Continental Congress. In consequence, the congressional leadership "signified, that, if the city would not support Congress, it was high time to remove to some other place,"[9] and the Congress abruptly adjourned to New Jersey. What Mr. Justice Story later called "the degrading spectacle of a fugitive congress"[10] thus prompted the draftsmen of the Constitution to consider exclusive federal jurisdiction at the seat of government.[11]

---

9 5 Elliott's Debates in the Congress of the Confederacy 92-93 (1901).

10 2 J. Story, Commentaries on the Constitution of the United States § 1219, at 116 (2d ed. 1851). The lesson of the mutiny scare, in Justice Story's words, was that "it could never be safe to leave in possession of any state the exclusive power to decide whether the functionaries of the national government should have the moral or physical power to perform their duties." *Id.* § 1218, at 115-16. *See generally* Report of the Indepartmental Committee for the Study of Jurisdiction over Federal Areas within the States, pt. II, at 15-27 (1957) [hereinafter cited as Study of Juris.].

11 The Continental Congress itself addressed the problem of federal jurisdiction just three months after the mutiny when, while meeting in Princeton, it adopted the following resolution:

> That buildings for the use of Congress be erected on or near the banks of the Delaware, provided a suitable district can be procured on or near the banks of the said river, for a federal town; and that the right of soil, and

George Mason of Virginia first raised the question at the Convention,[12] expressing two objections to having the national and a state capital at the same place. First, such a coincidence of location would produce jurisdictional disputes; second, it would give "a provincial tincture to your national deliberations."[13] Mason proposed a clause which would prevent co-location any longer than necessary to build the public buildings required for a permanent national capital, but withdrew his motion because of the political sensitivity of the issue of the location of the capital. Nevertheless, after the convention heard James Madison urge a central place as "just and wise," the Committee of Detail was instructed to consider a clause granting Congress the power "to exercise exclusively Legislative authority at the seat of the General Government and over a district around the same, not exceeding ____ square miles; the consent of the Legislature of the State or States comprising the same, being first obtained."[14] At the same time, Charles Pinckney of South Carolina asked the Committee to consider the power "to fix and permanently establish the seat of Government of the United States in which they shall possess the exclusive right of soil and jurisdiction."[15] These proposals were among those subsequently submitted for consideration by the Committee of Eleven on August 31, 1787, without further debate.[16]

The Committee's report on September 5 combined the two proposals into a clause creating the power "to exercise exclusive legislation in all cases whatsoever over such district (not exceed-

---

an exclusive or such other jurisdiction as Congress may direct, shall be vested in the United States.

8 J. OF CONTINENTAL CONGRESS 295 (G.P.O. ed. 1922); STUDY OF JURIS., *supra* note 10, at 17.

12 Early in the Constitutional Convention, Charles Pinckney of South Carolina submitted a draft constitution which authorized the legislature to "provide such dockyards and arsenals, and erect such fortifications, as may be necessary for the United States, and to exercise exclusive jurisdiction therein." 5 J. ELLIOTT, MADISON PAPERS CONTAINING DEBATES ON THE CONFEDERATION AND THE CONSTITUTION 130 (1845). There was no debate on his proposal at that time.

13 J. MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 332 (Hund & Scott ed. 1920) [hereinafter cited as MADISON'S DEBATES].

14 *Id.* at 420.

15 *Id.*

16 *Id.* at 512.

ing ten miles square) as may by cession of particular states and the acceptance of the Legislature become the seat of the Government of the United States. . . ."[17] The Convention approved this provision without debate, and it emerged, with minor changes by the Committee of Style, as article I, section 8, clause 17 of the Constitution.

That the memory of the mutiny scare and the need for full federal authority at the national capital motivated the drafting and acceptance of the "exclusive legislation" clause was clearly demonstrated in the subsequent ratification debates. In Virginia, for example, James Madison made a thinly veiled reference to Pennsylvania's failure to provide police protection to the Continental Congress when he asked:

> How could the general government be guarded from the undue influence of particular states, or from insults, without such exclusive power? If it were at the pleasure of a particular state to control the sessions and deliberations of Congress, would they be secure from the influence of such states? If this commonwealth depended for the freedom of deliberation on the laws of any state where it might be necessary to sit, would it not be liable to attacks of that nature (and with more indignity) which have been already offered to Congress?[18]

Another delegate in the same debate summarized clause 17 as granting only such power "as opposed to the legislative power of the state where it shall be"[19] — a power, in short, aimed only at avoiding future problems of state interposition at the seat of the national government. When opponents of the "exclusive legislation" power voiced their fear that it would be abused to create a base for excessive national power or a pirate haven, delegate Pendleton again emphasized the relatively narrow purpose of the power:

> [Clause 17] gives [Congress] power over the local police of the place, so as to be secured from any interruption in their proceedings . . . Congress shall exclusively legislate there, in order to preserve the police of the place and their own personal inde-

17 *Id.*

18 3 ELLIOTT'S DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE CONSTITUTION 433 (1901) [hereinafter cited as ELLIOTT'S DEBATES].

19 *Id.*

> pendence, that they may not be overawed or insulted, and of course to preserve them in opposition to any attempt by the state where it shall be.[20]

The question of the representation of District residents received little express attention during the course of the drafting of clause 17, or in subsequent ratification debates,[21] for several reasons. First, given the emphasis on federal police authority at the capital and freedom from dependence on the states, it is unlikely that the representation of future residents in the District occurred to most of the men who considered the "exclusive legislation" power. As long as the geographic location of the District was undecided, representation of the District's residents seemed a trivial question. Second, it was widely assumed that the land-donating states would make appropriate provision in their acts of cession to protect the residents of the ceded land.[22] Thus, delegate Iredell noted in the North Carolina ratification debates that "[w]herever they may have this district, they must possess it from the authority of the state within which it lies; and that state may stipulate the conditions of the cession. Will not such state take care of the liberties of its own people?"[23] Finally, it was assumed that the residents of the District would have acquiesced in the cession to federal authority. Madison, writing in *The Federalist No. 43*, argued that

> The inhabitants [of the District] will find sufficient inducements of interest to become willing parties to the cession; as they will have had their voice in the election of the government which is to exercise authority over them; as a municipal legislature for local purposes, derived from their own suffrages, will of course be allowed them .... every imaginable objection seems to be obviated.[24]

---

20 *Id.* at 439-40.

21 In the *Study of Jurisdiction* it is suggested that "[t]he principal criticism levied against ... [clause 17] in ... [the North Carolina and Virginia ratifying] conventions was that it was destructive of the Civil rights of the residents of the areas subject to its provisions." The record of the debates, however, shows that most criticism centered instead on the possible privileges and advantages which District residents might gain by virtue of their special status. STUDY OF JURIS., *supra* note 10, at 23.

22 *See* 3 ELLIOTT'S DEBATES, *supra* note 18, at 433 (remarks of James Macison); THE FEDERALIST No. 43, at 280 (Earle ed. 1937) (J. Madison).

23 4 ELLIOTT'S DEBATES, *supra* note 18, at 219.

24 THE FEDERALIST No. 43, at 280 (Earle ed. 1937) (J. Madison). Latter day propo-

It followed that no special mechanism for District representation was called for.

B. *The Acts of Cession and Acceptance*

After an area on the Potomac was selected as a site, Maryland and Virginia both authorized their representatives to Congress to cede the necessary land to the United States.[25] Congress accepted the cessions by the Act of July 16, 1790,[26] and ordered the territory surveyed. The acceptance established the first Monday of December, 1800, as the official date for the removal of the government to the District. In 1791, President Washington proclaimed the boundaries of the District, and in the same year, Maryland ratified the cession.[27] The District of Columbia duly became the seat of the national government on the first Monday of December, 1800.

Because of the lag between cession and acceptance, exercise of exclusive federal jurisdiction over the District was postponed. The Virginia act of cession provided that the jurisdiction of her laws over District residents and land would not "cease or determine until Congress should accept the cession, and should by law provide for the government thereof."[28] The Maryland ratification of cession contained a similar proviso.[29] Congress, acknowledging

nents of District representation have consistently misread this statement from *The Federalist* by dropping the future perfect tense to make the statement read, ". . . they will have their voice in the election of the government. . . ." *See, e.g., Hearings on H.J. Res. 396 Before the House Comm. on the Judiciary*, 90th Cong., 1st Sess., ser. 6, at 43 (1967) (statement of Citizens' Joint Comm. on Nat'l Representation). Properly cited, the statement is doubtful authority for the argument that Madison contemplated District representation in Congress, and as illustrious a contemporary as Chief Justice Marshall expressed the view in 1820 that the District "voluntarily relinquished the right of representation, and has adopted the whole body of Congress for its legitimate government . . . ." Loughborough v. Blake, 18 U.S. (5 Wheat.) 317 (1820) (dictum). *But see* G. GREEN, WASHINGTON: VILLAGE AND CAPITAL, 1800-18, at 11 (1962) (if Madison implied past tense, "few contemporaries observed the nuance").

25 Maryland passed cession legislation in 1788. An Act to Cede to Congress a District of Ten Miles Square in This State for The Seat of The Government of The United States, 2 Kilty Laws of Md., ch. 46 (1788). Virginia enacted a smiliar law the following year. An Act for the Cession of 10 Miles Square, 13 Va. Stat. at Large, ch. 32, at 43 (Hening 1823).

26 Ch. 50, 1 Stat. 130.

27 2 Kilty Laws of Md., ch. 45 (1791).

28 An Act for the Cession of 10 Miles Square, 13 Va. Stat. at Large, ch. 32, at 43 (Hening 1823).

29 An Act to Cede to Congress a District of Ten Miles Square in This State for The Seat of The Government of The United States, 2 Kilty Laws of Md., ch. 46 (1788).

these provisos, also established in the acceptance that the "operation of the laws" of the states within the District would continue until the removal of government to the District and the time when Congress would "otherwise by law provide."[30] As a result, not only did Maryland and Virginia law remain in full force and effect during the next decade, but District residents continued to participate in the congressional elections of these states, and to be represented by Maryland and Virginia congressmen after the cession.

The acceptance in 1791 was merely part of a compact with the ceding states, providing for the assimilation of state laws on the date of transfer of jurisdiction (December, 1800) until such subsequent date as Congress should act to create other law for the District. Consequently, District residents did not lose state citizenship until December, 1800, and the prior decade of voting and representation provided no precedent for the representation of District citizens.[31]

C. *The Disfranchisement*

The provisos of the acts of cession and acceptance continued Maryland and Virginia laws in full force and effect until such time as Congress acted. In 1800, less than a month after the seat of government was removed to the District, Congress took up a proposed bill expressly adopting for the District the state laws in effect in the District on the date of removal.[32] The bill was to "freeze" the state laws for the District as they stood in December, 1800, but was intended to allow Congress

> at some future period . . . to enter on a system of legislation in detail, and to have established numerous police regulations.

---

30 Act of July 16, 1790, ch. 50, 1 Stat. 130.

31 Clause 17 gave Congress exclusive jurisdiction only over the seat of the government, which the District did not become until December, 1800. United States v. Hammond, 26 F. Cas. 96 (No. 15293) (C.C.D.C. 1801).

32 *See* 10 ANNALS OF CONG. 824-25 (1800), setting forth the preamble of the proposed bill:

> Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, That the laws of the State of Virginia, as they existed on the first Monday of December, in the year 1800, shall be and continue in force in that part of the District of Columbia which was ceded by the same state . . . [and similarly the laws of Maryland].

> At this time, the present exigency would be provided for by confirming the laws of Virginia and Maryland, and by giving effect to them by the institution of a competent judicial authority.[33]

The bill would thus cure the "evil" of confusion over jurisdiction in the District,[34] and "remove uncertainty as to the effect of state laws."[35]

But an additional, implicit consequence of the proposed legislation was the disfranchisement of the District. Representative Nicholas of Virginia observed that by the exercise of exclusive legislative authority by Congress, all further state legislative authority, still continued until such exercise by the effect of the provisos, would be cut off. Thus, District residents "would cease to be the subject of State taxation, [and] it could not be expected that the States would permit them, without being taxed, to be represented."[36] Disfranchised, the District would be placed "in the situation of a conquered territory,"[37] and the District residents "would be reduced to the state of subjects, and deprived of their political rights."[38] According to the bill's opponents the proposed legislation was superfluous,[39] as it contributed no new substantive law to District affairs, and the alleged need to which it was addressed — the need for certainty — could not justify the serious political consequences for District residents. The alternative, they implied, was to pass no legislation at all[40] — the congressional power under clause 17 being entirely permissive and discretionary[41] — or to provide in the bill for continued District voting in Virginia and Maryland elections.[42]

---

33 *Id.* at 872 (remarks of Representative Harper).

34 *Id.* at 869 (remarks of Representative Lee).

35 *Id.* at 993 (remarks of Representative Craik).

36 *Id.* at 869 (remarks of Representative Nicholas).

37 *Id.* at 871 (remarks of Representative Randolph).

38 *Id.* at 992 (remarks of Representative Smylie).

39 Chief Justice Marshall subsequently confirmed this conclusion of the bill's opponents in United States v. Simms, with dictum that that bill "was perhaps only declaratory of a principle which would have been in full operation without such declaration . . . ." 5 U.S. (1 Cranch) 252, 257 (1803).

40 *See* 12 ANNALS OF CONG. 490 (1803) (remarks of Representative Dennis).

41 10 ANNALS OF CONG. 869-70 (1800) (remarks of Representatives Nicholas & Otis).

42 *Id.* at 874 (remarks of Representative Craik). One historian has suggested that such a bill could have been passed, containing a proviso permitting continued voting, similar to provisions governing voting rights of residents on other federally controlled

The opponents of the bill thus made it clear that disfranchisement would follow passage of the bill, and for the first time brought the issue of District representation before Congress. More importantly, they implied that without the bill, District representation by Maryland and Virginia congressional delegations could continue, notwithstanding the vesting of exclusive legislative authority in Congress on the first Monday of December, 1800. The premise underlying their opposition to the bill — a premise never challenged in the congressional debates which ensued — was that the location of the seat of government at the District and the lodging of exclusive legislative authority over the District in Congress were consistent with continued representation of District residents in Congress. Their objection was to the terms of the proposed bill, not to the constitutional grant of legislative authority to the Congress.

The bill's opponents did not succeed in convincing a majority of the Congress, however, and the bill was passed in early 1801.[43] One reason for its passage was simply that it permitted Congress to postpone indefinitely detailed lawmaking for the District, sparing indifferent congressmen from having to struggle with "numerous police regulations."[44] This factor may have weighed heavily on a lame duck Federalist Congress in the last month of its term, disrupted by the dramatic Burr-Jefferson tie in the electoral college.[45] Second, the passage of the bill did remove uncertainty about jurisdiction and the effect of state laws in the District, whatever the source of that uncertainty, and thereby probably satisfied District merchants, police and court personnel. At the same time, most of Congress assumed, as had James Madison writing in *The Federalist No. 43*[46] more than a decade previously, that District residents would receive adequate informal representation by senators and congressmen residing in the District. As Representative Dennis put it, ". . . from their contiguity to, and residence among the members of the General

land, *e.g.*, military reservations. J. YOUNG, THE WASHINGTON COMMUNITY: 1800-1828, at 14 n.5 (1966).

43 Act of Feb. 27, 1801, ch. 15, 2 Stat. 103.

44 10 ANNALS OF CONG. 872 (1800) (remarks of Representative Harper).

45 G. GREEN, *supra* note 24, at 24.

46 THE FEDERALIST No. 43, at 280 (Earle ed. 1937) (J. Madison).

Government, they knew that though they might not be represented in the national body, their voice would be heard."[47] The most important reason why opponents of the bill lost, however, was again probably congressional indifference to the small, sparsely populated District. The District registered only 14,093 in the Census of 1800, well below the 50,000 minimum population required for the erection of states in the Northwest Territory by the Ordinance of 1787.[48] Just as at the Constitutional Convention, the District's small size and the proximity of its residents to Congress made the problem of its representation less than pressing for lawmakers.

The opponents of the Act of February 27, 1801, did not give up their fight for some form of District representation, however. In 1803, they introduced a bill providing for retrocession of the District to Maryland and Virginia to prevent "political slavery." They argued that, as constituted, the District was "an experiment in how far freemen can be reconciled to live without rights."[49] The retrocession bill was also defeated.[50]

In the 1801 debates, proponents of the initial "assimilation" bill had suggested that constitutional amendment might in the future provide the District with a delegate to Congress, when its size merited representation,[51] but no one stated explicitly that amendment was the only solution. Rather, the emphasis was on the irrevocability of the cut-off of state lawmaking effected by the act, not the irrevocability of the disfranchisement itself.[52]

In 1803, on the other hand, even the proponents of enfranchisement by the device of retrocession seemed to question congres-

47 10 ANNALS OF CONG. 998-99 (1801). *See also* District of Columbia Fed'n of Civil Ass'n, Inc. v. Volpe, 434 F.2d 436, 461 (D.C. Cir. 1970) (Mackinnon, J., dissenting):

> It is commonly recognized that their close proximity to the seat of Government, the influence of a favorable local press that articulates their position and the frequency with which members of Congress, long resident in the District and its environs, tend to acquire similar local interests to those of local residents, gives them more actual influence in Congress than citizens of states.

48 *See* S. REP. No. 507, 67th Cong., 2d Sess. 14 (1922).

49 12 ANNALS OF CONG. 499 (1803) (remarks of Representative John Randolph, Jr.).

50 *Id.* at 506 (1803). One historian has suggested that it was defeated because retrocession was viewed as a first step in relocating the capital to the north. G. GREEN, *supra* note 24, at 30.

51 10 ANNALS OF CONG. 998-99 (1801) (remarks of Representative Dennis).

52 *See, e.g., id.* at 999 (1801) (remarks of Representative Mason).

sional power to enfranchise the District directly. Representative Smylie, a leading advocate of District representation in both the 1801 and 1803 debates, stated: "Under the exercise of exclusive jurisdiction the citizens are deprived of all political rights, nor can we confer them."[53] However, this statement may simply have been a declaration of political reality rather than of constitutional law, for Representative Randolph subsequently noted that statehood for the District was impossible because "the other states can never be brought to consent that two Senators, and at least three electors of the President, shall be chosen out of this small spot, and by a handful of men."[54] Thus congressional inability to confer voting rights on the District was arguably a political disability; the debates provide no clearly articulated argument that there was a constitutional bar.

In summary, the record of the Constitutional Convention and subsequent congressional debates indicates that the District was created for the relatively narrow purpose of preserving national police authority and jurisdiction at the seat of the government.[55] The clause 17 power "was like a coat of armor, intended to protect the Government in periods of danger and not to be worn at all times for parade and show."[56] Disfranchisement was neither necessary nor deliberately planned to achieve this purpose. District residents voted regularly until the Act of February 27, 1801, and no one in Congress at that time challenged the assumption that they could have continued to vote had the act not been passed or had it been passed in different form. Once the act was passed, there was some doubt of future congressional ability to remedy the resultant disfranchisement, but whether the disability was constitutional or merely political is unclear from the history.[57] Congressional action (or inaction) and the form such

53 12 ANNALS OF CONG. 487 (1803). *But see id.* at 489 (1803) (remarks of Representative Huger).

54 *Id.* at 498 (1803).

55 Reviewing the origins of clause 17, STUDY OF JURIS., *supra* note 10, at 21 concluded: "[T]he provision for exclusive jurisdiction appears to represent, to considerable extent, an attempt to resolve by the adoption of a legal concept a problem stemming from a lack of physical power."

56 10 ANNALS OF CONG. 868 (1800) (remarks of Representative Nicholas).

57 In 1846, the Congress authorized the retrocession of most of the Virginia grant, conditioned on approval by popular referendum in the District. Act of July 9, 1846, ch. 35, 9 Stat. 35. When such approval was given, the area once again became part

action took determined the non-representation of the District, not some inexorable command of clause 17.

II. The Theory of Nominal Statehood

The texts of article I, section 2 and of the 17th amendment stand as the chief obstacles to District representation in Congress. These provisions condition representation upon statehood, and the proposition that the word "state," as used in these provisions, should include the District has never been seriously considered. Yet words in the Constitution do not have inflexible or constant meanings. Indeed, "state" has been interpreted to include the District for purposes of other constitutional provisions, as will be shown below. And if a constitutional reference to "state" is ambiguous, then a rational and consistent approach to its interpretation may be to include the District where that is necessary to effectuate the framers' intent. Following this course, one might well conclude that the District should be treated as a "nominal state" for purposes of article I, section 2 and the 17th amendment, and thus be entitled to congressional representation.

A. *The Early Case Law*

The Supreme Court first had occasion to consider the District's nominal statehood for the purpose of determining whether District residents could bring suit in federal courts under the diversity jurisdiction conferred by the First Judiciary Act[58] and authorized by article III, sections 1 and 2. The answer given by Chief Justice Marshall in *Hepburn and Dundas v. Ellzey*[59] was a resounding "No."[60] The Chief Justice rejected the contention

of Virginia and its residents became entitled to suffrage in that state and representation by its congressional delegation. The constitutionality of this retrocession was subsequently challenged in Phillips v. Payne, 92 U.S. 130 (1875), but the Court held that the plaintiff was estopped by the passage of time, recognizing the retrocession de facto. Unstated but implied in the decision, was the Court's conclusion that the referendum constituted an unconstitutional delegation of clause 17 authority, but not that retrocession per se was unconstitutional. The Court also implied that retrocession could be effected by a compact between Maryland and the United States.

58 Act of Sept. 24, 1789, ch. 20, 1 Stat. 73.

59 6 U.S. (2 Cranch) 445 (1804).

60 *Accord,* Hooe v. Jamieson, 166 U.S. 395 (1897).

that "state" could have different meanings in the Constitution, and looked expressly to article I to determine its single meaning. "These clauses show that the word state is used in the Constitution as designating a member of the union, and excludes from the term the significance attached to it by the writers on the laws of nations."[61] Accordingly, the federal district courts had no jurisdiction to entertain an action by a District resident against a citizen of a state; such an action was beyond the limits of the federal judicial power set by article III, section 2.

Chief Justice Marshall did not subsequently reverse himself, but sixteen years later he implicitly retreated somewhat from *Hepburn* in *Loughborough v. Blake.*[62] In *Loughborough* he ruled that Congress had the power to impose a direct tax on the District in proportion to its population, notwithstanding the command of article I, section 2 that direct taxes (like seats in the House) be apportioned "among the several states which may be included within this union." He treated the apportionment language as a "standard" by which direct taxes were to be laid, citing the general tax power of article I, section 8, clause 1, to uphold the tax on the District, as well as Congress' clause 17 power over the District as two alternative grounds for the holding.[63] The "standard" theory was disingenuous, however. If *Loughborough* does not treat the District as a state, for what purpose is the "standard" applicable? A more forthright interpretation of the case is to read it as deeming the District a state for the purposes of taxation.

Subsequently, the Court did not feel itself bound by the *Hepburn* ruling in construing the application of other constitutional powers and rights to the District. In *Callan v. Wilson*[64] it held that District residents had a sixth amendment right to trial by jury, though the amendment spoke only of "an impartial jury of the state and [judicial] district wherein the crime shall have been committed, which district shall have been previously ascertained by law."[65] In *Stoutenburgh v. Hennick* the Court stated

61 Hepburn & Dundas v. Ellzey, 6 U.S. (2 Cranch) 444, 453-54 (1804).
62 18 U.S. (5 Wheat.) 317 (1820).
63 *Id.* at 319.
64 127 U.S. 540 (1887).
65 *See also* Capital Traction Co. v. Huf, 179 U.S. 1, 5 (1898).

that Congress could exercise but not delegate its commerce power to regulate business across District borders, notwithstanding the wording of article I, section 8, clause 3 ("commerce . . . among the several states").[66] Thus, the Court effectively recognized the District's nominal statehood for the purposes of congressional power to regulate interstate commerce.[67]

B. *The* Tidewater *and* Carter *Cases*

It was not until 1949, however, that the Court once again directly confronted the question of the District's nominal statehood and of *Hepburn's* continued vitality. In *National Mutual Insurance Co. v. Tidewater Transfer Co.*,[68] the Court considered the constitutionality of a congressional statute conferring on federal courts diversity jurisdiction over cases between District and state citizens.[69] By a five to four vote the Court upheld the statute, notwithstanding the language of article III, section 2 defining diversity cases as those "between citizens of different states."

Justices Jackson, Black and Burton refused to reconsider Chief Justice Marshall's rejection of the District's nominal statehood for the purposes of construing article III and the federal judicial power, on the grounds that any other view would make the Constitution inconsistent in its usage of "state."[70] Nevertheless, they found a congressional power under clause 17 to confer diversity jurisdiction over District plaintiffs on federal courts.[71] Yet such an analysis effectively gives Congress a power under clause 17 to override the express limits on the judicial power set

66 129 U.S. 141 (1889).

67 *See also* Neild v. District of Columbia, 110 F.2d 246 (D.C. Cir. 1940); District of Columbia v. Monumental Motor Tours, 122 F.2d 195, 196 (D.C. Cir. 1941).

68 337 U.S. 582 (1949).

69 28 U.S.C. § 41(1) (1970).

70 Inconsistency in word usage is not foreign to the Constitution, however. Compare "manner" in article I, section 4, with its use in article II, section 1. With the exception of Justice Black, the Court agreed that the article I, section 4 usage did not encompass the setting of voter qualifications. Oregon v. Mitchell, 400 U.S. 112, 288 (1970) (Stewart, J., dissenting). Yet the Court interpreted the article II, section 1 usage to include the setting of voter qualifications. *Id.* at 201 (Harlan, J., dissenting); Williams v. Rhodes, 393 U.S. 23, 29 (1968). *See* Greene, *Congressional Power Over the Elective Franchise: The Unconstitutional Phases of* Oregon v. Mitchell, 52 B.U.L. REV. 505, 512-14 nn.30, 36, 40 (1972).

71 337 U.S. at 582.

forth in article III.[72] Taken literally, Justice Jackson's opinion is not merely "contrived," as Hart and Wechsler described it,[73] but untenable.

An alternative analysis that would support the result reached by Justices Jackson, Black and Burton would be to view the statute as an exercise of "protective jurisdiction," conferred to protect a substantive federal interest in preventing "party discrimination" against District litigants in the state courts.[74] Then an action under the statute would clearly arise under the laws of the United States, and so fall within the limits of article III. This analysis also seems to avoid the intent of the framers, however, insofar as it "assumes that a case can arise under federal law where the only federal law involved is a naked grant of federal jurisdiction."[75] Such an assumption effectively swallows the limits on the federal judicial power set by article III, on the assertion of "some remote connection with an unexpressed federal interest."[76]

Justices Rutledge and Murphy, in their concurring opinion, approached the "hoary precedent" of Chief Justice Marshall with greater candor, if less respect:

> [N]othing but naked precedent, the great age of the Hepburn ruling, and the prestige of Marshall's name, supports [JJ. Jackson's, Black's, and Burton's] . . . result. It is doubtful whether anyone could be found who now would write into the Constitution such an unjust and discriminatory exclusion of District citizens from the federal courts. . . . The very brevity of the opinion and its groundings, especially in their ambiguity, show that the master hand which later made his work immortal faltered.[77]

Having thus unceremoniously set aside *Hepburn*, the Justices went on to treat the District as a nominal state for the purposes of Article III, and reject the notion that the Constitution only recog-

72 *See* P. BATOR, D. SHAPIRO, P. MISHKIN & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 12 *et seq.* (2d ed. 1973).

73 *Id.* at 417.

74 *Id.* at 416-417.

75 *Id.* at 417. Hart & Wechsler set up this argument, but neither adopt nor reject it explicitly.

76 *Id.*

77 337 U.S. at 617-18.

nized one meaning of "state," from which the District was excluded. "Marshall's sole premise of decision in the Hepburn case has failed, under the stress of time and later decision as a test of constitutional construction. Key words like 'state,' 'citizen,' and 'person' do not always and invariably mean the same thing."[78]

Thus *Tidewater*, while it did not expressly overrule *Hepburn*, significantly undermined its authority for the view that "state" has a single, unvarying constitutional meaning which excludes the District. Yet *Tidewater* effectively recognized the District's nominal statehood only for purposes of construing the federal judicial power, and not for purposes of representation. Even Justices Rutledge and Murphy implied that they might interpret article I differently, when they noted that Chief Justice Marshall had failed to distinguish between "the purely political clauses" in his reference to article I in *Hepburn*, and "those affecting civil rights of citizens."[79] Moreover, Chief Justice Vinson and Justice Douglas, dissenting, also drew a distinction in interpreting "state" between those constitutional provisions "to which time and experience were intended to give content" and those "concerned solely with the mechanics of government."[80]

Justice Frankfurter in his dissent was more summary, dismissing disdainfully the majority's "latitudinarian attitude of Alice in Wonderland toward language."[81] For him, it was enough that "it was not contemplated that the district which was to become the seat of government could ever become a State."[82] But he, too, drew the distinction between those constitutional provisions which were "technical in the esteemed sense of the word" and those dealing with "generalities expanding with experience."[83]

---

78 *Id.* at 623.
79 *Id.* at 623.
80 *Id.* at 645.
81 *Id.* at 654.
82 *Id.* at 653. This was, of course, unresponsive to Justices Rutledge and Murphy, since they did not argue that the District was a state. They only argued that the District could be regarded as a state ("nominal statehood") for the purpose of construing the federal judicial power; they were arguing a rule of construction, and not the District's formal status.
83 *Id.* at 654. *See generally* United States v. Lovett, 328 U.S. 303, 321 (1946) (Frankfurter, J., concurring); Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 U. CHI. L. REV. 502, 515 (1964).

Twenty-four years later, in *District of Columbia v. Carter*,[84] the Supreme Court recognized nominal statehood as a commonplace of constitutional construction. Justice Brennan, writing for the Court, observed that "[w]hether the District of Columbia constitutes a 'State' or 'State or Territory' within the meaning of any particular statutory or constitutional provision depends upon the character and aim of the special provision involved."[85] Thus, by 1973 a majority of the Court had rejected Chief Justice Marshall's insistence in *Hepburn* on a single unvarying meaning of "state" in the Constitution.[86]

III. Nominal Statehood and District Representation

A. *The Case for Representation*

Even if one concedes that "state" may have different meanings in different parts of the Constitution, there remains the question whether "state" should be read to include the District in the context of article I, section 2 and the 17th amendment. As the history reviewed in part I of this article suggests, the congressional disfranchisement wrought when the District was fully severed from Maryland and Virginia was unintended by both the constitutional framers and the parties to the cession legislation. The new government's purpose in creating the District was to gain exclusive police and judicial jurisdiction, thereby assuring the security of congressional deliberations. No federal purpose was asserted for, or served by, denying District residents participation in the national legislature equivalent to that exercised by state residents. Rather here, as in the diversity jurisdiction provisions, the framers proceeded in their drafting without considering

84 409 U.S. 418 (1973) (construing the words "State or Territory" not to include the District of Columbia in 42 U.S.C. § 1983, although the same words do include the District in § 1982).

85 *Id.* at 420.

86 The Supreme Court has also accepted the District's nominal statehood for purposes of statutory and treaty interpretation on numerous occasions. Thus, in Geofrey v. Riggs, 133 U.S. 141 (1889), the Court held that treaty references to "States of the Union" included the District in order to give aliens the right to inherit property in the District. *See also* Hurd v. Hodge, 334 U.S. 24 (1948); Talbott v. Silver Bow County, 139 U.S. 438 (1890).

the interests of the "unborn citizens" of the "hypothetical city"[87] which was to become the District.

In light of the limited purposes for which Congress was given complete jurisdiction over the District, and of the size to which the "hypothetical city" has grown, a reconsideration of its claim to congressional representation is in order. Interpreting "state" to include the District for purposes of congressional representation would remove a political disability which has no constitutional rationale. It would grant to District residents, who are in all other respects as much Americans as state residents, their proportionate influence in national decisions. It would correct the historical accident by which D.C. residents lost the shelter of state representation without gaining separate participation in the national legislature.

One might argue in opposition that the relevant constitutional provisions deal with structural relationships, and are thus what Justice Frankfurter would call "technicalities" to be strictly and narrowly construed, rather than "generalities expanding with experience."[88] However, there has been little agreement on the Court about what constitutional provisions fall in which category. Certainly no Justice has ever been able to classify the right of suffrage very confidently.[89] *Tidewater* demonstrates vividly the disagreements over classification, since the majority and minority are at odds over the classification of article III provisions — surely "mechanical" or "technical" on their face. One suspects that the classification is ultimately more conclusory than analytic, justifying a construction rather than guiding it.[90]

In addition, the Court had itself ignored the distinction altogether in prior cases. Thus, the effect of *Loughborough v. Blake*[91]

87 National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 622 (1949) (Rutledge, J., concurring).

88 *Id.* at 654. Justice Frankfurter was there referring to the first two sections of article III as "technicalities in the esteemed sense of the word." However, one observer has suggested "it is not at all clear . . . whether Mr. Justice Frankfurter placed a particular word in the frozen category because the word was specific or whether he called it specific — or 'technical in the esteemed sense of the word' — because he wanted it to be frozen." Wofford, *supra* note 83, at 517.

89 *See, e.g.*, the debate between Justices Douglas & Harlan in Oregon v. Mitchell, 400 U.S. 112, 138, 164 (1970).

90 *See* note 88 *supra.*

91 18 U.S. (5 Wheat.) 317 (1820).

is to recognize the District's nominal statehood for the purposes of construing the tax apportionment mandate of article I, a "political" or "technical" section of the Constitution according to Justices Douglas, Frankfurter, Reed and Chief Justice Vinson in *Tidewater.* And in *Stoutenburgh v. Hennick,*[92] the District's nominal statehood was also recognized for the purpose of construing the interstate commerce power, surely one of the most "political" provisions of the Constitution.

The status of article I, clause 2 and the 17th amendment is under these circumstances far from clear. But even if one might be tempted generally to place these provisions in the "technical" category, are they still to be so treated where linked to the right of suffrage? The right to vote, while not a constitutional right per se,[93] has long been recognized as a "fundamental political right, because preservative of all rights,"[94] and the "essence of a democratic society . . . the heart of a representative government."[95] In this context it would seem to be more appropriate to

92 129 U.S. 141 (1889).

93 *See, e.g.,* Dunn v. Blumstein, 405 U.S. 330 (1972); San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 35 n.78 (1973) (dictum). *But cf.* Baker v. Carr, 369 U.S. 186, 242 (1962) (Douglas, J., concurring in part) (right to vote is inherent in republican form of government envisaged by the Guaranty Clause); Greene, *supra* note 70, at 547; 1 W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE U.S. 523-24 (1953). The lower federal courts have to date rejected the argument that the District's lack of suffrage is unconstitutionally discriminatory. The D.C. District Court expressed the view in Hobson v. Tobriner, 255 F. Supp. 295 (1966) that "[b]y choosing to live within the District of Columbia, all citizens, regardless of race, relinquish the right to vote in local elections," and by the same argument, have voluntarily given up the right to vote for congressional representatives. That court also rejected a 15th amendment claim in Carliner v. Board of Comm'rs, 265 F. Supp. 736, 740 (1967), *aff'd per curiam,* 412 F.2d 1091 (D.C. Cir. 1969), with the dictum that "the circumstances of the place of birth can hardly be considered a discriminatory act on the part of the Federal Government." 265 F. Supp. at 740.

94 Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

95 Reynolds v. Sims, 377 U.S. 533, 555, 562 (1964). Wesberry v. Sanders, 376 U.S. 1, 17 (1964) is even stronger: "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." Justice Douglas has declared that the right to vote for national officers is a privilege and immunity of national citizenship. Oregon v. Mitchell, 400 U.S. 112, 149 (1970) (Douglas, J., concurring in part). Congress has also declared it an "inherent constitutional right," 84 Stat. 318 (1970), and of course, suffrage is implicit in the historical American principle of government by consent of the governed. Note, *Home Rule for District of Columbia Without Constitutional Amendment,* 3 GEO. WASH. L. REV. 205, 210-11 (1934).

follow the admonition of the Supreme Court in *United States v. Classic*:

> We read . . . [the Constitution's] words, not as we read legislative codes which are subject to continuous revision with the changing course of events, but as the revelation of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government.[96]

A corollary of that rule is that we avoid the restrictive constructions given statutory law, and those which would deny or thwart a basic constitutional purpose. Thus, Chief Justice Warren declared on the exclusion of Representative Adam Clayton Powell from the House:

> Had the intent of the Framers emerged from these materials with less clarity, we would nevertheless have been compelled to resolve any ambiguity in favor of a narrow construction of the scope of Congress' power to exclude members-elect. A fundamental principle of our representative democracy is, in Hamilton's words, "that the people should choose whom they please to govern them."[97]

It is similarly appropriate in reviewing the historical evidence and analyzing the constitutional text bearing on District representation in Congress to resolve ambiguities in favor of the "fundamental principle of our representative democracy."

B. *The Countervailing Arguments*

The conventional analysis would assert that representation for the District threatens "seathood." That is, nominal statehood for this purpose is said to be incompatible with the exclusive legislative authority of the District vested in Congress by clause 17.[98]

96 United States v. Classic, 313 U.S. 299, 316 (1941). *See also* 317 U.S. xlii, xlvii (1942) (Stone, C.J., speaking for the Court after the death of Justice Brandeis).

97 Powell v. McCormack, 395 U.S. 486, 547 (1969).

98 *See* S. REP. No. 507, 67th Cong., 2d Sess. 3 (1922), reporting favorably on a proposed constitutional amendment giving the District representation:

> The problem is to find a way to give the people of the District the representation to which they are entitled as national Americans in Congress and the electoral college, with access to the federal courts, without depriving Congress of the exclusive legislative control of the District, which the Constitution imposes upon it and which, the courts say, it may not surrender without specific constitutional law amendment.

