The Burger Court Opinion Writing Database

Byrne v. Karalexis

401 U.S. 216 (1971)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 18, 1970

Re: No. 1149 - Byrne v. Karalexis

Dear Hugo:

I join your Per Curiam in the above.

Regards,

W.E.B.

Mr. Justice Black

cc: The Conference

SUPREME COURT OF THE UNITED STATES

No. —. October Term, 1969

Garrett Byrne, as he is the duly elected District Attorney for Suffolk County, City of Boston, Commonwealth of Massachusetts, Petitioner,
v.
Serafim Karalexis, James Vlanos, Symphony Cinema II, Inc., and Film Distributors, Inc., all of 252 Huntington Avenue, Boston, Massachusetts.

Application for Stay.

[December —, 1969]

Opinion of Mr. Justice Black.

I agree completely with Mr. Justice Douglas that state criminal punishment of these respondents for showing an allegedly "obscene" film is absolutely prohibited by the First and Fourteenth Amendments. That, however, does not for me end the constitutional problems involved. In this case a Federal District Court stepped into the middle of a pending state criminal prosecution, rendered an opinion in effect deciding the fundamental constitutional issue in the state case, and enjoined the initiation of new prosecutions of these defendants or the execution of any sentence imposed on them in the pending state case. One of the fundamental aspects of our federal constitutional system requires that federal courts refrain from interfering in pending state criminal prosecutions except in highly unusual and very limited circumstances. I do not think the facts of this case present an occasion for departure from that general rule. It is for that reason alone that I agree with the Court's decision to stay the injunction issued by the Federal District Court against the State.

SUPREME COURT OF THE UNITED STATES

No. 1149.—October Term, 1969

Garrett H. Byrne et al., Appellants, *v.* Serafim Karalexis et al. } On Appeal From the United States District Court for the District of Massachusetts.

[June —, 1970]

Per Curiam.

This is an appeal from the order of a three-judge court granting a preliminary injunction against any civil or criminal proceedings in state courts against the appellees. The appellant, Byrne, is the district attorney of Suffolk County, Massachusetts. The appellees own and operate a motion picture theatre. As a result of exhibiting the film entitled "I am Curious (Yellow)" at their theatre, appellees were charged by District Attorney Byrne with violating Massachusetts General Laws Chapter 272, § 28A, which prohibits the possession of obscene films for the purpose of exhibition.[1]

After the filing of the original state indictments against them appellees brought the present action in federal

[1] Mass. Gen. Laws c. 272, § 28A, provides:

"Importing, printing, distributing or possessing obscene things.

"Whoever imports, prints, publishes, sells or distributes a pamphlet, ballad, printed paper, phonographic record, or other thing which is obscene, indecent or impure, or an obscene, indecent or impure print, picture, figure, image or description, or buys, procures, receives or has in his possession any such pamphlet, ballad, printed paper, phonographic record, obscene, indecent or impure print, picture, figure, image or other thing, for the purpose of sale, exhibition, loan or circulation, shall be punished . . . ."

December 4, 1969

MEMORANDUM TO THE CONFERENCE

RE: Byrne v. Karalexis

The Clerk is referring the attached application to the Conference at my request.

A three-judge court for the First Circuit proposes to issue a temporary injunction against the application of Massachusetts' obscenity laws to the motion picture "I Am Curious Yellow." The court's majority opinion states that the injunction would issue on December 5. However, I have asked Judge Aldrich to hold the issue of the injunction until Monday, December 8, and he has agreed to do so.

In addition to this case, we have No. 565 - Batchelor v. Stein, on tomorrow's list and Ed Cullinan advises me that a case raising the same question has been filed from Maryland. The question is whether Stanley v. Georgia invalidates a state's obscenity laws, as apparently this three-judge court believes, and as the three-judge court in No. 565 held in striking down the Texas law. I did not join the Stanley opinion, which, you will recall, expressly stated that Roth was not overruled. I think the question is of sufficient importance that it would be preferable to have the full conference act on the attached application.

