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Constitutional Law-Freedom of Speech and Press-Municipal Ordinances Restricting Distribution of Printed Matter

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Constitutional Law—Freedom of Speech and Press—Municipal Ordinances Restricting Distribution of Printed Matter.—Ordinances were passed in three cities prohibiting the distribution of handbills and other similar printed matter in the streets. A fourth city prohibited canvassing, soliciting, and the distribution of circulars from house to house without first having secured a permit from the Chief of Police, in whose discretion such permit was to be issued. In each of the first three cities, petitioners were convicted of distributing handbills and leaflets to pedestrians on the street, and in the fourth, petitioner was convicted of canvassing and soliciting money contributions without a permit. Held, convictions reversed, for all these ordinances are void, as applied to petitioners' conduct, as being in violation of the Fourteenth

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[15] Smith v. Bell (1832), 6 Pet. U. S. 68; Blatt v. Blatt (1926), 79 Colo. 57, 243 Pac. 1099, 57 A. L. R. 221 where it is said, "All the authorities that speak on the subject declare that the laws of the state where the testator lived at the time he made his will will not, in the courts of another state, where the will is probated, be controlling or conclusive or be followed in so far as it concerns the intention of the testator or as bearing on the effect and operation of the will, if it is contrary to the public policy or the statutes of the state where the will is probated." Thompson, Construction of Wills (1928), § 48 and cases cited.

[16] Burns Ind. Stat. Ann. (1933), § 7-417, "Foreign wills—Filing and recording in Indiana—Effect.—Such will . . . shall have the same effect as if it had been originally admitted to probate and recorded in this state."; § 7-709, lapsed legacy statute.

[17] Lemmon v. Peo. (1860), 20 N. Y. 562, quoted from in footnote 10, *supra*; Holcomb v. Wright (1894), 5 App. (D. C.) 76; Clarke's Appeal (1898), 70 Conn. 195, 483, 39 Atl. 155; Story on Conflict of Law (8th ed., 1883), 447.

[18] *Cf.* Clarke's Appeal, 70 Conn. 195, 483, 39 Atl. 155.

Amendment of the United States Constitution. *Schneider v. State of New Jersey* (1939), 60 S. Ct. 146, 84 L. Ed. 115.

The Federal Constitution[1] and all of the state constitutions contain provisions against abridging the freedom of speech or of the press.[2] The Supreme Court has extended the scope of the Fourteenth Amendment[3] to include federal protection of freedom of speech or press as guaranteed in the First Amendment against impairment by the states.[4] Since the police powers of the State may be delegated to municipal corporations created by the State, to be exercised for the health, safety, morals, and welfare of the public,[5] it is clear that such powers are in turn limited by the constitutional restrictions against the abridgment of freedom of speech and press.

This guarantee of freedom of speech and press is not absolute.[6] Certain regulations are valid under the police power, but the exercise of such power is prohibited when its resulting regulations violate constitutional rights, though it is apparently being used for the public interest. The problem of the courts would seem to be to define a compromise between the exercise of individual rights and liberties and the use of the police power of the State. The test should be one of reasonableness.[7] But to solve the problem through the test of reasonableness necessarily involves the definition by the court of the term "freedom of speech and press" as used in the First Amendment and the term "police power" as it may be exercised by the states. There are almost as many definitions and interpretations of these terms as there are cases considering them. A reasonable compromise between the two can be little more than a guess to be ultimately passed upon by the Supreme Court.

The provisions of the federal constitution and of the state constitutions which guarantee the freedom of speech and of the press do not create those rights, but protect existing rights from abridgment or interference.[8] The First Amendment was intended to preclude the federal government, and the

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1 U. S. Const. Amend. I: "Congress shall make no law . . . abridging the freedom of speech or of the press; . . ."

2 WILLIS, CONSTITUTIONAL LAW (1936), p. 488.

3 U. S. Const. Amendment XIV: ". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . ."

4 Gitlow v. New York (1925), 268 U. S. 652, 45 S. Ct. 625, 69 L. Ed. 1138; Whitney v. California (1927), 274 U. S. 357, 47 S. Ct. 641, 71 L. Ed. 1095; Stromberg v. California (1931), 283 U. S. 359, 51 S. Ct. 532, 75 L. Ed. 1117; Near v. Minnesota (1931), 283 U. S. 697, 51 S. Ct. 625, 75 L. Ed. 1357; Grosjean v. American Press Co. (1936), 297 U. S. 233, 56 S. Ct. 444, 80 L. Ed. 660, 56; Hague v. C. I. O. (1939), 307 U. S. 496, 59 S. Ct. 954, 83 L. Ed. 1423.