Second, nominal statehood may deprive the actual states of their equal suffrage in the Senate, guaranteed by article V of the Constitution. Third, nominal statehood may be a theory incapable of containment to the District, "opening the floodgates" to territorial representation in the national legislature.[99]

The alleged incompatibility of statehood and seathood, or exclusive congressional legislative authority, does not withstand close analysis. The question of the District's subordination to congressional authority is logically unrelated to the composition of Congress.[100] The granting of representation to the District does not somehow free it of congressional legislative authority; it merely gives the people of the District their fair share in that authority, which is to say two in 102 Senate seats, and two or three in 435 House seats. Of course a statute recognizing the District's representation in Congress as a nominal state could reaffirm the clause 17 plenary power by reserving "ultimate legislative authority" in Congress, just as the recent "home rule" act did,[101] but such a provision is technically superfluous in either case.

Nor would nominal statehood violate the second proviso of article V, stating that "no State, without its consent, shall be deprived of its equal suffrage in the Senate." This provision has been cited in opposition to District representation on the grounds that such representation would work the proscribed deprivation:

---

99 A fourth assertion is possible, *i.e.*, that article IV, section 3, providing that ". . . no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress," is a bar to the District's nominal statehood. Because the area which became the District was "to be forever ceded and relinquished to the Congress and government of the United States, in full and absolute right and exclusive jurisdiction," neither condition appertains. An Act to Cede to Congress a District of Ten Miles Square, 2 Kilty Laws of Md., ch. 46 (1788). State jurisdiction was irrevocably relinquished on the first Monday of December, 1800. United States v. Hammond, 26 F. Cas. 96 (No. 14293) (D.C. 1801). On the same date the District ceased to be a part of either of the ceding states. *Id.*; Downes v. Bidwell, 182 U.S. 244 (1901).

100 Residents of a federal enclave, also within the clause 17 "exclusive legislation" power of Congress, have been held to be entitled to vote in state and national elections, as citizens of the state in which their enclave lies. Evans v. Cornman, 398 U.S. 419 (1970); *cf.* Carrington v. Rash, 380 U.S. 89 (1965).

101 District of Columbia Self-Governmental Reorganization Act § 601, Pub. L. No. 93-198, 87 Stat. 774 (1973).

> . . . to accord two Senators to some unit of government not a state would be diluting, diminishing; and it would be depriving the states of their equal suffrage in the Senate. I do not see how two Senators could be accorded to a territory or a commonwealth or to a District set apart from the States, without violating the very provision of the Constitution which states that no State shall be deprived of its equal suffrage in the Senate.[102]

The short answer to this critique is that by the principle of nominal statehood, the District *is* a state for the purpose of representation. In addition, the history of the proviso indicates that its purpose was to ensure equality of the states in the Senate, and not to prevent the "dilution" of their votes. In the Constitutional Convention, Roger Sherman of Connecticut expressed his fear that three-quarters of the states might do things "fatal to particular states" by constitutional amendment, such as abolishing the particular states altogether or depriving them of their equal vote in the Senate.[103] In response, Gouverneur Morris proposed the proviso. It was thus aimed only at protecting the equality of states in the Senate, thereby preserving for the small states the benefit of the Great Compromise.[104]

Reviewing this history, a 1922 Senate Report rejected the article V "dilution" argument:

> The plain meaning of this provision is that no State shall have any greater numerical representation in the Senate than any other state. It cannot mean that the aliquot share of the legislative power possessed by a state at any given time cannot be reduced as the proportion of that power which was originally 2 as to 26, has been steadily diminished by the admission of new states until it is now 2 as to 96.[105]

District representation in the Senate manifestly fails to disturb the equality of existing states, nor does it give the District any

---

102 *Hearings Before Subcomm. on Const'l Amend. of the Senate Comm. on the Judiciary*, 87th Cong., 2d Sess. 72 (1962) (letter of Senator Francis Case).

103 MADISON'S DEBATES, *supra* note 13, at 573.

104 Indeed, Madison's notes of the convention suggest that the proviso was one condition of the small states' approval of the Constitution: ". . . being dictated by the circulating murmurs of the small states, [the proviso] was agreed to without debate . . . ." *Id.* at 575.

105 S. REP. No. 507, 67th Cong., 2d Sess. 16 (1922).

more voting power than that to which any new state would be entitled.

Finally, nominal statehood would not necessarily and inevitably open the door to territorial representation. "State" has been read in at least one constitutional provision to include the District but exclude a territory, the Virgin Islands.[106] Moreover, the structure of territorial status precludes such representation. For constitutional purposes, territories are regarded as either "incorporated" into the United States or "unincorporated."[107] "Unincorporated" territories are regarded as belonging to rather than part of the United States, and thus could hardly be considered "states" for any constitutional purpose.[108] "Incorporated" territories have been regarded as part of the United States for constitutional purposes, but all territories which have won "incorporated" status in the courts have since become states (*e.g.*, Alaska and Hawaii), so that, apparently, all present territories are unincorporated.[109]

Some of the present territories could, presumably, eventually become incorporated. But even for incorporated territories, nominal statehood under article I, section 2 and the 17th amendment would be inappropriate. For such territories, actual statehood is a "preordained end," for which territorial status is but a preliminary pupilege.[110] Nominal statehood for congressional representation would telescope the transitional period so carefully planned by the framers, in contradiction of the gradualism which is the chief characteristic of the transition or "period of ineligibility," as the Court has called it.[111] Nominal statehood therefore seems singularly inappropriate for incorporated territories. More-

106 The 6th amendment was so read in Callan v. Wilson, 127 U.S. 540 (1887); Government of the Virgin Islands v. Bodle, 427 F.2d 532 (3d Cir. 1970).

107 "Incorporation" of territories is a judicial concept developed by the Supreme Court after the Spanish-American War to deal with "the difficult problem of the extent to which the guarantees of the Constitution applied to newly acquired territories." Smith v. Gov't of Virgin Islands, 375 F.2d 714, 717 (3d Cir. 1967).

108 *See* Balzac v. Puerto Rico, 258 U.S. 298 (1922) (holding that Puerto Rico is an unincorporated territory so that its residents are not entitled to the protections of the 6th amendment).

109 86 C.J.S. *Territories* 12 (1973).

110 District of Columbia v. Carter, 409 U.S. 418, 431 (1973); Balzac v. Puerto Rico, 258 U.S. 298, 311 (1922) (incorporation is a "step leading to statehood").

111 O'Donoghue v. United States, 289 U.S. 516, 537 (1933).

over, it is unnecessary; if representation for such territories is required to achieve some constitutional purpose and the territories are ready for it, the Constitution has provided a means for achieving it: formal admission into the union. Since actual statehood is the object of territorial pupilege, it seems to be the exclusive means for achieving representation for the territories.

Conclusion

It has been the purpose of this article to suggest that conventional thinking about congressional representation for the District of Columbia has not adequately canvassed the constitutional possibilities. The theory of nominal statehood — that "state" may in some constitutional provisions have reference to more than just the familiar 50 jurisdictions — suggests a much more subtle and complex question than has been asked heretofore. In giving meaning to "state" in the context of article I, section 2 and the 17th amendment, one should seek a definition which reflects the intent of the framers and serves the broad purposes for which the Constitution was written.

The history of article I, section 8, clause 17, and of the legislation ceding and establishing the District, suggest that denial of congressional representation to District residents was neither necessary to effect the constitutional purpose nor desired by those involved. Rather the problem was not clearly perceived until the damage was done. If no constitutional purpose is served by exclusion of the District, the broader principles of representative government which the Constitution is meant to effect favor making the District a nominal state for purposes of congressional representation.

The analysis here has also suggested that such an application of the theory of "nominal statehood" would not undermine the District's subordination to the exclusive legislative authority of Congress, violate the states' equal protection in the Senate, or open the door to territorial representation. It hardly needs mention that nominal statehood for congressional representation would not automatically trigger any other constitutional provision on behalf of the District. Nominal statehood is a theory

of constitutional construction which emphasizes that "state" status for the District varies with the constitutional context.

The evidence and argument presented here in support of the District's nominal statehood for the purpose of representation is far from overwhelming. But the significance of representation for the people of the District dictates a reconsideration of the conventional analysis of the representation problem. If this preliminary reconsideration seems distortive of the Constitution's language, one might recall that the Supreme Court, in its exegesis of civil rights and liberties, has long signalled a willingness to treat the constitutional text as a remarkably flexible document. That "state" should be so flexed to achieve District congressional representation may not be obvious; but neither can the proposition be summarily dismissed.

HARVARD JOURNAL ON LEGISLATION

KENNETH N. BURNS
President

ROBERT E. ZAHLER
Articles Editor

CARY H. HALL
Managing Editor

PHILIP C. HUNT
Note Editor

ERIC J. ZAHLER
Congress Issue Editor

HAYWARD L. DRAPER
Book Review Editor

ARTHUR G. POWERS
Director of Legislation

Board of Editors

TED T. AMSDEN
STEPHEN CALKINS
MARK S. DICKERSON
MARK A. JARBOE
GERALD KERNER
KEVIN J. O'CONNOR
JOHN A. SATORIUS

Published four times during the academic year by the Harvard Legislative Research Bureau

ERNEST B. ABBOTT
NATHAN E. ASSOR
BETSY E. BAYHA
DENNIS N. BERMAN
HOWARD M. BLUMENTHAL
LORRAINE S. BLAIR
THEODORE D. BOGUE
RACHELLE V. BROWNE
BERNADETTE C. CHAVEZ
PHILLIP R. CLARK
STEVE A. CUNNINGHAM
THOMAS J. DOUGHERTY
WILLIAM H. EILBERG
KENNETH W. ELLISON
MICHAEL L. FEIGENHEIMER
MARC D. FREED
MARTIN R. GARAY
JOHN C. HENRY
JAMES A. HINDS
TIMOTHY J. HOWARD
BARRY M. KLAYMAN
TAD M. KRAMARCZYK
JOHN M. KUECHLE
DENNIS R. MAHONEY
FORREST D. MILDER
NEIL P. MOTENKO
ROBERT J. OWEN
VINCENT A. PIEKARSKI
JOHN R. POWER
KATHLEEN M. REINBOLT
E. LEO SLAGGIE
STAFFORD SMILEY
GARY J. SMITH
WILLIAM F. SMITH
PAUL E. STROHL
JAMIENNE S. STUDLEY
LAURENCE D. WELTMAN
DEBORAH K. WEST
B. LYNN WINMILL

Faculty Advisers

ROBERT E. KEETON
DAVID L. SHAPIRO
RICHARD B. STEWART

LINDA H. CLARK
Staff Assistant

NOTES

THE REQUIREMENT OF FORMAL ADJUDICATION UNDER SECTION 5 OF THE ADMINISTRATIVE PROCEDURE ACT

Introduction

The Administrative Procedure Act (APA) divides agency action into rulemaking and adjudication.[1] Under the APA the great bulk of rulemaking is informal, merely involving notice and comment,[2] though provision is made for formal, trial-type rulemaking.[3] In sharp contrast, the APA deals only with formal ad-

---

1 *Compare* Administrative Procedure Act § 2(c), 5 U.S.C. §§ 551(4) & (5) (1970) *with* Administrative Procedure Act § 2(d), 5 U.S.C. §§ 551(6) & (7) (1970). *See generally* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 5.02 (1958); U.S. DEP'T. OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 12-16 (1947) [hereinafter cited as ATTORNEY GENERAL'S MANUAL].

2 *See* Administrative Procedure Act § 4, 5 U.S.C. § 553 (1970). Under § 4(a), 5 U.S.C. § 553(b) (1970), the agency must publish notice of the proposed rulemaking in the Federal Register; under § 4(b), 5 U.S.C. § 553(c) (1970), the agency must give interested persons an opportunity to participate in the rulemaking, generally by written comment. However, § 4(a), 5 U.S.C. § 553(b)(B) (1970), gives an agency the right to adopt a rule wtihout notice and comment if it finds that such procedures "are impracticable, unnecessary, or contrary to the public interest." There are also exceptions for military and foreign affairs functions, *see* Administrative Procedure Act § 4(1), 5 U.S.C. § 553(a)(1) (1970); agency management, organization, procedure and practice, or personnel, *see* Administrative Procedure Act §§ 4(2) & 4(a), 5 U.S.C. §§ 553(a)(2) & 553(b)(A) (1970); matters relating to public property, loans, grants, benefits, or contracts, *see* Administrative Procedure Act § 4(2), 5 U.S.C. § 553(a)(2) (1970); and interpretative rules or general statements of policy, *see* Administrative Procedure Act § 4(a), 5 U.S.C. § 553(b)(A) (1970). *See generally* 1 K. DAVIS, *supra* note 1, §§ 6.01-.02, 6.04-.05; ATTORNEY GENERAL'S MANUAL, *supra* note 1, at 26-39.

3 Administrative Procedure Act § 4(b), 5 U.S.C. § 553(c) (1970) ("When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title [specifying trial-type procedures] apply instead of this subsection"). For a summary of the procedures that must be followed in a trial-type proceeding see text accompanying notes 6-15 *infra*. Formal rulemaking differs from formal adjudication in three important respects: (1) the agency may limit participation to written submissions, *i.e.*, there is no right to an oral hearing, see Administrative Procedure Act § 7(c), 5 U.S.C. § 556(d) (1970); (2) the presiding officer need not issue a recommended decision, *see* Administrative Procedure Act § 8(a), 5 U.S.C. §§ 557(b)(1) & (2) (1970); and (3) the separation of function provision, *see* text accompanying note 14 *infra*, does not apply, *see* Administrative Procedure Act §§ 5 & 5c, 5 U.S.C. §§ 554(a) & (d) (1970). *See generally* ATTORNEY GENERAL'S MANUAL, *supra* note 1, at 15, 32-35, 50-51, 78, 82-83.

In two recent decisions, United States v. Florida E. Coast Ry., 410 U.S. 224 (1973),

judication.[4] If the adjudication is not "required by statute to be determined on the record after opportunity for an agency hearing,"[5] the procedures specified for adjudications do not apply.

---

and United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742 (1972), the Supreme Court has severely restricted the situations in which an agency must hold formal rulemaking proceedings. *See* text accompanying notes 217-21 *infra*. As a result the federal courts have been struggling with a group of cases that require more than mere notice and comment, but less than a trial-type hearing. *See, e.g.*, Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 392-401 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974) (remand for failure to respond to party's comments); Mobil Oil Corp. v. FPC, 483 F.2d 1238, 1249-54 (D.C. Cir. 1973) (remand for, *inter alia*, failure to follow procedures necessary to create a sufficient record); International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 629-33 (D.C. Cir. 1973) (remand to allow for reasonable cross-examination); Kennecott Copper Corp. v. EPA, 462 F.2d 846, 850-51 (D.C. Cir. 1972) (remand so that agency may disclose basis for rule). *But see* Phillips Petroleum Corp. v. FPC, 475 F.2d 842, 851-52 (10th Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974) (only informal rulemaking required). The issues raised by these cases are beyond the scope of this Note. *See generally* Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185 (1974); Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375 (1974); Comment, *Ratemaking by Informal Rulemaking under the Natural Gas Act*, 74 COLUM. L. REV. 752 (1974); Note, *FPC Ratemaking: Judicial Control of Administrative Procedural Flexibility, Federal Administrative Law Developments—1973*, 1974 DUKE L.J. 326; Note, *The Judicial Role in Defining Procedural Requirements for Agency Rulemaking*, 87 HARV. L. REV. 782 (1974).

4 *See* Administrative Procedure Act § 5, 5 U.S.C. § 554(a) (1970). The omission of informal adjudicatory procedures was not a mere oversight of the legislative draftsmen. Since adjudication is defined as the formulation of an order, which is a final disposition other than rulemaking, *see* 5 U.S.C. §§ 551(6) & (7) (1970), informal adjudication under the APA's definitional scheme

> might include many governmental functions such as the administration of loan programs, which traditionally have never been regarded as adjudicative in nature and as a rule have never been exercised through other than business procedures. The exclusion of such functions from the formal procedural requirements . . . is accomplished by the introductory phrase of section 5.

ATTORNEY GENERAL'S MANUAL, *supra* note 1, at 40. *See, e.g.*, Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 414-15 (1971) (agency action characterized as neither rulemaking nor adjudication).

Professor Davis draws a distinction between informal adjudication and discretionary action. *See* K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 21-22 (1969). That distinction would not, however, appear to cover the *Overton Park* case, since the Court's requirement for a record, 401 U.S. at 419-20, implies anything but agency discretion. Rather Davis' distinction appears to draw the same line the APA draws between an order, *i.e.*, a final disposition, and any act of an agency short of a final disposition. *See* ATTORNEY GENERAL'S MANUAL, *supra* note 1, at 40. Whatever classification is adopted, the APA clearly excludes from its adjudicatory provisions "the great mass of administrative routine." SENATE COMM. ON THE JUDICIARY, 79TH CONG., 1ST SESS., SENATE COMPARATIVE PRINT OF JUNE 1945, at 7 (Comm. Print 1945), reprinted in SENATE COMM. ON THE JUDICIARY, ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, S. DOC. NO. 248, 79th Cong., 2d Sess. 22 (1946) [hereinafter cited as LEGISLATIVE HISTORY].

5 Administrative Procedure Act § 5, 5 U.S.C. § 554(a) (1970).

When the APA does apply to an agency adjudication, its provisions[6] require notice of the hearing[7] and an opportunity to participate in that hearing.[8] The APA further specifies that in the case of a disputed controversy the parties are entitled to an oral hearing with the right of cross-examination;[9] to submit proposed findings of fact and conclusions of law, exceptions to prior rulings, and a memorandum in support of such findings, conclusions, or exceptions;[10] to have the agency decision based on the entire record made at the hearing;[11] and to have the agency, or any part thereof, or a hearing examiner preside at the taking of evidence.[12] The presiding officer must be impartial and unbiased.[13] When that officer is a hearing examiner he may not engage in ex parte communications, nor may he consult an agency employee engaged in investigative or prosecutorial functions within the agency, nor may he be responsible to anyone engaged in such activities.[14] In addition, if the agency did not preside at

6 The adjudicatory procedures are not in a single section. If § 5, 5 U.S.C. § 554 (1970), applies then § 5(b), 5 U.S.C. 554(c)(2) (1970), directs the adjudication to be held in accordance with §§ 7 & 8, 5 U.S.C. §§ 556 & 557 (1970). Generally, § 7 lays down requirements for the hearing, and § 8 lays down requirements for the decision.

7 Administrative Procedure Act § 5(a), 5 U.S.C. § 554(b) (1970). *See generally* ATTORNEY GENERAL'S MANUAL, *supra* note 1 at 46-47.

8 Administrative Procedure Act § 5(b), 5 U.S.C. § 554(c) (1970). *See generally* ATTORNEY GENERAL'S MANUAL, *supra* note 1, at 47-50.

9 Administrative Procedure Act § 7(c), 5 U.S.C. § 556(d) (1970). *See generally* ATTORNEY GENERAL'S MANUAL, *supra* note 1, at 77-78. The right, however, is not unlimited; the test being whether it is necessary "for a full and true disclosure of the facts." ATTORNEY GENERAL'S MANUAL, *supra* note 1, at 77-78; *see* United States v. Storer Broadcasting Co., 351 U.S. 192, 202-03, 205 (1956); FPC v. Texaco, 377 U.S. 33, 39 (1964); Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609, 620-21 (1973); American Airlines, Inc. v. CAB, 359 F.2d 624, 628-29 (D.C. Cir.), *cert. denied*, 385 U.S. 843 (1966).

10 Administrative Procedure Act § 8(b), 5 U.S.C. § 557(c) (1970). *See generally* ATTORNEY GENERAL'S MANUAL, *supra* note 1, at 85.

11 Administrative Procedure Act §§ 7(c), 7(d), 8(b) & 10(e)(B)(5), 5 U.S.C. §§ 556(d), 556(e), 557(c)(A) & (B), 706(2)(E) (1970). *See generally* ATTORNEY GENERAL'S MANUAL, *supra* note 1, at 79, 86-87, 109. In the case of an informal adjudication, *i.e.*, an adjudication not invoking § 5, even though the substantial evidence test does not apply, the courts have held that the validity of the agency action is to be based on the record made at the agency level. *E.g.*, Camp v. Pitts, 411 U.S. 138, 141-43 (1973). What exactly that record is and how it was created is not entirely clear. *Cf.* cases cited at note 3 *supra*.

12 Administrative Procedure Act § 7(a), 5 U.S.C. § 556(b) (1970). *See generally* ATTORNEY GENERAL'S MANUAL, *supra* note 1, at 71-72.

13 Administrative Procedure Act § 7(a), 5 U.S.C. § 556(b) (1970). *See generally* ATTORNEY GENERAL'S MANUAL, *supra* note 1, at 72-74.

14 Administrative Procedure Act § 5(c), 5 U.S.C. § 554(d) (1970). *See generally*

the taking of evidence, the presiding employee must make the initial or recommended decision.[15] In any given case the agency decision can be overturned not only because it lacks substantial evidence but also because the specified procedures were not followed.[16] Thus, the APA provides a rather clear standard for measuring the procedural validity of any adjudication to which it applies.

This Note examines the scope of these formal, trial-type requirements.[17] The statutory test "required by statute" is contained in § 5 of the APA. While at first glance § 5 appears to provide a clear standard for when APA procedures are required, the Supreme Court has given a broad reading to that section. To

---

ATTORNEY GENERAL'S MANUAL, *supra* note 1, at 50-58, 72. When the agency or a member thereof is the presiding officer 5 U.S.C. § 554(d)(C) (1970) provides the exemption from the separation of functions requirement. In addition, 5 U.S.C. §§ 554(d)(A) & (B) (1970) provide exemptions for initial licensing and adjudications concerning the validity or applicability of rate structures. The justification for both exemptions is that such proceedings are similar to rulemaking and should be consolidated with the appropriate rulemaking proceeding or carried on in a similar fashion. *See* ATTORNEY GENERAL'S MANUAL, *supra* note 1, at 50-53.

15 Administrative Procedure Act §§ 5(c), 8(a), 5 U.S.C. §§ 554(d), 557(b) (1970). *See generally* ATTORNEY GENERAL'S MANUAL, *supra* note 1, at 53, 81-85. The exact procedures to be followed depend on whether § 5(c) is or is not applicable to the adjudication. When § 5(c) is applicable the hearing examiner must issue an initial decision that becomes final unless appealed to the agency, or if the agency issues an initial decision the hearing examiner must file a recommended decision. When § 5(c) is not applicable any qualified hearing examiner may issue the initial decision. Furthermore, with respect to initial licensing and rulemaking the hearing examiner's recommended decision may be replaced by a tentative agency decision or a recommended decision by an agency employee. The agency may omit the report if it finds "that due and timely execution of its functions imperatively and unavoidably so requires."

16 Administrative Procedure Act § 10(e)(B)(4), 5 U.S.C. § 706(2)(D) (1970); *see, e.g.*, Local 134, IBEW v. NLRB, 486 F.2d 863 (7th Cir. 1973) *rev'd sub nom.* International Tel. & Tel. Corp. v. Local 134, IBEW, 95 S. Ct. 600 (1975) (Board's order finding unfair labor practice not enforced since hearing officer later served in prosecutorial capacity); Twigger v. Schultz, 484 F.2d 856 (3d Cir. 1973) (alternate holding) (order suspending customhouse broker's license set aside for violation of § 5(c)); Oil Shale Corp. v. Morton, 370 F. Supp. 108 (D. Colo. 1973) (Interior Department's rejection of patent claims remanded for, *inter alia*, failure to comply with § 5); Van Teslaar v. Bender, 365 F. Supp. 1007 (D. Md. 1973) (ruling of the Commandant of the Coast Guard that merchant marine officer was guilty of shoving a superior officer set aside since substitution of hearing examiner midway in proceedings violated § 5). *See also* cases cited at notes 115, 131-32, 139, 141, 150 *infra*.

17 In addition to the "required by statute" limitation at the beginning of § 5, the APA also specifies six specific exemptions to the provisions of § 5, and therefore also to §§ 7 & 8. *See* 5 U.S.C. §§ 554(a)(1)-(6) (1970). This Note does not deal with those exemptions. *See generally* ATTORNEY GENERAL'S MANUAL, *supra* note 1, at 43-46.

understand what the standard is, this Note first discusses the scheme anticipated by the legislative draftsmen as evidenced by the legislative history of the APA. The Supreme Court's interpretation of that scheme is next examined, and finally the judicial reception of the Supreme Court's ruling is discussed.

I. The Legislative Background of Section 5

One of the recurrent themes in the evolution of administrative law has been the constant search for uniformity in administrative practice.[18] But while the call for uniformity is often heard, a cogent justification does not often accompany the call. Surely the variety of administrative functions[19] and the equally varied situations in which those functions are carried out,[20] do not require uniformity as a matter of a priori logic. On the other hand, there is something to be said for knowing that most, if not all, administrative activities follow similar patterns. It makes access to the agencies easier, it makes agency action more efficient, and it makes judicial review more evenhanded.[21]

---

18 *See* H.R. Rep. No. 1980, 79th Cong., 2d Sess. 16 (1946), reprinted in Legislative History, *supra* note 4, at 250; S. Rep. No. 752, 79th Cong., 1st Sess. 1 (1945), reprinted in Legislative History, *supra* note 4, at 187; H.R. Rep. No. 1149, 76th Cong., 1st Sess. 2 (1939); S. Rep. No. 442, 76th Cong., 1st Sess. 9-10 (1939); Attorney General's Manual, *supra* note 1, at 5, 9; U.S. Attorney General's Committee on Administrative Procedure, Final Report of the Attorney General's Committee on Administrative Procedure 20 (1941) [hereinafter cited as Final Report]. *See also* Wong Yang Sung v. McGrath, 339 U.S. 33, 41 & n.21 (1950).

19 For example, the Securities and Exchange Commission evaluates registration statements and annual accounting information from corporations subject to its provisions; regulates and if necessary disciplines stock exchanges (and members thereof), national securities associations (and members thereof), and individual broker-dealers, investment advisers, etc.; approves or files recommendations for certain types of corporate reorganizations, particularly with respect to utility holding companies; enforces various monetary regulations; as well as undertaking a host of other day-to-day and long range policy and operative programs. *See generally* Final Report, *supra* note 18, at 20, 317-321; 1 L. Loss, Securities Regulation 129-55 (2d ed. 1961); 4 *id.* at 2275-93 (Supp. 1969).

20 The various functions described in note 19 *supra* may be implemented by rulemaking or adjudication or more discretionary, informal, investigative-type procedures; they may be initiated by the SEC or a concerned party; and they may be carried out at the agency level or in the federal courts, either by a civil action for an injunction or by a criminal trial.

21 *See, e.g.*, S. Rep. No. 442, 76th Cong., 1st Sess. 9-10 (1939):

> The results of the lack of uniform procedures . . . have been at least three

However, the uniformity in administrative practice sought by legislative reform comes at a high price. Since not everything is the same, general guides must contain exceptions in order not to straightjacket administrative actions that legitimately require other than ordinary procedures. While the need for exceptions was accepted by the legislative draftsmen, the method to be used in recognizing such exceptions has provoked controversy. This can be seen in the progression of legislation which eventually resulted in the APA.

An early attempt at regulating administrative procedure, the Walter-Logan bill, exempted particular agencies from its provisions as well as specific types of proceedings.[22] President Roosevelt's objection to this type of exemption is one of the reasons for his veto of the bill.[23] The Attorney General's Committee on Administrative Procedure[24] took a more functional approach. With respect to the adjudicatory provisions, a majority of the Committee suggested a bill that provided for six exemptions,

---

> fold; (1) the respective administrative agencies give little heed to, and are little assisted by, the decisions of other administrative agencies . . . ; (2) the courts are placed at considerable disadvantage because they must verify the basic statutes of all decisions relating to other administrative agencies which are cited to them . . . ; and (3) individuals and their attorneys are at a disadvantage in the presentation of their administrative appeals . . . .

22 The Walter-Logan bill, S. 915, H.R. 6324, 76th Cong., 1st Sess. (1939), was passed by both houses of a Congress before the Attorney General's Committee on Administrative Procedure, appointed in 1939, see note 24 *infra*, finished its work and recommended legislation. For a general description and analysis of the bill see S. Doc. No. 145, 76th Cong., 3d Sess. (1940). Section 7(b) of the bill exempted all activities of the Federal Reserve Board, the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Interstate Commerce Commission, the Department of State, and the Department of Justice. In addition there was a long list of particular activities that were exempt from the act.

23 The President's veto message of December 18, 1940, is reprinted in 86 CONG. REC. 13942-43 (1940). While the concept of exempting specific agencies was not the main reason for the President's veto, the report of the Attorney General accompanying the veto notes that:

> The principles that governed what should be included and what excepted are not discernible. . . . Cases involving the denial of a loan are exempted; but the denial of a grant-in-aid is presumably blanketed in. The Federal Reserve Board, the Office of the Comptroller of the Currency, and the Federal Deposit Insurance Corporation are exempted; but the Secretary of the Treasury is presumably blanketed in.

86 CONG. REC. 13944 (1940).

24 On the origins and progress of the Attorney General's Committee see FINAL REPORT, *supra* note 18, at 1, app. A.

most of which dealt with specific types of subject matter,[25] and which applied

> only to proceedings wherein rights, duties, or other legal relations are required by law to be determined after opportunity for hearing, and if a hearing be held, only upon the basis of a record made in the course of such hearing.[26]

If the proceeding did not meet the required by law test or if it fell within any of the exemptions it was not subject to the adjudicatory requirements of the bill. The minority suggested a bill with eight specific exemptions,[27] although many of the exemptions were not similar to the majority bill. The most important difference was an exemption for "[a]dministrative decisions, determinations or orders subject to, or made and issued upon, trial de novo by a separate and independent administrative tribunal or in any court."[28] The minority also included a required by law test, in similar though not exactly equivalent language as the majority's bill.[29] But instead of wording the required by law test as a conjunctive requirement to be met, the minority proposal stipulated that its function was limited to bringing within the bill those actions that were otherwise exempted under any of the eight specific exemptions, except for the trail de novo exemption which was absolute.[30] The apparent implication of this odd scheme is that all adjudications were subject to the bill unless specifically exempted, but even then, if the adjudication met the required by law test it fell under the bill's adjudicatory provisions. This is a much more limited exception provision than that suggested by the majority.[31] Subsequently, these suggested bills were intro-

---

25 *See* FINAL REPORT, *supra* note 18, at 195-96, § 301(a)-(f).

26 *Id.* at 195, § 301.

27 *Id.* at 232, § 301(a)-(h).

28 *Id.* at 232, § 301(a).

29 Instead of "proceedings wherein rights, duties, or other legal relations are required by law," the minority substituted "proceedings in which the *statutory* rights, duties, or other legal relations of *any person* are required by law." *Id.* at 233, § 301 (emphasis added).

30 *Id.*

31 *See Hearings on S. 674, S. 675 and S. 918 Before a Subcomm. of the Senate Comm. on the Judiciary*, 77th Cong., 1st Sess. 1477-78 (1941) (statement of Francis Biddle, Acting Attorney General, labeling the breadth of the minority bill's coverage "so broad as to lead to fantastic results") [hereinafter cited as *Senate Hearings*, 1941]. *But see* FINAL REPORT, *supra* note 18, at 233; *Senate Hearings*, 1941, *supra*, at 1389-90

duced in Congress,[32] and hearings on them were held before a subcommittee of the Senate Committee on the Judiciary in 1941. The advent of the war prevented any final action by Congress.

The hearings did, however, provide valuable insight into the congressional intent behind the exception provision. Clyde Aitchison, a Commissioner of the Interstate Commerce Commission, in testifying before the Senate noted that the required by law test raised two problems of interpretation. First, did it cover the situation where the relevant statute was silent as to the requirement for a hearing, but the Constitution might require it?[33] Second, did it cover the situation where the agency might as a matter of convenience or discretion offer the opportunity for a hearing?[34] He suggested that the answers to these questions "should be made unmistakably clear," though he did not offer any solutions.[35]

Others who testified did make suggestions. Major Schofield, Special Assistant to the Attorney General in charge of the Immigration and Naturalization Service, advocated that the required by law language be changed to "required by the constitution or statutes."[36] In his view this would restrict the bill only to those cases in which agencies now disposed of matters by formal hearing. For example, in the case of the Immigration and Naturalization Service, this formulation would limit the application of the bill to exclusion and deportation cases.[37] Otherwise, he felt that the bill as currently drafted might include those situations in which an agency grants a formal hearing only at its discretion, such as an alien's request for an extension of his stay.[38] Francis Biddle, the Acting Attorney General, also suggested that "statute or constitution" be substituted for "required by law" to avoid covering agencies that ". . . have ex gratia by regulation imposed

(where the minority felt its exemptions were broader than those in the majority bill since their bill distinguished between rule and order and the majority bill did not).

32 The majority bill was S. 675, 77th Cong., 1st Sess. (1941) and the minority bill was S. 674, 77th Cong., 1st Sess. (1941).

33 *Senate Hearings*, 1941, *supra* note 31, at 454.

34 *Id.* at 453-54.

35 *Id.* at 454.

36 *Id.* at 577.

37 *Id.* at 577-78.

38 *Id.* at 578.

upon themselves requirements for formal procedures though the applicable statute makes no such requirement."[39]

Of Aitchison's two problem areas, the concern of those who testified was to draw the line between hearings required by statute or constitution and hearings given at the agency's discretion. Admittedly, the legislative history is meager, and its impact on the committee uncertain since the committee's task was cut short; but if anything is to be derived, it is that only discretionary hearings were intended to be excluded from the bill's adjudicatory provisions.

When the matter of administrative law reform was taken up again in 1945, four new bills were considered in addition to the old majority and minority bills. The two old bills still retained the ambiguous required by law phrase.[40] Three of the other bills retained the earlier bills' exemption provision, but replaced the required by law phrase with required by statute.[41] The fourth and most important bill, the precursor of the bill eventually passed, also replaced required by law with required by statute, and also simplified the phrase to "[i]n every case of adjudication required by statute to be determined after opportunity for an agency hearing . . . ."[42] Thus, two changes were considered: the change to required by statute, and the elimination of the requirement that the proceeding be one involving rights, duties, or other legal relations. At first glance one might assume that the legal relations language which had originally modified "proceeding" had been subsumed by the inclusion of the word "adjudication" and its definition.[43] But since three of the other bills used both

39 *Id.* at 1456.

40 *See* H.R. 184, 79th Cong., 1st Sess. § 301 (1945), reprinted in LEGISLATIVE HISTORY, *supra* note 4, at 134 (the old majority bill); H.R. 1206, 79th Cong., 1st Sess. § 301 (1945), reprinted in LEGISLATIVE HISTORY, *supra* note 4, at 170 (the old minority bill).

41 The proviso became, "In every administrative adjudication in which the rights, duties, obligations, privileges, benefits, or other legal relations of any person are required by statute to be determined only after opportunity for an administrative hearing." H.R. 339, 79th Cong., 1st Sess. § 4 (1945), reprinted in LEGISLATIVE HISTORY, *supra* note 4, at 140; H.R. 1117, 79th Cong., 1st Sess. § 4 (1945), reprinted in LEGISLATIVE HISTORY, *supra* note 4, at 149; H.R. 2602, 79th Cong., 1st Sess. § 7 (1945), reprinted in LEGISLATIVE HISTORY, *supra* note 4, at 181.

42 H.R. 1203, 79th Cong., 1st Sess. § 5 (1945), reprinted in LEGISLATIVE HISTORY, *supra* note 4, at 157.

43 *See id.* § 2(d), reprinted in LEGISLATIVE HISTORY, *supra* note 4, at 156 (" 'Order'

the legal relations language and the definition of adjudication,[44] that is an unconvincing analysis.[45]

A more plausible analysis is that elimination of the legal relation language and substitution of "statute" for "law" evidences an entire change in philosophy of how the exemption was to operate. In the earlier concept the attempt had been to characterize in functional terms those classes of proceedings to which the adjudicatory provisions would apply.[46] But in 1945 that attempt was abandoned and replaced with a non-functional scheme that relied on previous congressional pronouncements, *i.e.*, had Congress explicitly required a hearing. There was, therefore, no need to include the legal relation language since it no longer mattered if the adjudication belonged to a class involving legal relations, etc., as long as Congress had explicitly spoken. Furthermore, it was no longer necessary to decide whether constitutionally required adjudications or discretionary hearings should be included in the class, since now one only had to look to congressional intent as evidenced by other statutes.

There is nothing new in this conclusion. Whatever there is in the 1945-46 legislative history supports this interpretation,[47] and the *Attorney General's Manual on the Administrative Procedure*

---

means the whole or any part of the final disposition or judgment . . . of an agency, and 'adjudication' means its process, in a particular instance other than rulemaking but including licensing").

44 *See* note 41 *supra.*

45 In those other three bills the legal relations language must have meant something in addition to adjudication so as not to run afoul of the principle that a statute should be construed in order to give effect to every word. *See* 2A J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION §§ 46.06, 47.37 nn.11-14 (4th ed. C. Sands 1973).

46 *Cf.* text accompanying notes 24-31 *supra*, indicating the desire to replace ad hoc exemptions with functional classifications.

47 The change from "required by law" to "required by statute" is never directly addressed. Instead one finds an endless number of remarks where the "required by statute" language is construed to mean that Congress must by some other statute have specifically required an administrative hearing. *See* S. REP. No. 752, 79th Cong., 1st Sess. 16, 40 (1945), reprinted in LEGISLATIVE HISTORY, *supra* note 4, at 202, 226; H.R. REP. No. 1980, 79th Cong., 2d Sess. 26 (1946), reprinted in LEGISLATIVE HISTORY, *supra* note 4, at 260; 92 CONG. REC. 2155 (1946) (remarks of Senator McCarran), reprinted in LEGISLATIVE HISTORY, *supra* note 4, at 315; 92 CONG. REC. 5651 (1946) (remarks of Congressman Walter), reprinted in LEGISLATIVE HISTORY, *supra* note 4, at 359; *Hearings on H.R. 184, etc. before the House Committee on the Judiciary*, 79th Cong., 1st Sess. 33 (1945) (testimony of Mr. McFarland), reprinted in LEGISLATIVE HISTORY, *supra* note 4, at 79.