W. J. B. Jr.

Dear Bill

I would deny the stay and let the appeal be heard in the regular way

Mr Justice Brennan

Wm O Douglas

SUPREME COURT OF THE UNITED STATES

No. —. OCTOBER TERM, 1969

Garrett Byrne, as he is the duly elected District Attorney for Suffolk County, City of Boston, Commonwealth of Massachusetts, Petitioner,

v.

Serafim Karalexis, James Vlanos, Symphony Cinema II, Inc., and Film Distributors, Inc., all of 252 Huntington Avenue, Boston, Massachusetts.

Application for Stay.

[December 9, 1969]

MR. JUSTICE DOUGLAS, dissenting.

Respondents are the owners and operators of a motion picture theatre which has been showing the film, "I Am Curious (Yellow)." On June 3, 1969, they were indicted by the Suffolk County Grand Jury for possessing with intent to exhibit an obscene film in violation of Mass. Gen. Laws, c. 272, § 28A. On June 17, 1969, respondents brought an action in the United States District Court for the District of Massachusetts to enjoin future prosecutions for the showing of "I Am Curious (Yellow)" and to declare that prosecution and the Massachusetts statute unconstitutional. On June 24, 1969, the three-judge District Court enjoined the prosecution on the ground that the indictments did not allege *scienter*. The indictments were then dismissed, and new indictments were thereafter returned. Respondent's request for a temporary injunction barring the second prosecution was denied by the District Court on July 15, 1969. The court stated that it would not consider a claim that the film was not obscene as an evidentiary matter, but invited the parties to submit briefs on the question whether the Massachusetts statute was unconstitutional on its face.

345

To: The Chief Justice
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Fortas
Mr. Justice Marshall

SUPREME COURT OF THE UNITED STATES

From: Douglas, J.

No. —. October Term, 1969

Circulated:

Recirculated: 12/9/69

Garrett Byrne, as he is the duly elected District Attorney for Suffolk County, City of Boston, Commonwealth of Massachusetts, Petitioner,

v.

Serafim Karalexis, James Vlanos, Symphony Cinema II, Inc., and Film Distributors, Inc., all of 252 Huntington Avenue, Boston, Massachusetts.

Application for Stay.

[December 9, 1969]

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To: The Chief Justice
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Fortas
Mr. Justice Marshall

From: Douglas, J.

Circulated: 12/10/69

SUPREME COURT OF THE UNITED STATES

No. —. October Term, 1969

Garrett Byrne, as he is the duly elected District Attorney for Suffolk County, City of Boston, Commonwealth of Massachusetts, Petitioner,

v.

Serafim Karalexis, James Vlanos, Symphony Cinema II, Inc., and Film Distributors, Inc., all of 252 Huntington Avenue, Boston, Massachusetts.

Application for Stay.

[December 9, 1969]

Mr. Justice Douglas, dissenting.

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To: The Chief Justice
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall

SUPREME COURT OF THE UNITED STATES

From: Douglas, J.

No. —. October Term, 1969

Circulated: _____

Recirculated: 12-11

Garrett Byrne, as he is the duly elected District Attorney for Suffolk County, City of Boston, Commonwealth of Massachusetts, Petitioner,

v.

Serafim Karalexis, James Vlanos, Symphony Cinema II, Inc., and Film Distributors, Inc., all of 252 Huntington Avenue, Boston, Massachusetts.

Application for Stay.

[December 9, 1969]

Mr. Justice Douglas, dissenting.

Respondents are the owners and operators of a motion picture theatre which has been showing the film, "I Am Curious (Yellow)." On June 3, 1969, they were indicted by the Suffolk County Grand Jury for possessing with intent to exhibit an obscene film in violation of Mass. Gen. Laws, c. 272, § 28A. On June 17, 1969, respondents brought an action in the United States District Court for the District of Massachusetts to enjoin future prosecutions for the showing of "I Am Curious (Yellow)" and to declare that prosecution and the Massachusetts statute unconstitutional. On June 24, 1969, the three-judge District Court enjoined the prosecution on the ground that the indictments did not allege *scienter*. The indictments were then dismissed, and new indictments were thereafter returned. Respondent's request for a temporary injunction barring the second prosecution was denied by the District Court on July 15, 1969. The court stated that it would not consider a claim that the film was not obscene as an evidentiary matter, but invited the parties to submit briefs on the question whether the Massachusetts statute was unconstitutional on its face.