Note that as late as 1922, the Supreme Court held that ". . . neither the Fourteenth Amendment nor any other provision of the constitution of the United States imposes upon the States any restrictions about 'freedom of speech' or the 'liberty of silence' . . ." Prudential Insurance Co. of America v. Cheek, 259 U. S. 530, 42 S. Ct. 516, 66 L. Ed. 1044. The question had been specifically left undecided in Patterson v. Colorado (1907), 205 U. S. 454, 27 S. Ct. 556, 51 L. ed. 879.

5 COOLEY, CONSTITUTIONAL LIMITATIONS (8th ed. 1927), p. 390.

6 Gitlow v. New York (1925), 268 U. S. 652, 666-668, 45 S. Ct. 625, 69 L. ed. 1138; Whitney v. California (1927), 274 U. S. 357, 371, 47 S. Ct. 641, 71 L. Ed. 1095 Stromberg v. California (1931), 283 U. S. 359, 51 S. Ct. 532, 75 L. Ed. 1117.

7 WILLIS, *Freedom of Speech and of the Press* (1929), 4 Ind. L. J. 445, 454.

8 COOLEY, CONSTITUTIONAL LIMITATIONS (8th ed. 1927), p. 880.

Fourteenth Amendment the state governments, from adopting any form of previous restraint[9] upon printed publications[10] or their circulation[11] (except a few minor historical exceptions). They were not intended to prevent the subsequent punishment of such as might be deemed contrary to the public welfare.[12] Abuse of the freedom guaranteed is subject to punishment under the police power. The exercise of such power, for example, may be used to punish utterances inimical to the public welfare, or those tending to corrupt public morals, inciting crime, disturbing the public peace, or endangering the foundations of organized government and threatening its overthrow by unlawful means.[13]

Ordinances regulating or prohibiting the distribution of handbills and similar printed matter were held by the great weight of authority to constitute a valid exercise of the police power where distribution was by such means as would ordinarily result in the littering of the streets.[14] Most of the courts held that such a littering of the streets constituted a fire and sanitation hazard, a danger

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9 See VANCE, *Freedom of Speech and of the Press* (1918), 2 Minn. L. Rev. 239, 242 in which it is said: "It would seem more reasonable, and far more practicable, to say that the constitutional provision in question prohibits any other previous restraints than those recognized and accepted at the time the constitution was adopted, thus leaving the courts free to exercise their equity powers in accordance with settled principles of justice."

10 Grosjean v. American Press Co. (1936), 297 U. S. 244, 56 S. Ct. 444, 80 L. Ed. 660; Near v. Minnesota (1931), 283 U. S. 697, 51 S. Ct. 625, 75 L. Ed. 1357; Patterson v. Colorado (1907), 205 U. S. 454, 27 S. Ct. 556, 51 L. Ed. 879.

But see WALSH, *Is the New Judicial and Legislative Interpretation of Freedom of Speech and of Freedom of the Press Sound Constitutional Development?* (1932-33), 21 GEORGETOWN L. J. 35, 161, pages 188 to 190, and COOLEY, CONSTITUTIONAL LAW (4th ed. 1931), p. 346.

11 "Liberty of circulation is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value." Ex parte Jackson (1877), 96 U. S. 727, 733, 24 L. ed. 877. See also, Lovell v. Griffin (1938), 303 U. S. 444, 58 S. Ct. 666, 82 L. ed. 949; Buxbom v. City of Riverside (1939), 29 F. Supp. 3.

12 Patterson v. Colorado (1907), 205 U. S. 454, 27 S. Ct. 556, 51 L. Ed. 879.

13 Gitlow v. New York (1925), 268 U. S. 652, 45 S. Ct. 625, 69 L. Ed. 1138; Whitney v. California (1927), 274 U. S. 357, 47 S. Ct. 641, 71 L. Ed. 1095; Stromberg v. California (1931), 283 U. S. 359, 51 S. Ct. 532, 75 L. Ed. 1117.

14 The cases on this subject may be classified as follows:

A. Ordinances Prohibiting any Distribution In Public Places—Upheld:—Anderson v. State (1903), 69 Neb. 686, 96 N. W. 149; People v. Horwitz (1912), 140 N. Y. S. 437; Milwaukee v. Kassen (1931), 203 Wis. 383, 234 N. W. 352. Contra: People v. Armstrong (1889), 73 Mich. 288, 41 N. W. 275; Chicago v. Schultz (1930), 341 Ill. 208, 173 N. E. 276; Re Thornburg (1937), 55 Ohio App. 229, 9 N. E. (2d) 516 (ordinance applied only to congested districts); Lovell v. Griffin (1938), 303 U. S. 444, 58 S. Ct. 666, 82 L. Ed. 949. See also, People v. Johnson (1921), 117 Misc. Rep. 133, 191 N. Y. S 750; People v. Banks (1938), 168 Misc. Rep. 515, 6 N. Y. S. (2d) 41.