Act reaches a similar conclusion.[48] It has been discussed at such length because the Supreme Court, in its first construction of this section, rejected the analysis, finding the legislative history inconclusive.[49] In light of the clear meaning of the word "statute,"

---

48 *See* ATTORNEY GENERAL'S MANUAL, *supra* note 1, at 41-43:

> [The] formal procedural requirements of the Act are invoked only where agency action "on the record after opportunity for an agency hearing" is required by some other *statute*. The legislative history makes clear that the word "statute" was used deliberately so as to make sections 5, 7 and 8 applicable only where Congress has otherwise *specifically* required a hearing to be held. [citations omitted] Mere statutory authorization to hold hearings (e.g., "such hearings as may be deemed necessary") does not constitute such a requirement. In cases where a hearing is held, although not required by statute, but as a matter of due process or agency policy or practice, sections 5, 7 and 8 do not apply.

Id. at 41 (emphasis in original).

However, under the Attorney General's analysis it is not necessary that the statute use the talismanic words "on the record after an opportunity for an agency hearing." The courts may, of course, engage in standard statutory construction. The *Manual* anticipates three cases where the APA hearing provisions would apply. First, those cases where the statute indicates that the adjudication is to be based on the record made at the hearing, *e.g.*, Federal Trade Commission cease and desist orders for unfair methods of competition under 15 U.S.C. § 45(b) (1970), *see* Robertson v. FTC, 415 F.2d 49, 51-52 (4th Cir. 1969); National Labor Relations Board cease and desist orders for unfair labor practices, 29 U.S.C. § 160(c) (1970), *see* NLRB v. Stocker Mfg. Co., 185 F.2d 451, 454 (3d Cir. 1950). ATTORNEY GENERAL'S MANUAL, *supra* note 1, at 41. Second, where the statute requires a hearing and no mention of "on the record" is made, but the requirement of a record can be implied from an explicit provision for judicial review, *e.g.*, denial or revocation by the Securities and Exchange Commission of a broker-dealer registration, 15 U.S.C. § 78(b)(5) & (7) (1970), *see* R.A. Holman & Co. v. SEC, 366 F.2d 446, 451-55 (2d Cir. 1966); Amos Treat & Co. v. SEC, 306 F.2d 260, 265-66 (D.C. Cir. 1962); cease and desist orders by the Secretary of Agriculture issued under the Packers and Stockyards Act, 7 U.S.C. § 213(b) (1970), *cf.* Denver Union Stock Yard Co. v. Producers Livestock Marketing Ass'n, 356 U.S. 282, 296, 304-08 (1958) (Whittaker, J., dissenting); Glover Livestock Comm'n Co. v. Hardin, 454 F.2d 109, 114 (8th Cir. 1972), *rev'd on other grounds sub nom.* Butz v. Glover Livestock Comm'n Co., 411 U.S. 182 (1973). ATTORNEY GENERAL'S MANUAL, *supra* note 1, at 41-42. And third, where the statute authorizes a hearing, but there is no reference to a decision "on the record" nor any specific provision for judicial review, *e.g.*, an order by the Secretary of the Agriculture suspending or revoking a warehouseman's license under the United States Warehouse Act, 7 U.S.C. § 246 (1970). *Id.* at 42-43. This conclusion is based on the belief

> that with respect to adjudication the specific statutory requirement of a hearing, without anything more, carries with it the further requirement of decision on the basis of the evidence adduced at the hearing . . . . Of course, [this] is inapplicable to any situation in which the legislative history or the context of the pertinent statute indicates a contrary congressional intent.

Id.

49 Wong Yang Sung v. McGrath, 339 U.S. 33, 49 (1950) (in rejecting a theory put forth by the government similar to that detailed in the text, the Court said: "We do not know. The legislative history is more conflicting than the text is ambiguous.");

that interpretation by the Supreme Court appears misguided and perhaps indefensible.[50]

II. A Judicial Monkeywrench: The Doctrine of *Wong Yang Sung*

Wong Yang Sung, a Chinese national, filed a petition for a writ of habeas corpus in the District Court for the District of Columbia, alleging, *inter alia*, that deportation proceedings resulting in a warrant of deportation were not conducted in conformity with the APA.[51] In particular, the petitioner argued that the hearing he was granted before an immigrant inspector violated §§ 5[52] and 11[53] of the APA. The disrict court's discharge of the

accord, Cates v. Handerlein, 189 F.2d 369, 372 (7th Cir.), *rev'd*, 342 U.S. 804 (1951) (per curiam) ("The legislative history of the Administrative Procedure Act . . . will not be referred to as it has been held to be . . . 'ambiguous,'" citing *Wong Yang Sung*).

50 *Cf.* Colorado Public Interest Research Group, Inc. v. Train, 507 F.2d 743, 746-747 (10th Cir. 1974) (in giving literal interpretation to statute, court relies on three principles of statutory construction: (1) where language of statute is clear and the purpose reasonably certain, there is no need to resort to other rules of construction to ascertain statute's meaning; (2) where there is an express exception to a statute, additional exceptions by implication are not favored; and (3) the legislative history of a statute cannot be used to change the meaning of a clear and unambiguous statute).

51 Petitioner arrived at the port of New York on April 21, 1946, as a seaman; was granted a shore leave not to exceed 29 days in conformity with the Immigration Act of 1924, ch. 190, §§ 3(5) & 19, 43 Stat. 154-55, 164 (now 8 U.S.C. §§ 1101(a)(15)(D) & 1283 (1970)); failed to return to his ship, allegedly remaining in the United States unlawfully. On October 4, 1947, he was arrested, and as a result of hearings before a single immigrant inspector on December 11, 1947, and January 29, 1948, was ordered deported, on March 22, 1948, for violation of Immigration Act of 1924, ch. 190, § 14, 43 Stat. 162. His appeal from the order of deportation was dismissed by the Board of Immigration Appeals on June 4, 1948. The petition for habeas corpus followed on July 23, 1948. *See* Brief for Petitioner at 6, Brief for Respondent at 5-7, Wong Yang Sung v. McGrath, 339 U.S. 33 (1950).

52 5 U.S.C. § 554(d) (1970) requires the hearing officer to be detached from investigative and prosecuting functions (the so-called separation of functions requirement). *See* note 14 *supra*. This separation "must be reflected in the rules of organization and procedure published pursuant to section 3(a) [of the APA]." H.R. Rep. No. 1980, 79th Cong., 2d Sess. 30 (1946), reprinted in Legislative History, *supra* note 4, at 262. At the time of Wong Yang Sung's deportation hearings, the presiding officer was an immigrant inspector who was both prosecutor and judge, *see* 12 Fed. Reg. 5115-16 (1947) (8 C.F.R. § 150.6(b)), although in rare instances it was possible to have a separate examining inspector and presiding inspector. *See* 12 Fed. Reg. 5115-16, 5116-17 (1947) (8 C.F.R. § 150.6(b) & (n)). The immigrant inspector was, in addition, an investigator, *see* 12 Fed. Reg. 5114 (1947) (8 C.F.R. § 150.1(a)), and although the inspector could not be investigator and judge in the same case, *see* 12

writ was affirmed by the court of appeals, but reversed by the Supreme Court in *Wong Yang Sung v. McGrath.*[54]

The case presented two issues: (1) whether the adjudicatory provisions of the APA applied to deportation hearings, and (2) if so, did the exception in § 7(a), relating to proceedings before officers specially provided for or designated pursuant to statute, provide an exemption in any event. Without explicitly reaching the first issue the district court[55] and court of appeals[56] upheld the deportation, because in their opinion § 16 of the Immigration Act of 1917[57] was the specific statutory authorization necessary to meet the requirements of § 7(a) of the APA. On this point the Supreme Court disagreed. The majority[58] held that § 16 of the Immigration Act only authorized the immigrant inspectors to carry out border searches and other necessary investigative procedures, but not to hold deportation hearings. That being the case, the Court held that there was no basis for judicially declaring an exception to the APA for deportation hearings.[59]

The Court, therefore, had to reach the first issue. Since the

---

Fed. Reg. 5115-16 (1947) (8 C.F.R. § 150.6(b)), nothing prevented such dual roles in separate cases. Finally, the immigrant inspector was subject to the immediate supervision and control of a District Director who was charged with investigatory and arrest powers. *See* 12 Fed. Reg. 5070-71, 5115 (1947) (8 C.F.R. §§ 60.25, 60.27, 60.28, 150.3). The district court found that hearings conducted under such regulations did not comply with the separation of functions requirement. Wong Yang Sung v. Clark, 80 F. Supp. 235, 235 (D.D.C. 1948).

53 5 U.S.C. §§ 1305, 3105, 3344, 5362, 7521 (1970) specifies the requirements and procedures to be used in selecting, compensating and removing hearing examiners for § 5 adjudications. Allowing immigrant inspectors to investigate and prosecute would appear to violate 5 U.S.C. § 3105 (prohibition against performing duties inconsistent with the duties of a hearing examiner); putting them under the control of a District Director would appear to violate 5 U.S.C. §§ 5362 & 7521 (pay to be prescribed by Civil Service Commission independent of agency recommendations or ratings, and removal from job only after determination of good cause by Civil Service Commission). *See* 80 F. Supp. at 235.

54 339 U.S. 3 (1950), *rev'g* Wong Yang Sung v. Clark, 80 F. Supp. 235 (D.D.C. 1948), *aff'd per curiam*, 174 F.2d 158 (D.C. Cir. 1949).

55 Wong Yang Sung v. Clark, 80 F. Supp. 235 (D.D.C. 1948).

56 Wong Yang Sung v. Clark, 174 F.2d 158 (D.C. Cir. 1949).

57 Ch. 29, 39 Stat. 885-86.

58 On this issue Justice Reed dissented. *See* 339 U.S. at 53-55. Lower federal court opinions would appear to have supported Justice Reed's position. *See* Azzollini v. Watkins, 172 F.2d 897, 898-99 (2d Cir. 1949); Wolf v. Boyd, 87 F. Supp. 906, 907 (W.D. Wash. 1949); Chou Kau v. Clark, 83 F. Supp. 969, 970 (D.D.C. 1949); Yiakoumis v. Hall, 83 F. Supp. 469, 472-73 (E.D. Va.), *appeal dismissed*, 177 F.2d 804 (4th Cir. 1949); *Ex parte* Wong So Wan, 82 F. Supp. 60, 60 (N.D. Cal. 1948).

59 339 U.S. at 51-53.

government admitted that Wong Yang Sung's deportation hearing did not meet the requirements of the APA,[60] the crucial question was whether a deportation hearing was required by statute to be determined on the record after an agency hearing. Section 19 of the Immigration Act provided that ". . . any alien . . . shall, upon the warrant of the [Attorney General], be taken into custody and deported . . . . In every case where any person is ordered deported . . . the decision of the [Attorney General] shall be final."[61] Clearly, the statute did not meet the § 5 requirement of an adjudication required by statute to be determined after an agency hearing. Petitioner argued, however, that under a long line of cases[62] the Court had required a full hearing prior to deportation so as to conform to due process.[63] The issue that Commissioner Aitchison had raised in 1941[64] was now before the Court: did a hearing held to satisfy the requirements of due process trigger the APA adjudicatory provisions? The Court, rejecting the legislative history previously discussed, held that it did. In deciding whether a particular proceeding was governed by § 5 the Court laid down the following test:

> We think that the limitation to hearings "required by statute" in § 5 of the Administrative Procedure Act exempts from that section's application only those hearings which administrative agencies may hold by regulation, rule, custom, or special dispensation; not those held by compulsion. We do not think the limiting words render the Administrative Procedure Act inapplicable to hearings, the requirement for which has been read into a statute by the Court in order to save the statute from invalidity. They exempt hearings of less than statutory authority, not those of more than statutory authority.[65]

To reach that conclusion, Mr. Justice Jackson argued that the Court could "hardly attribute to Congress a purpose to be less scrupulous about the fairness of a hearing necessitated by the

---

60 *Id.* at 36.

61 Ch. 29, 39 Stat. 889 (1917).

62 *See, e.g.*, Bridges v. Wixon, 326 U.S. 135, 160 (1945) (Murphy, J., concurring); Kwock Jan Fat v. White, 253 U.S. 454, 459, 464 (1920); Japanese Immigrant Case (Yamataya v. Fisher), 189 U.S. 86, 99-101 (1903).

63 339 U.S. at 48-49.

64 *See* text accompanying notes 33-35 *supra*.

65 339 U.S. at 50.

Constitution than one granted by it as a matter of expediency."[66] That is the crucial link in the Court's opinion. It is the only justification for going beyond the clear words of the statute. But aside from what the Court would like to attribute to Congress, there is little support for the argument. If one accepts the view of the legislative history that the change from "required by law" to "required by statute" was more than a clarification, that it was a change from a functional approach to the exemption problem,[67] then not only is the conclusion not attributable to Congress, but the very opposite is most probably true.[68]

The precise holding of *Wong Yang Sung*, the *ratio decidendi*, is not entirely clear. There are a number of alternative hypotheses that can be advanced. The narrowest explanation for the decision is that where the Supreme Court has previously read into a statute, by means of an explicit and authoritative holding, a requirement for a full trial-type hearing in order to satisfy due process, the APA governs the procedures to be followed during such a hearing.[69] *Wong Yang Sung* certainly meets that test, since earlier Supreme Court decisions had required a full hearing under the deportation statute.[70] However, later Supreme Court decisions in *Riss & Co. v. United States*[71] and *Cates v. Haderlein*[72] extended the decision in *Wong Yang Sung* to statutes that had not previously been construed to require a full hearing.

A second alternative, also narrow in scope, is to view the decision as one of constitutional dimensions. While the Court's opinion in *Wong Yang Sung* is traditionally viewed as one of statutory construction (*i.e.*, a failure to comply with the APA, and not a violation of due process, was the basis of the Court's holding),[73] the decision need not have gone off in that direction. The

66 *Id.*

67 *See* text accompanying notes 40-49 *supra.*

68 *Cf.* note 78 *infra.*

69 *Cf.* Miller v. California, 413 U.S. 15 & n.6 (1973); United States v. 12-200 Ft. Reels Film, 413 U.S. 123 & n.7 (1973) (obscenity statute must specifically define illegal conduct, either as written or authoritatively construed by the state's highest court).

70 *See* cases cited at note 62 *supra.*

71 341 U.S. 907 (1951) (per curiam) (hearing for certificate of public convenience and necessity before ICC); *see* text accompanying notes 134-38 *infra.*

72 342 U.S. 804 (1951) (per curiam) (proceeding for issuance of a mail fraud order); *see* text accompanying notes 123-30 *infra.*

73 *See* 339 U.S. at 51-53; 2 K. DAVIS, *supra* note 1, § 13.08, at 228.

Court could have found that in balancing an alien's interest in avoiding deportation and the Immigration and Naturalization Service's interest in excluding people improperly in this country, due process required a separation of functions similar to that specified in the APA. The opinion would then have been based on the Constitution and not a statute. This would probably have been one of the small class of cases where a constitutional decision would be a more limited adjudication of the controversy.

Some of the language and much of the structure of Justice Jackson's opinion supports a constitutional decision in *Wong Yang Sung*. The Court, of course, found that deportation hearings do involve interests protected by due process.[74] But it went further and asserted:

> When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality. . . . It might be difficult to justify as measuring up to constitutional standards of impartiality a hearing tribunal for deportation proceedings the like of which has been condemned by Congress as unfair even where less vital matters of property rights are at stake.[75]

Under this analysis the APA would not be irrelevant. It would represent persuasive evidence that Congress did not feel that government agencies had a strong interest in combining functions. The legislative history Justice Jackson cites as supporting the view that a fundamental purpose of the APA was "to curtail and change the practice of embodying in one person or agency the duties of prosecutor and judge," might then swing the balance in a close case.[76] Thus, *Wong Yang Sung* could stand for the proposition that separation of functions is a requirement of due process in deportation hearings, and leave open the question of whether due process required separation of functions in other

---

74 Wong Yang Sung v. McGrath, 339 U.S. 33, 50 (1950) ("A deportation hearing involves issues basic to human liberty and happiness and, in the present upheavals in lands to which aliens may be returned, perhaps to life itself.").

75 *Id.* at 50-51.

76 *Id.* at 41. While Justice Jackson labels as inconclusive the legislative history of § 5 of the APA, *see* text accompanying note 49 *supra*, he does, at some length, detail the legislative history of the separation of functions requirement. *See* 339 U.S. at 41-45.

cases. That issue would be resolved by balancing the particular interests at stake, when before the Court in a later case.

However, that has not been the course of events. First, courts have generally failed to recognize the separation of functions requirement as an element of due process.[77] In the case of deportation proceedings, subsequent events indicate that the Court was not willing to give the separation of functions requirement a constitutional base even there. Soon after *Wong Yang Sung* Congress passed legislation exempting deportation hearings from the adjudicatory provisions of the APA.[78] Courts have universally held that this legislation did not violate due process.[79]

Second, in *United States v. L. A. Tucker Truck Lines, Inc.*[80]

---

77 *See* FTC v. Cinderella Career & Finishing Schools, Inc., 404 F.2d 1308, 1315 (D.C. Cir. 1968); Pangburn v. CAB, 311 F.2d 349, 356 (1st Cir. 1962); cases cited note 79 *infra*. *But see* Amos Treat & Co. v. SEC, 306 F.2d 260, 267 (D.C. Cir. 1962) (alternate holding). *See generally* 2 K. DAVIS, *supra* note 1, § 13.02.

78 Congress originally acted by providing in the Supplemental Appropriations Act, 1951, ch. 1052, 64 Stat. 1048, that, "Proceedings under law relating to the exclusion or expulsion of aliens shall hereafter be without regard to the provisions of sections 5, 7, and 8 of the Administrative Procedure Act." The validity of this proviso has been upheld in the face of a challenge that Congress has no power by a provision in an appropriations act to make a change in substantive law. *See* Roccaforte v. Mulcahey, 169 F. Supp. 360, 363 (D. Mass. 1958). In addition, it was held that the effect of a provision in an appropriations bill could extend beyond the end of the fiscal year if Congress so intended, and that with respect to this proviso Congress did so intend. *Id.* at 363-64.

This exemption was later modified and included in the Immigration and Nationality Act of 1952, § 242, 8 U.S.C. § 1252 (1970). This was accomplished by repealing the proviso contained in the Supplemental Appropriations Act, *see* Immigration and Nationality Act of 1952, ch. 477, § 403(a)(47), 66 Stat. 280, and adding § 242 which included special procedural requirements for deportation hearings in lieu of the APA requirements. *See* Ho Ching Chow v. Attorney General, 362 F. Supp. 1288, 1290 n.6 (D.D.C. 1973). Many of the procedures prescribed by 8 U.S.C. § 1252(b) have the evils condemned in *Wong Yang Sung*. *See* notes 52-53 *supra*. Thus, the special inquiry officer can still take the dual role of prosecutor and hearing officer, though he may not hear cases that he has specifically investigated. In addition, the special inquiry officer is still subject to supervision and control by the Attorney General and District Directors. *See* 8 U.S.C. § 1101(b)(4) (1970).

79 *See* Belizaro v. Zimmerman, 200 F.2d 282 (3d Cir. 1952) (1951 legislation); United States *ex rel.* Catalano v. Shaughnessy, 197 F.2d 65 (2d Cir. 1952) (per curiam) (same); Barber v. Yanish, 196 F.2d 53 (9th Cir. 1952) (per curiam) (same); Roccaforte v. Mulcahey, 169 F. Supp. 360 (D. Mass. 1958) (same); United States *ex rel.* Lombardo v. Bramblett, 114 F. Supp. 183 (N.D. Ohio 1953) (same); Marcello v. Bonds, 349 U.S. 302 (1955) (1952 legislation); United States *ex rel.* Belfrage v. Kenton, 224 F.2d 803 (2d Cir. 1955) (same); Couto v. Shaughnessy, 218 F.2d 758 (2d Cir. 1955) (same); Saurez-Seja v. Landon, 124 F. Supp. 871 (S.D. Cal. 1954), *aff'd*, 237 F.2d 133 (9th Cir. 1956) (same).

80 344 U.S. 33 (1952), *rev'g* 100 F. Supp. 432 (E.D. Mo. 1951) (3-judge court).

the Supreme Court rejected an invitation to extend its ruling in *Wong Yang Sung* to constitutional dimensions. The case involved a petition to set aside an order of the Interstate Commerce Commission (ICC) granting additional operating authority to a third party.[81] Everyone agreed that under the Court's earlier decision in *Riss & Co. v. United States*[82] the proceeding before the ICC violated the APA.[83] The crucial question was whether that objection could be raised for the first time in the district court.[84] The Supreme Court said no.[85]

The Court reasoned that the holdings in *Wong Yang Sung* and *Riss & Co.* only meant that if a party objects to the type of hearing offered at the time of the hearing, it is entitled to the hearing guaranteed by statute. But, in the absence of a timely objection, the defect in the hearing is not one which would deprive the ICC of power or jurisdiction and render its eventual order a nullity.[86]

---

81 C. L. Cunningham, d/b/a Pemiscot Motor Freight Co., applied to the ICC for a certificate of convenience and necessity under 49 U.S.C. § 307 (1970) to authorize extension of his existing motor carrier route. Appellee was one of twelve intervenors who opposed the application. A hearing examiner recommended that the certificate be granted and the ICC affirmed. Appellee brought its action in the district court pursuant to 28 U.S.C. §§ 2284 & 2325 (1970) alleging that the evidence failed to show a need for additional service. *See* 344 U.S. at 34.

82 341 U.S. 907 (1951) (per curiam); *see* text accompanying notes 134-38 *infra*.

83 *See* 344 U.S. at 35-36. It appears that at the time of the hearing, the hearing examiner had not been appointed pursuant to Administrative Procedure Act § 11, 5 U.S.C. § 3105 (1970). *See* 100 F. Supp. at 433.

84 The objection to the hearing examiner was not raised during the administrative hearing nor in the complaint as originally filed. At the time of the hearing before the district court, appellee moved for leave to amend its complaint to include the objection to the hearing examiner. The district court granted the motion. 100 F. Supp. at 434.

85 344 U.S. at 35. The Supreme Court considered it relevant that the appellee did not offer nor did the district court require any excuse for failure to raise the issue before the agency; that appellee was neither misled nor prevented from determining the facts about the hearing examiner; that the appellee was in no way injured from the manner of the appointment of the hearing examiner, there being no showing of bias, favoritism or unfairness; and that the Court's decision in *Riss & Co.* apparently prompted appellee to make the last minute objection about the hearing examiner's qualifications. *See* 344 U.S. at 35-36 & n.4.

86 344 U.S. at 36, 38. Perhaps the most interesting aspect of *L. A. Tucker* is that procedurally it is on all fours with *Wong Yang Sung*. In *Wong Yang Sung* the Court entertained a habeas corpus proceeding, *i.e.*, a collateral attack on the deportation order. *See* 339 U.S. at 35. The first sentence of the opinion is, "This *habeas corpus* proceeding involves a single ultimate question . . . ." And, still on the first page of the decision, Justice Jackson notes, "Wong Yang Sung then sought release from custody by *habeas corpus* proceedings . . . ." (emphasis in original). The majority argued, however, that the collateral nature of the attack in that case was never

While a constitutional basis for *Wong Yang Sung* might have been a defensible position, that was not the approach taken by the Court, and it is not the law today.

The final and most traditional approach to the decision in *Wong Yang Sung* is that as a matter of statutory construction the language in § 5 of the APA, *i.e.*, "in every case of adjudication required by statute," means in every case of adjudication required by a statute or the Constitution. But even under this hypothesis there is some ambiguity. To determine whether the Constitution requires a hearing the court must engage in a due process scrutiny. A narrow reading of *Wong Yang Sung* would take this requirement to mean that whenever traditional due process analysis requires a full trial-type hearing, *Wong Yang Sung* applies. A more liberal explanation of the decision, and a plausible one in light of Justice Jackson's rather sketchy language, would interpret this requirement to mean that whenever due process analysis requires any type of hearing, even an informal proceeding, *Wong Yang Sung* applies. While the latter interpretation is more radical, both views have grave ramifications. To understand their full impact one must compare the analysis *Wong Yang Sung* requires when a given proceeding is subject to the APA and the due process analysis required when a proceeding is not governed by the APA.[87]

If anything can be said of procedural due process, it is that it is almost impossible to define. As Justice Frankfurter pointed out, "due process is not a mechanical instrument. It is not a yardstick. It is a process."[88] And being a process it is not immutable, but

---

raised, in brief, in argument, or in opinion, and therefore is not binding precedent on that point. That argument smacks of disingenuousness.

87 The most obvious case of a proceeding not subject to the APA is a state administrative adjudication. In addition, it is possible that a federal proceeding might not be conducted by an agency within the meaning of Administrative Procedure Act § 2(a), 5 U.S.C. § 551(1), (1970), or that the agency might be exempted under Administrative Procedure Act § 2(a)(1)-(4), 5 U.S.C. § 551(1)(E)-(H) (1970). Finally, a proceeding would be exempted if it came under any of the six specific exemptions found in Administrative Procedure Act § 5(1)-(6), 5 U.S.C. § 554(a)(1)-(6) (1970). *See* note 17 *supra*. *See generally* ATTORNEY GENERAL'S MANUAL, *supra* note 1, at 9-12.

88 Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 163 (1951) (concurring opinion). *See also* Cafeteria Workers Local 473 v. McElroy, 367 U.S. 886, 895 (1961).

forever changing with a varying factual background. Yet, after years of judicial construction, some things can be said about due process.

Defining procedural due process is a two-step procedure.[89] At the first stage, it is necessary to determine whether the issue at controversy falls within the purview of due process protection. In the case of administrative action that means that the action complained of must deprive the person of life, liberty, or property.[90] While an action that deprives a person of life is obvious, the constitutional definitions of liberty and property are not so precise.

The Court has held that liberty means more than just freedom from bodily restraint imposed by the criminal process, but exactly what additional meaning it has is not clear.[91] Where administrative action has resulted in charges that might damage a person's standing or association in his community, or besmirch his reputation and thereby foreclose opportunities open to others, or close off a whole range of employment opportunities, the Court has found that a "liberty" was involved and the action must be measured against the standards of due process.[92] But beyond that the Court has never attempted to define liberty with any great precision.

In contrast the Court has laid down a somewhat less amorphous

---

89 *See* Board of Regents of State Colleges v. Roth, 408 U.S. 564, 570-71 (1972); Morrissey v. Brewer, 408 U.S. 471, 481 (1972). While the two-step process may have always been the reasoning process used by the Court, a reading of early cases fails to indicate that. *See* Cafeteria Workers Local 473 v. McElroy, 367 U.S. 886 (1961); Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951). What the Court did in those cases was to merely balance interests. Where today the Court would say that the interests asserted were not within the scope of due process protection, the older line of reasoning was to assume that due process applied but conclude that the government's interests outweighed those of the private party. *Compare* Arnett v. Kennedy, 416 U.S. 134 (1974) *with* Cafeteria Workers Local 473 v. McElroy, 367 U.S. 886 (1961).

90 *See* Board of Regents of State Colleges v. Roth, 408 U.S. 564, 569-70 (1972).

91 In Meyer v. Nebraska, 262 U.S. 390, 399 (1923), the Court mentioned "the right of the individual to contract, to engage in any of the common occupations of life, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men."

92 *See* Wisconsin v. Constantineau, 400 U.S. 433 (1971); Wilner v. Committee on Character & Fitness, 373 U.S. 96 (1963); Schware v. Board of Bar Examiners, 353 U.S. 232 (1951).

standard to define constitutionally protected property. What due process protects is the security a person has acquired in specific possessory benefits, and this may "extend well beyond actual ownership of real estate, chattels, or money."[93] The test is whether the person has a "legitimate claim of entitlement" to the property,[94] and that is determined by reference to some objective standard, usually a statute,[95] though arguably a well-held understanding recognized by the community would suffice.[96]

Assuming the issue in controversy is protected by due process, the second stage requires a balancing of interests.[97] This weighing process determines the form of the procedure required. Some circumstances may require a full adversary hearing, with the right

93 Board of Regents of State Colleges v. Roth, 408 U.S. 564, 572, 576 (1972). *See* Perry v. Sinderman, 408 U.S. 593 (1972) (future employment at state junior college with de facto tenure system may be protected); Fuentes v. Shevin, 407 U.S. 67 (1972) (conditional sales property protected); Bell v. Burson, 402 U.S. 535 (1971) (automobile driver's license protected); Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare benefits protected); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) (debtor's wages protected). *But see* Arnett v. Kennedy, 416 U.S. 134 (1974) (plurality opinion) (government job not protected).

94 Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972):

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

95 *See* Arnett v. Kennedy, 416 U.S. 134, 151-52 (1974); Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972).

96 Justice Rehnquist's plurality opinion in Arnett v. Kennedy, 416 U.S. 134 (1974), suggests that if the state can entirely foreclose the property interest by statute, it can also limit the procedures one can use to enforce those interests. *Id.* at 152; *see* Mitchell v. W.T. Grant Co., 416 U.S. 600, 607 (1974); Lindsey v. Normet, 405 U.S. 56 (1972). By implication a majority of the Court is yet unwilling to accept that interpretation of the entitlement doctrine. In Goss v. Lopez, 95 S. Ct. 729 (1975) (students facing suspensions of up to ten days are entitled to notice of charges and hearing on charges, preferably prior to removal from school) the Court apparently rejected Justice Rehnquist's thesis and held that since the state had chosen to extend a property interest it could "not withdraw that right on grounds of misconduct absent fundamentally fair procedures to determine whether the misconduct has occurred." *Id.* at 736; *cf.* 95 S. Ct. at 742 (Powell, J., dissenting). In addition there is language in *Roth* supporting the contrary view, *i.e.*, that a common understanding is sufficient:

> It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.

408 U.S. at 577. *See also* Perry v. Sinderman, 408 U.S. 593 (1972). From this property interpretation the test would be whether the claimant acted in a manner one would expect an "owner" of such objects, tangible or otherwise, to act, and whether such "ownership" is consistent with society's concept of that term. *See The Supreme Court, 1973 Term*, 88 HARV. L. REV. 41, 73 n.18, 85-89 (1974).

97 *See* Board of Regents of State Colleges v. Roth, 408 U.S. 564, 570-71 (1972).

to have counsel present and the ability to cross-examine witnesses. Other circumstances may require more informal processes, and others still may require only written presentations. But whatever procedure is required, its sufficiency is evaluated by balancing the interests of the government and the interests of the private individual.[98] While the Court has from time to time attempted to list some of the factors relevant to the balancing test,[99] the most that can be said is that a court should isolate and compare the nature of the government function as well as the private interest.[100] A finding that the balance tips to the individual will require a hearing, though in light of the recent decisions in *Mitchell v. W. T. Grant Co.*[101] and *North Georgia Finishing, Inc. v. Di-Chem, Inc.*,[102] exactly when that hearing must be held, and what issues it must adjudicate, are not clear.[103]

---

98 While the Court has universally used the balancing test to determine the form of the hearing required, the Court has not been consistent in the degree to which it has spelled out exactly what due process does require. *Compare* Goldberg v. Kelly, 397 U.S. 254, 268-71 (1970) (explicit procedural minimums to be followed in terminating welfare benefits) *with* Fuentes v. Shevin, 407 U.S. 67, 96-97 (1972) (simply striking down replevin statute as unconstitutional) *and* Sniadach v. Family Finance Corp., 395 U.S. 337, 342 (1969) (striking down prejudgment garnishment statute). One explanation could be that the situations encountered in replevin and garnishment are so varied as to preclude explicit judicial guidelines, whereas the interests at stake when welfare benefits are terminated are so essential and the factual situations so similar as always to require the rights specified by the Court. *See The Supreme Court, 1971 Term*, 86 HARV. L. REV. 50, 90-91 (1972).

99 Justice Frankfurter's attempt in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 163 (1951), is typical:

> The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished — these are some of the considerations that must enter into judicial judgment.

100 *See* Cafeteria Workers Local 473 v. McElroy, 367 U.S. 886, 895 (1961).

101 416 U.S. 600 (1974).

102 95 S. Ct. 719 (1975).

103 Prior to *Mitchell* the Court had held that in various situations the interest balancing analysis required a hearing prior to state action. *See* Perry v. Sinderman, 408 U.S. 593 (1972) (tenured professor fired); Morrissey v. Brewer, 408 U.S. 471 (1972) (parole revoked); Fuentes v. Shevin, 407 U.S. 67 (1972) (consumer goods repossessed); Bell v. Burson, 402 U.S. 535 (1971) (driver's license revoked); Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare benefits terminated); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) (wages garnished). *See also* Arnett v. Kennedy, 416 U.S. 134, 206 (Marshall, Douglas and Brennan, JJ., dissenting).

These cases were based on the idea that the fundamental requirement of due process is "the opportunity to be heard." Grannis v. Ordean, 234 U.S. 385 (1914).

In comparison, under *Wong Yang Sung* a court must first determine whether the relevant statute requires a hearing on the record, or presumably, whether such a requirement can reasonably be implied under standard principles of statutory construction.[104] If neither is the case, the court must then engage in a

---

"It is an opportunity which must be granted at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545 (1965). And, although due process tolerates variances in the form of a hearing "appropriate to the nature of the case," Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), "at a meaningful time" has been traditionally taken to mean an opportunity for hearing before the deprivation at issue takes place. *See* Fuentes v. Shevin, 407 U.S. 67, 80-82 (1972).

In *Mitchell*, however, Justice White asserted that these cases

> merely stand for the proposition that a hearing must be held before one is finally deprived of his property and do not deal at all with the need for a pretermination hearing where a full and immediate post-termination hearing is provided. The usual rule has been "[w]here only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for ultimate judicial determination of liability is adequate." Phillips v. Commissioner, 283 U.S. 589, 596-97 (1931) [other citations omitted].

416 U.S. at 611. *But see* Fuentes v. Shevin, 407 U.S. 67, 90-92 (1972) (Justice White's authorities are distinguished as falling within the "extraordinary situations" exception); Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972) ("The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a 'personal' right . . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property"). *See also The Supreme Court, 1973 Term*, 88 HARV. L. REV. 41, 77-79 (1974).

In *North Georgia Finishing* the Court backed away from a wooden application of the strict rule in *Mitchell*. Rather than classify due process cases in terms of the types of rights involved, as *Mitchell* appears to do, the majority signaled a return to *Fuentes* by arguing that "[the Court is] no more inclined now than we have been in the past to distinguish among different kinds of property in applying the Due Process Clause [citing *Fuentes*]." 95 S. Ct. at 723. In deciding whether the Georgia attachment statute under attack was constitutional, the majority asked whether the situation was more like *Fuentes* or *Mitchell*. In answering that question the Court listed three relevant factors: (1) whether a judge is involved; (2) whether more than a conclusory affidavit is sufficient to attach the funds; and (3) whether there is an opportunity for an early hearing on the merits. Because the response to each question is no under the Georgia statute, the Court held it unconstitutional. 95 S. Ct. at 722-23.

In an amusing concurring opinion, Justice Stewart remarked that:

> It is gratifying to note that my report of the demise of Fuentes v. Shevin, 407 U.S. 67, *see* Mitchell v. W. T. Grant Co., 416 U.S. 600, 629-636, seems to have been greatly exaggerated. *Cf.* S. Clemens, Cable from Europe to the Associated Press, reprinted in II A. PAINE, MARK TWAIN: A BIOGRAPHY 1039 (1912).

95 S. Ct. at 723.

104 *See* 339 U.S. at 48; note 48 *supra*.

due process scrutiny.[105] As before, the first stage is to determine whether the agency action deprives the claimant of life, liberty, or property. That determination is not altered by *Wong Yang Sung*; it depends instead on the traditional analysis developed above.[106] But, if the court finds that the interests asserted are protected by due process, rather than engaging in interest balancing to determine the exact form of hearing required, *Wong Yang Sung* directs the court to do something else. Under the narrow interpretation of the decision, the court must determine if the interest balancing requires a full hearing. If so, then that full hearing is to be an APA hearing. But precisely what a full hearing is and where it lies in the spectrum of possible hearings is not explained by the decision in *Wong Yang Sung*. All that is clear is that at some point due process requires a hearing of sufficient formality to trigger an APA hearing and that at that point the continuity of the spectrum is broken.

Under the liberal interpretation of *Wong Yang Sung* the methodology is easier. Rather than engaging in any interest balancing, the court need only determine whether the agency's proposed action affects an interest protected by due process. If so, then *Wong Yang Sung* directs the court to require a full APA trial-type hearing in all cases.[107] The effect of the Court's opinion is to hold that in enacting the APA Congress intended that all federal actions involving interests protected by due process, and not exempted from the Act, require full trial-type hearings, while proceedings that involve due process interests, but which are exempt, need only be governed by the minimal procedural rights which due process grants. In both views, then, the decision in *Wong Yang Sung* produces a discontinuity. The justification for creating this discontinuity, in what before had been a continuous spectrum of procedural rights, should rest on something stronger than a goal attributed to Congress, but not found in the legislative history.[108]

---

105 *See* 339 U.S. at 50; text accompanying note 65 *supra*.
106 *See* text accompanying notes 89-96 *supra*.
107 *See* 339 U.S. at 50; text accompanying note 65 *supra*.
108 To the extent that due process analysis only consists of interest balancing,

III. The Death Knell of *Wong Yang Sung*: Judicial Reception to the Doctrine

It would be an understatement to say that the Supreme Court's decision in *Wong Yang Sung* was unexpected. This Note has suggested that the decision is contrary to the legislative history of the APA,[109] and based on dubious logic.[110] Yet, the Court has never overruled *Wong Yang Sung*, nor even directly restricted its holding.[111] It remains good law. That is not, however, to say that lower federal courts apply its teachings with relish. On the contrary, as Professor Davis has remarked, courts still tend to give the words "required by statute" a literal reading, in apparent disregard of *Wong Yang Sung*.[112]

This part of the Note attempts to analyze the judicial response to *Wong Yang Sung*. The cases display little consistency and even less reasoning. After an introductory section on the evolution of the doctrine in the three specific areas where the Supreme Court has ruled, there follows a functional analysis of the lower court opinions. Rather than treat the decisions by subject matter, they have been grouped into categories based on the court's approach to the *Wong Yang Sung* doctrine. In this manner it is

---

see note 89 *supra*, without the threshold determination of whether the interests were protected by due process, the Court's opinion is not as objectionable. Since *Wong Yang Sung* requires a finding that due process applies, when that determination was made by balancing interests, the courts could always find that such a balancing did not tip in favor of the private party, subconsciously, if not overtly, considering that in the case of the APA that would mean a full trial-type hearing. But, when due process first requires a threshold determination, and *Wong Yang Sung* thereby short-circuits the interest balancing, that option is no longer open to the courts.