The Chief Justice
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Fortas
Mr. Justice Marshall

SUPREME COURT OF THE UNITED STATES

No. —. October Term, 1969

Garrett Byrne, as he is the duly elected District Attorney for Suffolk County, City of Boston, Commonwealth of Massachusetts, Petitioner,
v.
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Application for Stay.

Douglas, J.

Circulated: 12/12/69

Recirculated:

[December 9, 1969]

Mr. Justice Douglas, dissenting.

Respondents are the owners and operators of a motion picture theatre which has been showing the film, "I Am Curious (Yellow)." On June 3, 1969, they were indicted by the Suffolk County Grand Jury for possessing with intent to exhibit an obscene film in violation of Mass. Gen. Laws, c. 272, § 28A. On June 17, 1969, respondents brought an action in the United States District Court for the District of Massachusetts to enjoin future prosecutions for the showing of "I Am Curious (Yellow)" and to declare that prosecution and the Massachusetts statute unconstitutional. On June 24, 1969, the three-judge District Court enjoined the prosecution on the ground that the indictments did not allege *scienter*. The indictments were then dismissed, and new indictments were thereafter returned. Respondent's request for a temporary injunction barring the second prosecution was denied by the District Court on July 15, 1969. The court stated that it would not consider a claim that the film was not obscene as an evidentiary matter, but invited the parties to submit briefs on the question whether the Massachusetts statute was unconstitutional on its face.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

June eighth
1970

Dear Hugo:

In No. 1149 - Byrne v. Karalexis, in which I believe you are preparing a per curiam for remand in light of the so-called Dombrowski cases, would you kindly note that I took no part in the consideration or decision of the case.

WOD

William O. Douglas

Mr. Justice Black

June 10, 1970

Re: No. 1149 - Byrne v. Karalexis

Dear Hugo:

I agree with your *per curiam*.

Sincerely,

J.M.H.

Mr. Justice Black

CC: The Conference

December 4, 1969

MEMORANDUM TO THE CONFERENCE

RE: Byrne v. Karalexis

The Clerk is referring the attached application to the Conference at my request.

A three-judge court for the First Circuit proposes to issue a temporary injunction against the application of Massachusetts' obscenity laws to the motion picture "I Am Curious Yellow." The court's majority opinion states that the injunction would issue on December 5. However, I have asked Judge Aldrich to hold the issue of the injunction until Monday, December 8, and he has agreed to do so.

In addition to this case, we have No. 565 - Batchelor v. Stein, on tomorrow's list and Ed Cullinan advises me that a case raising the same question has been filed from Maryland. The question is whether Stanley v. Georgia invalidates a state's obscenity laws, as apparently this three-judge court believes, and as the three-judge court in No. 565 held in striking down the Texas law. I did not join the Stanley opinion, which, you will recall, expressly stated that Roth was not overruled. I think the question is of sufficient importance that it would be preferable to have the full conference act on the attached application.

W. J. B. Jr.

No 347 Cert

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 8, 1969

MEMORANDUM TO THE CONFERENCE

Attached is the copy of the injunction and stay thereof, pending our action, entered by the three-judge Massachusetts District Court and to be the subject of our conference following Court today.

W. J. B. Jr.

May 12, 1970

MEMORANDUM TO THE CONFERENCE

69-1149
RE: Byrne v. P.B.I.C., Inc.

I am referring to the Conference the application for the stay in the above concerning the injunction issued by a divided three-judge court against the prosecution of the exhibitors of the play "Hair" for violating either the Massachusetts Lewdness statute or the Common Law of indecent exposure. The three-judge court stayed the injunction for one week to give the Massachusetts authorities the opportunity to apply to me for a stay. The application was filed this morning. As you will recall, I'll be at the First Circuit Conference on Thursday.