Furthermore, to the extent that current judicial thinking about due process, at least with respect to property rights, does not require a hearing prior to the contested action but only afterwards, see note 103 *supra*, *Wong Yang Sung* exacerbates the discontinuity between APA-required procedures and due process required procedures. Not only will the rights granted under the APA usually be more broad, but they will always be given prior to the contested action.

109 *See* text accompanying notes 46-50 *supra*.

110 *See* text accompanying notes 66-68 *supra*.

111 In International Tel. & Tel. Corp. v. Local 134, IBEW, 95 S. Ct. 600, 609 n.15 (1975), *rev'g* Local 134, IBEW v. NLRB, 486 F.2d 863 (7th Cir. 1973), the Supreme Court explicitly failed to reach an argument by the NLRB that raised the scope of the "required by statute" language in § 5 of the APA. *See* text accompanying notes 165-71 *infra*.

112 2 K. Davis, *supra* note 1, § 13.08, at 229.

hoped that the cases will exhibit principles useful in constructing a theory of when an APA trial-type hearing is required.

A. *Supreme Court Precedent*

1. Immigration Service Proceedings

As might be expected, application of *Wong Yang Sung* to deportation hearings has been quite easy. Soon after its decision in that case the Supreme Court, in a brief, one-sentence per curiam opinion, granted certiorari and reversed a decision denying a petition for habeas corpus on the authority of *Wong Yang Sung*.[113] A district court had reached the same conclusion as the Supreme Court almost two years earlier,[114] and after *Wong Yang Sung* lower federal courts issued a number of writs for habeas corpus challenging deportation orders for failure to grant an APA hearing.[115]

But even here the inhospitable reception of the *Wong Yang Sung* doctrine is clear. The courts are always looking for ways to limit the doctrine and distinguish slightly varying factual patterns. Thus while deportation orders are subject to the APA, exclusion orders are not.[116] Whereas the Supreme Court was unwilling to hold that immigrant inspectors who hold deportation hearings are

---

113 United States *ex rel.* Lee Wo Shing v. Shaughnessy, 339 U.S. 906 (1950).

114 Eisler v. Clark, 77 F. Supp. 610 (D.D.C. 1948), *cert. denied*, 338 U.S. 879 (1949).

115 *See* United States *ex rel.* Steffner v. Carmichael, 183 F.2d 19 (5th Cir.), *cert. denied*, 340 U.S. 829 (1950); Miller v. United States *ex rel.* Hunt, 181 F.2d 363 (5th Cir. 1950); Kokoris v. Johnson, 180 F.2d 355 (4th Cir. 1950) (per curiam); United States *ex rel.* Chin Fat Neu v. Zimmerman, 180 F.2d 582 (3d Cir. 1950) (per curiam); United States *ex rel.* Frisch v. Miller, 181 F.2d 360 (5th Cir. 1950) (dicta); Regan v. Papagianakis, 180 F.2d 888 (4th Cir. 1950) (dicta); United States *ex rel.* Kasel de Pagliera v. Savoretti, 139 F. Supp. 143 (S.D. Fla. 1956); *In re* Weber, 94 F. Supp. 376 (S.D.N.Y. 1950) (dicta). The 1951 and 1952 legislation changed all of this and exempted deportation orders from the APA. *See* text accompanying note 78 *supra*.

116 *See* Wah v. Shaughnessy, 190 F.2d 488 (2d Cir. 1951); United States *ex rel.* Frisch v. Miller, 181 F.2d 360 (5th Cir. 1950); United States *ex rel.* Saclarides v. Shaughnessy, 180 F.2d 687 (2d Cir. 1950); United States *ex rel.* Kasel de Pagliera v. Savoretti, 139 F. Supp. 143 (S.D. Fla. 1956); Tom We Shung v. McGrath, 103 F. Supp. 507 (D.D.C. 1952). An exclusion hearing differs from a deportation hearing in that in the former the alien is seeking admission to this country, while in the latter the alien has already been admitted and is attempting to remain here. *See* Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953).

specifically provided for by statute, lower federal courts are willing to hold that immigrant inspectors who hold exclusion hearings are specifically provided for, and the hearings are therefore exempt.[117] The exclusion cases are characteristic of those situations in which courts refuse to apply *Wong Yang Sung* because of an alleged statutory exception.

In other cases courts have held that *Wong Yang Sung* does not apply because any hearing held is merely gratuitous and not required by due process. Under this rubric courts have refused to grant APA hearings to seamen seeking shore leave,[118] aliens requesting an adjustment of status under the Displaced Persons Act of 1948,[119] and deportable aliens seeking a stay of deportation

---

117 The statute in question was the Immigration Act of 1917, ch. 29, § 17, 39 Stat. 887 (now 8 U.S.C. § 1226 (1970)). It provided that boards of special inquiry were authorized to determine whether any alien detained at the port of entry were to be allowed to land or were to be deported. The board was composed of three immigrant inspectors selected by the commissioner of immigration. The section differs from § 16, which was found not to specifically provide that immigrant inspectors hold hearings in *Wong Yang Sung*, *see* text accompanying notes 55-59 *supra*, in that it makes specific mention of the exclusion hearings while § 16 only authorized the inspectors to take evidence and carry out other investigative procedures when necessary.

The text is not meant to imply that the cases cited at note 116 *supra* are wrong, they are probably not, but to indicate a particular method courts use to limit the *Wong Yang Sung* doctrine. *See* text accompanying notes 191-93 *infra*.

118 *See* United States *ex rel.* Wei Yan Mun v. Shaughnessy, 89 F. Supp. 743 (S.D.N.Y. 1950). The seaman was ordered detained on board ship pursuant to the Immigration Act of 1924, ch. 190, § 20, 43 Stat. 164 (now 8 U.S.C. § 1284 (1970)), because of his chronic history of jumping ship and illegally remaining in the country. Petitioner argued that under *Wong Yang Sung* that determination could only be made after an APA hearing. The court rejected the argument noting that seamen seeking shore leave were not entitled to an administrative hearing, United States *ex rel.* D'Istria v. Day, 20 F.2d 302 (2d Cir. 1927), and therefore *Wong Yang Sung* was not applicable. 89 F. Supp. at 744.

However, the court's analysis is suspect since it employs the now discredited right-privilege doctrine. *See generally* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968). The fact that shore leave is granted at the discretion of the immigrant inspector does not imply that there is no right to a hearing. The present day approach would require a determination of whether denial of shore leave denied petitioner of a significant liberty interest. The court's own admission that the inspector's action could be reversed for arbitrary or capricious action, 89 F. Supp. at 744, citing United States *ex rel.* United States Lines v. Watkins, 170 F.2d 998 (2d Cir. 1948), is strong evidence that a significant liberty interest was at stake. In that case a liberal interpretation of *Wong Yang Sung*, *see* text accompanying note 107 *supra*, would have required an APA hearing.

119 *See* Gutnayer v. McGranery, 108 F. Supp. 290 (D.D.C. 1952), *aff'd*, 212 F.2d 462 (D.C. Cir. 1954) (dicta). Under § 4(a) of the Displaced Persons Act, 50 U.S.C.A.

based on a claim of physical persecution if deported.[120] While in each of these three cases it is well accepted that the relevant statute grants broad authority to the administrative official, and the proceedings conducted in these matters, if any, have always been informal, a liberal interpretation of *Wong Yang Sung* would lead to a contrary result.[121]

Appendix, § 1953(a) (1970), so-called displaced persons, *see* 50 U.S.C.A. Appendix, § 1953(b) (1970), that meet certain conditions may be recommended by the Attorney General to Congress for a change from immigrant status to permanent resident. The plaintiff alleged that the Attorney General's decision must be made after an APA hearing. In rejecting the argument the court analogized the Attorney General's determination under the statute to an exclusion proceeding, *i.e.*, the plaintiff's request for a change of status was similar to "a person . . . knocking at our doors seeking admission," and in that case the APA did not apply. But the exclusion case was exempt from the APA because it qualified under § 7(a), *see* note 117 *supra*, not because due process was inapplicable. To establish the latter point the court would have had to determine if a significant liberty interest was involved. Instead the court makes the conclusionary right-privilege argument based on the broad power invested in the Attorney General. *See* note 118 *supra*. For a harsh criticism of the doctrine that due process applies to deportation hearings but not to exclusion cases see Professor Henry Hart's now famous dialogue in P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS & THE FEDERAL SYSTEM 350-56 (2d ed. 1973).

120 *See* Hosseinmardi v. Immigration & Naturalization Service, 405 F.2d 25 (9th Cir. 1968) (by implication; no right to cross-examination or separation of functions); Cakmar v. Hoy, 265 F.2d 59 (9th Cir. 1959); Chiu But Hao v. Barber, 222 F.2d 821 (9th Cir.), *vacated and dismissed as moot*, 350 U.S. 878 (1955); Vardjan v. Esperdy, 197 F. Supp. 931 (S.D.N.Y.), *aff'd*, 303 F.2d 279 (2d Cir. 1962). Under 8 U.S.C. § 1253(h) (1970) the Attorney General is authorized to withhold deportation if "in his opinion" the alien would be subject to physical persecution after deportation. There is no doubt that this broad grant of authority severely limits judicial review of such determinations. *See, e.g.*, Muskardin v. Immigration & Naturalization Service, 415 F.2d 865, 866-67 (2d Cir. 1969); United States *ex rel.* Dolenz v. Shaughnessy, 206 F.2d 392, 394 (2d Cir. 1953). That, however, is irrelevant in determining whether the proceedings are to be measured by due process. Yet courts consistently rely on that broad grant of discretion to deny APA hearings. Typical is the language of the court in Vardjan v. Esperdy, 197 F. Supp. 931 (S.D.N.Y. 1961):

> In view of the gratuitous nature of the relief extended in § 243(h), and the wide discretion vested by Congress in the Attorney General . . . this court is unable to agree with plaintiff that she is entitled to a hearing on her application as a matter of right. The constitutional compulsion in *Wong Yang Sung* is lacking here.

Id. at 937.

The irony of the § 1253(h) proceedings is that even when courts recognize that the hearings are to be judged by a due process standard, *see* Sovich v. Esperdy, 319 F.2d 21, 24 (2d Cir. 1963); United States *ex rel.* Cantisani v. Holton, 248 F.2d 737 (7th Cir. 1957); United States *ex rel.* Leong Choy Moon v. Shaughnessy, 218 F.2d 316, 318 (2d Cir. 1954), they do not require APA hearings as *Wong Yang Sung* requires.

121 *See* notes 118-20 *supra*.

2. Postal Service Proceedings

One of the regulatory powers of the Postal Service[122] is the authority to issue mail fraud orders[123] on a finding that the person is using the mails to obtain money or property by false representations or is conducting a lottery, gift enterprise, or other scheme for distributing money or property by lottery, chance or drawing of any kind.[124] The question of whether the APA applied to mail fraud orders depended on whether the statute required a hearing as a matter of due process, since by its terms the statute did not require a decision after a hearing on the record.[125] Prior to the decision in *Wong Yang Sung*, it had been held that the APA did not apply because a hearing was not required by statute.[126] After *Wong Yang Sung* a court of appeals found that the APA still did not apply since the statute was valid without any hearing requirement being read into it.[127] While there are some early cases holding that due process does not require a hearing prior to the issuance of a fraud order,[128] those decisions are clearly wrong under present-day analysis.[129] The Supreme

---

122 Effective August 12, 1970, the Post Office Department was abolished and a new quasi-governmental body, the Postal Service, was established to carry out the functions previously delegated to the Post Office Department. *See* Postal Reorganization Act, Pub. L. No. 91-375, § 2, 84 Stat. 719 (1970). As a result functions previously delegated to the Postmaster General were delegated to the Postal Service. That change has no effect on the applicability of the APA to the new Postal Service or the continued validity of previously decided cases.

123 The effect of a fraud order is to direct the local postmaster to return to sender all mail addressed to the offending party, to prohibit the offending party from cashing any postal money order drawn to him, and to allow that the sum be remitted to the maker. *See* 39 U.S.C. § 3005(a)(1) & (2) (1970).

124 39 U.S.C. § 3005 (1970).

125 The statute authorizes the Postal Service to issue a fraud order "upon evidence satisfactory to the Postal Service". 39 U.S.C. § 3005(a) (1970).

126 *See* Bersoff v. Donaldson, 174 F.2d 494, 495 (D.C. Cir. 1949).

127 *See* Cates v. Haderlein, 189 F.2d 369 (7th Cir.), *rev'd*, 342 U.S. 804 (1951) (per curiam). The court of appeals decision is an example of sloppy opinion writing. The court's conclusion that *Wong Yang Sung* does not require an APA hearing is based on a citation to *Bersoff* which merely said that the explicit words of the statute did not require a hearing.

128 *See* People's United States Bank v. Gilson, 140 F. 1 (C.C.E.D. Mo. 1905), *aff'd*, 161 F. 286 (8th Cir. 1908) (hearing given, but due process does not require one). *But see* Donnel Mfg. Co. v. Wyman, 156 F. 415 (C.C.E.D. Mo. 1907) (for fraud order to be conclusive on court, findings must be after hearing).

129 *See* Stanard v. Olesen, 74 S. Ct. 768, 770-71 (Douglas, Circuit Justice, 1954) ("The power of the Post Office Department to exclude material from the mails and to intercept mail addressed to a person or a business is a power that touches basic

Court reversed the court of appeals, per curiam, after the unusual procedure of the Solicitor General confessing error.[130]

Since that time the APA has been held to apply not only to initial fraud order proceedings but also to "supplemental" proceedings.[131] And the requirement has also been extended to the analogous section authorizing the Postal Service to issue an order against the mailing of "an obscene, lewd, lascivious, indecent, filthy, or vile thing."[132] Apparently, the only legislative exception to the APA has been to create the post of judicial officer by statute, thereby empowering him to conduct the hearings required by the APA.[133]

3. Interstate Commerce Commission Proceedings

The final area where the Supreme Court has directly ruled on the applicability of the APA is in proceedings before the ICC for a certificate of public convenience and necessity by a motor

---

freedoms. It might even have the effect of a prior restraint on communication in violation of the First Amendment, or the infliction of punishment without the due process of law which the Fifth and Sixth Amendments guarantee."); Olesen v. Stanard, 227 F.2d 785, 788 & n.7 (9th Cir. 1955); Pike v. Walker, 121 F.2d 37, 39-40 (D.C. Cir. 1941).

130 Cates v. Haderlein, 342 U.S. 804 (1951).

131 *See* Kirby v. Shaw, 358 F.2d 446, 448 (9th Cir. 1966). Supplemental proceedings are invoked when the General Counsel has reason to believe that an outstanding fraud order is being evaded by conducting a similar business under a different name or at a different address. *See* 39 C.F.R. § 952.30 (1973). The court in *Kirby* did not require that a hearing be given in every case, but that if a hearing was not to be held, the Postmaster General at least had to make a showing sufficient under *Storer Broadcasting*, *see* note 9 *supra*, to justify not proceeding by full hearing. 358 F.2d at 450.

132 *See* Door v. Donaldson, 195 F.2d 764 (D.C. Cir. 1952) (APA applies to 39 U.S.C. § 259a (now 39 U.S.C. § 3006 (1970))). The question of APA applicability to the obscenity section may now be moot since it has been declared unconstitutional on First Amendment grounds. *See* Blount v. Rizzi, 400 U.S. 410 (1971). There is a rather ambiguous footnote in the *Rizzi* opinion about the continued vitality of the mail fraud section. *See* 400 U.S. at 414 n.2.

133 *See* 39 U.S.C. § 204 (1970). That section was added as a result of the decision in Borg-Johnson Electronics, Inc. v. Christenberry, 169 F. Supp. 746 (S.D.N.Y. 1959). In that case the court enjoined enforcement of a fraud order for deceptive advertising. Pursuant to the Post Office Department rules of practice the hearing was conducted by the Judicial Officer. The court held that this violated the APA since the Judicial Officer was not one of the three classes of persons authorized under § 7(a) of the APA to conduct hearings. *See* text accompanying note 12 *supra*. To avoid that result 39 U.S.C. § 204 (1970) was amended to say that, "[t]he Judicial Officer shall be the agency for the purposes of the requirements of [the APA] . . . ." *See* S. REP. No. 1825, 86th Cong., 2d Sess. (1960).

carrier to engage in interstate operations.[134] In *Riss & Co. v. United States*[135] the Court reversed per curiam the decision of a three-judge district court that the APA did not apply to such proceedings. After noting that the relevant statute did not require any hearing,[136] the district court had held that there was no due process right to a hearing, so *Wong Yang Sung* did not apply.[137] Instead, the court found that since the hearing afforded plaintiff was "fair' 'and met constitutional minimums, there was no denial of due process.[138] The Supreme Court holding in *Riss & Co.* has

---

134 Under 49 U.S.C. § 306(a)(1) (1970) it is unlawful for a

> common carrier by motor vehicle subject to the provisions of this chapter [to] engage in any interstate or foreign operations on any public highway, or within any reservation under exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations.

49 U.S.C. § 307(a) (1970) provides that certificates shall be issued to qualified applicants if

> the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this chapter . . . and that the proposed service . . . is or will be required by the present or future public convenience and necessity.

135 341 U.S. 907 (1951), *rev'g* 96 F. Supp. 452 (W.D. Mo. 1950) (3-judge court).

136 96 F. Supp. at 454-55. Section 307(a) merely states that a certificate shall be issued "if it is found" that the applicant meets the requirements.

137 *Id.* at 456. In response to plaintiff's argument that under ICC v. Louisville & N.R.R., 227 U.S. 88 (1913) and American Trucking Ass'n., Inc. v. United States, 326 U.S. 77 (1945) a hearing was required by due process on an application for a certificate, the district court said:

> Regardless of the rulings . . . we do consider them authorities ruling that hearings are to be held . . . on all applications . . . and that such [hearings] are compulsory in the constitutional sense, so as to bring such proceedings within the provisions of [the APA].

96 F. Supp. at 456.

138 96 F. Supp. at 457. The argument that the hearing received was fair or that the plaintiff was not injured is a common one. See text accompanying notes 215-16 *infra*. The courts then usually conclude that since it was fair, any failure to comply with the APA is not a violation of due process. That, of course, puts the cart before the horse. The issue is not whether what was granted to an applicant meets the standards of due process, but whether the hearing is simply to be measured by due process, in which case *Wong Yang Sung* requires a full trial-type hearing.

This faulty analysis then leads courts to attempt to distinguish the facts of their case from the deportation hearings in *Wong Yang Sung*. For example:

> The compulsory hearing found essential to satisfy the essence of "due process of law" involved in deportation proceedings is not to be found or read into all proceedings instituted by a motor carrier before the ICC by the voluntary filing of an application for a certificate of authority under [§ 307(a)].

96 F. Supp. at 455.

been followed by some district courts, and the APA provisions required in contested proceedings for a certificate of public convenience and necessity,[139] and even where investigative proceedings[140] have had the indirect effect of conferring more operating authority on the carrier than before the investigation.[141]

The application of "modified procedures"[142] to contested applications for certificates of convenience and necessity, however, represents a break from this pattern. In 1966 the ICC announced that due to its increasing workload it was no longer possible to give complete oral hearings on all applications, and that thereafter much of this work would be carried out in a more summary manner.[143] Soon after the ICC, by way of dicta, commented on

139 *See* Pinkett v. United States, 105 F. Supp. 67 (D. Md. 1952) (3-judge court); Capital Transit Co. v. United States, 97 F. Supp. 614 (D.D.C. 1951) (3-judge court). Both these cases, in deference to *Riss & Co.* involved objections by intervenors that the proceedings held did not conform to the APA. They therefore also establish a due process right for an intervenor in applications for a certificate. *But see* text accompanying notes 203-05 *infra*.

In addition *Pinkett* held that the intervenors could raise their objections to the hearing examiner after the hearing had been concluded. 105 F. Supp. at 73. While the court relied on the district court opinion in *L. A. Tucker* which was subsequently reversed by the Supreme Court, *see* text accompanying notes 80-86 *supra*, the case is reconcilable with the eventual decision in *L. A. Tucker*, since in *Pinkett* the court found that the intervenor had no notice that the hearing examiner was not qualified under the APA. 105 F. Supp. at 73.

140 The ICC has investigative authority with respect to motor carriers under 49 U.S.C. § 304(c) (1970) (for failure to comply with act); *id.* § 312(a) (1970) (incident to revocation of certificate); *id.* § 316(e) (1970) (for improper rate charge); *id.* § 318(b) (1970) (incident to establishment of just and reasonable minimum rate); *id.* § 325 (1970) (incident to report on need for federal regulation of the sizes and weights of motor vehicles; authority transferred to Secretary of Transportation by Act of Oct. 15, 1966, Pub. L. No. 89-670, 80 Stat 931).

141 *See* Akers Motor Lines, Inc. v. United States, 286 F. Supp. 213 (W.D.N.C. 1968) (3-judge court). The court held that the decision of the ICC resulting from an investigation into the practices of Malone Freight Lines, Inc. under 49 U.S.C. §§ 304(a) & 312(a) (1970) granted Malone more operating authority than its certificate granted, and therefore required an APA hearing. This is another example of an intervenor attacking a decision of the ICC for failure to conform to the APA.

142 The ICC's modified procedures are presently codified at 49 C.F.R. §§ 1100.45-.54 (1973). Under such rules evidence is introduced by sworn affidavits (*id.* § 1100.50); trial-type oral hearings are to be conducted only for those issues where material facts are in dispute, and not solely for the purpose of cross-examination (*id.* § 1100.53); and any cross-examination requested must specify the name of the witness and the subject matter of the desired examination (*id.* § 1100.53(a)).

143 *See* Motor Carrier Licensing Procedures, 31 Fed. Reg. 6600 (1966). The ICC divided all applications into three categories. All unopposed applications are assigned directly to an Operating Rights Review Board. All opposed applications are placed either on the hearing docket or the modified procedure docket. The

the appropriateness of such modified procedures.[144] It held that since modified procedures were to be used only when an application was to be granted, *Wong Yang Sung* did not require an APA hearing.[145] The theory behind this argument is that a competitor of the applicant who intervenes to oppose the application has no due process right to a hearing on its opposition.[146] The validity of that argument depends on the applicability of the *Ashbacker* doctrine which requires a hearing on an application if the grant of that application deprives a competing applicant of its right to a full hearing.[147] While the *Ashbacker* case involved two mutually exclusive applications, its teaching has been extended to the case where

> one certificate for a route [already] exists, and . . . the grant of a second competitive route would as a matter of economic fact destroy or substantially reduce the rendition of the service required by the public interest . . . .[148]

Those conditions will not always be met when an intervenor seeks to oppose an application, but in cases where they are met, the combination of *Wong Yang Sung* and *Ashbacker* requires a hearing irrespective of the ICC's modified procedures. This argument has not, however, been accepted in a long line of district court cases which hold that the modified procedures do not violate the APA.[149]

---

more complex cases and those which "for one reason or another, might be handled more expeditiously and effectively with an oral hearing" are assigned to the hearing docket and handled as the APA directs. *Id.* In those cases where "an oral hearing is not necessary for their proper disposition" modified procedures are followed. *Id; see* note 142 *supra.*

144 *See* Kingpak, Inc., 103 M.C.C. 318 (1966), *aff'd sub nom.* Household Goods Carriers' Bureau v. United States, 288 F. Supp. 641 (N.D. Cal.) (3-judge court), *aff'd per curiam,* 393 U.S. 265 (1968). The proceeding involved facts particularly persuasive for the use of less than full trial-type hearings. The ICC ruled for the first time that motor carriers performing terminal operations on behalf of an exempt class of containerized freight forwarders were not exempt from the certificate requirements of the Interstate Commerce Act. 103 M.C.C. at 339. The ICC estimated that as a result of its decision between 400 to 600 new applications would be filed. *Id.* at 343. As a result of this burden the ICC saw no need to retain its "longstanding custom" of holding an oral hearing. *Id.; cf.* Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672 (1954); Permian Basin Area Rate Cases, 390 U.S. 747 (1968).

145 103 M.C.C. at 343. *But see* notes 139 & 141 *supra.*

146 *Id.* at 344.

147 Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945).

148 Delta Air Lines, Inc. v. CAB, 275 F.2d 632, 638 (D.D.C. 1959), *cert. denied,* 362 U.S. 969 (1960).

149 *See* Slay Transportation Co. v. United States, 353 F. Supp. 555 (E.D. Mo.

Interestingly, a district court has held that the hearing examiner provisions of the APA are applicable to the ICC's modified procedures.[150] The case involved an application for a reparation award alleging that demurrage and penalty charges assessed by the defendant-carrier were inapplicable.[151] The ICC ordered that the proceedings be handled by modified procedure, but in light of the exception in § 7(c) of the APA, allowing for the submission of all or part of the evidence in written form in determining claims for money, there was no dispute over the right to use such procedures. The complainant did, however, object that the hearing examiner was not qualified under § 11 of the APA.[152] The court rejected the government's argument that the hearing examiner provisions of the APA did not apply to the ICC's modified procedures.[153] The apparent implication of the case is that at least in some situations ICC modified procedures will be measured by the standards of the APA. Exactly what those situations are and which standards of the APA will be used has not yet been defined by the courts.[154]

1973); Frozen Foods Express, Inc. v. United States, 346 F. Supp. 254 (W.D. Tex. 1972); Howard Hall Co. v. United States, 332 F. Supp. 1076 (N.D. Ala. 1971); Allied Van Lines Co. v. United States, 303 F. Supp. 742 (C.D. Cal. 1969).

150 *See* Reliance Steel Products Co. v. United States, 150 F. Supp. 118 (W.D. Pa. 1957).

151 Under the Interstate Commerce Act any person aggrieved by the action of a common carrier in violation of the Act may complain to the ICC. *See* 49 U.S.C. § 13(1) (1970). After a full hearing on the complaint the ICC may award damages for the violation and issue an order directing the carrier to pay that sum to the complainant. *See* 49 U.S.C. § 16(1) (1970).

152 This contention was not disputed by the government. Since the hearing was by modified procedure, the complainant did not know the identity of the hearing examiner and raised its objection to his qualifications only after the initial decision was filed. The court found that the exception was "promptly filed." *See* 150 F. Supp. at 120.

153 *See id.* at 123. The court was of the opinion that the term "hearing" as used in § 7 of the APA covered modified procedures and required the hearing examiner to be duly qualified.

By way of dicta the court commented on the significance of the Supreme Court's decision in *Riss & Co.*:

> Constitutional considerations rather than a statute required a hearing in [the *Riss & Co.*] case. . . . There was no issue of admissability of evidence or credibility of witnesses involved, and the plaintiff admitted that the hearing was fair and the examiner competent. Yet the decision was reversed [citations omitted] because the hearing officer was not qualified as prescribed by the Administrative Procedure Act.

Id.

154 The holding of *Reliance Steel* has been slightly cut back by the decision in Magnet Cove Barium Corp. v. United States, 175 F. Supp. 473 (S.D. Tex.),

Aside from the question of modified procedures, the APA has been held not to apply to a railroad's application for a certificate of public convenience and necessity to abandon its operations,[155] or to petitions for reconsideration of applications to transfer operating rights[156] or broker's licenses.[157]

B. *Failure to Apply APA Procedures Based on a Finding that the Proceeding is not Adjudicatory*

Quite often a court will refuse to require the full trial-type APA hearing guaranteed by *Wong Yang Sung* by labeling the proceeding non-adjudicatory. In *FPC v. Texaco, Inc.*[158] the Supreme Court upheld the summary rejection of a gas producer's application for a certificate of public convenience and necessity under the Natural Gas Act.[159] Justice Douglas characterized the Federal Power Commission's (FPC) action in the case as:

---

aff'd, 361 U.S. 32 (1959), finding that the plaintiff had waived its right to object to the hearing examiner. While recognizing that determining the identity of the hearing examiner conducting the modified procedures is particularly difficult, the court felt the delay in this case was overly long and the objection raised "with an eye to review by the District Court." 175 F. Supp. at 475-76. *But see* note 152 *supra*.

155 *See* Brotherhood of Locomotive Engineers v. United States, 217 F. Supp. 98 (N.D. Ohio 1963) (abandonment proceedings under 49 U.S.C. § 1(19) (1970) are held in accordance with the rules and regulations of the ICC, and therefore being merely discretionary do not give rise to a due process claim, so *Wong Yang Sung* is inapplicable).

156 *See* Monumental Motor Tours, Inc. v. United States, 316 F. Supp. 663 (D. Md. 1970); A.L. Root Transportation, Inc. v. United States, 280 F. Supp. 152 (D. Vt. 1969); Chemical Leaman Tank Lines, Inc. v. United States, 251 F. Supp. 269 (E.D. Pa. 1965). Under 49 U.S.C. §§ 5(10) & 312(b) (1970) operating rights involving no more than 20 vehicles may be transferred pursuant to any rules the ICC may adopt. Under 49 C.F.R. § 1132.4 (1973) notice of approved transfers will be made in the Federal Register, and thereafter upon timely petition an interested person may seek reconsideration. The decisions uniformly conclude that there is no due process right to a hearing at the requested reconsideration proceedings.

157 *See* Lincoln Transit Co. v. United States, 256 F. Supp. 990 (S.D.N.Y. 1966). The right to transfer a broker's license is governed by 49 U.S.C. § 304(a)(4) (1970) and 49 C.F.R. §§ 1131.1-.2 (1973).

158 377 U.S. 33 (1964), *rev'g* 317 F.2d 796 (10th Cir. 1963).

159 Under 15 U.S.C. § 717f(c) (1970) it is unlawful to transport or sell natural gas, or construct or extend any facility to transport or sell, or acquire or operate any such facility unless there is in effect a certificate of public convenience and necessity. Section 717f(c) also provides that all decisions on an application for a certificate shall be after notice and hearing and a finding which meets the requirements of 15 U.S.C. § 717(e) (1970). Under regulations adopted by the FPC all applications must include as exhibits a "conformed copy of each contract for sale or transportation of gas for which a certificate is requested." 18 C.F.R. § 157.25

> not an "adjudication," not "an order," not "licensing" within the meaning of § 2 [of the APA]. Whether [petitioner] can qualify for a certificate of public convenience and necessity has never been reached. It has only been held that its application is not in proper form because of the pricing provisions in the contracts it tenders.[160]

As a result the Court held that it was not improper for the FPC to deny a hearing to Texaco on its application for a certificate.

For the Court to characterize the proceeding as non-adjudicatory, it would have had to find that the FPC's decision was not "a part of a final disposition" on Texaco's application.[161] While it is true that the FPC's decision did not foreclose another application from Texaco,[162] it did reject the present application.[163] Furthermore, the ground for rejection, *i.e.*, an unlawful pricing provision in an accompanying contract, was not merely an easily correctable, clerical error, but went to the very validity of the application. The FPC's action was based on a finding that the pricing provision violated its regulation. Surely that is a final disposition. The Court's action, however, foreclosed Texaco's opportunity to contest that finding. In addition, the FPC's action could not be properly labeled "investigative," the more familiar class of non-adjudicatory actions exempt from the APA.[164]

In *International Telephone & Telegraph Corp. v. Local 134, IBEW*[165] the Supreme Court labeled a National Labor Relations Board (NLRB) proceeding as both non-final[166] and investigative[167]

(1974). The application will be rejected if the contracts submitted contain an illegal price-changing provision. *Id.* The only permissible provisions are those described in 18 C.F.R. § 154.93(a)-(c) (1974). Texaco's application was rejected for including a price-changing provision other than as specified in § 154.93. *See* 28 F.P.C. 551 (1962).

160 377 U.S. at 45.

161 *See* Administrative Procedure Act § 2(d), 5 U.S.C. § 551(6) (1970); note 4 *supra*.

162 The FPC's "Letter Rejecting Rate Schedule and Related Certificate Application" states that, "such rejection is without prejudice to the submittal [of a new application] which [does] not contain the objectionable pricing provisions." 28 F.P.C. at 551-52.

163 *See id.* at 551.

164 *See, e.g.*, Torras v. Stradley, 103 F. Supp. 737 (N.D. Ga. 1951) (APA not applicable to income tax investigation).

165 95 S. Ct. 600 (1975), *rev'g* Local 134, IBEW v. NLRB, 486 F.2d 863 (7th Cir. 1973).

166 *Id.* at 610-11.

167 *Id.* at 610.

and therefore refused to find the APA applicable. The case involved an appeal by a labor union from a finding by the NLRB that the union had committed an unfair labor practice. The unfair labor practice was based on a union organized work stoppage to induce the employer to assign particular work to the union's members and not members of a rival union. The National Labor Relations Act (NLRA) treats such jurisdictional disputes by means of a two-step procedure. NLRA § 8(b)(4)(D)[168] makes such action an unfair labor practice, but in order to induce unions to settle their differences without awaiting unfair labor practice proceedings and enforcement of NLRB orders by courts of appeals, NLRA § 10(k)[169] provides for a more informal preliminary hearing. The court of appeals had refused to enforce the unfair labor practice order issued by the NLRB since it found that the hearing examiner in the § 10(k) proceeding was the prosecuting attorney in the § 8(b)(4)(D) hearing, a violation of the separation of functions requirement of the APA.[170] The Supreme Court reversed, holding that the § 10(k) determination was not a final disposition within the meaning of the APA.[171]

In addition to characterizing an agency action as a non-final disposition, courts often characterize the proceedings as rule-making rather than adjudication and thereby avoid the impact of *Wong Yang Sung*. One method of reaching this result is to view a particular individualized determination as part of a larger more generalized proceeding. For example, in *Law Motor Freight, Inc. v. CAB*[172] the court held that the Civil Aeronautics Board's decision to allow a specific air freight forwarder to operate surface transportation from Boston, Massachusetts to Nashua, New Hampshire had the effect of declaring Nashua within the Boston pickup and delivery zone, so that henceforth all air carriers and air freight forwarders could operate such transportation, subject only to approval of tariffs.[173] The problem with that analysis is

168 29 U.S.C. § 158(b)(4)(D) (1970).

169 *Id.* § 160(k) (1970).

170 486 F.2d at 866-68.

171 95 S. Ct. at 610-11; *accord*, Bricklayers Union v. NLRB, 475 F.2d 1316 (D.C. Cir. 1973).

172 364 F.2d 139 (1st Cir. 1966), *cert. denied*, 387 U.S. 905 (1967).

173 The CAB is authorized to permit motor carriers pick-up and delivery service of air cargo if such services are performed "in connection with [the] air

that all agency action, subject to the principle of stare decisis, has the effect of laying down guidelines that may have a more general, future impact.[174] If courts are going to make this type of analysis, they should at least examine the questioned proceedings to see how similar they were to rulemaking. Relevant factors might be whether notice of the more general issue, rather than of the specific request, was given; whether comment was requested or received by the agency; whether interested parties intervened in the proceedings, and if they did, was the basis of the intervention to contest the general or specific issues; and whether the eventual decision formed part of a new policy, either as the base of a traditional rulemaking proceeding or more informally by circulation as a statement of policy. Short of this type of analysis, a court is ill-advised to label as a rulemaking proceeding a proceeding that has all the indicia of adjudication.[175]

---

transportation" of such cargo. *See* 49 U.S.C. § 1373(a) (1970); 14 C.F.R. § 222.1 (1974). When the desired service does not exceed 25 miles from the airport the air carrier or air freight forwarder need only file a tariff request in conformity with the applicable rules. 14 C.F.R. § 222.2 (1974). But when the requested service exceeds 25 miles the carrier or forwarder must file an application requesting authority to operate the delivery and pick-up service. *Id.* § 222.3 (1974). Since the distance from Boston to Nashua is 34 miles, the air freight forwarder, Emery Air Freight Corp., was requested to file an application under 14 C.F.R. § 222.3 (1974).

The court in *Law Motor* said that the CAB's decision in that case:

> has declared new ground rules available to the air carrying industry applicable to an additional nine miles of terrain.
>
> In our view, this falls within the ambit of rule-making, even though the occasion was the application of one company for pickup and delivery tariffs, and the [CAB's] order was accordingly addressed to the applicant.

364 F.2d at 142-43.

174 The court recognized that the order might also meet the APA definition of "licensing" but dismissed this point with the rather offhand remark, "[b]ut, for the purpose of determining the applicable procedural requirements . . . we affix the 'rule-making' label to the [CAB's] order in this case." 364 F.2d at 143. *See generally* 1 K. DAVIS, *supra* note 1, § 5.02, at 297-98.

175 The CAB treated the proceeding as an adjudication, albeit denying the intervenor a hearing. *See* Emery Air Freight, 44 C.A.B. 778 (1966). The court felt the proceedings were analogous to the "more momentous" action in American Airlines, Inc. v. CAB, 359 F.2d 624 (D.C. Cir. 1966) (en banc), where the D.C. Circuit upheld rulemaking proceedings in the regulation of blocked space service. *See* 364 F.2d at 143 n.5. But in that case the CAB acknowledged that it was acting in a rulemaking capacity by issuing a policy statement regulation, Reg. No. PS-24, dated August 7, 1964, constituting amendment 3 to Part 339 of the CAB's regulations, then codified at 14 C.F.R. § 399.37, 29 Fed. Reg. 11590 (1964), and subsequently deleted as the result of another rulemaking proceeding, 33 Fed. Reg. 15413-14 (1968). *See* 359 F.2d at 625-26 n.2.

A very similar approach, when dealing with a single entity, is to characterize a proceeding as ratemaking, and therefore subject to rulemaking procedures, rather than licensure. In *Sun Oil Co. v. FPC*[176] the petitioner, upon the termination of its contract with a customer, applied for a new certificate of convenience and necessity under the Natural Gas Act based on a new contract which it filed as an initial rate schedule.[177] The FPC summarily rejected the application on the ground that where the same service was involved no new certificate was required and the entire application would be treated merely as a rate change, requiring only rulemaking proceedings.[178] The court of appeals dissent chides the majority for acquiescing in this view without giving a reason, and more importantly, without requiring an agency hearing on the issue.[179] For what the court has accepted is the notion that an agency can foreclose a hearing by labeling what the applicant calls a request for a license, a request for a rate change, and do so without even holding a hearing on the propriety of its characterization.

When the proceeding involves a large number of affected persons, it is easier to justify the rulemaking label. Yet, size alone should not be the determinative fact, and courts often go wrong when they rely merely on numbers. In *Gart v. Cole*[180] the court rejected an argument that a challenge to an urban renewal relocation plan was an adjudication and should be conducted in conformity with § 5 of the APA. Under the Housing Act of 1949 the Administrator of the Federal Housing and Home Finance Agency must determine that the relocation plan meets certain minimum federal standards.[181] Because the plan dealt with

176 266 F.2d 222 (5th Cir. 1959), *aff'd*, 364 U.S. 170 (1960).

177 *See also* Humble Oil & Refining Co. v. FPC, 266 F.2d 235 (5th Cir. 1959), *cert. denied*, 363 U.S. 842 (1960); Hunt Oil Co. v. FPC, 266 F.2d 232 (5th Cir. 1959), *cert. denied*, 363 U.S. 841 (1960) (contract cancelled prior to expiration date and superseded by subsequent agreement with higher rates); Magnolia Petroleum Co. v. FPC, 266 F.2d 234 (5th Cir. 1959), *cert. denied*, 363 U.S. 842 (1960) (new contract submitted prior to FPC action on original application); Richardson v. FPC, 266 F.2d 233, *cert. denied*, 363 U.S. 841 (1960) (direct appeal from FPC rejection without alternative filing of new contract as a rate change).

178 *See* Sun Oil Co., 18 F.P.C. 609 (1957); 18 F.P.C. 611 (1957).

179 *See* 266 F.2d at 227, 231-32 (Brown, J., dissenting).

180 263 F.2d 244 (2d Cir.), *cert. denied*, 359 U.S. 978 (1959).

181 The relocation standards are found at 42 U.S.C. § 1455(c)(1) (1970). At the

the relocation of a geographically defined group and not individuals, and because the large number of individuals affected implied that individual interests were not being affected, the court decided that there was no justification for requiring adjudicatory procedures.[182] The implication of that argument is that as the relocation program becomes smaller and smaller, and its impact equally small, adjudicatory procedures are required. And conversely, when the relocation program becomes large, and its impact larger, rulemaking procedures are more appropriate. A better analysis would have been for the court to determine the character of the effect the relocation program would have had. If its effect was "general," rulemaking procedures would have been appropriate, while if its effect was "particular," adjudication should have been required.[183] Arguably, where the federal agency's role was to determine whether minimum standards were met, as distinct from drawing up the relocation plan in the first place, that determination would require an individualized appraisal of the program's impact on each individual, and adjudication would have been proper.[184]

C. *Failure to Apply APA Procedures Based on Statutory Analysis*

The most egregious form of judicial reception of the *Wong Yang Sung* doctrine is the small number of cases in which the

time of the suit 42 U.S.C. § 1451(c)(iv) provided that the Administrator could not delegate his responsibility to determine whether the relocation requirements of § 1455(c)(1) had been met. *See* 68 Stat. 624 (1954). Since that time this requirement has been repealed. *See* 79 Stat. 670 (1965). When the Department of Housing and Urban Development was established, the Administrator's power under this section was transferred to the Secretary of HUD. *See* 81 Stat. 21 (1967).

182 [T]he number of residents affected by the relocation proposals and therefore within the group is quite large. [*Compare* Londoner v. Denver, 210 U.S. 373 (1908) *with* Bi-Metallic Investment Co. v. State Board of Equalization, 239 U.S. 441 (1915).] In such a case the determination is not such an adjudication of individual interests as may justify the implied application of § 5 of the [APA].

263 F.2d at 251. This numerical interpretation of *Londoner* and *Bi-Metallic* is misplaced. *See* Note, *The Judicial Role in Defining Procedural Requirements for Agency Rulemaking*, 87 HARV. L. REV. 782, 786-87 & n.31 (1974).

183 *See* Note, *supra* note 182, at 786-87.

184 Conversely, to the extent one views the administrator's function as legislative, *i.e.*, as making a policy decision on the appropriateness of the chosen relocation program, the proceedings are properly treated as rulemaking. *See id.*

courts merely check the relevant statute to determine whether it requires a hearing on the record without considering whether due process requires a hearing.[185] But even short of that blunderbuss approach, courts often rely on principles of statutory construction to avoid the impact of *Wong Yang Sung*. The justification for this approach is that if Congress can explicitly exempt a given proceeding from the APA adjudicatory provisions when due process requires some type of hearing,[186] a similar intent of Congress, though not as explicit as the direct exemption, should be given effect by the courts.[187]

This approach has been followed in a number of varying situations. Where the statutory scheme gives the agency broad discretion to administer its programs, including the authority to regulate the "manner and form of adjudication,"[188] finding such an exemption is not difficult. [189] When the statutory language is

185 *See, e.g.*, Sisselman v. Smith, 432 F.2d 750 (3d Cir. 1970) (neither the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 401 (1970), nor the General Bridge Authority Act of 1946, 33 U.S.C. § 525 (1970), required the Army Corps of Engineers or the Commandant of the United States Coast Guard to whom that authority has been transferred pursuant to 49 U.S.C. § 1655(g)(6)(A)-(C) (1970), to give plaintiff-landowners an APA hearing on the defendant's application for a bridge permit); Barefield v. Byrd, 320 F.2d 455 (5th Cir. 1963) (Title 38, U.S.C., Veterans' Benefits, does not require a hearing on disabled veteran's mother's application for further compensation).

186 See text accompanying notes 78-79 *supra*.

187 The relationship between the explicit exemption and that read into the statute is not entirely analogous. Administrative Procedure Act § 12, 5 U.S.C. § 559 (1970), provides that the APA can be superseded only "to the extent that [a statute] does so expressly." Furthermore, the courts have given a strict interpretation to all claimed exemptions. *See, e.g.*, Wong Yang Sung v. McGrath, 339 U.S. 33, 45, 51-53 (1950). However, whatever force § 12 of the APA has is partially attenuated with respect to hearings required by due process, since that gloss was added by the Court itself in *Wong Yang Sung*. There is, therefore, some logic in allowing courts to construe statutes so as not to find a hearing requirement, if the court is also required to construe the statute to see if due process requires a hearing.

188 *See* 38 U.S.C. § 210(c) (1970) (Veterans Administrator authorized to make all rules and regulations to carry out law including manner and form of adjudications and awards); 12 U.S.C. § 27 (1970) (Comptroller of the Currency authorized by special commission appointed by him or otherwise to determine if banking association lawfully entitled to commence business).

189 *See* Barefield v. Byrd, 320 F.2d 455, 457 (5th Cir. 1963) (the statutory scheme leaves "to the Veterans' Administrator discretion in selecting the procedure to be followed in reaching his decisions"); Webster Groves Trust Co. v. Saxon, 370 F.2d 381, 385 (8th Cir. 1966) ("The very nature of the decision [under 12 U.S.C. § 27 (1970)] indicates that formal adversary type hearing would be of little benefit to [the Comptroller] in the discharge of his discretionary powers").

less clear, courts will look to the function that any hearing held will serve. A finding that the hearing is held only for the informational benefit of the agency in order to enable the agency better to perform its function, usually leads to the conclusion that the hearing is discretionary and therefore not covered by the APA.[190]

Another approach is to give content to an ambiguous statutory requirement by reference to the larger statutory scheme. For example, while the phrase "if it finds" has been interpreted to require notice and a full hearing in some cases,[191] this is not always the interpretation. Where the phrase is used in conjunction with other relevant sections of the statute that use "after notice and hearing," courts have been willing to infer that by use of "finds" Congress intended that the agency need not hold a full hearing.[192] This form of analysis is more susceptible to

190 *See* Dyer v. SEC, 287 F.2d 773 (8th Cir. 1961); Bridgeport Federal Savings & Loan Ass'n v. Federal Home Loan Bank Board, 307 F.2d 580 (3d Cir. 1962), *cert. denied*, 371 U.S. 950 (1963).

In *Dyer* the plaintiff-shareholders of the Union Electric Co. objected to the materials the company filed with the SEC pursuant to the Public Utility Holding Company Act of 1935, 15 U.S.C. § 79*l*(e) (1970), and Rule U-62, 17 C.F.R. § 250.62 (1974), which requires anyone intending to solicit proxies for an annual meeting to file a declaration of the materials desired to be used and to obtain SEC approval thereof. The statute authorizes the SEC to promulgate any rule which it "deems necessary or appropriate in the public interest . . . ." 15 U.S.C. § 79*l*(e) (1970). In response to plaintiff's objection the SEC held a hearing at which time it approved the materials, and plaintiff then sought review of that order. The court held that any hearings the SEC may hold on the matter were not proceedings for resolving and redressing legal rights, but were to enable the SEC to properly exericse its regulatory power and were, therefore, proceedings not subject to the APA. 287 F.2d at 779-80.

Bridgeport involved an application to establish a branch bank under the Home Owner's Loan Act of 1933, 12 U.S.C. § 1464(e) (1970), which requires that the Federal Home Loan Bank Board determine in its "judgment" that there is a need for the institution, that there is a reasonable probability of its success, and that there will be no undue injury to existing local thrift institutions. In response to the applicant's argument that the hearing it was given was not in conformity with the APA, the court said the Board was under no statutory obligation to offer a hearing. And when it did proceed by hearing, the hearing was for the benefit of the Board to help in "obtaining certain particular information it desired in connection with its appraisal of the application before it." 307 F.2d at 582.

191 *See* text accompanying notes 125-30, 134-38 *supra*.

192 *See* Eastern Airlines, Inc. v. CAB, 185 F.2d 426 (D.C. Cir. 1950) (petition by intervenor to review order granting competing airline exemption from certain requirements of the Civil Aeronautics Act of 1938).

Under the statutory scheme at the time of suit no air carrier could engage in air transportation unless the CAB had issued a certificate. Civil Aeronautics Act

criticism than the discretionary finding discussed above, since there is a difference in finding that Congress did not intend to require a hearing and finding that Congress intended to exempt the hearing from the APA if due process required a hearing. It is only the latter conclusion that would suffice to avoid the impact of *Wong Yang Sung*.[193]

D. *Failure to Apply APA Procedures Based on Due Process Analysis*

The largest number of cases where *Wong Yang Sung* is not followed are based on a judicial determination that due process does not require a hearing. In many of those cases, that judicial determination is erroneous. Part of the explanation for this phenomenon must rest with the all-or-nothing approach of *Wong Yang Sung*. Under *Wong Yang Sung* a conclusion that due process requires a sufficiently full hearing means that a full APA trial-type hearing must be given. It is no longer possible for the

---

of 1938, ch. 601, § 401(a), 52 Stat. 987 (now 49 U.S.C. § 1371(a) (1970)). The certificate could be altered, amended, modified or suspended "after notice and hearing" if the public convenience and necessity required. *Id.* § 401(h), 52 Stat. 989 (now 49 U.S.C. § 1371(g) (1970)). But the CAB had authority to exempt an air carrier from any requirement of the act "if it [found]" that the requirement would be an undue burden on the carrier and that the exemption would be in the public interest, *id.* § 416(b)(1), 52 Stat. 1005 (now 49 U.S.C. § 1386(b)(1) (1970)), except that any exemption dealing with the pay or working hours of a pilot had to be "after notice and hearing." *Id.* § 416(b)(2), 52 Stat. 1005 (now 49 U.S.C. § 1386(b)(2) (1970)).

After reviewing this statutory scheme the court concluded:

> In some contexts the word "finds" may imply notice and hearing but the present context precludes that implication. To read such a requirement into [the exemption section] would frustrate the action of Congress in permitting the Board to exempt carriers from nearly all requirements of the Act . . . . The purpose of Congress in permitting the Board to grant exemptions was to avoid "undue burden" on carriers. But that purpose and the fact that the words "notice and hearing" . . . are omitted from § 416(b)(1) indicate that this paragraph does not require a full hearing.

185 F.2d at 428.

See also Springfield Airport Authority v. CAB, 285 F.2d 277 (D.C. Cir. 1960) (similar conclusion reached for application to temporarily suspend service pursuant to 49 U.S.C. § 1371(j) (1970)).

193 In the *Eastern* case, *see* note 192 *supra*, for example, it is very clear that Congress did not intend a full hearing on applications for an exemption. However, one could read *Wong Yang Sung* to mean that such a situation is no different than the case where Congress enacts a regulatory statute with no mention of a hearing. In both cases one must make a further analysis to determine whether due process requires a hearing.

courts to balance the interests and arrive at a suitable procedure.[194] As a result one can only presume that faced with such an awesome prospect, if courts are to err, they err on the conservative side and hold either that due process requires no hearing or that the hearing is not of such magnitude as to be covered by *Wong Yang Sung*.

When courts deal with the due process issues, their approach follows fairly traditional lines of thought, and the propriety of the decisions can be evaluated by reference to the due process analysis developed above.[195] For example, with respect to property rights court have held that the APA does not require a trial-type hearing when the relevant statute fails to create a fully vested property interest.[196] That analysis is compatible with the legitimate claim of entitlement doctrine that the Supreme Court has developed to measure property interests.[197] However, to the extent that the courts in these cases rely on an explicit statutory reservation that no property interest attaches,[198] they accept unquestioningly the notion that there are no bounds to limit how the state may define property. Only a minority of the Supreme Court in *Arnett v. Kennedy*[199] was ready to accept that view, and in the Court's more recent pronouncement in *Goss v.*

---

194 See text accompanying notes 104-08 *supra*.

195 See text accompanying notes 89-103 *supra*.

196 *See* Lesser v. Humphrey, 89 F. Supp. 474 (M.D. Pa. 1950) (no right to an APA hearing on the forfeiture of earned good-time at a federal prison since 18 U.S.C. § 4165 (1970) makes accumulation of good-time conditional until the time has arrived when the prisoner is entitled to release); LaRue v. Udall, 324 F.2d 428 (D.C. Cir. 1963) (plaintiff has no property interest under Taylor Grazing Act, 43 U.S.C. § 315b (1970), since statute provides that "grazing privileges recognized and acknowledged shall be adequately safeguarded, but the creation of a grazing district . . . shall not create any right, title, interest, or estate in or to the lands."); United States v. Walker, 409 F.2d 477 (9th Cir. 1969) (qualified applicant seeking to purchase land under Mining Claims Occupancy Act, 30 U.S.C. § 701 (1970), not entitled to APA hearing since statute that says Secretary of Interior may convey land to one who relinquishes mineral claim only creates a potential privilege to receive a conveyance). *But see* Adams v. Witmer, 271 F.2d 29 (9th Cir. 1958) (applicant for patents to certain mining claims entitled to hearing since mining claims are a property right); United States v. Libby, McNeil & Libby, 107 F. Supp. 697 (D. Alas. 1952) (corporate defendants operating salmon trap entitled to APA hearing on agency decision to withdraw land from public domain and create Indian reservation).

197 See text accompanying notes 93-96 *supra*.

198 *See* 18 U.S.C. § 4165 (1970); 30 U.S.C. § 701 (1970); 43 U.S.C. § 3156 (1970).

199 416 U.S. 134 (1974).

Lopez[200] the majority clearly rejected such a theory. Traditional notions of property law lead to the conclusion that where the society has a commonly understood definition of what characteristics constitute property that definition cannot be altered by governmental involvement.[201] Measured by that standard some court decisions may be too glib in holding that no cognizable property interests were involved.[202]

Similar to the property right cases are those decisions that deny an APA hearing where the asserted interest is freedom from competition.[203] Typically, such cases arise when intervening competitors allege that they were not given an APA hearing on the competitor's request for a license, charter, exemption, etc. The courts respond to such allegations by reciting the oft-quoted rule that due process does not guarantee protection against economic damage from competition and making reference to the familiar litany of cases where that was said to be the law.[204] Whatever validity that notion once had, it is of highly questionable value today. Usually the statute in question requires an agency finding that the requested action is in the public interest. In that case competing intervenors may assume the status of community representatives, and properly assert a due process right to vindicate that interest.[205] The problem, however, with that analysis is that vindicating the public interest hardly ever requires a full trial-type hearing, and so long as *Wong Yang Sung* requires such a hearing, it is not likely that courts will accept such a tenuous, non-traditional claim as giving rise to an interest protected by due process.

---

200 95 S. Ct. 729 (1975); *see* note 96 *supra.*

201 *See* note 96 *supra.*

202 Measured against the property interests recognized in *Adams* and *Libby, McNeil & Libby,* the failure to recognize a property interest in *Walker* is particularly difficult to understand. See note 196 *supra.*

203 *See* Bridgeport Federal Savings & Loan Ass'n v. Federal Home Loan Bank Board, 199 F. Supp. 410, 412 (E.D. Pa. 1961), *aff'd,* 307 F.2d 580 (3d Cir. 1962), *cert. denied,* 371 U.S. 950 (1963) (intervenor contested application to establish branch bank); First National Bank v. First Federal Savings & Loan Ass'n, 225 F.2d 33, 36 (D.C. Cir. 1955) (same); Eastern Airlines, Inc. v. CAB, 185 F.2d 426, 429 (D.C. Cir. 1950) (intervenor challenged grant of exemption from act).

204 *E.g.,* Tennessee Electric Power Co. v. TVA, 306 U.S. 118 (1939); Alabama Power Co. v. Ickes, 302 U.S. 464 (1938); *cf.* Perkins v. Lukens Steel Co., 310 U.S 113 (1940).

205 *See* 13 B.C. IND. & COM. L. REV. 184, 190-91 (1971).

Finally, a court may hold that even though a protected property interest is at stake, the second stage interest balancing does not require a sufficiently full hearing to trigger an APA trial-type hearing. In *Aircrane, Inc. v. Butterfield*[206] a three-judge district court was convened to hear plaintiff's challenge to the constitutionality of 49 U.S.C. §§ 1471(a)(1) & (b), 1473(b)(2) (1970) authorizing the Administrator of the Federal Aviation Administration (FAA) summarily to seize any aircraft that is involved in a violation for which a civil penalty may be imposed on the owner or operator. All that the FAA need do is determine that there is probable liability for a civil penalty.[207] The issue before the court was whether a hearing prior to seizure was necessary. There was no doubt that since by definition the aircraft had to be the property of the alleged wrongdoer, the owner had a significant property interest in the aircraft. The court therefore engaged in a careful balancing of interests to determine the proper form of hearing required by due process. It eventually decided that the government's interests in a summary procedure outweighed the owner's interests in a prior hearing and upheld the constitutionality of the statute.[208]

The court then responded to plaintiff's argument that § 5 of the APA required a prior hearing. In rejecting that contention the court reasoned that since due process did not require a prior hearing in this case, the constitutional compulsion present in *Wong Yang Sung* was lacking, and therefore the APA was not applicable.[209] That, however, is not a sufficient response, for in

206 369 F. Supp. 598 (E.D. Pa. 1974).

207 *See id.* at 603. 49 U.S.C. § 1471(a)(1) (1970) imposes a $1000 per violation civil penalty for wrongdoing and 49 U.S.C. § 1471(b) (1970) authorizes the imposition of a lien to secure the penalty. Under 49 U.S.C. § 1473(b)(2) (1970) the FAA can summarily seize property subject to such a lien. The regulations authorize a state or federal law enforcement officer to seize the aircraft on order of the FAA's Regional Director. 14 C.F.R. § 13.17(a) (1974). At the time of seizure the Regional Director must send notice to the registered owner including, *inter alia*, the "reasons for the seizure, including the violations believed or judicially determined, to have been committed." *Id.* § 13.17(c)(3) (1974).

208 369 F. Supp. at 605-08.

209 The obvious answer to this argument is that the challenged sections of the FAA Act do not require "an adjudication . . . to be determined on the record after opportunity for an agency hearing." This is why the statute is constitutionally suspect in the first place. [Plaintiffs] have presented their argument in the alternative; on the one hand, no hearing

Wong Yang Sung a due process analysis would not have required an independent hearing examiner.[210] So too here, it is irrelevant that due process does not require a prior hearing. Due process will require a hearing at some time, and that is what is important. While it may be that in the case of *Aircrane* the due process requirement is not of such magnitude as to invoke the rule of *Wong Yang Sung*, the court should at least make such a finding. The conclusory argument that due process does not require the requested procedure is insufficient. At a minimum[211] *Wong Yang Sung* should be interpreted to mean that a court must engage in interest balancing not to determine whether due process requires any given procedure, but to determine whether due process requires a hearing of sufficient formality to trigger an APA hearing.[212] And that finding is necessarily less difficult to make than a finding that due process requires the requested procedure.

Even when a court recognizes a due process interest, it may still look for an escape route before granting an APA hearing. If the objection to the procedures afforded was not made to the agency, or there was a substantial delay in raising the objection, the court is likely to find that the rights were waived.[213] And where it appears that the agency accepted as true all the information submitted by the complainant, the court is likely to find that

---

> is statutorily required, posing constitutional questions; on the other, the FAA Act, read through the APA, requires a hearing which was not granted. We have agreed with [plaintiffs] that no hearing is required, but have resolved the constitutional question against them. Having concluded that the statute requires no hearing, there is no need to discuss the alternative contention, except to note that although the APA defines the content of a hearing procedure when a hearing is constitutionally or statutorily required [*see Wong Yang Sung*], it does not independently create the right to a hearing.

Id. at 608.

210 *See* text accompanying note 77 *supra.*

211 If one takes a more liberal construction of *Wong Yang Sung* (*i.e.*, that whenever due process applies because a protected property interest is at stake, a full APA trial-type hearing is required, see text accompanying note 107 *supra*), then the court's entire mode of analysis in *Aircrane* is wrong. Under this view once the court determined that the claimant sought to protect a constitutionally recognized property interest, it should have required a full trial-type hearing.

212 *See* text following note 106 *supra.*

213 *See* United States v. Consolidated Mines & Smelting Co., 455 F.2d 432, 441 (9th Cir. 1971); Adams v. Witmar, 271 F.2d 29 (9th Cir. 1958); text accompanying notes 80-86 *supra.*

there are no material facts in dispute, and foreclose the requested hearing on that ground.[214]

Also, courts often refuse to follow *Wong Yang Sung* because in their opinion the procedures offered were "fair." One court justified such a conclusion by analogy to the harmless error rule.[215] Another court held that the plaintiff would not be heard to object to the infirmity of the procedures afforded where the court offered him a "trial de novo" to show that the agency's decision was arbitrary and capricious or not based upon the facts.[216] The court, however, left unspecified how it felt obtaining judicial review of the agency action could substitute for allegedly invalid agency procedures. Courts usually have sufficient grounds to warrant making such determinations. But it should be remembered that conclusions of this type involve a high degree of judicial discretion, and the judgment to decide the case on such highly discretionary grounds is just another example of the inhospitable treatment afforded the *Wong Yang Sung* doctrine.

Conclusion

This Note has examined the scope of formal adjudications under the APA. The trigger phrase for such adjudications, "required by statute to be determined on the record after opportunity for an agency hearing," was given a broad interpretation by the Supreme Court in *Wong Yang Sung*. Yet, whether by congressional action or judicial action, that opinion has not been faithfully followed. Part of the problem lies with the Supreme Court itself. The opinion is not supported by the legislative history of the APA, and in terms of deciding the case before it, the Court may have painted with an overbroad brush. To com-

---

214 *See* Railway Express Agency, Inc. v. CAB, 345 F.2d 445, 450 (D.C. Cir. 1965); note 9 *supra*.

215 *See* Kerner v. Celebrezze, 340 F.2d 736, 740 (2d Cir. 1965) (hearing to establish disability under 42 U.S.C. § 415(b) (1970) and eligibility for disability insurance benefit under 42 U.S.C. § 423 (1970)).

216 *See* Gardner v. United States, 239 F.2d 234, 238 (5th Cir. 1956) (challenge to hearing by County Committee pursuant to 7 U.S.C. § 1301(b)(13)(E) (1970) finding plaintiff guilty of over-planting peanuts and imposing fine under 7 U.S.C. § 1359(a) (1970)). The court's characterization of its proceedings as a trial de novo cannot be taken literally since the court was merely reviewing the County Committee's determination for abuse of discretion.

pound the problem, the Court's recent decisions in *United States v. Allegheny-Ludlum Steel Corp.*[217] and *United States v. Florida East Coast Railway*,[218] which significantly narrowed the range of proceedings where formal rulemaking is required,[219] cast even more doubt on the vitality of the *Wong Yang Sung* decision. The legislative history of the APA indicates that the draftsmen viewed the formal rulemaking and adjudication requirements *in pari materia*.[220] The Court's decision may be an indication that the Court would restrict *Wong Yang Sung* if the issue were now presented.[221]

The decision in *Wong Yang Sung* can, however, serve a useful function. The APA is based on a sharp dichotomy between rulemaking and adjudication. But as regulatory patterns change, and government regulation extends deeper into the mainstream of American society, such a distinction blurs.[222] Where once a proceeding was viewed as adjudicatory in nature, the increasing

217 406 U.S. 742 (1972).

218 410 U.S. 224 (1973).

219 *See* note 3 *supra*.

220 As eventually passed the language of both sections are equivalent. That was not always the case. The version of the bill reported to and passed by the Senate used "required by law" as the triggering test for formal rulemaking. The House changed this to "required by statute" explaining the change in a footnote to the committee report:

> The change is made to conform to the language used in the introductory clause of section 5 respecting adjudication. A statute may, in terms, require a rule or order to be made upon the record of a hearing, or in the usual case be interpreted as manifesting a Congressional intention so to require, and in either situation sections 7 and 8 would apply . . . .

H.R. REP. NO. 1980, 79th Cong., 2d Sess. 51 & n.9 (1946), reprinted in LEGISLATIVE HISTORY, *supra* note 4, at 285.

When the court in *Allegheny-Ludlum* distinguishes *Wong Yang Sung* on the ground that the latter involved adjudication, it is implying some due process notion that it is not generally thought to be in the opinion. *See* United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 756-57 (1972) ("Because the proceedings under review were an exercise of legislative rulemaking power rather than adjudicatory hearings . . . the provision of 5 U.S.C. §§ 556 and 557 were inapplicable."). *See also* United States v. Florida E. Coast Ry., 410 U.S. 224 (1973). Arguably, the *Florida East Coast Railway* case, which involved ratemaking as distinct from the rulemaking in *Allegheny-Ludlum*, is a case where the *Attorney General's Manual* would have thought formal procedures should apply. *See* ATTORNEY GENERAL'S MANUAL, *supra* note 1, at 33; *cf.* 410 U.S. at 246-56. (Douglas & Stewart, JJ., dissenting).

221 *But cf.* International Tel. & Tel. Corp. v. NLRB, 95 S. Ct. 600 (1975); note 111 *supra*.

222 *See, e.g.*, Chicago v. FPC, 458 F.2d 731, 739 & n.37 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1074 (1972).

size of such proceedings mandates procedures more akin to rulemaking. Faced with such a development courts can no longer rely on the APA's dichotomy between rulemaking and adjudication. Courts have required more than the APA guarantees in rulemaking procedures,[223] and in some cases of adjudication they should require less. But as presently viewed *Wong Yang Sung* inhibits such a development. The decision there forces courts to deny due process rights when they legitimately exist.

The solution to this quandary is to view *Wong Yang Sung* as requiring the court to consider the congressional purposes of the APA whenever they engage in interest balancing under the due process clause. Where other legislation indicates that the Congress sought to exempt the contested procedures from the APA, the analysis need not go any further. But when that is not the case, *Wong Yang Sung* should be read to require the "selective incorporation" of the APA, based on the circumstances, rather than "total incorporation."

*Robert E. Zahler**

223 *See* note 3 *supra*.

* Member of the Class of 1975 at Harvard Law School.

THE RIGHT TO TRAVEL AND COMMUNITY GROWTH CONTROLS

Introduction

Nearly a decade has passed since the groundswell of professional concern with exclusionary zoning began.[1] The character of the discussion has changed somewhat, as recent calls for environmental protection have added a measure of respect for concern with water supply and quality, sewerage capacity, and scenic values as adjuncts to the fiscal and snob values believed to underlie exclusionary land-use controls. Indeed a more neutral term, "growth controls," seems to have replaced the "snob zoning" of old. Yet in many instances the problems remain the same, and the solutions seem no closer.

Major focus during this period has been on the judicial process. Courts have been seen as the proper forum both for righting present wrongs and for forcing legislative attention to the prevention of future wrongs. In a few states, particularly New Jersey[2] and Pennsylvania,[3] this vision of judicial activism has been realized to a considerable extent. Elsewhere, however, the need for

---

1 *See generally* NATIONAL COMMISSION ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY, REPORT TO THE PRESIDENT (1969); PRESIDENT'S COMMITTEE ON URBAN HOUSING, A DECENT HOME, REPORT TO THE PRESIDENT (1969); Adang, *Snob Zoning: A Look at the Economic and Social Impact of Low Density Zoning*, 15 SYR. L. REV. 507 (1964); Aloi, *Recent Developments in Exclusionary Zoning: The Second Generation Cases and the Environment*, 6 SW. U.L. REV. 88 (1974); Brooks, *Exclusionary Zoning*, ASPO ADVISORY REPORT No. 254 (1970); Davidoff & Davidoff, *Opening the Suburbs: Towards Inclusionary Land Use Controls*, 22 SYR. L. REV. 509 (1971); Freilich & Bass, *Exclusionary Zoning: Suggested Litigation Approaches*, 3 URB. LAW. 344 (1971); Potwin, *Suburban Zoning Ordinances and Building Codes: Their Effect on Low and Moderate Income Housing*, 45 NOTRE DAME LAW. 123 (1969); Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969); Schoenbrod, *Large Lot Zoning*, 78 YALE L.J. 1418 (1969); Williams and Norman, *Exclusionary Land Use Controls: The Case of North-Eastern New Jersey*, 22 SYR. L. REV. 475 (1971); Note, *Equal Protection and Exclusionary Zoning After Valtierra and Dandridge*, 81 YALE L.J. 61 (1971).

2 *E.g.*, Molino v. Borough of Glassboro, 116 N.J. 195, 281 A.2d 401 (1971); Southern Burlington County NAACP v. Township of Mt. Laurel, 119 N.J. Super. 164, 290 A.2d 465 (Super. Ct. L. Div. 1972); Oakwood at Madison, Inc. v. Township of Madison, 128 N.J. Super. 438, 320 A.2d 223 (Super. Ct. L. Div. 1974).

3 *E.g.*, National Land & Investment Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1965); Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (1970); Appeal of Kit-Mar Builders, 439 Pa. 466, 268 A.2d 765 (1970).

a comprehensive theory of intervention has impeded progress, as promising approaches were tried and discarded.

From the outset the "presumption of validity" which traditionally attaches to zoning enactments was sufficient to withstand most constitutional challenges on due process grounds,[4] but recent evolution of a "new equal protection" raised hopes for a stricter standard of review. Contemporary constitutional theory establishes that a violation of the equal protection clause requires two elements: (1) governmental action causing harm to some individual right, and (2) an arbitrary or irrational classification. Normally, if the challenged action is rationally related to a permissible public purpose, no more is asked of it. But (1) if the right infringed is one judicially deemed to be of fundamental importance in the constitutional scheme, such as voting, freedom of speech, or fairness in criminal trials, or (2) if the classification is inherently suspect or invidious, such as one based on race or national origin, a stricter scrutiny is required. This strict, second-tier scrutiny is one of both ends and means. Instead of a permissible public purpose, a compelling public purpose is demanded, and, instead of means rationally related to that purpose, only the least restrictive of alternative means is acceptable.[5]

Exclusionary zoning was thought by some commentators to require "strict scrutiny" by virtue of either the fundamental interest or the suspect classification exceptions. Subsequent case development, however, strongly indicates that adequate housing is not to be considered a fundamental interest for purposes of constitutional litigation.[6] As for the classification issue, while racial

---

4 Note, *The Right to Travel: Another Constitutional Standard for Local Land Use Regulations?*, 39 U. CHI. L. REV. 612, 613-15 (1972). Indeed the modern trend may well be toward even greater latitude for public regulation where only due process objections are involved. *See* F. BOSSELMAN, *et al.*, THE TAKING ISSUE (1973).

5 *See* THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS & INTERPRETATION, S. DOC. NO. 92-82, 92d Cong., 2d Sess. 1471-77, 1507-27 (1973); Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969); Note, *supra* note 4, at 634-35. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969), (especially dissent of Harlan, J., at 658-61); San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1972).

6 Lindsey v. Normet, 405 U.S. 56 (1972); James v. Valtierra, 402 U.S. 137 (1971); Aloi, *supra* note 1, at 98-111; Note, *supra* note 4, at 621-22.

classifications continue to be strictly scrutinized,[7] the broader notion that classifications based on economic means should be considered suspect has been similarly truncated.[8]

Construction Industry Association of Sonoma County v. City of Petaluma[9] suggests that strict judicial review may be evoked from another perspective, the fundamental right of travel. After a long but somewhat sporadic history of judicial application,[10] the right to travel was resurrected in the landmark case of *Shapiro v. Thompson*.[11] Pennsylvania, Connecticut, and the District of Columbia required new residents to wait one year to become eligible for welfare benefits. These requirements amounted to penalties on travel, a right viewed by the court as fundamental, and, since there was no compelling reason for them, they were found violative of the equal protection clause. Subsequently, similar residence requirements have been deemed unconstitutional as applied to voting,[12] medical services for the indigent,[13] public housing, and a host of other services or privileges.[14]

---

7 *See, e.g.*, Kennedy Park Homes Assoc. v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970); Daily v. City of Lawton, 425 F.2d 1037 (10th Cir. 1970).

8 San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1972); James v. Valtierra, 402 U.S. 137 (1971); Dandridge v. Williams, 397 U.S. 471 (1970); Note, *supra* note 4, at 618-21. *See also* Michelman, *The Supreme Court, 1968 Term —Foreword: On Protecting the Poor through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

Judicial attack under the Supremacy Clause is ultimately dependent upon federal legislation with which local growth controls may be said to conflict. THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS & INTERPRETATION, *supra* note 5, at 868. *See also* Fessler, *Casting the Courts in a Land Use Reform Effort*, in M. CLAWSON, MODERNIZING URBAN LAND POLICY 193-99 (1973). Such legislation has not been forthcoming.

9 375 F. Supp. 574 (N.D. Cal. 1974).

10 Histories of the right to travel may be found in Z. CHAFEE, THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787 at 162-245 (1956). Vestal, *Freedom of Movement*, 41 IOWA L. REV. 6 (1955); Note, *The Right to Travel and Exclusionary Zoning*, 26 HASTINGS L.J. 849, 858-65 (1975); Note, *Shapiro v. Thompson: Travel, Welfare and the Constitution*, 44 N.Y.U.L. REV. 989, 989-93 (1969); Comment, *The Right to Travel and its Application to Restrictive Housing Laws*, 66 NW. U.L. REV. 635, 637-50 (1971); Note, *The Right to Travel—Quest for a Constitutional Source*, 6 RUTGERS-CAMDEN L.J. 122, 123-26 (1974); Comment, *Travel: The Evolution of a Penumbral Right*, 5 ST. MARY'S L.J. 84, 84-89 (1973); Note, *supra* note 4, at 622-28.

11 394 U.S. 618 (1969).

12 Dunn v. Blumstein, 405 U.S. 330 (1971).

13 Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974).

14 *See, e.g.*, Comment, *The Right to Travel—Its Protection and Application*

Petaluma represents the first attempt to apply right to travel doctrine to local growth controls. Petaluma, a sleepy exurb of San Francisco in 1960, experienced the typical boom in fringe housing development during the subsequent decade and, by the early 1970's, was anxious about the implications of uncontrolled growth. The city established a long-range population maximum considerably below projected natural population growth, enacted an annual ceiling of about 500 new developmental housing units, and drew an "urban extension line" beyond which there was to be no growth at all for twenty years and within which density was to be strictly limited. An organization of builders challenged this so-called "Petaluma Plan," asserting various constitutional rights of future homebuyers who would be excluded from Petaluma were the plan to be implemented. The district court decided for plaintiffs solely on grounds of the right to travel. Noting that the right to travel, which includes travel with "intent to settle and abide,"[15] is fundamental, and arguing that the curtailment of potential in-migration was a clear infringement of that right, the court demanded a compelling justification. Neither asserted inadequacies of sewage treatment and water supply nor a desire to protect Petaluma's "small town character" were considered sufficiently compelling. Indeed, the court categorically declared that "a zoning regulation which has as its purpose the exclusion of additional residents in any degree is not a compelling governmental interest."[16] Though citing primarily the residence requirement cases in its application of right to travel doctrine, the court displayed no awareness of the distinguishing features of this rather typical growth control situation.

There are, however, difficulties of both doctrine and policy in extending the right to travel from residence requirements to growth controls. The doctrinal points may well be resolved in light of the policy issues which, for present purposes, are twofold. First, the *Petaluma* court's rather simplistic use of the right to

Under the Constitution, 40 U. Mo. AT KANSAS CITY L. REV. 66, 78-93 (1971); RUTGERS-CAMDEN Note, *supra* note 10, at 139-41.

15 Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974); Cole v. Housing Authority of City of Newport, 435 F.2d 807, 811 (1st Cir. 1970).

16 375 F. Supp. at 586.

travel threatens a wide variety of heretofore valid land use controls, building codes, and environmental impact statement requirements which have the effect of raising the costs or slowing the pace of housing development. In the words of one commentator, "[i]f the Court defines and protects the right to migrate and settle as a fundamental liberty, few local land use regulations are likely to survive . . . ."[17] Second, if a local government is barred (absent a compelling public purpose) from exercising controls which deter or channel or otherwise affect migratory travel, so apparently is any other level of government. Yet the primary thrust of the anti-exclusionary movement is not that planning for growth is undesirable per se, but only that planning should be done at a level (generally the metropolitan region or the state) which encompasses all the parties significantly affected.