My own view is that I would allow the stay to expire and the injunction to become effective. I do not see this case as coming within Hugo's opinions in Younger or Mackell. Here the only pending state proceeding is a civil action which, although not formally terminated, has been for all practical purposes completed. As footnote 16 of Judge Coffin's opinion points out, a final order has not been entered but the Massachusetts Supreme Judicial Court has held in an opinion already filed (copy with the papers) that "injunctive relief will be given but . . . conditioned upon excision forthwith of" specified features of the play. Since the state proceeding is actually completed, and because of the patent overbreadth of both the statute and the Common Law principle, and their obvious deterrent effect upon the exercise of First Amendment rights, I think that Dombrowski plainly supports the action of the three-judge court.

If the Conference should reach a different conclusion I should like my dissent noted on the public record.

W.J.B. Jr.

P.S. I have arranged with Judge Aldrich to continue the stay of the injunction through Friday and told him that we would have the Clerk inform him Friday of the action of the Conference.

70-83

Mr. Justice Black
Mr. Justice Douglas
✓Mr. Justice Harlan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

1

SUPREME COURT OF THE UNITED STATES

Mr. Justice Brennan, J.

No. 1149.—October Term, 1969

Circulated: 6-15-70

Recirculated: _____

Garrett H. Byrne et al., Appellants, *v.* Serafim Karalexis et al. } On Appeal From the United States District Court for the District of Massachusetts.

[June —, 1970]

Mr. Justice Brennan.

The injunction appealed from issued December 6, 1969, after appellees' convictions in state court on November 12, 1969, of exhibiting an obscene film in violation of state law. In the absence of any showing of bad faith or harassment, appellees were therefore obliged to pursue their constitutional defenses on appeal from the convictions to the state appellate court, and the Federal District Court erred in enjoining appellant from interfering with future showings of the film. To be sure, *Freedman* v. *Maryland,* 380 U. S. 51, 60 (1965), forbade such interference until after appellees were afforded a "prompt judicial determination" of the question of the film's alleged obscenity. See also *Lee Art Theater* v. *Virginia,* 392 U. S. 636 (1968). But there was no interference from July through November; appellant honored a stipulation made July 15 in federal court not to seize the film or interfere with its exhibition pending the outcome of the trial. Appellant withdrew from the stipulation and threatened to move against further exhibition of the film only after the convictions were obtained. Clearly, he was not required to continue to stay his hand pending the outcome of appeals from the convictions; *Freedman* was satisfied by a "prompt judicial decision *by the trial court,*" *Teitel Film Corp.* v. *Cusack,* 390 U. S. 139, 142 (1968). (Emphasis supplied.) Rather than remand I would therefore reverse the judgment of the District Court for the reasons stated in my opinion in Nos. 4, 11, and 20.

Circulated
6-18-70

SUPREME COURT OF THE UNITED STATES

No. 1149.—October Term, 1969

Garrett H. Byrne et al., Appellants, v. Serafim Karalexis et al. } On Appeal From the United States District Court for the District of Massachusetts.

[June —, 1970]

Mr. Justice Brennan, with whom Mr. Justice White and Mr. Justice Marshall join.

The injunction appealed from issued December 6, 1969, after appellees' convictions in state court on November 12, 1969, of exhibiting an obscene film in violation of state law. In the absence of any showing of bad faith or harassment, appellees were therefore obliged to pursue their constitutional defenses on appeal from the convictions to the state appellate court, and the Federal District Court erred in enjoining appellant from interfering with future showings of the film. To be sure, *Freedman* v. *Maryland*, 380 U. S. 51, 60 (1965), forbade such interference until after appellees were afforded a "prompt judicial determination" of the question of the film's alleged obscenity. See also *Lee Art Theater* v. *Virginia*, 392 U. S. 636 (1968). But there was no interference from July through November; appellant honored a stipulation made July 15 in federal court not to seize the film or interfere with its exhibition pending the outcome of the trial. Appellant withdrew from the stipulation and threatened to move against further exhibition of the film only after the convictions were obtained. Clearly, he was not required to continue to stay his hand pending the outcome of appeals from the convictions; *Freedman* was satisfied by a "prompt judicial decision *by the trial court*," *Teitel Film Corp.* v. *Cusack*, 390 U. S. 139, 142 (1968). (Emphasis supplied.) Rather than remand I would therefore reverse the judgment of the District Court for the reasons stated in my opinion in Nos. 4, 11, and 20.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

July 10, 1970

In re: direct appeals

Dear Chief,

Congress has authorized direct appeals to this Court from the District Courts under six statutes:

(1) Under 28 U. S. C. 1252, the Government, when a party to a civil action, may appeal a single judge's declaration that a federal statute is unconstitutional.