These difficulties may be met in four ways. First, application of the right to travel could be limited solely to interstate travel. Since most of the migration affected by local growth and other land-use controls is intrastate in character, the right to travel would rarely be infringed by such controls. Second, the fundamental nature of the right to travel could be restricted to the equal protection context; strict scrutiny would be required only when the right to travel is discriminatorily infringed. If this pattern prevails, the validity of local controls may similarly be free from right to travel challenge since most land-use controls apply equally to all, whether residents or travellers. Both of these options may be criticized: by deciding to preserve traditional land-use controls and the possibility of regional or statewide growth planning, perhaps the best remaining tool for assuring meaningful review of local controls must be curtailed.

A third possibility is a relaxation of the present two-tiered standard of review in favor of a more flexible test whereby public interests and private burdens may be balanced. Fourth, a similar relaxation could be less forthrightly accomplished by placing greater emphasis upon the threshold question of whether the right to travel has been unconstitutionally infringed.

---

17 Note, *supra* note 4, at 637. *See also* Note, *The Reconciliation of Land Use Laws and the Right to Travel: Toward a Realistic Standard of Judicial Review*, 31 WASH. & LEE L. REV. 575, 603 (1974).

I. Limitation of the Right to Travel Doctrine to Interstate Travel

At one time or another the right to travel has been associated with a variety of constitutional provisions[18] including the commerce clause,[19] the privileges and immunities of state citizenship,[20] the privileges or immunities of national citizenship,[21] Ninth Amendment reserved rights,[22] First Amendment "penumbral rights,"[23] the liberties protected by the Fifth Amendment due process clause[24] and a "general unwritten premise" of the constitutional scheme.[25] In recent years the Supreme Court has declined to assign sources to the right to travel, asserting only that its con-

18 *See* Note, *Residence Requirements After Shapiro v. Thompson*, 70 COLUM. L. REV. 134, 137-39 (1970); Comment, *Intrastate Residence Requirements for Welfare and the Right to Intrastate Travel*, 8 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 591, 600-08 (1973); N.Y.U. Note, *supra* note 10, at 998-1000; NW. Comment, *supra* note 10, at 638-39; RUTGERS-CAMDEN Note, *supra* note 10, at 124-34; Comment, *supra* note 14, at 67-77.

19 *E.g.*, Edwards v. California, 314 U.S. 160 (1941); Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868) (opinion of Clifford, J.); Shapiro v. Thompson, 394 U.S. 618 (1969) (dissent of Warren, C.J.).

20 *E.g.*, Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868) (majority opinion); Corfield v. Coryell, 4 Wash. C.C. 371 (C.C.E.D. Pa. 1825). U.S. CONST. art. 4, § 2 provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." This has been interpreted only to forbid discrimination by a state against non-citizens. Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1869); Slaughter House Cases, 83 U.S. (16 Wall.) 36, 77 (1873).

21 *E.g.*, Twining v. New Jersey, 211 U.S. 78, 97 (1908); Edwards v. California, 314 U.S. 160, 177-83 (1941) (concurring opinion of Douglas, J.); Oregon v. Mitchell, 400 U.S. 112, 285-87 (1970) (opinion of Stewart, J.). U.S. CONST. amend. XIV, § 1 provides: "No state shall . . . abridge the privileges or immunities of citizens of the United States; . . . ." Little content has historically been accorded this clause, and the recent extension of travel doctrine to limit not just state but federal action (see text accompanying notes 51-66 *infra*) raises questions about its role as a source of the right to travel. *See generally* Kurland, *The Privileges or Immunities Clause: 'Its Hour Come Round at Last'?* 1972 WASH. U.L.Q. 405.

22 U.S. CONST. amend. IX: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Although suggested as a possible source by most of the commentators, *supra* note 18, no case has yet invoked it in the travel context. Though interest in its use was undoubtedly kindled by Justice Goldberg's concurrence in Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (marital privacy), the better view of the Ninth would seem to be as a rule of construction for the Bill of Rights—*i.e.*, the intent in enumerating some rights was not to abjure all others. *See* THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS & INTERPRETATION, *supra* note 5, at 1257-59.

23 Aptheker v. Secretary of State, 378 U.S. 500 (1964).

24 *Id.*; Kent v. Dulles, 357 U.S. 116 (1957); Zemel v. Rusk, 381 U.S. 1 (1965).

25 *See* Vestal, *supra* note 10; NW. Comment, *supra* note 10, at 639.

stitutional origin is well established;[26] but whether or not a constitutional peg for the right to travel is eventually chosen, some further elaboration of its nature is clearly needed.

The right to travel can be viewed either as deriving from considerations of federalism or as a personal right in the sense that free speech, voting, privacy, etc. are considered to be personal rights.[27] Possible sources of the federalism view are the commerce clause and the privilege and immunities clause of article IV, section 2, dealing with state citizenship; the implication of this view is that only interstate travel is entitled to special constitutional protection. The personal right view is based upon the other constitutional provisions enumerated above;[28] the implication of this view is that travel should be protected regardless of its inter- or intrastate character.

History tends to support the federalism view. To begin with, the Articles of Confederation, by providing for "free ingress and regress to and from any other State,"[29] comprehended interstate travel only. Within the same section were clauses which survived to become the commerce clause and the state privileges and immunities clause of the present Constitution.[30] The travel clause did not survive and was apparently regarded as superfluous.[31] Early judicial opinions seem to confirm this interpretation by finding an implicit right of interstate travel in the state privileges and immunities clause.[32]

---

26 Shapiro v. Thompson, 394 U.S. 618 (1969); United States v. Guest, 383 U.S. 745 (1966).

27 Note, *supra* note 4, at 629-33.

28 The "general unwritten premise" possibility is sufficiently vague to support either view of the right to travel. Although the privileges or immunities clause of the Fourteenth Amendment (national citizenship) has so far been applied only to interstate travel, nothing in its nature limits it to the interstate context. *See* Kurland, *supra* note 21, at 418-20.

29 The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, . . . shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively. . . .

ARTICLES OF FEDERATION, art. IV.

30 *Id.*

31 *See generally* Z. CHAFEE, *supra* note 10, at 176-81, 184-86; RUTGERS-CAMDEN Note, *supra* note 10, at 125-26.

32 Corfield v. Coryell, 4 Wash. C.C. 371 (C.C.E.D. Pa. 1825); Crandall v. Nevada,

Moreover, most of the possible constitutional sources of the personal right view could not have been initially available as restrictions on intrastate regulation by state government. The concept of national privileges and immunities had to await the enactment of the Fourteenth Amendment, and First Amendment rights were not considered applicable to the states until subsequently "incorporated" into the provisions of the Fourteenth. The Ninth Amendment, originally a restriction on the national government, has rarely been viewed as a restriction upon state action,[33] nor has the relevant part of the Fifth Amendment, although the latter has a ready substitute in the due process clause of the Fourteenth.[34] This argument need not be dispositive; the right to travel may have meant one thing in the early period of constitutional development and something quite different subsequently. Supreme Court interpretations of the Constitution change over time, and, with respect to the right to travel, the added factor of the Fourteenth Amendment may well support a fundamental change in the nature of the right to travel.

However, case law since the Fourteenth Amendment has, at least until recently, failed to indicate a change in the nature of the right to travel. Probably every case construing the right to travel within the United States has dealt with attempts to hinder travel across state lines, and terms like "the right to interstate travel" are frequently employed, even in the recent cases.[35] As Justice Frankfurter once said: "The privilege of ingress and egress among States . . . was to prevent the walling off of the States, what has been called the Balkanization of the Nation."[36] Perhaps sub-

---

73 U.S. (6 Wall.) 35 (1868); Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1869); Ward v. Maryland, 79 U.S. (12 Wall.) 418 (1871).

33 *But see* Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (Goldberg opinion).

34 No case has yet suggested that travel is merely a "liberty" to be protected by the Fourteenth's due process clause, but Justice Harlan, dissenting in *Shapiro*, accepted the Fifth Amendment source and would have applied it, apparently through the Fourteenth, to the state action there at issue. 394 U.S. at 671. Z. CHAFEE, *supra* note 10, at 192-93, supports a due process grounding for travel doctrine, but again on an incorporation-from-elsewhere basis: "the 'liberty' of all human beings which cannot be taken away without due process of law includes liberty of speech, press, assembly, religion, and also liberty of movement." *Id.*

35 Dunn v. Blumstein, 505 U.S. 330 (1971); Griffin v. Breckinridge, 403 U.S. 88 (1971); Oregon v. Mitchell, 400 U.S. 112 (1970); Shapiro v. Thompson, 394 U.S. 618 (1969); United States v. Guest, 383 U.S. 745 (1966); Edwards v. California, 314 U.S. 160 (1941).

36 New York v. O'Neill, 359 U.S. 1, 8 (1959). The case upheld a state statute

state levels of government have had no particular interest in trying to keep some people in and others out, or, alternatively, perhaps people restricted by such local actions have not found them worth challenging. Whatever the explanation, decisional law shows little evidence of a right to intrastate travel which is entitled to the same degree of constitutional protection as the right to interstate travel.

Even the recent Supreme Court opinion in *Memorial Hospital v. Maricopa County*[37] lends support to this view. Maricopa County, which includes Phoenix, imposed a one-year residence requirement for free non-emergency medical care for indigents. Obviously this requirement could penalize in-migration both from out-of-state and from elsewhere within the state. Since the plaintiff in this particular case had entered from another state, the Court was able to restrict its consideration to interstate travel. Moreover, since Arizona's highest court had construed the requirement as equally applicable to inter- and intrastate in-migrants, the Supreme Court felt justified in striking it on its face without considering whether it could have been partially saved by a contrary construction. Whether this disposition represents a surfeit of judicial caution or a conscious retreat from the expansive language in the earlier decision in *Shapiro,* the Court's care in limiting its decisional grounds to the well established right of interstate travel implies a view that no fundamental right of intrastate travel has yet been established.

Other recent developments, however, indicate future acceptance of the right to intrastate travel into the category of fundamental rights. Lower courts have so held; the Supreme Court's use of the "new equal protection" in its residence requirement cases suggests a personal right view of travel; and holdings that congressional power to restrict travel is as limited as that of the states seem inconsistent with the federalism view of travel.

In *Cole v. Housing Authority of the City of Newport*[38] the First

compelling residents to travel to other states to testify when subpoenaed. Justice Douglas, dissenting, argued that travel is "a basic human right," *id.* at 16, and referred to it as "the right to go to any State or stay home as one chooses." *Id.* at 14. Does this limitation to interstate travel merely reflect the interstate characteristic of the issue at hand? *Cf.* note 134 *infra* and accompanying text.

37 415 U.S. 250, 255-56 (1974).

38 435 F.2d 807 (1st Cir. 1970).

Circuit invalidated a durational residency requirement for admission to local public housing. Although plaintiffs included recent in-migrants from within and without Rhode Island, no distinction was drawn between them. The Second Circuit, in *King v. New Rochelle Municipal Housing Authority*,[39] dealt more explicitly with intrastate travel. Noting only that "the use of the term 'interstate travel' in *Shapiro* was [nothing] more than a reflection of the state-wide enactment involved in that case," and that *Shapiro* "relied on 'our constitutional concepts of personal liberty,' " the court concluded that "[i]t would be meaningless to describe the right to travel between states as a fundamental precept of personal liberty and not to acknowledge a correlative constitutional right to travel within a state."[40] Other decisions have similarly found intrastate travel to be protected as a fundamental right with equal or even less rationale.[41]

Whether *Shapiro* actually envisioned travel as a personal right rather than as a way of precluding "Balkanization" of the nation is not so clear. On the one hand, *Shapiro* eschewed tests associated with the latter view in favor of ones associated with the former. Discrimination against out-of-state commerce, which includes the movement of persons,[42] invokes a kind of strict scrutiny under traditional commerce clause and state privileges and immunities doctrine.[43] The Court chose instead to use the rubric of the new equal protection to trigger strict scrutiny, a rubric normally reserved for personal rights such as free speech, voting, privacy, and fair trials, or for assuring equality of treatment to "discrete and insular minorities." Moreover, the Court apparently continued this approach in *Maricopa*, a situation in which interstate and

39 442 F.2d 646 (2d Cir. 1971), *cert. denied*, 404 U.S. 863.

40 *Id.* at 648.

41 Demiragh v. DeVox, 476 F.2d 403 (2d Cir. 1973); Valenciano v. Bateman, 323 F. Supp. 600 (D. Ariz. 1971) (one year residence requirement for non-emergency public medical care violates intrastate migrant's right to travel); Donnelly v. City of Manchester, 111 N.H. 50, 274 A.2d 789 (1971) & Krzewinski v. Kugler, 338 F. Supp. 492 (D.N.J. 1972) (requirement that city employees live within city invokes compelling interest test, met in latter but not former case).

42 Gloucester Ferry Co. v. Pennsylvania, 114 U.S. 196 (1885); Edwards v. California, 314 U.S. 160 (1941).

43 *E.g.*, Welton v. Missouri, 91 U.S. 275 (1876); Toomer v. Witsell, 94 U.S. 391 (1877); Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935); Edwards v. California, 314 U.S. 160 (1941); Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951).

intrastate commerce were treated equally and in which commerce clause tradition counsels not strict scrutiny but a balancing of state interests and private burdens.[44] State privileges and immunities may not even be applicable.[45]

On the other hand, discussion of travel in *Shapiro,* including the very sentence from which the Second Circuit drew its sustenance in *King,*[46] evinces a continuing regard for considerations of federalism:

> This Court long ago recognized that the Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.[47]

The Court then quotes from the *Passenger Cases*[48] as support for this proposition, although this opinion, both by its language and its early date (1849), could have viewed the right to travel only as deriving from considerations of federalism. Perhaps through its uniting of federalist concerns with personal liberty the Court is attempting to expand the rationale for travel's fundamentality. Perhaps it is just confused. In any event, this passage is difficult to reconcile with either the use of new equal protection noted above or the limitation of federal power discussed below.

If the right to travel is intended solely to prevent parochial encroachment by the states upon the federal union, the national government should retain power to restrict it. If the main concern is personal liberty, however, the level of government infringing the right is irrelevant. By these standards, *Shapiro* can be most powerfully construed as establishing the personal right view of the right to travel.[49]

---

44 *E.g.,* Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945); Hood & Sons, Inc. v. DuMond, 336 U.S. 525 (1949); Bibb v. Navajo Freight Lines, 359 U.S. 520 (1959); Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960); Note, *State Environmental Protection Legislation and the Commerce Clause,* 87 HARV. L. REV. 1762, 1777-81 (1974); THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS & INTERPRETATION, *supra* note 5, at 193-94. *See also* Pike v. Bruce Church, Inc., 397 U.S. 137 (1970), quoted in text at note 71 *infra.*

45 *See* note 20 *supra.*

46 *See* text at note 40 *supra.*

47 394 U.S. at 629.

48 74 U.S. (7 How.) 283 (1849).

49 Congressional power to remove impediments to travel, even where such im-

Connecticut and Pennsylvania argued that their one-year residence requirements were authorized by Congress. Apparently dissatisfied with its holding that Congress did not in fact authorize the requirements, the Court went on to say that it could not constitutionally have done so.[50] As Justice Harlan argued in dissent, however,

> nothing in the nature of federalism would seem to prevent Congress from authorizing the States to do what Congress might validly do itself. Indeed, this Court has held, for example, that Congress may empower the States to undertake regulations of commerce which would otherwise be prohibited by the negative implications of the Commerce Clause. See *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946).[51]

The Court then went on to strike down the District of Columbia's residence requirement even though the D.C. requirement was unquestionably adopted by Congress as an exercise of federal power.[52] If the federalism view of travel is to prevail, no alternative exists but to overrule these portions of *Shapiro*.

Nor is *Shapiro* the sole authority for federal inability to restrict travel without a compelling purpose. Cases dealing with passport issuance posit a similarly exacting standard of review with regard to federal attempts to limit foreign travel.[53] These cases — *Kent v. Dulles*,[54] *Aptheker v. Secretary of State*,[55] and *Zemel v. Rusk*[56] — may be distinguishable on several grounds.

In *Kent* a passport was denied to a Communist Party member. Despite some stirring admonitions against burdening the right to

---

pediments might not rise to the level of constitutional invalidity, is well established. Griffin v. Breckinridge, 403 U.S. 88 (1971); Oregon v. Mitchell, 400 U.S. 112 (1970); United States v. Guest, 383 U.S. 745 (1966).

50 394 U.S. at 638-41.

51 *Id.* at 669.

52 *Id.* at 641-42. While viewing the District of Columbia as essentially equivalent to a state for purposes of applying constitutional rules which derive from considerations of federalism is tempting, the parochialism characteristic of state legislative enactments can hardly obtain when representatives from all over the nation are doing the legislating.

53 Since these cases are not true equal protection cases, and since they predate the new equal protection, and because equal protection with regard to federal action is subsumed in the Fifth Amendment due process clause, *see* Bolling v. Sharpe, 347 U.S. 497 (1954), strict scrutiny and other concepts of the new equal protection rubric are not employed.

54 357 U.S. 116 (1957).

55 378 U.S. 500 (1964).

56 381 U.S. 1 (1965).

travel, the Court held only that Congress had not intended to give the Secretary of State the power to create the restrictions at issue. *Aptheker,* on the other hand, invalidated a congressional ban on issuing passports to Communists, citing *Kent* for the proposition that "[t]he right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment."[57] The Court added that "freedom of travel is a constitutional liberty closely related to rights of free speech and association."[58] The enactment in question was stricken as overbroad, and a dissenting opinion objected to this extension of overbreadth doctrine from First Amendment rights to the area of travel.[59] It is possible, however, to interpret this as essentially a First Amendment case in which travel is only a lesser right the deprivation of which in response to one's exercise of clearly fundamental rights of association places an undue burden on those latter rights. Travel may be to association in these cases what welfare is to travel in *Shapiro.*[60]

The same cannot be said of *Zemel,* which sustained a flat prohibition of travel to Cuba. Here travel was not clearly "bound up" with other fundamental rights, but the Court still seems inclined to scrutinize the restriction strictly, sustaining it only as "supported by the weightiest considerations of national security."[61] The fact that a balancing test involving "the extent of the governmental restriction imposed" and the "extent of the necessity for the restriction" is used[62] is perhaps best explained by the still inchoate status in 1965 of two-tiered review.

That these cases may be distinguishable by the fact that they involve foreign rather than domestic travel is also questionable. The personal considerations underlying the fundamental right to travel abroad[63] are equally applicable to domestic travel. So also with the asserted social values in travel as a preserver of other

57 378 U.S. at 505-06.
58 *Id.* at 517.
59 *Id.* at 522-23.
60 That *Shapiro* rested upon the fundamentality of travel, and not of welfare, is confirmed in Dandridge v. Williams, 397 U.S. 471, 484-85 (1970).
61 381 U.S. at 16.
62 *Id.* at 14.
63 Z. CHAFEE, *supra* note 10, at 195-96.

rights and a check on governmental usurpation of power. Justice Douglas, concurring in *Aptheker,* argued that

> . . . freedom of movement is the very essence of our free society, setting us apart. Like the right of assembly and the right of association, it often makes other rights meaningful —knowing, studying, arguing, exploring, conversing, observing, and even thinking. Once the right to travel is curtailed, all other rights suffer, just as when curfew or home detention is placed on a person.[64]

And further:

> Free movement by the citizen is of course as dangerous to a tyrant as free expression of ideas or the right of assembly and it is therefore controlled in most countries in the interests of security. That is why riding boxcars carries extreme penalties in Communist lands. That is why the ticketing of people and the use of identification papers are routine matters under totalitarian regimes, yet abhorrent in the United States.[65]

Moreover, the additional factor of national security considerations in foreign travel[66] goes only to the likelihood of finding a compelling purpose for a given restriction. In short, if foreign travel is a fundamental personal right, to hold that domestic travel is to be protected as fundamental only when considerations of federalism are served is inconsistent and illogical.

To sum up, the right to travel has historically been characterized almost exclusively in terms of interstate travel; even *Shapiro* and subsequent Supreme Court cases show continuing evidence of this outlook. On the other hand, the *Shapiro* approach to travel as a fundamental personal right within the ambit of the new equal protection seems somehow to indicate concern with more than mere protection of the federal union. Some respectable lower courts have so read the case in explicitly holding intrastate travel to be a fundamental right. Finally, the treatment of federal power to restrict travel in *Shapiro,* and perhaps also in the passport cases, implies a personal right view. In resolving these

64 378 U.S. at 520.
65 *Id.* at 519.
66 *See generally* Gould, *The Right to Travel and National Security,* 1961 WASH. U.L.Q. 334.

doctrinal ambiguities, the Supreme Court can easily go either way, but will have to ignore or overrule some of its previous pronouncements.

If the choice is to limit strict scrutiny to infringements of interstate travel, the question of applying travel doctrine to local growth controls would seem to be settled: when a community closes its doors to outsiders, in-state residents (and generally far more of them proportionately) and out-of-staters are equally affected. But lack of discrimination between migrants on the basis of their origins is not enough. The plain implication of *Maricopa* is that even if newcomers from elsewhere in Arizona may be denied county services for one year, newcomers from outside the state may not. In *Maricopa* and many other situations, this causes no difficulties; newcomers may be individually identified in terms of where they last lived and treated accordingly. In a growth-limiting locality such as Petaluma, however, this is not the case, since the restrictions typically at issue are not imposed directly upon the parties ultimately burdened in their travel. The validity of construction-limiting devices such as large lot zoning, excessive set-asides for industrial development, rationing of building permits, and building moratoria cannot practicably be made to depend on the geographic source of unknown future migrants.[67]

Thus some sort of unitary test for any particular locality's set of growth controls must be accepted. Three options present themselves: (1) all controls are always valid as against right to interstate travel challenges; (2) no controls are ever valid as against such challenges (assuming they would be invalid as applied in a situation of exclusively interstate in-migration); and (3) controls are valid in some places and invalid in other places depending upon the extent of harm to interstate travel. The first alternative fails to account for cases in which the bulk of the precluded future growth would be from out-of-state sources. Alternative two meets this problem but at the expense of condemning many controls which would directly affect only negligible amounts of interstate travel.

The last option, therefore, seems most reasonable. It is con-

67 The standing of developers to assert the rights of future immigrants is considered in Aloi, *supra* note 1, at 123-54.

sistent with commerce clause doctrine.[68] In *Milk Control Board v. Eisenberg Farm Products,*[69] state-prescribed prices for milk purchased within the state were held valid as against a purchaser who sent all of his milk out of state because most of the regulated milk under this price-support system was not sent out of state; any burden on interstate commerce was only incidental. The clear implication is that if most regulated milk had been destined for commerce, the result would have differed. By analogy, the proportion of potential migration which would have been interstate but for a local growth restriction would emerge as the primary index of burden on travel.

Extent of injury to commerce must be considered in conjunction with the public interest in controlling growth. As the Court stated recently in *Pike v. Bruce Church, Inc.:*[70]

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.[71]

Thus a court undertaking consideration of a challenge to a growth control ordinance, based on the right to interstate travel, would occasionally have the opportunity to engage in a limited sort of balancing of interests which the two-tiered system of review would probably preclude were the personal right view of travel to prevail. But in the great majority of cases, local growth controls would remain impregnable to travel doctrine.

II. Equal Protection and the Right to Travel

Beginning with *Shapiro,* virtually every case which has applied the right to travel has done so in an equal protection context.[72]

68 *See* note 19 *supra.*
69 306 U.S. 346 (1939).
70 397 U.S. 137 (1970).
71 *Id.* at 142.
72 *E.g.,* Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974); Evansville-

Thus, an amicus brief for appellant city in *Petaluma* argued that the lack of a classification in that growth control scheme ought to render it immune from right to travel challenge.[73] The bulk of the discussion concerns, first, whether there is or is not a proper classification in the Petaluma plan,[74] and second, the need to establish inequality of treatment under an enactment before equal protection may be applied. However, the critical premise of this argument—that travel must be discriminatorily infringed in order to call forth strict judicial scrutiny — goes unexamined and, in fact, may well be wrong.

Assuming that travel is a fundamental personal right akin to speech, voting, and privacy,[75] it would most logically be treated the same as those rights. Many cases make clear that infringement of free speech, religion, and association, without more, will command strict review.[76] The First Amendment's rather special constitutional status is no distinction, since the recent case of *Roe v. Wade*[77] strictly scrutinized nondiscriminatory abortion laws which were deemed violative of a fundamental right of privacy — a right which, like travel, is neither explicit in the Constitution nor

---

Vanderburgh Airport Authority District v. Delta Airlines, 405 U.S. 707 (1972); Dunn v. Blumstein, 405 U.S. 330 (1971); Cole v. Housing Authority of City of Newport, 435 F.2d 807 (1st Cir. 1970); King v. New Rochelle Housing Authority, 442 F.2d 646 (2d Cir.), *cert. denied*, 404 U.S. 863 (1971); Gaddis v. Wymen, 304 F. Supp. 717 (N.D.N.Y. 1969), *aff'd sub nom.* Wymen v. Bowens, 397 U.S. 49 (1970); note 41 *supra*. Most of these cases, like *Shapiro*, involve durational residence requirements in which the classification is between residents who have recently exercised their right to travel and all other residents. Others are non-durational residence requirement cases in which a simple "ins" versus "outs" classification obtains.

73 Brief for Joint Center for Urban Affairs as Amicus Curiae, Construction Industry Association of Sonoma County v. City of Petaluma, on Appeal to the 9th Cir. *See also* WASH. & LEE Note, *supra* note 17, at 590-92.

74 The Petaluma plan affects anyone who wishes to purchase new housing in Petaluma, and such a person may initially be either a resident or a non-resident of Petaluma; "all persons of whatever origin who enter [the market for a developmental dwelling unit] are treated alike." Brief, *supra* note 73, at 14. Of course, to the extent that such persons are disproportionately non-residents of Petaluma, a kind of "ins" versus "outs" classification may be implicated.

75 *See* text at note 27 *supra*. Except where otherwise noted, this assumption obtains throughout the rest of this Note; if travel doctrine were held to protect only interstate travel, much of what follows would be rendered moot.

76 *E.g.*, NAACP v. Alabama, 357 U.S. 449 (1957) (association); Bates v. Little Rock, 361 U.S. 516 (1959) (association); NAACP v. Button, 371 U.S. 415 (1962) (expression and association); Sherbert v. Verner, 374 U.S. 398 (1962) (religion).

77 410 U.S. 113 (1973).

clearly linked by general consensus to some specifiable provision in the Constitution. Indeed, one commentator even suggested that *Shapiro,* by invoking equal protection, actually broke from a tradition that restrictions on fundamental interests will be strictly scrutinized without even considering the equality or inequality of the restriction's application.[78]

Justice Stewart agrees with this tradition, but is not so sure that *Shapiro* broke with it. Concurring in *San Antonio Independent School District v. Rodriguez,*[79] he outlined the new equal protection, then noted almost parenthetically that

> quite apart from the Equal Protection Clause, a state law that impinges upon a substantive right or liberty created or conferred by the Constitution is, of course, presumptively invalid, whether or not the law's purpose or effect is to create any classifications. . . . Numerous cases in this Court illustrate this principle.[80]

One of them, according to Stewart, is *Shapiro.* In fact, a good case can be made for the proposition that *Shapiro* rests on the two separable and individually sufficient grounds of violation of the right to travel and violation of the equal protection clause:

> There are four considerations supporting this interpretation. The first is the organization of the opinion. The Court began by discussing the constitutional right to travel, applied

---

78 N.Y.U. Note, *supra* note 10, at 1002-03. *See also* Note, *supra* note 4, at 622, 632. Michelman, *supra* note 8, at 33, posits an analytic model which "somewhat resembles that which has become associated with litigation under the equal protection clause." Michelman further asserts:

> "Equal protection" radar is sensitized to governmental implication in systematic inequality. . . . When a blip—a warning signal—occurs, the ensuing inspection focuses first upon the criteria which, explicitly or implicitly, are used to classify the affected population. If those criteria are free of invidiousness, the case is to be treated, in effect, as one of "substantive due process."[80]
>
> . . . .
>
> 80 That is, the challenged acts of government will be invalidated only if (i) not rationally related to any proper governmental purpose, or (ii) so damaging to some judicially favored interest as not (in the court's judgment) to be justified by whatever tendency they do have to advance a proper governmental end. Invalidation on either of these grounds is unconcerned with whether the governmental acts in question entail any "classification" or disparity of treatment.

Id. at 33 & n.80.

79 411 U.S. 1 (1972).

80 *Id.* at 61.

> the compelling state interest test to it, and then moved on to discuss equal protection and again applied the compelling state interest test. The second is the decision of the lower court in *Shapiro*.[81] The district court clearly distinguished between the constitutional right and equal protection, and based its decision on both, although it emphasized the former, stating: "Not only does . . . [the statute] abridge the right to travel and its concomitant right to establish residence, but it also denies plaintiff the equal protection of the laws."[82] Third, Mr. Justice Stewart's concurrence tried to place the majority opinion in better perspective by stating that travel is "an established constitutional right" to which the Court has given "no less protection than the Constitution itself demands," and that it "is . . . under . . . equal protection standards."[83] Finally, in *Dandridge v. Williams*,[84] the Supreme Court clarified *Shapiro* by declaring in dictum that the factor triggering the compelling interest test was that the Constitution itself protected travel.[85, 86]

Regardless of how *Shapiro* is to be read, nothing in the decisional law of fundamental rights stands in the way of scrutinizing those rights as strictly outside equal protection contexts as within them.

Perhaps this should not be so. Justice Jackson has decried the Court's willingness to scrutinize enactments as readily and as closely under the due process clause as under the equal protection clause:

> The burden should rest heavily upon one who would persuade us to use the due process clause to strike down a substantive law or ordinance. . . . Invalidation of a statute or an ordinance on due process grounds leaves ungoverned and ungovernable conduct which many people find objectionable.
>
> Invocation of the equal protection clause, on the other hand, does not disable any governmental body from dealing with the subject at hand. It merely means that the prohibition or regulation must have a broader impact. . . . [T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles

81 Thompson v. Shapiro, 270 F. Supp. 331 (D. Conn. 1967).
82 *Id.* at 336.
83 394 U.S. at 642-43.
84 397 U.S. 471 (1970).
85 *Id.* at 484-85 & n.16.
86 Nw. Comment, *supra* note 10, at 646-47 (footnotes retained but renumbered).

> of law which officials would impose upon a minority must be imposed generally.[87]

Moreover, commentators suggest that under new equal protection analysis the importance of the interest injured and the invidiousness or irrelevance of the classification employed ought to be mutually reinforcing considerations.[88] That the notion of certain fundamental rights or inherently suspect classifications which will trigger strict scrutiny solely by their own force represents an intrusion upon this neat and sensible model is undeniable, but in all likelihood the true culprit is the rigid two-tiered system of review.

Nevertheless, the possibility that *Shapiro* and its progeny are intended to be understood as requiring more than just an injury to travel is intriguing. At the outset, language in many of the cases to the effect that classifications based on recent exercise of the right to travel are "invidious"[89] must be discounted as unhelpful. The fundamentality of the infringed right to travel triggers strict scrutiny, and the fact that there is also a classification based on travel can add nothing;[90] otherwise there would be a kind of "double-counting" of travel. Moreover the classification typical of durational residence requirement cases[91] cannot be a required element, for if it were, an actual prohibition of travel could accomplish what merely penalizing travel cannot accomplish. Keeping outsiders out altogether must be considered at least as constitutionally suspect as letting them in but treating them worse for awhile.[92]

---

87 Railway Express Agency v. New York, 336 U.S. 106, 112 (1949).

88 Michelman, *supra* note 8, at 35-36; *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1120-21 (1969); Comment, *The Evolution of Equal Protection—Education, Municipal Services, and Wealth*, 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 103, 106 (1972).

89 *E.g.*, Shapiro v. Thompson, 394 U.S. 618, 627 (1969); Memorial Hospital v. Maricopa County, 415 U.S. 250, 269 (1974); Vaughan v. Bower, 313 F. Supp. 37, 41 (D. Ariz. 1970).

90 Dunn v. Blumstein, 405 U.S. 330 (1971), is illustrative. It places travel on the classification side of the fundamental right-suspect classification division: "[W]hether we look to the benefit withheld by the classification (the opportunity to vote) or the basis for the classification (recent interstate travel) we conclude that the State must show a substantial and compelling reason . . . ." *Id.* at 335. But the travel section of the opinion is phrased exclusively and repeatedly in terms of burdening the fundamental right to travel. *Id.* at 338-42.

91 *See, e.g., id.* at 334.

92 *See* Edwards v. California, 314 U.S. 160 (1941).

The most significant difference between *Petaluma* and *Shapiro* seems to be the fact that in the latter only those people poor enough to be eligible for welfare are being penalized for traveling. Indeed, in most of the residence requirement cases the subject restrictions tend to fall only on those who would be eligible for free medical care, public housing, or the like. This factor is not present in *Petaluma* in the same way. To be sure, growth controls will inflate the price of housing by decreasing supply relative to demand, which could arguably disadvantage the poor more than others, but, except in rare cases, the price of housing in all price ranges will increase by some amount, and the disadvantage will not bear such a direct relationship to one's ability to pay as in denials of welfare and public housing. Moreover, the "classification" will not have been as discretely drawn; rather than such clear lines as "welfare eligible" v. "welfare ineligible," a kind of continuum of income levels will evolve of the sort in which the Court was so unwilling to find a "classification" in *Rodriguez.*[93]

Dunn v. Blumstein,[94] which struck residence requirements for voter eligibility, may argue against such an interpretation, for the Court was clearly not concerned with discrimination between newcomers on the basis of whether they were eligible voters or not. Tennessee cannot have been trying to keep out voters in the way that Connecticut and Pennsylvania were trying to keep out the indigent. Perhaps the presence of another fundamental right, voting, diminishes *Dunn*'s importance as precedent on right to travel doctrine, much as speech and association do in the passport cases.[95] The Court explicitly holds that either of the fundamental rights is sufficient to invoke strict scrutiny,[96] but at least the option is available of future retreat from one branch of this holding without disturbing the result.

In summary, no doctrinal reason exists for strictly scrutinizing restrictions on fundamental personal rights only when they are discriminatorily applied. Indeed *Shapiro* itself may be interpreted as resting on both equal protection and non-equal protection

---

93 411 U.S. 1 (1972).
94 405 U.S. 330 (1972).
95 *See* text at note 60 *supra.*
96 405 U.S. at 335. *See* note 90 *supra.*

grounds. Yet the potential exists in *Shapiro* and subsequent cases, with the possibly dispositive exception of *Dunn,* for treating travel differently from other fundamental rights in this regard. Maybe it is worse to exclude or penalize the entry of only some but not all. If so, local growth controls could easily be rendered immune from right to travel challenges.

III. Retreat from Two-Tiered Review

The preceding sections have assumed continuation of the present two-tiered system of review,[97] and have sought to determine, by alternate doctrinal routes, which of the two standards should be applied to local growth controls. On the theory that under strict scrutiny the government almost always loses, while so-called "rational basis" review reaches only the most egregious or arbitrary of governmental acts,[98] society is compelled to choose between historically inadequate review of local activities which significantly affect personal mobility and review which all but ignores valid public interests. An alternative to this Hobson's choice is the substitution of intermediate approaches to the review of governmental enactments alleged to restrict personal liberties, fundamental or otherwise.[99]

The advantages of such an approach are obvious. In the area of growth controls, for example, a court could weigh the local

97 See text at note 5 *supra.*

98 Dunn v. Blumstein, 405 U.S. 330, 363-64 (1971) (Burger, J., dissenting); Goodpaster, *The Constitution and Fundamental Rights,* 15 Ariz. L. Rev. 479 (1973); Gunther, *supra* note 5, at 8. Compelling interests capable of overriding the right to travel have, however, been found or suggested in dicta with some frequency. *E.g.,* Burns v. Fortson, 410 U.S. 686 (1973) (per curiam) (50 day residence requirement for voting necessary to vindicate state's interest in accurate voting records); Zemel v. Rusk, 381 U.S. 1 (1966) (national security; reference in dicta to quarantining of devastated or epidemic areas); United States v. Chalk, 441 F.2d 1277 (4th Cir. 1971), *cert. denied,* 404 U.S. 943 (1972); United States v. Matthews, 419 F.2d 1177 (D.C. Cir. 1969), Davis v. Justice Court, 89 Cal. Rptr. 409, 414 (Dist. Ct. App. 1970) (curfews during time of domestic turmoil); Krzewinski v. Kugler, 338 F. Supp. 492 (D.N.J. 1972) (residence requirement for policemen and firemen necessary to assure quick availability for emergency and for off-duty police to help deter crime); Hadnott v. Amos, 320 F. Supp. 107 (M.D. Ala. 1970), *aff'd,* 401 U.S. 968 (1971) (durational residence requirement for judges necessary to assure electorate's familiarity with qualifications).

99 Wash. & Lee Note, *supra* note 17, at 602-03.

reasons for slowing growth, the likelihood that less parochial approaches to meeting legitimate concerns would be adopted, availability of nearby land for development, conformance with regional plans, the extent of travel actually prevented or diverted, whether different income or other groups are affected equally or not, etc. On the other hand, courts may not be willing or able to analyze the huge quantities of data which such litigation would surely generate. Nor, perhaps, would a course so fraught with opportunities for "judicial legislation" be desirable.

Nevertheless, judges and scholars are increasingly critical of the present system whereby the somewhat arbitrary characterization of a right as fundamental or non-fundamental determines the standard of review, and thereby the result. In *Dandridge v. Williams*,[100] a welfare "ceiling" which allegedly discriminated against larger families was held to infringe no fundamental rights, and thus was subjected only to minimal scrutiny. Justice Marshall, dissenting, argued that

> equal protection analysis of this case is not appreciably advanced by the *a priori* definition of a "right," fundamental or otherwise. Rather, concentration must be placed upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification.[101]

Professor Gunther, another critic of two-tiered review, claimed to recognize a center-seeking retreat in the 1971 term of the Court as several decisions eschewed the new equal protection for a more balanced review.[102] This approach continues to appear in

---

100 397 U.S. 471 (1970).