(2) Under 18 U. S. C. 3731, the Criminal Appeals Act, the Government may appeal a single judge's dismissal of an indictment rested on one of certain specified grounds.

(3) Under 15 U. S. C. 28 and 29, the Expediting Act, appeals may be taken from single or three-judge court decisions in civil actions brought by the Government to enforce

(a) the Antitrust Acts, 15 U. S. C. 28-29;

(b) the Interstate Commerce Act, 49 U. S. C. 44-45;

(c) Title II (the carrier provisions) of the Federal Communications Act, 47 U. S. C. 401(d).

(4) Under 28 U. S. C. 1253, appeals may be taken from three-judge court determinations in

(a) civil actions to restrain the enforcement of allegedly unconstitutional state laws, 28 U. S. C. 2281;

(b) civil actions to restrain the enforcement of allegedly unconstitutional federal laws, 28 U. S. C. 2282;

(c) civil actions to restrain the enforcement of allegedly erroneous orders of the Interstate Commerce Commission, 28 U. S. C. 2325.

(5) Under 42 U. S. C. 1971, the Civil Rights Act of 1964, appeals may be taken from single or three-judge court decisions in civil actions brought by the Government to enforce

(a) provisions against voting discrimination, 42 U. S. C. 1971(g);

(b) provisions against discrimination in public accommodations, 42 U. S. C. 2000a-5(b);

(c) provisions against discrimination in employment, 42 U. S. C. 2000e-6(b).

(6) Under 42 U. S. C. 1973, the Voting Rights Act of 1966, appeals may be taken from three-judge court decisions in

(a) declaratory judgment actions brought by states to sustain changes in voting qualifications or procedures, 42 U. S. C. 1973c;

(b) declaratory judgment actions brought by states to sustain voter eligibility tests, 42 U. S. C. 1973b(a);

(c) actions brought by the Attorney-General to void state poll tax requirements, 42 U. S. C. 1973h(c).

A docket that has crossed the 4000 mark necessarily arouses concern that the Court may soon be overburdened. This is reason enough for Congress to reexamine the necessity for direct appeals. Apart from this important consideration, however, the policy considerations which justified direct appeals no longer obtain or, in any event, are outweighed by the policy considerations against overburdening the Court. Provisions for direct review in this Court were thought necessary (a) to assure a prompt ultimate decision; (b) to assure review by this Court; (c) to foster the ends of comity between the national and state governments, or among the departments of the national government; (d) to avoid the supposedly unseemly situation of having a panel of three judges of the District Court reviewed by a panel of three judges of a Court of Appeals. Whatever their merits when they influenced the adoption of the direct appeal statutes, none of these reasons seems compelling today, particularly since other alternatives can accomplish the same ends with equal or greater effectiveness.

1. Prompt decision

Expedition has no necessary link with direct appeal. Congress has recognized this in choosing other devices to attain that end. See, e.g., 42 U. S. C. 2000e-6: "It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited." Similar provisions

directed to the Courts of Appeals and to certiorari procedures would further the desired goal. The time required for ultimate disposition would be no greater (particularly if certiorari were denied) than is now required to give plenary review on a direct appeal. Moreover, in special cases, on proper representation, the Court can exercise the authority granted by 28 U. S. C. 1254(1) to bypass the court of appeals. That section provides that "Cases in the Court of Appeals may be reviewed by the Supreme Court . . . (1) By writ of certiorari granted . . . before or after rendition of judgment or decree."

2. Assurance of review by this Court

Congress' assumption in providing for direct review is that the issues involved are always of great and general importance. Legislatively-mandated review, however, almost always suffers from inflexibility on at least three scores: First, times change, and with them the issues that are of pressing importance. Antitrust, ICC and Federal Communications Act cases were of great public importance and controversy in the early 1900's. In each instance, though the battle has long since been won, the provisions for direct appeal linger on. Legislation, once adopted, has a momentum of its own, unrelated to the policies that it was enacted to serve. Second, the context in which the issues are presented in particular cases often downgrades their importance to the point of rendering the issues wholly frivolous. Third, even when the issues are important, they often are less important than a number of other issues competing for the Court's limited time. Actually, the authorization of direct review reflects

upon the competency of the Court to separate the wheat from the chaff and is thus inconsistent with the basic premise of our certiorari jurisdiction. It has been aptly noted that "[i]f the ranking Court can be trusted to decide cases -- to establish the supreme law of the land, it can surely be trusted to determine what cases it should decide." Moore & Vestal, Present and Potential Role of Certification in Federal Appellate Procedure, 35 Va. L. Rev. 1, 45 (1949).

Perhaps, however, direct appeal may be nothing more than the residue of a bygone era in the Court's history. Many of the direct review statutes were adopted before the Courts of Appeals had developed their own traditions and before this Court was given broad discretion to decide what cases would be reviewed. In "Direct Appeals in Antitrust Cases," 81 Harv. L. Rev. 1558, 1560-61 (1968), for example, it is said, "The Expediting Act [of 1903] merely added another equally important category of litigation to the six classes of cases which still were appealed directly even after the creation of the courts of appeals. Moreover, there generally was an appeal of right to the Supreme Court after an intermediate appeal . . . . Thus, direct appeal as a remedy for lower court misapplication of national antitrust policy was not particularly drastic. Important cases of all sorts were not finally concluded until the Court had had a chance to pass on them. The Expediting Act only hastened a prevailing process and did not force the Court to hear cases it otherwise could have avoided. Few objected to this bypassing at the time, because both the necessity for the

courts of appeals and their judicial competence were doubted when the Act was passed. Established only twelve years before as an intermediate stage of federal appellate review, the courts of appeals had yet to prove their presently recognized utility." Therefore, Congress ought appreciate that with the expansion of this Court's certiorari jurisdiction -- a development necessitated by the increasing press of judicial business -- and with the emergence of the courts of appeals as prestigious and reliable decision-makers, direct appeals may be safely dispensed with.

3. Comity

On this score, I concede the strength of the argument that the authority should be retained for the narrowly limited class of cases in which federal courts enjoin the enforcement of state statutes. When federal courts intervene directly in the affairs of states they must be unusually sensitive to the demands of federalism, both out of deference for the states' role in our body politic and out of concern that the courts' orders not be ignored. Thus, the manner of the intervention becomes important. It should be designed to avoid unnecessary insult and to lessen the disruption that results both from erroneous lower court decisions and from the uncertainty inherent in any yet unreviewed decision. Direct appeal from the trial court to the Supreme Court is one method of realizing these objectives. The need for it is particularly great when injunctions against enforcement of state laws are involved. Then issues of national supremacy, as well as of judicial review, are presented. When federal law is enjoined,

on the other hand, federalism is not a concern since the controversy centers around the question of judicial review alone.

Prof. David Currie in his article, "The Three-Judge District Court in Constitutional Litigation," 32 U. Chi. L. Rev. 1, 75 (1964), observed that "whatever need there was for a direct appeal to avoid abuse of the injunction in 1910 and 1937 seems still to exist. Race-relations and reapportionment cases, in particular, have caused a good deal of friction between the states and the courts. Without the appeal, the three-judge statute provides some protection; three judges are less likely than one to block a legislative program erroneously. But they may, and the most effective way to correct such a mistake quickly is direct review. Speed, rather than the safeguard of three judges, was emphasized in arguments for the Expediting Act of 1903, which the state-law section copied and for the 1937 bill extending the procedure to suits against federal laws."