101 *Id.* at 520-21.

102 Gunther, *supra* note 5, at 17-20, 25-37. *See also* Goodpaster, *supra* note 98, at 503-05; Note, *The Decline and Fall of the New Equal Protection: A Polemical Approach*, 58 VA. L. REV. 1489, 1507 (1972): "the balancing test is the most likely analysis for the future. . . . [I]t is a standard uniquely suited to the compromise of ideas. Groups of people and the rights of these people will no longer have to be irrevocably categorized and perpetually damned or exulted as was the case under the new equal protection." This optimistic forecast should be tempered by the author's questionable supposition that the balancing test is already the favored one, having permeated both old and new equal protection cases all along.

subsequent cases,[103] despite counter-indications that two-tier review is by no means yet defunct.[104]

Adoption of some intermediate test is also the solution urged by those who have commented on the particular problem of reconciling the right to travel and land use controls. For one commentator, review is to be triggered by alleged departures from a "regional concept of rationality."[105] The right to travel would not even be implicated:

> [A]pplication of the right-to-travel compelling-state-interest doctrine to land use ordinances is inapposite, because such laws are highly complex, affect a multiplicity of interests, and are not practically susceptible to the rather mechanistic analysis employed in the Shapiro line of cases.[106]

Ignoring an arguably applicable constitutional right on what are essentially grounds of convenience, however, is dubious. Moreover, it is unnecessary: if an intermediate standard of review may be reached through a heightened sense of rationality in appropriate cases, it should also be attainable through a relaxed concept of compelling interest in such cases.

Another commentator suggests not only that such an intermediate review standard is desirable, but that it in fact already applies in right to travel cases: "The derivation, historical treatment and recent judicial application of the right to travel indicate that when a law interferes with free travel, a court will balance the degree of interference against the importance of the governmental objective served by the law."[107] Except for a very recent

---

103 *E.g.*, Jimenez v. Weinberger, 417 U.S. 628 (1974); Cleveland Board of Educ. v. LaFleur, 414 U.S. 632, 651-67 (1974) (Powell, J., concurring); United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973).

104 *See, e.g.*, Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 17 (1973); Salyer Land Co. v. Tulare Lake Basin Water Dist., 410 U.S. 719, 732 (1973). *See generally The Supreme Court, 1973 Term*, 88 HARV. L. REV. 41, 124-25 (1974).

105 WASH. & LEE Note, *supra* note 17, at 594-603.

106 *Id.* at 603-04.

107 HASTINGS Note, *supra* note 10, at 850.

case unavailable to that commentator, however, the post-*Shapiro* cases would not seem amenable to such a reading.

The deviant case is *Sosna v. Iowa*,[108] which sustained a one year residence requirement for use of state courts to obtain a divorce. While the personal importance of divorce relative to so-called basic necessities of life may well be insufficient to constitute a penalty on travel under *Maricopa*-type analysis,[109] the Court did not employ such analysis. Rather, it appeared to weigh the personal interest in not having to wait for a divorce against asserted state interests in regulating the divorce process and protecting its court decrees against collateral attack. The right to travel is not discussed, and the review standard actually used is not articulated. Justice Marshall, dissenting, referred to the process as an "ad hoc balancing test,"[110] but later suggested that the Court's conjuring up of possible justifications for the restriction is really more akin to the minimal scrutiny of two-tier review. The relative unpersuasiveness of the prevailing state interests[111] also suggest that the latter standard is what may in fact be involved here.

Thus it is unclear just what *Sosna* stands for. It may portend a trend to interest balancing, or it may simply represent minimal scrutiny where the right to travel is found not to be infringed.[112] If the former obtains, a true balancing of the multifarious interests involved in the typical growth control situation could proceed without resort to such seemingly outcome-determinative characterizations of travel and other interests as fundamental or not fundamental. If the latter obtains, *Sosna* is consistent with the accommodation developed in the next section.

---

108 95 S. Ct. 553 (1975).

109 *See* Section IV *infra*, especially at notes 118-25. Justice Marshall's dissent in *Sosna* faithfully applies this analysis, but concludes on the basis of cases according particular deference to marital interests that divorce is of sufficient importance. Absent a link with such quasi-fundamental interests, however — and the majority clearly denied such a link here — the question of divorce's importance for *Maricopa* purposes is at least debatable. It also illustrates the difficulty of applying *Maricopa* to concrete situations. See note 138 and accompanying text *infra*.

110 95 S. Ct. at 567.

111 See especially Justice Marshall's careful analysis of these interests. *Id.* at 568-71.

112 See text accompanying notes 126-36 *infra*.

IV. Determining When the Right to Travel is Infringed

Writing for the Court in *Maricopa,* Justice Marshall introduced the notion of examining the deprivation which exercise of the right to travel will entail, and then simply withholding "application of strict scrutiny until the deprivation involved reaches a certain level of importance to the individual."[113] By thus determining when the fundamental right to travel shall be deemed to be infringed, some measure of judicial discretion is injected into the review process.

Immediately after *Shapiro* it was uncertain whether alleged restrictions on travel had actually to deter travel or merely constitute penalties upon travel in order to trigger strict scrutiny.[114] Subsequent decisions clearly opted for the latter view. As stated in *Dunn* and reiterated in *Maricopa,*

> *Shapiro* did not rest upon a finding that denial of welfare actually deterred travel. Nor have other "right to travel" cases in this Court always relied on the presence of actual deterrence. In *Shapiro* we explicitly stated that the compelling-state-interest test would be triggered by "any classification which serves to *penalize* that right . . . ."[115]

Nevertheless, *Shapiro* also cautioned that residence requirements for some sorts of services might not be characterized as penalties upon travel.[116] Thus even before *Maricopa* the stage was set for confrontation of the question of what constitutes a penalty. Moreover, an intervening series of decisions validating durational residence requirements as a condition to lower tuition at state universities intensified the need to begin drawing distinctions.[117]

Maricopa discussed in this connection only *Shapiro, Dunn,* and the tuition cases. The law at issue in *Shapiro,* in temporarily denying access to welfare, is said to involve "basic 'necessities of

---

113 *The Supreme Court, 1973 Term, supra* note 104, at 116. *See also* Wash. & Lee Note, *supra* note 17, at 587-88.

114 *See, e.g.,* N.Y.U. Note, *supra* note 10, at 1000-03.

115 Memorial Hospital v. Maricopa County, 415 U.S. 250, 258 (1974) *citing* Dunn v. Blumstein, 405 U.S. 330, 339-40 (1971). *See also* Cole v. Housing Authority of City of Newport, 435 F.2d 807, 810 (1st Cir. 1970).

116 394 U.S. at 638 n.21.

117 *See* note 122 *infra* and accompanying text.

life.' "[118] In this category the denial of free medical care for indigents immediately at issue in *Maricopa* is also placed. *Dunn,* on the other hand, involved denial of a "fundamental political right."[119] Voting, however, is hardly a "necessity of life" to the individual, and most likely a concern with protection of the political system underlies *Dunn.*[120] In other words, a restriction upon travel will be deemed a penalty if sufficiently important either to the individual or to the society as a whole.

This notion of importance distinguishes the tuition cases. *Maricopa* quoted approvingly from *Kirk v. Board of Regents:*[121]

> While we fully recognize the value of higher education, we cannot equate its attainment with food, clothing and shelter. *Shapiro* involved the immediate and pressing need for preservation of life and health of persons unable to live without public assistance, and their dependent children. Thus, the residence requirement in *Shapiro* could cause great suffering and even loss of life. The durational residence requirements for attendance at publicly financed institutions of higher education do not involve similar risks. Nor was petitioner . . . precluded from the benefit of obtaining higher education. Charging higher tuition fees to nonresident students cannot be equated with granting of basic subsistence to one class of needy residents while denying it to an equally needy class of residents.[122]

Thus, higher education is not a necessity of life. The quoted passage also suggests that mere variation in cost of access to a

118 Memorial Hospital v. Maricopa County, 415 U.S. 250, 259 (1974).

119 *Id.*

120 This view gathers strength from, and in turn lends support to, the proposition that actual deterrence of travel is not necessary to a finding of constitutional violation. See text accompanying note 115 *supra.* The importance of any given deprivation to the individual would seem to be directly related to the amount of travel which it would deter.

121 273 Cal. App. 2d 430, 78 Cal. Rptr. 260 (1st Div. 1969), *appeal dismissed,* 396 U.S. 554 (1970).

122 273 Cal. App. 2d at 440, 78 Cal. Rptr. at 266. *Kirk,* decided very shortly after *Shapiro,* also argues that in the case of higher tuition for out-of-state students there is no actual deterrent to travel, an argument which is no longer of any weight. *See* text at note 115 *supra.* Starns v. Malkerson, 326 F. Supp. 234, 237-38 (D.C. Minn. 1970), *aff'd mem.,* 401 U.S. 985 (1971), adds yet another argument to those in *Kirk:* such tuition differentials are not adopted for the purpose of excluding out-of-state students. Even if this were true factually, it is questionable whether purpose or intent is a proper inquiry here. *See* text at note 132 *infra.* Vlandis v. Kline, 412 U.S. 441 n.9 (1973) apparently reaffirms *Starns. See also* Annot., 37 L. Ed. 2d 1056 (1974).

governmental service is not as serious as total denial of a service, but this may simply be an additional dimension of the importance issue.

One other case not discussed in *Maricopa* is perhaps worth noting here if only to delineate more fully the present state of opinion on what constitutes an infringement of the right to travel. In *Evansville-Vanderburgh Airport Authority District v. Delta Airlines,*[123] an airport head tax on outbound passengers was upheld as reasonably related to the cost of providing and operating facilities which expedite travel; such a reasonable "user charge" is not a penalty on travel.[124] In order to constitute a penalty on travel, therefore, a denial or cost must not only be sufficiently important to the individual or to society, but it must also be more than just a reasonable charge for the costs incurred by society as a result of individual travel.[125]

The right to travel will not be deemed infringed unless the challenged enactment places a substantial and unjustified burden on travel. There is some suggestion in the case law that intent to discourage or otherwise abridge travel may also serve as a trigger-

---

123 405 U.S. 707 (1972).

124 *Id.* at 714-16. *See also* Note, *Pay Now, Fly Later: Head Taxes—A New Phenomenon in Airport Finances,* 58 CORNELL L. REV. 759 (1973).

125 Perhaps this notion can adequately distinguish *Petaluma* from Golden v. Planning Board of the Town of Ramapo, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972), which reluctantly validated one community's growth control ordinance. For critical appraisals, see H. FRANKLIN, CONTROLLING URBAN GROWTH—BUT FOR WHOM? (1973); Bosselman, *Can the Town of Ramapo Pass a Law to Bind the Rights of the Whole World?* 1 FLA. ST. L. REV. 234 (1973). To be sure, the *Ramapo* court shows no sign of having considered the issue before it in terms of federal constitutional travel doctrine. But if it had, it might well have noted that *Ramapo,* unlike *Petaluma,* permits developers whose land is not considered ripe for development due to inadequate public facilities to remedy such deficiencies themselves and then proceed with development. In effect, future migrants are not excluded if they are willing to assume the extra costs for housing which pays its own way in terms of necessary expansion of sewers, roads, etc. exceeding in scope or pace those facility extensions which the town itself can reasonably undertake to provide. This may be undesirable from a policy viewpoint: it takes the pressure off the municipality to use best efforts to extend facilities at public expense, and it exacerbates economic segregation by increasing housing costs. Indeed, such subdivision exactions have not always been judicially well received even under the minimal scrutiny characteristic of traditional land use control litigation. *See, e.g.,* D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL 253-58 (1971). But perhaps *Evansville Airport* immunizes a Ramapo-type system from challenge on right to travel, if not alternative, grounds by analogy to the "user charge" exception.

ing mechanism. In *Village of Belle Terre v. Boraas*[126] the Supreme Court considered an ordinance of a small community which restricted occupancy of dwelling units by more than two persons to families — *i.e.*, persons related by blood or marriage. A group of unrelated students who lived together brought suit to invalidate the ordinance as violative of several different fundamental rights, including travel. All received short shrift in Justice Douglas' opinion for the Court, although as a dissent by Justice Marshall pointed out, at least some of these rights (but not travel) did indeed appear to be infringed. Regarding the travel claim, the Court said only that the ordinance "is not aimed at transients. *Cf. Shapiro v. Thompson*, ..."[127] *Shapiro* does note that "the purpose of inhibiting migration of needy persons into the State is constitutionally impermissible,"[128] and that, as a factual matter, such a "specific objective" was indeed present.[129] But the opinion read as a whole strongly implies the irrelevance of such an objective when coupled with the substantial penalty on travel also found to inhere in the challenged scheme. The real question is what role intent may properly play in the absence of a substantial burden, and *Belle Terre* rather cryptically suggests it may be determinative.[130] The district court in *Petaluma* apparently reads *Belle Terre* in this manner, for it attempts to distinguish that case by pointing out that "the very reason for being of the 'Petaluma Plan' is to keep people out, a patent attempt to effect such excluded persons' right to travel."[131]

All this may be unnecessary. The proper role of legislative purpose or intent or motive in constitutional adjudication has long been subject to controversy, and judicial pronouncements on the subject are far from consistent. A careful and reasonably coherent theory of this role has been developed by Professor Ely.[132] Under his analysis, improper motive can add nothing to

126 416 U.S. 1 (1974).
127 *Id.* at 7.
128 394 U.S. at 629.
129 *Id.* at 628. *Cf.* Edwards v. California, 314 U.S. 160, 174 (1941) (state attempt to keep out the indigent violates commerce clause).
130 *See also* Starns v. Malkerson, 326 F. Supp. 234; note 107 *supra.*
131 375 F. Supp. 574, 584 n.1. *See also* text accompanying note 16 *supra.*
132 Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970).

the burden of justification which the challenged government must meet; its only role is to trigger review which would otherwise not obtain. In the kinds of cases considered herein, a showing of undue burden on travel, without more, will invoke strict scrutiny. Motive is not needed to trigger review and properly serves no other purpose in the ensuing analysis.[133]

If Ely is correct, then *Belle Terre* is probably best understood as merely holding that the burden on travel occasioned by the ordinance is insubstantial.[134] The number of people whose travel was penalized was minimal, and the small size of Belle Terre[135] meant that ample alternatives were available to those people within the general vicinity. The plan in *Petaluma,* on the other hand, excluded larger numbers from a larger area. Moreover, it involved a type of exclusionary ordinance which we may reasonably assume is more likely to spread to neighboring municipalities, thus foreclosing even larger swaths of territory than is the case in *Belle Terre.* There is no need in either case to determine intent before passing on the subject ordinance.

On the assumption that the right to travel comprehends intrastate travel, that infringement will invoke strict scrutiny even when non-discriminatory, and that an explicit balancing test has not yet replaced two-tiered review, the state of right to travel doctrine exemplified by *Maricopa* may nevertheless be adequate to deal with the two practical problems of protecting prosaic land-use controls and permitting regional planning for growth. Of the two, perhaps the first is more easily resolved.

Districting of land uses, set-back requirements, reasonable density and bulk limitations, subdivision standards, safety and fire codes, and environmental protection requirements all tend to have impacts on housing costs, land carrying capacity, and individual

133 *Id.* Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive,* 1971 SUP. CT. REV. 95, presents an alternative theory in which illicit motivation can add to the government's burden of proof. He focuses, however, on intended classifications along suspect lines, especially racial ones, and adverse effects to one class are always assumed. One senses diminished grounds for disagreement with Ely where harm to a fundamental interest is intended, at least where harm is not the primary motive but only a derivative one.

134 Alternatively, only interstate travel is protected as a fundamental right, and interstate travel is not sufficiently implicated in *Belle Terre.*

135 416 U.S. at 2. Belle Terre occupies less than one square mile and consists of only 220 homes.

access to particular localities, the negative aspects of which are of particular importance neither to society nor to the individual. Whatever interest society has in free mobility and adequate housing is not greatly burdened and may often be promoted by such controls. Moreover, most individuals do not appear to feel burdened by such controls, and those individuals who do feel burdened probably attribute the burden to grounds other than restriction of the right to travel. Indeed, widespread adoption of such traditional land-use controls suggests a prevailing belief that they are desirable.[136] Strict growth controls, on the other hand, will tend to appeal only to those who are already safely ensconced in the controlling community. Were they to become as widespread as the more prosaic controls, their current popularity would surely decline in this mobile society.

In short, there are no grounds for a judicially cognizable burden on travel. Neither can any purpose or intent to restrict residential mobility be implied from such controls to the extent that intent is considered relevant. That there obviously remains the problem of distinguishing "prosaic" from "exclusionary" controls is of little consequence for this problem inheres in every judicial approach to land-use control. In drawing this line, the judiciary must inevitably exercise judgment. The problem has been to discern how this discretion can be preserved under a broad personal right view of travel.

Perhaps the greater difficulty, however, is assuring the application of strict scrutiny to unquestionably exclusionary controls. Does being excluded from Petaluma — or, to be more exact, being permitted entry only upon payment of significantly and artificially inflated housing costs[137] — amount to denial of a "basic necessity of life"? Is it more like welfare and medical care or lower college tuition? No principled method of answering this question is ap-

136 The importance of any burden is to be conceived of in general or systemic terms, rather than by reference to each particular individual. Surely, a year's denial of free medical care by Maricopa County would be of no particular concern to some otherwise eligible newcomers who are and remain healthy, while higher tuition at a state university may well be very important to, say, a poor out-of-stater who has particular cause for wanting to attend that university.

137 Even if no new housing were to be permitted in Petaluma, it would still be possible to buy one's way in: there would be some offering price sufficiently high to induce a present resident to sell out.

parent; indeed, this is perhaps the most cogent criticism of the course chosen in *Maricopa*.[138] Housing does, however, seem somehow more like a basic necessity than higher education.[139] Also, the point is not that one can find housing somewhere but that one can find it where one wants it.[140] That *Shapiro* would have been decided differently if Connecticut and Pennsylvania had been the only states denying welfare to newcomers is inconceivable. Moreover, the court in *Petaluma* made the realistic prediction that if growth controls were to receive judicial blessing, in only a matter of time they would come into widespread use, foreclosing large areas to people in search of a better life.[141] Finally, the practical effect of most growth control ordinances will be not merely to penalize but actually to deter in-migration, a factor which may and should make it easier to find an impermissible burden on travel.[142]

The second practical problem is preserving the option for growth planning at the metropolitan, state, or some other "regional" level. Regional growth planning as used herein does not mean Petaluma-type controls "writ large" and applied to a whole region. Such an arrangement would foster the same wrongs as the Petaluma plan, but at a much broader and thus, from the viewpoint of personal liberties, disastrous scale. Rather, regional planning should be concerned with the rational distribution of a region's natural growth. Only when truly necessary to promote a compelling public purpose ought whole regions to be closed off to outsiders desirous of moving in.[143]

That the *Petaluma* court saw no inconsistency between regional growth planning and the right to travel is evident. Heavy reliance is placed upon a well-known series of Pennsylvania cases which

---

138 *The Supreme Court, 1973 Term, supra* note 104, at 117-18.

139 Probably elementary or secondary education would be treated differently—*i.e.*, temporary or partial denial of it, unlike higher education, would also be of sufficient importance to individuals and society to constitute a penalty on travel.

140 This statement should be conditioned in light of the ensuing discussion on regional control of growth patterns.

141 375 F. Supp. at 579-81.

142 *Cf.* Note, *Local Govt.—City Size Limitation—Municipal Govt. Attempt to Curtail Growth May Violate Right to Travel*, 60 GEO. L.J. 1363, 1371 (1972) (discussing Boulder, Colorado growth moratorium)

143 An example might be imminent water shortages in certain Southwestern areas.

invalidated the common growth controls of large lot zoning and prohibition of apartments.[144] The most recent of these, *Appeal of Kit-Mar Builders,*[145] is quoted approvingly as follows:

> The implication of our decision in *National Land* is that communities must deal with the problems of population growth. . . . They may not refuse to confront the future by adopting zoning regulations that effectively restrict population to near present levels. It is not for any given township to say who may or may not live within its confines, while disregarding the interests of the entire area. If Concord Township is successful in un-naturally limiting its population growth through the use of exclusive zoning regulations, the people who would normally live there will inevitably have to live in another community, and the requirement that they do so is not a decision that Concord Township should alone be able to make.[146]

Clearly the concern here is with the parochialness of the exclusionary decisionmaking; if the "interests of the entire area" were recognized and if "any given township," such as "Concord Township . . . alone," were not making the decisions, controls of this sort would receive a much more sympathetic review. This line of decisions, according to *Petaluma,* "best expresses the underlying rationale of those cases which do recognize the right to travel as fundamental. Accordingly, we concur with those decisions and adopt their reasoning as our own view of the law under the Federal Constitution also."[147]

But how can growth controls, which require compelling justification when locally decreed, be any less objectionable when decreed by some higher governmental authority? Concededly, the kinds of pluralistic checks and balances sanctified by Madison in his famous *Federalist Paper No. 10* diminish the likelihood of abuse in the latter case. But does not the Constitution imply that fundamental rights are normally to be beyond the reach of even

144 *See* note 3 *supra.*

145 439 Pa. 466, 268 A.2d 765 (1970).

146 *Id.* at 474-75, 268 A.2d at 768-69. Quoted in *Petaluma,* 375 F. Supp. at 586. *See also* Appeal of Girsh, 437 Pa. 237, 245 n.4, 263 A.2d 395, 399 n.4.

147 375 F. Supp. at 584. None of these decisions in fact makes any mention of a constitutional right to travel. Nevertheless, the impulse to interpret them as travel cases is not limited to the *Petaluma* court. *See, e.g.,* Nw. Comment, *supra* note 10, at 658-62.

the most representative and overwhelming of majorities? Resolution of this problem may well lie in a *Maricopa*-like approach to determining the threshold question of when the fundamental right to travel is infringed.

No one doubts that certain areas may be set aside for different uses or for different densities of the same use. Such districting is the very essence of zoning,[148] and even the Pennsylvania cases comprehend differentiated areas of relative exclusivity or density within the confines of the zoning municipality. Indeed, where a municipality is so small as to be in effect just a neighborhood, and is surrounded by areas providing alternative residential options, *Belle Terre*[149] would permit a somewhat exclusive homogeneity throughout the zoning municipality.

The issue thus reduces to the determination of a proper "grain" of density and housing types within the relevant geographical area; if migration can unquestionably be excluded from sufficiently small areas but not from sufficiently large areas, the problem is one of line-drawing. The impact upon individual migrants of the location of such lines will depend upon a variety of factors, including the accessibility to jobs, shopping and recreational facilities, and the like in areas which are open to migration; the degree of economic and, derivatively, racial segregation permitted by the overall growth plan; perhaps the extent to which local fiscal burdens for public services are equalized; and similar factors.

For any given region many "correct" plans could be established. Courts are ill-equipped to judge these on their merits; the judiciary cannot sit as a super-planner. Courts can, however, look to the planning process for assurance that all the factors noted above have been considered with some objectivity. One way to do this might be through rebuttable presumptions that (1) where a municipality unilaterally attempts to exclude outsiders, no such assurance obtains, and (2) where land-use or growth controls are applied in accordance with duly adopted region-wide plans (regardless of which governments actually apply the controls), such assurance does obtain. A variant would be to require any government making land-use decisions to provide for the full projected natural

148 *See, e.g.*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).
149 416 U.S. 1 (1974). *See* text at note 126 *supra*.

growth in its population (absent a compelling justification for doing otherwise), though of course the government could provide for a reasonable distribution of that growth within its borders. Thus, if Petaluma wants to make its own decisions, it must neither slow the pace of development nor require an overall development density which is unreasonably low; but if California or some San Francisco area-wide government decided to channel growth away from Petaluma into other parts of the region, the natural growth of Petaluma could be restricted.[150]

The point is simply this: the sorts of deprivations which arguably raise growth controls to the level of an infringement upon the right to travel may be avoided even where there is a considerable degree of governmental interference with natural or free market growth patterns; a plan for such interference cannot be judged on its merits by the judiciary; and the question of who decides may provide a realistic surrogate for such judgment on the merits. In short, controls which invoke strict scrutiny when adopted locally may reasonably be subjected to only minimal scrutiny when adopted at a regional level.

All this becomes somewhat problematic if intent to restrict travel is admitted as a valid ground for overruling land-use controls. Regardless of the level at which decisions are made, the kinds of controls envisioned herein are undeniable attempts to channel, divert, distribute, and otherwise alter resettlement. The decision process may be inclusive, the results benign, the effects on travel of insufficient impact to constitute infringement of the fundamental right. Yet, in the words of *Belle Terre,* the controls clearly are "aimed at transients."[151] Perhaps the answer is that properly conceived regionwide growth controls, insofar as they try to avoid rather than carelessly cause important deprivations to migrants, do not evidence intent to infringe the fundamental right of travel; the intent is to stop short of unconstitutional infringement. But this approach would seem to eviscerate the independent significance of intent as a test of constitutionality by

---

150 *Cf.* Norbeck Village Joint Venture v. Montgomery County Council, 254 Md. 59, 254 A.2d 700 (1969) (permitting large-lot zoning with a "green wedge" of the radial-corridor "Year 2000 Plan" for metropolitan D.C.).

151 *See* note 127 *supra* and accompanying text.

tying it back to impact analysis. The better answer is simply that intent is irrelevant.

Conclusion

"Right to travel" is a misnomer. What is at issue is a right of resettlement, or as the courts have quaintly phrased it, "migration with intent to settle and abide."[152] So conceived, right to travel doctrine is not a devious way to invoke careful scrutiny of growth controls. Rather, it lies at the core of discomfort with such controls. As one commentator has noted,

> The modern right to travel is in actuality a unique guarantee of population mobility. Just as Professor Turner saw the frontier as an escape valve for an expanding population — as "a new field of opportunity, a gate of escape from the bondage of the past," the most important effect of which "has been in the promotion of democracy," the modern travel doctrine serves a similar function by keeping open the escape valves for our expanding population. It removes the artificial barriers inhibiting the pursuit of a new occupation or a better place to live.[153]

The frontier on which Frederick Jackson Turner focused is gone, and with it the transformation from exploited city worker to independent yeoman which it symbolized. Today's migration is rural to urban, urban to suburban, and metropolitan area to metropolitan area. Yet the same human impulse occasionally to try life somewhere else continues to inform the American dream. Individual reasons for migration are manifold:[154] better jobs, shorter commutation, different life style possibilities, proximity

---

152 *See* note 15 *supra*. Travel doctrine, of course, includes more than resettlement. Non-migratory travel, which has not been considered herein, may nonetheless conflict with land use controls. Must resort communities permit unlimited development for accommodating transients? Are the experimental and proposed restrictions on visitor access to national parks constitutionally invalid? *See* CONSERVATION FOUNDATION, NATIONAL PARKS FOR THE FUTURE 35-37, 53, 102, 205-07 (1972). *Maricopa* may provide a distinction: a resort accommodation is not a basic necessity of life in the way that a permanent residence is. Moreover, in cases like restricted access to national parks, a compelling governmental purpose may be involved, since the very purposes for maintaining a park system would be abrogated by overuse.

153 Nw. Comment, *supra* note 10, at 668. The quotations are from F. TURNER, THE FRONTIER IN AMERICAN HISTORY 30, 38 (1920).

154 *See, e.g.*, Woodruff, *Land Use Control Policies and Population Distribution in America*, 23 HASTINGS L.J. 1429 (1972).

to mountains or sea, the draw of close friends or relatives, improved housing conditions. And while some reasons are not so noble, *e.g.*, "white flight" from increasingly black urban centers, solutions lie not in greater restrictions on travel but fewer restrictions on those whose mobility has traditionally been circumscribed. Whatever the reasons for resettlement, they are frequently of great importance to the individual and, derivatively, to a society which seeks to maintain domestic tranquility and the allegiance of its members.

Social benefits, however, are also to be derived from sound planning. Sprawl and "leapfrog" development patterns are costly both in fiscal and environmental terms. Excessively rapid growth in a few sub-areas may mean inadequate public service for newcomers and "natives" alike. Aquifer recharge and drainage collector areas should not be overdeveloped, and flood plains probably should not be developed at all. Marshes and forests, once lost, are lost forever, to the detriment of both the eco-system and the human spirit. Densities requiring individual sewage disposal should be permitted only rarely except in truly rural areas. The list can go on and on.

As is so often the case in human affairs, different sets of desiderata are in competition. One side of the ledger should not be overweighted by limiting the fundamental right to travel to interstate or equal protection contexts. Rather, a way must be found to balance, on a case-by-case basis, the private interest in residential mobility and the public interest in planned growth. This may be accomplished forthrightly through substitution of a balancing test for rigid two-tier review, as frequently advocated and as arguably adopted in some recent cases, including one involving the right to travel. It may also be approximated through a *Maricopa*-like analysis of when the right to travel will be deemed infringed, followed by application of strict or minimal scrutiny as appropriate. Either approach is calculated to invalidate exclusionary land-use controls while sustaining the more traditional controls, as well as preserving the option of regionally-adopted growth controls.

*Richard G. Caldwell**

*Member of the Class of 1975 at Harvard Law School.

BOOK REVIEWS

IN PURSUIT OF PRICE STABILITY: THE WAGE-PRICE FREEZE OF 1971. By *Arnold R. Weber,* Washington, D.C.: The Brookings Institution, 1973. Pp. 131, index. $2.95 paper, $6.95 cloth.

*Reviewed by Peter Fortune**

On August 15, 1971, President Nixon announced a "New Economic Policy" whose chief feature was a freeze of wages, salaries, prices and rents for a period of 90 days, to be followed by less restrictive, but still effective, wage-price controls.[1] At the time he and his chief economic advisers faced the risks accepted by the circus performer who announced that he had a new and great act—he would jump from the peak of the Big Top, 75 feet high, into a 3-foot pile of sand. The circus owner asked to see the act and after it was successfully done, while the performer was brushing the sand off, he offered a substantial pay increase. The performer refused, to the astonishment of the owner who offered an even greater increase. Finally the owner was forced to accept the refusal when he was told, "Well, it was the first time I've done that and I don't feel so good."

Arnold Weber was one of the advisers who put together the government's new act in 1971, and he has written this book to describe and evaluate what happened. Weber finds that the wage-price freeze was successful, and concludes that such an act should be in the circus' repertory. But while the reader will find much valuable information on the actual administration of the freeze, he will find insufficient hard evidence to support Weber's broader conclusion.

The author's widely accepted skills as an academic economist (at the University of Chicago's Graduate School of Business, and now Provost of the Carnegie-Mellon University) as well as his experience in government (at the Office of Management and

---

*Assistant Professor of Economics, Harvard University. B.A., 1967, Indiana University; M.A., 1970, Ph.D., 1972, Harvard University.

1 Exec. Order No. 11,615, Aug. 17, 1971, 36 Fed. Reg. 15,727. The President announced his Executive Order over radio and television the evening of Aug. 15. The text of this address can be found in 7 WEEKLY COMP. PRES. DOC. 1,173 (1971).

Budget and the Department of Labor prior to the freeze, and as Executive Director of the Cost of Living Council during the freeze) could be expected to produce a book which throws off sparks. A well-trained mind at the center of early wage-price policy, Weber should be able to tell us what were the "real" causes of our loss of innocence on August 15. His prior experience as an economist also should make him better able than most administrators to draw out the lessons of his experience and to evaluate the successes as well as warn us of the pitfalls.

Yet it is precisely these most critical questions about the causes and effects of the freeze that the book gives the least attention. Weber spends nine pages telling us the background of the freeze — what economic circumstances forced President Nixon to reverse his oft-stated rejection of controls. The last ten pages are devoted to a summary of the "lessons and limitations" of the freeze. The 112 pages in between describe the freeze itself. These pages are separated into six chapters which describe in detail the potential uses of a wage-price freeze, the administrative machinery required, the policy decisions which had to be made, the methods of enforcement, and the record of compliance with the freeze.

Weber thus has bitten off less than he can chew. In place of carefully reasoned economic insights he provides descriptions of the technical aspects of the 90-day freeze itself. We are given *Hamlet* without the Prince of Denmark. The book will do nothing to sway the critics of wage-price controls, nor can it successfully reinforce the proponents of controls. To be sure, Weber warns us in his preface that

> [t]his study does not attempt to deal in fine details with the relationships between the freeze and complex economic variables and behavior. Those issues are best considered in an analytical framework encompassing the stabilization program in its entirety. . . .
>
> [In addition] I have strenuously attempted to avoid making this account either a memoir or a *mea culpa.* Indeed, the reader will propably conclude that when I was confronted with a choice between an insider's anecdote and dry analysis I opted for the academic virtues. (p. ix)

Yet one man's virtue is another man's vice. What we get is neither the insider's anecdote nor analysis. It is, however, dry.

I do not mean that the book should not be read. I do recommend it. Those concerned with the complex policymaking problems entailed in administering wage and price controls, and who are willing to accept a concentration on a brief 90-day period in the history of economic policy, will find Weber's book quite useful. Indeed, it is his access to this information which makes his book worth reading. But those who want answers to the important question of whether or not we should have travelled the road of wage-price controls — or those less ambitious who simply would like to know what questions should be asked — must wait for the future studies of wage-price policy which the Brookings Institution promises on the dust jacket.

Although Weber thus gives short shrift to the areas of most concern to general readers, their continuing importance warrants an initial discussion in this review of the material Weber does present on the causes of the freeze and his evaluation of whether the freeze was a "success." The review then will turn to Weber's more detailed description of the actual mechanics of the freeze and of the issues which had to be resolved by the Cost of Living Council.

I. The Decision to Impose a Freeze

Weber notes that the recession begun in 1969 through the use of restrictive monetary and fiscal policy had failed to reduce the rate of inflation substantially by mid-1971. It seemed clear that if inflation was to be curbed we would have to accept a lengthy period of recession with a consequent rise in unemployment. By early 1971 such important economic advisers as Arthur Burns had publicly announced their support of an "incomes policy."[2] The precipitating factor was, according to Weber, the

2 For two of Burns' earliest statements on the need for an incomes policy, *see* N.Y. Times, July 24, 1971, at 1, col. 6; *The 1971 Economic Report of the President, Hearings Before the Joint Economic Committee*, 92d Cong., 1st Sess., pt. 1, at 244 (1971).

rapid deterioration in the U.S. balance of payments (the balance on current account), which suggested that we were pricing ourselves out of foreign markets, and the severe speculation against the U.S. dollar which forced our partners in foreign trade to buy up large quantities of dollars.

But were these really the precipitating factors? Was it really our national concern for our international position which ultimately "forced" us to adopt wage-price controls? If this were so, it would seem that simply not pegging the price of gold could have dealt with this problem. Indeed, part of the "New Economic Policy" announced on August 15 was suspension of the convertibility of dollars into gold. This led to a devaluation of the dollar — the traditional response to an untenable international position. The fact that we did not wait around to see the effect of this devaluation, but simultaneously announced the wage-price freeze, suggests that the real motive for the freeze was domestic.

One domestic problem that might have motivated the freeze was the conflict between fighting inflation and maintaining full employment, both politically important issues. Making this compromise less painful was, indeed, the main reason why controls found many supporters among both economists and the public.[3] But was this why the Administration reversed its own position on controls? I have no idea, and Weber doesn't help me wallow out of ignorance. He does not ask the question, nor does he give us his judgments of the positions held by important people in the Administration.

In this period of concern for presidential use and abuse of power one feels entitled to ask what role the upcoming presidential election played in administration decisions. The lack of planning which surrounded the freeze, both with respect to the administration of the freeze itself and to the kind of wage-price policy which would follow the freeze, suggests the short-term view which the circus performer adopted. The earliest date at which Weber reports the White House to have shown any inter-

3 Even the AFL-CIO supported mandatory controls. *See* Daily Labor Report, Aug. 10, 1971, at A-15. Support for controls was, however, hardly unanimous. For the view of one critic, *see* Houthakker, *Are Controls the Answer?*, 54 REV. ECON. & STATISTICS 231 (1972).

est in planning for wage-price controls was "the first week in August," when the White House requested a presentation of options with regard to an incomes policy (p. 8). This gives us little confidence in Weber's *obiter dictum* that "[t]hus despite the element of surprise, the imposition of the freeze was not a capricious act taken to confound critics or to confuse political antagonists" (p. 9).

II. Was the Freeze Successful?

In Chapter VIII (The Record of Compliance) Weber notes that the rate of inflation was substantially lower during the freeze than just before the freeze. The Consumer Price Index, which had been rising at a 4 percent annual rate in the six months prior to the freeze, rose at only a 1.6 percent annual rate in August-November, 1971. Average hourly earnings in the private non-farm economy (an economy-wide measure of "the" wage rate) rose at only a 2.2 percent annual rate in August-November, in sharp contrast to the 6.7 percent annual rate experienced in the six months prior to the freeze.[4]

But it would be a great surprise if a wage-price freeze did not reduce the rate of inflation of wages and prices. Furthermore, a fair evaluation of the freeze cannot be based solely on the behavior of wages and prices during the freeze, any more than a surgeon can fairly call an operation a success simply because the patient did not die on the operating table. Critics of wage-price controls are quick to note that the response of wages and prices in the early stages of controls not only tells us nothing about the long-run effectiveness of the controls, but also fails to distinguish the impact of the controls from that of other factors possibly influencing wage and price levels.[5]

4 Why did wages and prices continue to rise during the "freeze"? Some important prices were excluded from the freeze, among these being the prices of raw agricultural products and the prices of imported goods (which were given an added boost by the devaluation of the dollar). Also, some sectors failed to comply fully with the requirements of the freeze, perhaps the most notable example being insurance rates. Finally, equity considerations forced the Cost of Living Council to approve some wage and price increases for those who were caught by the freeze.

5 Some economists, but not many, argued that the reduction in wage and price

If the appropriate test of the effectiveness of controls is that they reduce the price level below that which would otherwise occur, we meet a major problem. To evaluate the wage-price freeze we must know what wages and prices would have been (both during the freeze and after) in the absence of the freeze. Yet we cannot run history over again.

One useful approach to this problem is to turn to computer simulation methods. Thus one might construct an econometric model for the purpose of forecasting the behavior of wages and prices, although the forecasting ability of such models is, unfortunately, nothing to write home about. Still, this model can help predict what wages and prices would have been without controls. By comparing these predictions with actual wages and prices which occurred during controls, a tentative judgment about the effectiveness of controls can be made.

Weber undertakes no such exercise. He does, however, cite two studies published by Brookings which confirm the view that controls did, at least in the early stages, keep wage and price levels down (p. 127). One of these studies[6] used economic simulation techniques, though the other[7] follows Weber's approach

---

inflation during the freeze was due to the recession and not the controls. But they had no more factual foundation than does Weber in attributing most of the reduction to controls rather than recession. *See* Anderson, *A Look at Ten Months of Price-Wage Controls*, 54 FEDERAL RESERVE BANK OF ST. LOUIS, REVIEW 14 (1972).

It is also likely that data on market prices and wages may provide a biased view of the effectiveness of controls because of shortages of goods, deterioration in the quality of goods, or biases in the measurement of market prices. If a price control induces shortages of the good in question, or leads to a reduction in quality, the effective price of the good will rise even though the market price does not. Consider the case of a shortage (the product quality case being self-evident). A shortage means that those who can buy the good at the low market price would consider the price control effective. But what about those who cannot buy the good at the market price? Can we say that a control is effective if it keeps down the price at which you can *not* buy a good? The excluded group is likely to answer correctly that so far as they are concerned the price has risen — by enough to prevent them from buying.

Weber himself notes some other problems in calculating the price indices upon which his judgments are based. For example, for some goods in the wholesale price index the price included is the "list" price, not the price at which the good is actually sold. Thus a list price could go down while the actual price is rising (p. 104).

6 Gordon, *Wage-Price Controls and the Shifting Phillips Curve*, 1972 BROOKINGS PAPERS ON ECON. ACTIVITY 385.

7 Bosworth, *Phase II: The U.S. Experiment with an Incomes Policy*, 1972 BROOKINGS PAPERS ON ECON. ACTIVITY 343.

and cannot be considered an independent judgment. My own research using computer simulation indicates that the controls were effective in keeping wage and price levels down, at least through Phase III of the controls, which ended in mid-1973.[8]

But not enough time has passed for us to make any final judgments. Since the fall of 1973 we have faced an explosion in prices which now is feeding back to wage demands and generating a resurgence of the wage-price spiral. Some critics of controls attribute this development to the natural post-operative status of the patient — controls may temporarily reduce inflation but, in their view, the piper must be paid.[9] Paul Samuelson has referred to this phenomenon, with tongue in cheek, as the "Law of the Conservation of Prices."[10]

In response to such critics, proponents of controls maintain that our current inflationary bout is not the payment of the piper but the patient developing new diseases.[11] The Arab Oil Embargo, the subsequent increases in royalties on Mid-East oil, and the recent poor world harvests of grain may well be responsible for the double-digit inflation of 1974. Yet while I would side with this latter view, we simply do not know to what extent our current problems are the result of wage-price controls.

Even assuming the freeze is judged effective, though, that is not the end of the matter. In his final chapter Weber argues that a freeze will be more successful if it is a surprise. While no one would doubt this (all policy actions are weakened in effect if they are anticipated), one who thinks the wage-price freeze of

---

8 Fortune, *An Evaluation of Anti-Inflation Policies in the United States*, N.E. ECON. REV., Jan./Feb., 1974, at 3. My study found that by the end of 1971 the level of consumer prices was about 1.5 percent below what it would have been in the absence of the freeze. By the end of the second quarter of 1973 — after 22 months of wage-price controls — the level of consumer prices was almost 5 percent below what it would have been in the absence of controls. Thus I subscribe to Weber's conclusion that the freeze did substantially reduce the rate of inflation and I go farther in believing that this beneficial impact also characterized the post-freeze phases of wage-price controls. *But see* Poole, *Comment*, N.E. ECON. REV., Jan./Feb., 1974, at 28. Poole argues that wage-price controls merely shift the ultimate timing of inflationary increases and therefore are of questionable value.

9 *See* Poole, *supra* note 8.

10 Samuelson, *Discussion of the Bosworth and Poole Reports*, 1973 BROOKINGS PAPERS ON ECON. ACTIVITY 300.

11 *See* Bosworth & Farmer, *The Current Inflation: Malign Neglect?*, 1973 BROOKINGS PAPERS ON ECON. ACTIVITY 263.

1971 did succeed must next ask if we can ever again initiate such a surprise. People learn to anticipate actions which are repeated. In recent months we have had widespread anticipation that a return to wage-price controls is in the cards, and this expectation can only have exacerbated our current inflation as those with discretion over wages and prices have tried to beat the controls.

Weber's basic conclusion that the freeze was a successful wage-price policy must also be tempered by consideration of our subsequent experience. Soon after Weber's book was published we had a second freeze, one which cannot be judged very successful. While it is not true that "a freeze is a freeze," this second freeze encountered a number of problems of which critics of wage-price controls constantly remind us. The extreme relaxation of controls when Phase III began (January 1, 1973) was followed by a burst of inflation. Much of this should have been expected,[12] but the magnitude of the wage-price bulge led President Nixon to institute "Phase III½" — a 60-day freeze — in mid-1973. During this freeze we had a "meat crisis" which was directly due to the freeze on prices at retail with no freeze on rapidly accelerating costs of producing meat and poultry.

The "meat crisis" brought to the fore the additional fear that freezes may result in serious inequities. Weber, for example, argues that " . . . a freeze will probably exercise greater short-term restraint on wages than on prices" (p. 123). This conclusion, however, is in contrast with most research with which I am familiar.[13] My own research suggests that the freeze and the subsequent

12 *See* Fortune, *supra* note 8, at 19. During the first two quarters of 1973 the consumer price deflator rose at a 6.2 percent annual rate, up from the 2.6 percent annual rate experienced during the four previous quarters (Phase II). A significant part of this bulge was due to two factors other than the relaxation of controls when Phase III began: (1) the rapid expansion in real output, and decline in unemployment, due to expansionary monetary policy, and (2) the sizeable boost in Social Security taxes in January, 1973, the employers' share of which was temporarily passed on in higher prices.

13 *See* Shalit & Ben-Zion, *The Expected Impact of the Wage-Price Freeze on Relative Shares*, 64 AM. ECON. REV. 904 (1974); *see also* Fortune, *supra* note 8; *but cf.* Gordon, *The Response of Wages and Prices to the First Two Years of Controls*, 1973 BROOKINGS PAPERS ON ECON. ACTIVITY 765. Gordon finds essentially the same results I do but concludes that over a longer period of time controls are likely to have "no direct effect on wages, given the actual behavior of prices." *Id.* at 777.

phases of controls had a greater impact on prices than on wages — controls depressed the profit margin in American industry.[14] Since one of the key issues in the acceptability of controls to the public is the impact on the distribution of income between labor and capital, this discrepancy identifies an area in which much more research is needed.

III. Administering Controls

Executive Order 11,615,[15] which implemented the freeze, contained little specific guidance for those charged with its administration. Its main contribution was in the following statement:

> Prices, rents, wages, and salaries shall be stabilized for a period of 90 days from the date hereof at levels not greater than the highest of those pertaining to a substantial volume of actual transactions by each individual, business, firm or other entity of any kind during the 30-day period ending August 14, 1971, for like or similar commodities or services.[16]

The first question which Weber and the Cost of Living Council faced was whether they should attempt to extend this principle beyond the original mandate. Since public acceptance of a freeze depends on conveying the impression (if not the reality) of equity, the CLC considered including profits, interest rates and dividends in the freeze. In the end, these extensions were not made, but a set of "voluntary" guidelines for dividends was issued.[17] These

14 Indeed, this may explain why labor was so docile in the early stages of the current acceleration of inflation to double-digit levels. If controls discriminated in favor of labor it is less likely that wage demands in the early post-controls period would respond fully to price increases.

15 August 17, 1971, 36 Fed. Reg. 15,727.

16 *Id.* § 1(a).

17 According to Weber (p. 38), controls on profits were rejected because of the accounting problems involved. In addition, if controls on profits were superimposed on controls of wages and prices the result would have been to prevent firms from increasing their sales and from adopting measures to increase productivity.

Control of interest rates was rejected because they would have been ineffective. The Economic Stabilization Act of 1970, which gave the President the power to impose mandatory controls, stated that price ceilings could not be below the price on May 25, 1970. In August, 1971, interest rates were far below the May, 1970, levels.

Guidelines on dividends were deemed necessary to present an image of equity. However, this was recognized as illusory because: (a) dividends normally change

voluntary dividend guidelines presented no significant problems of compliance except in one case, when the Florida Telephone Corporation refused to rescind a dividend increase even after its chief executives had been called to Washington to discuss the matter. Only after the Administration brought pressure through the financial community and through its large customers did Florida Telephone agree to a compromise (pp. 93-94).

The CLC next faced the question of how inclusive the freeze should be. Should all, or only some, "prices, rents, wages and salaries" be covered? The more limited the coverage the less effective controls would be — a freeze on auto prices in the face of increases in steel prices eventually will break down. But broad coverage raises other problems, including the need for a larger administrative bureaucracy.

The CLC chose a broad coverage, believing that for a 90-day period this could be effectively administered without a large bureaucracy. It did, however, exclude from the freeze prices of *unprocessed* agricultural products, *finished* imported products, and exports. The first were excluded because these product prices presented no problems at the time, because problems of enforcement in an industry with large numbers of producers and buyers could be expected, and because other federal units were actively engaged in policies supporting prices of agricultural products. Internationally traded goods were excluded in the hope of improving the U.S. balance of trade.[18]

Having made this basic decision, the CLC faced two tasks: definition of the terms, and enforcement of the freeze. Weber devotes Chapters V-VII (48 pages) to these problems.

With "raw" agricultural products excluded, the CLC had to determine what was a raw agricultural product. This required,

---

slowly so no problem of sharply increasing dividends was expected, and (b) to the extent that firms do retain earnings instead of paying them out as dividends, there is little impact on stockholders — the retained earnings create capital gains which roughly equal the amount of dividends which would have been received.

18 Weber does not examine the distortions that exclusions of imports and exports may have created. One critic of controls argues that the controls were evaded by the lumber industry in the Pacific Northwest by exporting lumber to Canada and then reimporting it at substantially higher prices. Poole, *Wage-Price Controls: Where Do We Go From Here?*, 1973 BROOKINGS PAPERS ON ECON. ACTIVITY 285.

as Weber notes, answers to such esoteric questions as: Is drained or strained honey an unprocessed product (yes)? Is "shelled, shucked, skinned or scaled" seafood unprocessed (no)? Are shelled peanuts unprocessed (yes)?[19]

But this was only the beginning. What is a "price"? The CLC decided that the price ceiling applied to published prices less "normal" discounts. It also determined that dues were a price — and forced the Girl Scouts of North Carolina to roll back a dues increase (p. 49). Transfer payments (alimony, welfare, unemployment compensation) were not prices and could therefore be increased. "Points" on mortgages were not a price. State and local taxes and license fees were not prices while fees charged for specific services were controlled. Maintenance fees for condominium owners were not prices while fees for management services were. Prices of commodity futures contracts were included under the freeze, but did this mean prices for specific traders or for the exchange as a whole, *i.e.*, what was the "entity" whose price was to be controlled?

And what is a "wage"? The CLC adopted a broad interpretation which included fringe benefits, vacation and holiday payments, and any "changes in working conditions which result in more pay per hour worked" (p. 53). But was a deferred wage increase which had been written into labor contracts negotiated prior to the freeze covered? The CLC said yes, since a "substantial volume of transactions" had not occurred at the higher wage (p. 58). Furthermore, the deferred wage increase is a forward contract so the principle applied to forward commodity contracts could be applied here.

These are only a few of the problems of definition which Weber discusses.[20] While in most cases the definitions adopted

19 Shelled peanuts were covered under agricultural price support programs. Had they been considered processed they would have been subject to a price ceiling below the support price and the Department of Agriculture would have had to buy $50 million of peanuts (p. 48). It takes a subtle mind to decide that the U.S. government should be alleviated from the consequences of a freeze while the private sector should not.

20 Among the others are: What is a "substantial volume of actual transactions"? What should be the base price for a product which had not been sold in the 30-day period prior to the freeze? Since the wage freeze did not include pay increases resulting from "promotion," what is a promotion? What ceilings should new products be given, and how "new" must a new product be?

seem reasonable, the arbitrary nature of some definitions is obvious (*e.g.*, shelled peanuts and shelled seafood). Weber notes that a grievance procedure did exist and that "relief could be granted 'to prevent gross inequities'" (p. 81). However, "gross inequities" were operationally defined as bankruptcies, a difficult claim to prove before the damage has already been done.

The great number and complexity of such detailed administrative decisions required to implement a freeze highlights one of the criticisms against wage-price controls; namely, that controls require a large bureaucracy. This, of course, need not be an obstacle if the alternative to controls is wide-spread unemployment. The more costly the alternative, the more we can afford a federal bureaucracy intervening in formerly private areas. Weber notes that President Nixon insisted that the freeze be administered without creating a large bureaucracy, and that the use of existing administrative units (the I.R.S. and the Office of Economic Preparedness) allowed the President's wish to be fulfilled (p. 128). After analyzing a number of deficiencies in the administration of the freeze Weber states that "[n]onetheless, on balance, the performance of the improvised structure was adequate to the task and outstanding in the light of the extreme demands that were placed on it under such short notice" (p. 34). Yet later we learn that "the structure that was designed would have proven too cumbersome and diffuse to operate effectively over a long period" (p. 35). Also, ". . . the difficulty of sustaining uniform general policies increased geometrically as the freeze progressed. By the end of the 90 days, The Cost of Living Council was almost running out of thumbs to plug the dike" (p. 83).

In recent months there has been increasing talk of a return to wage-price controls. I suggested above that if controls are most effective when a surprise, a reinstitution of controls may not be as effective as the first experience. Indeed, the current talk may be a self-fulfilling prophecy, since the more seriously it is taken the greater the inflation will be and the more likely is a return to controls. One must ask whether the same principle does not apply to the "weight" of the administrative machinery. Our first experience with controls in peacetime was encouraging in that it did not lead to a large new bureaucracy. But American business and

the American people are successful at "learning by doing," and if they have learned how to evade controls in the first round we can expect that a reinstitution of controls will find more holes in the dike and a need for more thumbs. Even if still "successful" without a large bureaucracy in the early stages, any controls will encounter diminishing success and increasing administrative costs in later stages. Weber stresses this latter point in particular:

> As a form of incomes policy, a wage-price freeze properly belongs to an opening phase, the time of the sounding of the trumpets rather than the execution of a victorious plan of battle (p. 19).

Given the events which have followed the 1971 wage-price freeze, this caveat seems especially relevant for policymakers to keep in mind today. While wage-price controls have not been an unmitigated failure, and indeed we find a number of potential benefits, many observers will echo the circus performer: "It was the first time we'd tried it — and we don't feel so good."

ENERGY REGULATION BY THE FEDERAL POWER COMMISSION. By *Stephen G. Breyer* and *Paul W. MacAvoy*, Washington, D.C.: The Brookings Institution, 1974. Pp. 445, index. $7.95.

*Reviewed by Gerald Garvey**

Breyer and MacAvoy's work appears at a time when increasing numbers of observers in government, business and academic circles are trying to develop solutions for America's energy crisis; when members of Congress are actively considering proposals for new legislation to de-regulate natural gas;[1] and when a series of studies of executive reorganization have raised fundamental questions about the viability of regulatory activity itself.[2] It is a

*Professor of Politics, Princeton University. B.S., 1959, U.S. Air Force Academy; M.A., 1961, Ph.D., 1962, Princeton University. Professor Garvey served as Director of Planning, Federal Power Commission, 1966-1968, and has published frequently on energy policy.

1 *See, e.g.*, S.269, 94th Cong., 1st Sess. (1975), S.1829, 93d Cong., 2d Sess. (1974), and S.371, 93d Cong., 2d Sess. (1974).

2 *See* PRESIDENT'S ADVISORY COUNCIL ON EXECUTIVE ORGANIZATION, A NEW REGULATORY FRAMEWORK: REPORT ON SELECTED INDEPENDENT REGULATORY AGENCIES (1971); *cf.* R. NOLL, REFORMING REGULATION (1971).

splendid book, summarizing the existing knowledge (might one say, "conventional wisdom") in the important area of energy regulation by the Federal Power Commission (FPC) and pointing toward some appropriate lines of future action. Supplemented by tabular displays which display the results of sophisticated original analyses and econometric studies, and readable by the layman as well as by the specialist, it is must reading for the legislators who will pass on the future of the FPC during the forthcoming review of energy policies by the 94th Congress. Breyer, a professor of law at Harvard, emerges as a new name in the energy literature, but one which belongs at the front rank of those who have contributed to the energy policy debate. MacAvoy, a chaired professor of economics at M.I.T., has long been an authoritative and influential figure in the field.[3]

Still, Breyer and MacAvoy's study does not go as far as it might. Their conclusions, while unassailable within their own economic framework of analysis, may be open to challenge at a more fundamental level.

In studying the record of the FPC one must address two interlocking questions: (1) taking conventional economic analysis as a frame of reference, has regulation by the FPC been a "success," and (2) are the basic assumptions of conventional economics the proper reference for judging the full impact of regulatory activity in this case? Breyer and MacAvoy limit themselves entirely to the first question, concluding that the Commission has, even if the most favorable reading is put on the record, failed to produce savings and efficiencies greater in dollar terms than what the public spends on direct and indirect support of the regulatory process. However, precisely because the authors so thoroughly document this bit of new "conventional wisdom," their book may well serve for scholars and practitioners alike as a point of entry into a new, more profound discussion of the validity of the basic beliefs and assumptions underlying economic studies of the regulatory process. After summarizing Breyer's and MacAvoy's case

---

3 *See, e.g.*, P. MACAVOY, PRICE FORMATION IN NATURAL GAS FIELDS (1962), and THE ECONOMIC EFFECTS OF REGULATION (1965).

against FPC regulation, this review will attempt to spotlight some of these deeper questions the authors pass by.

I. The Economic Model

Breyer and MacAvoy's book deals with three problems: classic utility regulation, exemplified by FPC control of the prices charged by natural gas pipeline companies to local distributors; control of rents (in the economic sense of the term), through federal setting of the ceiling prices which may be charged to pipelines by gas producers at the well-head; and industrial planning, including FPC attempts to rationalize the electric power industry through a combination of cajolery and bargaining with the utilities themselves. Of special significance in their study of these three areas is the credence given by Breyer and MacAvoy to the familiar analysis of the shortcomings of FPC regulation of the American natural gas market in the 1970's — shortcomings supposedly responsible for our present gas shortage.

The argument is as follows: In a misguided and benighted effort to serve the American consumer, the Commission throughout the 1960's set artificially low well-head rates for wholesale purchases of gas to be pumped across state lines. These artificially low prices (that is, lower than the level at which buyers would have cleared in a free market) had several effects. First, various energy users who would in a free market have relied on other fuels, such as coal, now found it economically profitable to use gas. As a result, demand for natural gas was artificially stimulated. Second, petroleum executives anticipated lower profits than could have been realized in the (hypothesized) free market situation. So they diverted risk capital from natural gas exploration and production into investments which promised a higher return. Hence even as the demand side of the gas market was being over-stimulated, the prospective supply situation was deteriorating for a want of financial incentives to the industry.

A further alleged consequence of FPC rate-setting policies in the late 1960's was the development of an enormous gas-using

industrial complex within producing states. Often such industries use this resource for "inferior" purposes such as boiler fuel. Since this gas never crosses a state line it has been seen as beyond the reach of existing federal legislation under the interstate commerce clause.[4]

This analysis exhibits a strong disposition in favor of solutions bottomed on economic theory. For example, Breyer and MacAvoy prefer reliance on competition to control prices in gas transmission whenever the evidence within a given market area suggests the feasibility of more than one pipeline to supply fuel. This preference, however, is not merely asserted as a matter of economic faith, but is backed by empirical study of the woeful record of regulation in areas where some degree of competition does exist (pp. 54, 133). The authors also adopt a conventional supply-demand analysis of the causes of the current gas supply shortfall, though again one backed by an econometric analysis heavy on empirical content and conservative in its assumptions.

Numerous other economic studies in this field of gas supply have been done over the years. The so-called Wein-Edmonston econometric model was used by Federal Power Commission staff members in the 1960's to evaluate the demand elasticity of natural gas to increases in field prices.[5] The more sophisticated work of Daniel Khazzoom in the late 1960's also was done under FPC auspices.[6] More recent was the work of Edward Erickson and Robert Spann, which supported the argument that higher field prices would call forth more than proportionately increased sup-

4 One could hardly find more ample legal justification for extending FPC jurisdiction to the intrastate market than in the Breyer-MacAvoy analysis itself. The authors make it amply clear that the burgeoning intrastate market sufficiently affects interstate commerce to bring it under congressional powers as enumerated in Article I, Section 8 of the United States Constitution. But the authors, after discussing this alternative of extended FPC jurisdiction to recover "gas leakage" into the high-priced intrastate market, reject it in favor of their more general preference for less, rather than more, regulation (p. 127).

5 *See* P. KLINE, A LAYMAN'S GUIDE TO THE WEIN-EDMONSTON ECONOMETRIC STUDY OF NATURAL GAS SUPPLY AND DEMAND (1964). For original presentations, *see* Statement Relating to Staff Exhibits, in Permian Basin Area Rate Proceeding, 34 F.P.C. 159, 235-38 (1965) (statement of Harold H. Wein), and Staff Exhibit 38A, Southern Louisiana Area Rate Proceeding, 40 F.P.C. 530 (1968) (witness J. Harvey Edmonston).

6 D. Khazzoom, *The FPC Staff's Econometric Model of Natural Gas Supply in the United States*, 2 BELL J. ECON. & MGMT. SCI. 51 (1971).

plies.[7] The MacAvoy model, however, which is presented in a surprisingly readable summary in the text, comes as close to settling the empirical issue within an economic framework as is ever likely to be required. Based on this model, the authors conclude that "new reserve supplies might have been three times greater, and immediate production twice as great, if there had been no field price regulation" (p. 83).

In the implications of this conclusion for the future of federal regulation in the energy field, *Energy Regulation by the Federal Power Commission* contrasts particularly sharply with Dean James Landis' report on regulatory agencies presented to President-elect John F. Kennedy in 1960.[8] Landis, at that time perhaps the nation's leading scholar of the administrative process, maintained that regulation, though rife with inefficiency, could yet be made to work. Indeed, since 1960 the FPC, called by Landis "the outstanding example . . . of the breakdown of the administrative process,"[9] has made various efforts to validate Landis' prophecy through a variety of improvements. Most notable was the adoption of an area-rate technique for natural gas field price setting in the early 1960's.[10]

The Breyer and MacAvoy volume, though, will convince many readers that Landis, alas, was wrong; that the "improvements" of the past fifteen years have actually been self-defeating; and that, in short, it is time simply to trim our losses and write off federal regulation of the gas and electric power industries as a bad job from the first.[11]

Yet the authors' conclusions are only as valid as the premises and basic assumptions of neo-classical economic theory on which

---

7 Erickson & Spann, *Joint Costs and Separability in Oil and Gas Exploration*, in ENERGY MODELLING 209 (M. Searl ed. 1973); E. ERICKSON, R. SPANN & R. CILIANO, FOSSIL FUEL DEMAND (1973).

8 SENATE COMM. ON THE JUDICIARY, 86th CONG., 2D SESS., J.M. LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT (Comm. Print 1960).

9 *Id.* at 54.

10 Permian Basin Area Rate Proceeding, 34 F.P.C. 159 (1965), *aff'd sub nom.* Skelly Oil Co. v. FPC, 375 F.2d 6 (10th Cir. 1967), *aff'd sub nom.* Permian Basin Area Rate Cases, 390 U.S. 747 (1968).

11 ". . . [T]he causes of failure lie in the structure of regulation itself. The chapters that follow assess not only FPC performance but also the limits of the regulatory agency as an instrument of social policy" (p. 15).

they are founded. Before we hurriedly decide to cut back or scrap federal regulation it would be useful briefly to develop a perspective in terms of which the biases implicit in the authors' assumptions may be evaluated.

II. The Political Model

Social scientists in the late 1950's were titillated by what was known as the "end of ideology" debate.[12] The feeling was widespread that the onset of apparently permanent material prosperity throughout the Western world, coupled with an apparent waning of Cold War militancy on both sides, signalled the close of an era in which politics had been guided by ideological dispositions. A new epoch of empiricism and pragmatism, it was predicted, would carry the West through the remainder of the twentieth century, thence into the material cornucopia of millennial post-industrial society. One vainly searches recent intellectual history for any other sociological prophecy of such sweep and popularity which also so disastrously and rapidly miscarried. Indeed, one is struck by the extent to which ideology has come to dominate contemporary political dialogue. The emergence of a dedicated apostolate of "eco-theologians" illustrates the power of non-empirical belief systems in the crossplay of contemporary political forces.[13] And the ascendancy of economists within American governmental and business power structures during the past three decades has been accompanied by a heightened fervor in the stridency and dogmatism with which proponents of the free market ideology recite the economists' litany of panaceas.

Against this background of resurgent ideology, the real significance and perhaps the true measure of the contribution of Breyer and MacAvoy's temperate, non-doctrinaire volume becomes apparent. A careful reader, I believe, can reasonably take issue with the conclusions advanced by this work *only* by taking issue with the basic assumptions of the study. In other words, since the authors have so thoroughly settled the empirical case,

12 *See* D. Bell, The End of Ideology (1960).
13 *See* G. Garvey, Energy, Ecology, Economy ch. 8 (1972).

at least within their chosen frame of reference of conventional economic analysis, we are now free to reopen the question of ideology. And by doing so, we might, in answer to Breyer and MacAvoy, suggest with respect to regulation what Franklin Roosevelt once said of capitalism: the problem is not that it never worked, but that it never really has been tried.

Energy regulation in the United States has never been given a fair test because the American belief system has always been so strongly biased, just as Breyer and MacAvoy are, in favor of free market operations. The resulting deprecation of the political process relative to that of arms-length bargaining between putatively free and equal buyers and sellers has had both structural and sociological consequences.

Structurally, the American approach to government has contributed to a cumulation of statutes which err on the side of delegating too little power, or of fragmenting power to perform inherently unitary governmental missions among a variety of competing agencies. On Breyer and MacAvoy's own showing, the FPC has been given arguably inadequate jurisdiction over the electric power industry, as in the area of electric grid system coordination and rationalization (pp. 113-16). In this respect the FPC illustrates the general pattern of American national government.

With respect to the gas industry, the Commission's jurisdiction is much more extensive than in electric power. Indeed, lawyers for natural gas producers have been charging that it is excessive ever since the Supreme Court in 1954 gave the Commission the authority to set ceiling field prices.[14] Nevertheless, the patchwork of jurisdictions which have divided governmental power in the petroleum field among the states and the national government, and then among the Interior Department, the old Office of Emergency Planning, the FPC, and even the Department of Transportation (with respect to pipeline safety), is also consistent with the characteristic pattern of American constitutionalism.[15]

Sociologically, the American tendency to deprecate power in general, and to limit the authority of federal agencies in partic-

14 Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672 (1954).
15 *See generally* G. GARVEY, *supra* note 13, ch. 8.

ular, has made government suspect in terms of the general quality of its personnel. And in their appraisal of FPC personnel as on a par with those of other federal agencies and departments (p. 126), Breyer and MacAvoy are excessively generous. Scandals of recent years in city, state, and federal governments have only heightened anxieties regarding the supposed inherent corruptibility of the governmental process in contrast with the impersonal forces of the free market. In the regulatory field in particular, a longstanding belief that most commissions are quickly captured by the industries which they are supposed to regulate has contributed to concern over the validity of any regulatory process.[16]

Thus a fundamental ideological, as opposed to empirical, suspicion of regulation has conditioned our entire approach to regulation of the energy industry. Let us consider, albeit briefly, how an alternative set of concepts yields a somewhat different account of the facts.

The first in a train of decisions in the producer rate area which ostensibly led to the gas shortage of the mid-1970's was taken in the mid-1960's.[17] The Commission was still dominated by liberal Democrats who acted on occasion as if they subscribed to John F. Kennedy's reputed acceptance of his father's charge that "all businessmen are sons of bitches."[18]

Contrary to the assertion made by Breyer and MacAvoy (p. 73), the decline in gas reserve finds was well known by the FPC and its staff in the 1960's. And the implications which might be drawn from this fact concerning the need for producer incentives were amply clear to all participants in the regulatory proceedings of the time, both in industry and on the Commission staff. But a kind of "conspiracy theory" of a sort that could never be documented in the legal record had gained footing within the Commission. It was believed that the gas industry executives were merely trying to "hold the consumer up" for higher profit margins. Some members of the Commission staff thought that the industry threat of a continued diversion of investment funds from new gas explora-

16 *See* Douglas, *Improvement of Ethical Standards in the Federal Government*, 280 ANNALS, March, 1952, at 149, 154.

17 Southern Louisiana Area Rate Proceeding, 40 F.P.C. 530 (1968), *modified*, 41 F.P.C. 301 (1969), *aff'd*, 428 F.2d 407 (5th Cir. 1969), *cert. denied*, 400 U.S. 950 (1970).

18 *See* A. SCHLESINGER, JR., A THOUSAND DAYS 635 (1965).

tion was simply blackmail. Therefore producers would continue to invest, even at a lower rate of return, if the Commission refused to approve high ceiling rates, provided that some margin of profit remained. In an important sense, those who participated in FPC proceedings with this view acted on the basis of a more sophisticated (or at least a more complex) theory of business behavior than underlies the economic paradigm on which Breyer and MacAvoy rely.

To this day, the belief remains widespread that the petroleum industry has indeed discovered a great deal more natural gas than has been reported.[19] But, subscribers to this "conspiracy theory" allege, those who control such reserves have shut the gas in, and for the most sinister and selfish of reasons. Withholding known and producible gas from consumers strengthens pressures for deregulation, and deregulation will produce a windfall for all holders of petroleum properties. Hence by withholding known gas reserves and even denying their very existence, producers stand to recover significantly more profit than could be gained by marketing the (perhaps) available reserves under current regulated price levels.

Under such an interpretation of the facts, is the conventional market forces analysis of the shortages used by Breyer and MacAvoy correct? The short answer is that we just do not know, nor can we until much better access is gained to essential industry data.

Besides their failure to deal with the woeful inadequacy of public access to information regarding the state of industry reserve inventories, the authors also fail adequately to treat the post-1970 regulatory record. Any account of the mid-1970's gas picture must take account of the curious situation which has existed in federal regulation from 1970 onward as the members of a reconstituted Commission of Nixon appointees have functioned as *agents provocateur* with respect to the regulatory authority that they have themselves been exercising. The majority in these years actually have favored complete deregulation of the natural gas industry,

19 *See* Phillips, *Energy Report: Congress Nears Showdown on Proposal to Decontrol Gas Price*, 6 NAT'L J. REP. 761, 770-71 (1974); Phillips, *Energy Report: Major Industrial Users Threatened by Natural Gas Shortage*, 6 NAT'L J. REP. 1380, 1383 (1974).

or at least of field producers.[20] The inept and obstructionist record of the FPC during the early 1970's therefore seems less to furnish evidence of the defects of regulation than of the Commissioners' own mediocre competence (at best) or their cynicism (at worst).

Nor can we accept as conclusive any call for even the partial dismantling of regulatory authority, whether by politicians or by scholars, until one further dimension of the problem has been more fully considered than is done in *Energy Regulation by the Federal Power Commission.* The authors, although writing from a mastery of discount theory, exhibit a significant lack of appreciation of what Carl Friedrich once called the "Law of Anticipated Reaction."[21]

The Breyer-MacAvoy analysis of the price savings to consumers effected by the Commission's field price regulation sets forth from a criticism of the Commission's own procedure for self-evaluation (p. 17). Typically, the Commission considers the price increases which are requested by companies who participate in the FPC's own adversary proceedings. The final Commission-approved price is compared with the requested price and the difference is then used as a rough measure of the consumer savings resulting from the Commission's work.

There are, to be sure, serious defects in such a technique. On the other hand, the authors' contention that this procedure overstates the benefits to consumers depends entirely on the assumption that the industry petitioners' requested price levels tend to be artificially high (p. 54). The authors make this assumption due to their awareness that regulatory proceedings are actually a rather cumbersome form of bargaining, being "judicial" only in form. As a consequence of the bargaining character of the process, gas industry claimants do press for higher allowable price levels than they really expect the Commission to grant, quite as Breyer and MacAvoy contend. And obversely, Commission staff members are likely to be stiffened in opposition even to reasonable price increases in their initial briefs. Such a strategy reserves some toler-

20 Four of the five members of the FPC now support deregulation, including FPC Chairman John N. Nassekas. Only one, Donald Smith, favors continued regulation. *See* Phillips, *Energy Report: Congress, supra* note 19.

21 C. FRIEDRICH, CONSTITUTIONAL GOVERNMENT AND DEMOCRACY 402 & *passim* (1941).

ance for negotiations and some room for fallback by both sides to a price outcome which would actually have been satisfactory from the first.

But regulation is not merely the sum of a series of discrete bargaining proceedings, in each of which the above negotiating technique is likely to produce an inflation of the price at which the petitioning company enters the adversary process. We might explore just how inadequate is perceiving the regulatory process in this incremental way by considering the functioning of the more familiar judicial system on which the regulatory process is modelled.

One weakness of the adjudicatory process, itself noted by Breyer and MacAvoy (pp. 130-32), is its fragmentation. Because of lawyers' general preference for case-by-case dispositions, the litigative process might appear an inadequate tool for social policymaking. At least it would seem unequal to the task of comprehensive planning in areas where a comprehensive, systematic, and continuous overview is required. Yet the American litigation process is more than a series of cases. It is a constantly looming process of continuing import to individuals in American society. Any one may "go to law" or be called before the bar of justice. Thus although the individual is not actually involved in a case, the institutionalization of the judicial system makes the availability (or the threat) of legal process an element of his worldview. Consequently he restricts his conduct to accord to the anticipated reaction of this institutionalized system.

Just as people anticipate and respond to vaguely apprehended future consequences of their behavior resulting from the existence of the judicial process, so presumably do executives of natural gas corporations respond to the sheer existence of the regulatory process embodied in the FPC. Therefore, while it is not improper for Breyer and MacAvoy to consider the regulatory process as in part a series of individual bargaining confrontations (the approach most direct and rational in the economist's sense), a second component which the authors overlook acts as a counter-weight working in the direction of lower industry price requests.

Thus it seems probable that the existence of the threat of investigation, opposition, or public exposure has served to dampen

the press toward higher rates which would otherwise have resulted from monopoly power. The law of anticipated reaction acts with particular effect in the energy field because these threats are institutionalized in the process of FPC regulation as a permanent element of the political landscape, and hence of every industry leader's lifespace.

In the case of the FPC, moreover, not only does the judicial analogy militate against Breyer and MacAvoy's analysis, but the limiting impact of the existence of the regulatory process is further reinforced by the judicial system itself. Breyer and MacAvoy do not begin to give the reader unfamiliar with Commission operations an adequate sense of the dominance of lawyers in this agency's proceedings. And while the authors note the inconsistency between reliance on the litigative process and the need for comprehensive planning in the energy industry, they do not suggest what may be a more serious direct consequence of the adjudicative nature of the FPC. Not only is the process dominated by lawyers, but the lawyers' behavior is dominated by a single objective: "building a record." FPC lawyers concentrate their energy on developing through the course of an entire proceeding a transcript which will resist reversal if the Hearing Examiner and then the full Commission's holding should be appealed to the courts.

The constant concern with the possibility of a judicial appeal explains the reluctance of the lawyers who so dominate Commission proceedings to adopt any novel modes of analysis such as sophisticated economic or statistical techniques. Anything not protected by prior judicial pronouncements is shied away from. And in this conservatism we again see the law of anticipated reaction. By an extended chain of inferences an individual foresees the possibility of certain potentially threatening outcomes, although outcomes of a contingent and only vague sort, such as the fear that years of work will suffer reversal on eventual appeal. By such expectations actual behavior is maintained within certain rather narrow, often highly predictable patterns.

Conclusion

The dominant intellectual ideology today, of which Breyer and MacAvoy's book is an implicit exemplification, supports im-

personal price setting through the clash of economic forces in the free market. This belief implies a suspicion of the corruptibility of the regulatory process, with "corruptibility" referring not to venal conduct by officials but to a common syndrome likely to beset a regulatory agency because enormously important social and fiscal decisions are being entrusted to the judgment of imperfectly informed, inadequately compensated, and often poorly monitored human beings. The market mechanism avoids all this. "Once prices are abandoned as a measure of value," the authors write in perhaps the tip-off sentence of the entire book, "the number of dormants, citing a variety of economic and social imperatives, becomes impossibly large" (p. 87).[22]

Set against this approach, however, is the more political viewpoint which holds that the very existence of a regulatory process, although preferably one that is adequately funded and more competently staffed than presently is common in the federal bureaucracy, evidences a public commitment to ideals of good government and "public interest" which experience has shown to be inadequately secured over the long run by unrestrained economic activity. It also serves, through the working of the law of anticipated reaction, to set outer limits on the likely antisocial behavior in which industry leaders would, in the absence of regulation, indulge.

My own view lies in the latter direction, in support of continued and expanded federal regulation of energy. Yet I express this view with a renewed sense of responsibility and with heightened respect for the case espoused by Breyer and MacAvoy. More than any other single contribution to the literature, this book will reverse any existing presumption in favor of continued reliance on the regulatory process. Thanks to Breyer and MacAvoy's work the burden of proof now falls on those who support the continuation and extension of federal regulation in the energy field.

---

22 In noting Breyer's and MacAvoy's fear of the possibility of a large number of dormants when a pure free market mechanism is abandoned, would it be unfair to ask at what point the authors believe administrative ease becomes a valid qualification of the principle of distributive justice?