Currie overstates the case if his statement that "whatever need there was for a direct appeal to avoid abuse of the injunction in 1910 and 1937 seems still to exist" is meant to apply beyond the case where an injunction issues against enforcement of a state law. As noted in ALI's "Division of Jurisdiction between State and Federal Courts," Tentative Draft No. 6 (April 30, 1968), "Fed. Rule Civ. Proc. 65, and its predecessors in the Equity Rules of 1912, have created safeguards against the improvident issuance of interlocutory injunctions. The Johnson Act, 28

U. S. C. § 1342, and the Tax Injunction Act, 28 U. S. C. § 1341, have taken from any federal court, whether composed of one judge or three, the power to enjoin state rate orders and tax collections -- the areas which were most significant in 1910 -- so long as a plain, speedy, and efficient remedy is available in the courts of the state . . . . Supreme Court decisions have removed the due process objection to state economic regulation that was the basis for most of the injunctions complained of in 1910. The image of the federal courts as a barrier against liberal state legislation has long since disappeared." Too, federal courts no longer engage in the wholesale voiding of a wide range of state statutes, as was the case in the early 1900's. Thus, it seems that the 1910 and 1937 measures were responsive to conditions which have largely disappeared since their enactment.

Thus, comity as a reason for direct review makes a case only for those cases in which an injunction against the enforcement of a law is ~~actually granted. If the injunction isn't granted, the state has no sub-~~ stantial reason for demanding a direct hearing in this Court -- neither governmental ego nor governmental activities will have been significantly impaired. I would therefore not allow direct appeal from declaratory judgments, whatever may be said about this force as injunctions, simply because that would extend the scope of direct review at a time when everything politically feasible should be done to narrow it. Moreover, I would limit the direct appeal to the enjoining of state law alone. Only in that

context are both strains of comity present: those concerned with federalism, as well as those dealing with relations among different branches of government. Further, it is in the state context that the bulk of injunctions are granted. Federal law is rarely enjoined, and when it is, the conflict is one wholly within the federal family. Moreover, a case in which a district court voids a federal law is likely to be a prime candidate for by-passing the court of appeals under § 1254(1).

Finally, an argument against even the exception I favor should at least be mentioned. Presumably the blow to state ego and interests is just as great when a state law is challenged and set aside solely because it conflicts with a congressional statute (as opposed to a provision of the Constitution), and yet injunctions on this ground don't give rise to a direct appeal under existing law. Similarly, presumably federal ego and interests are disturbed by the voiding of federal administrative orders, yet only the voiding of state administrative orders gives rise to a direct appeal under existing law. Thus it may be questioned whether the states or the federal government really regard direct appeal as essential to their comity concerns.

4. Avoidance of review by a court of appeals of a three-judge district court decision

I think this objective borders on the frivolous, though 28 U. S. C. 1253 suggests that Congress may have found it persuasive. In the first place, review is in a court of appeals whenever a three-judge court has

been formed erroneously and this Court therefore has no jurisdiction to review its decision. In the second place, there is no functional difficulty involved -- the roles of the two three-judge courts are wholly different: that of the District Court is intended to oversee the making of the record and to rule on every issue presented; that of the Court of Appeals, on the other hand, is concerned primarily with questions of law, with refining the record and narrowing the issues. One is a trial court and the other is an intermediate appellate court, both with important but clearly distinct jobs to do. The fact that each has three judges is immaterial. Thus, it seems to me the only real objection to court of appeals review of a three-judge district court is that such tends to undercut the prestige of the latter, primarily since the two courts are of roughly equal status. To a degree, that's no doubt true. But it's by no means a weighty enough reason to justify direct appeal to this Court.

It is very important, I think, to make a distinction between the provision of a three-judge court and the provision of direct review. The two are not inextricably related. Direct review can be had from a single-judge court, and, by the same token, it need not occur simply because three judges constituted the trial court. Each should be viewed on its own merits, without an automatic assumption that along with three judges comes direct appeal.

Three-judge district courts, indeed, are a more important comity device than direct appeal. As such, I believe there may be need for a

court of three judges without the need for a direct appeal to this Court from its decision. There is substantial merit in the observation of the ALI Draft, supra, at 242, that "[t]he three-judge court allows 'a more authoritative determination and less opportunity for individual predilection in sensitive and politically emotional areas.' Swift & Co. v. Wickham, 382 U.S. 111, 119 (1965). The moral authority of a federal court order is likely to be maximized if the result cannot be laid to the prejudices or political ambitions of a single district judge . . . . In matters of such great public moment [of course, a recurring problem is that the matters at issue are all too frequently not of such great moment], the burden on the federal judicial system that a three-judge court creates is outweighed by the beneficial effect it has on federal-state relations." Prof. Currie states that "the three-judge court provisions . . . are the products of battles between competing political forces over four persistent and significant issues: judicial review, national supremacy, sovereign immunity, and the use of the injunction." 32 U. Chi. L. Rev., at 3. He argues that "there is no means of reviewing state laws which is better calculated to give offense to the states than to entrust the job to 'one little federal judge' armed with the injunction," and says that "[t]hree judges lend the dignity required to make [the voiding of a state statute as unconstitutional] palatable. The very cumbersomeness and extraordinary nature of the procedure show that the federal courts recognize that important and delicate interests are at stake. More importantly, the presence of three

judges also ensures greater deliberation with less chance of error or bias." Id., at 7. He concludes that the "three-judge procedure is a rather effective means of ameliorating the inevitable frictions and reducing the opportunities for abuse." Id., at 12. All true, perhaps, but none of it requires that the decision of a three-judge court be appealed as of right directly to this Court. Provision of the three-judge court alone, it seems to me, could meet the legitimate interests of comity.

So much for the arguments made in support of direct review. I now suggest that direct review has the following affirmative disadvantages.

1. It deprives the Court of control over a part of its docket. This, in turn, (a) unduly burdens the Court, as it seeks to deal with a burgeoning case load, and (b) misallocates judicial time, as it forces the Court to treat in detail some cases that it would otherwise ignore, either because they are too insignificant to merit review here or because, though significant, they are less significant than other cases competing for the Court's time.

2. It deprives the Court of the assistance of the Courts of Appeals. Except where a factual review is necessary to a constitutional decision, this Court does not accord litigants a factual review. That is the function of the Courts of Appeals and they have a wealth of experience in the discharge of that function which our Court does not have. We should not be asked to perform this Court of Appeals' function; it may even be that when we do the result is less informed and judicious review. See Justice

Harlan's statement in Brown Shoe Co., Inc. v. United States, 370 U. S. 294, 364-65 (1962), that "I venture to predict that a critical reappraisal of the problem would lead to the conclusion that 'expedition' and also, overall, more satisfactory appellate review would be achieved in these cases [antitrust] were primary appellate jurisdiction returned to the Court of Appeals, leaving this Court free to exercise its certiorari power with respect to particular cases deemed deserving of further review. As things now stand this Court must deal with all government civil antitrust cases, often either at the unnecessary expenditure of its own time or at the risk of inadequate appellate review if a summary disposition of the appeal is made."

Thus, given my choice, I would end all direct appeals except in the injunction-of-state-law sphere. If such appeals must remain in other contexts, I would hope that Congress would provide that (1) direct appeal is waived unless specially requested after trial and accompanied by certification of the trial court or the Attorney General that the issue in the case is of great and general importance; (2) this Court has discretion to accept or decline such appeals upon their proffer.

I attach a brief analysis of each of the direct appeal statutes (the sequence is that of the opening pages of this letter), and also copies of several pending bills proposing amendments of the Expediting Act, and of a bill proposing amendment of the Criminal Appeals Act.

Sincerely,

The Chief Justice

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 10, 1970

No. 1149, Byrne v. Karalexis

Dear Hugo,

I am glad to join the Per Curiam you have prepared in this case.

Sincerely yours,

P.S.

Mr. Justice Black

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 18, 1970

Re: No. 1149 - Byrne v. Karalexis

Dear Bill:

Please join me.

Sincerely,

T.M.

Mr. Justice Brennan

cc: The Conference