B. Ordinances Directed to Manner of Circulation—Upheld:—City of Philadelphia v. Brabender (1902), 201 Pa. 574, 51 Atl. 374; Internat'l Textbook Co. v. Dist. of Col. (1910), 35 App. D. C. 307; Coughlin v. Sullivan (1924), 100 N. J. L. 42, 126 A. 177 (dictum); People v. St. John (1930), 108 Cal App. 779, 288 Pac. 53; Sieroty v. City of Huntington Park (1931), 111 Cal. App. 377, 295 Pac. 564; Allen v. McGovern (1933), 12 N. J. Misc. 12, 169 Atl. 345; San Francisco Shopping News v. City of San Francisco (C. C. A. 9th 1934), 69 F. (2d) 879; Buxbom v. City of Riverside (1939), 29 F. Supp. 3. See also, Wettengel v. City of Denver (1895), 20 Colo. 552, 39 Pac. 343. Contra: Chicago v. Schultz (1930), 341 Ill. 208, 173 N. E. 276; Ex parte Pierce (1934),

to horses, or as generally increasing the uncleanliness and unsightliness of the municipality.[15] The Los Angeles, Milwaukee, and Worcester ordinances considered by the Supreme Court in the principal case were upheld by the respective state courts[16] upon the theory that the distribution encouraged or resulted in such littering of the streets as the police power gave authority to prevent. The present holding seems to practically abolish such grounds, at least for totally prohibiting or restricting the right of distribution, yet the decision is apparently applicable only: (1) where the manner of distribution is by handing the printed matter to one willing to receive it,[17] and (2) where the contents of the handbills or leaflets deal with some economic, political, social or religious question, upon which information or opinion is being disseminated. Although the ordinances considered in the principal case did prohibit other means of distribution as well as commercial solicitation and canvassing and the distribution of purely advertising matter, the Court made no inference that such regulation is not a reasonable exercise of the police power.[19] The Court holds as an abridgment of the constitutional liberty only the prohibition of such activity as bears a "necessary relationship to the freedom to speak, write, print or distribute information or opinion."

The Court thus admits that the exercise of the police power to qualify the freedom of speech and press is proper where reasonable, and holds that

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127 Tex. Crim. Rep. 35, 75 S. W. (2d) 264; Ex parte Johns (1935), 129 Tex. Crim. Rep. 487, 88 S. W. (2d) 709.

C. Ordinances Prohibiting Circulation of Certain Types of Publications (e. g. advertising matter)—Upheld:—Wettengel v. City of Denver (1895), 20 Colo. 552, 39 Pac. 343; People v. Johnson (1921), 117 Misc. Rep. 133, 191 N. Y. S. 750; San Francisco Shopping News v. City of San Francisco (C. C. A. 9th, 1934), 69 F. (2d) 879; Goldblatt Bros. Corp. v. City of E. Chicago (1937), 211 Ind. 621, 6 N. E. (2d) 331; Commonwealth v. Kimball (Mass. 1938), 13 N. E. (2d) 18, 114 A. L. R. 1440.

D. Ordinances Requiring Permit to Distribute Handbills and Circulars—Upheld:—Almassi v. Newark (1930), 8 N. J. Misc. 420, 150 A. 217; Dziatkiewicz v. Maplewood Twp. (1935), 115 N. J. L. 37, 178 A. 205; Commonwealth v. Kimball (Mass. 1938), 13 N. E. (2d) 18, 114 A. L. R. 1440 See dictum in People v. Banks (1938), 168 Misc. Rep. 515, 6 N. Y. S. (2d) 41. Contra: Lovell v. Griffin (1938), 303 U. S. 444, 58 S. Ct. 666, 82 L. ed. 949; Borough of Edgewater v. Cox (New Jersey 1939), 8 A. (2d) 375.

[15] See Anderson v. State (1903), 69 Nebr. 686, 96 N. W. 149.

[16] People v. Young (Cal. App. Supp. 1938), 85 Pac. (2d) 231; City of Milwaukee v. Snyder (1939), 230 Wis. 131, 283 N. W. 301; Commonwealth v. Nichols (Mass. 1938), 18 N. E. (2d) 166.

[17] "We are of the opinion that the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it. Any burden imposed upon the city authorities in cleaning and caring for the streets as an indirect consequence of such distribution results from the constitutional protection of the freedom of speech and press. This constitutional protection does not deprive a city of all power to prevent street littering. There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets." Schneider v. State of New Jersey, etc. (1939), 60 S. Ct. 146, 151, 84 L. Ed. 115, 121.

[18] Many of the courts inquire into the contents of the handbills or circulars in deciding whether they are likely to be cast aside so as to litter the streets. Some ordinances make specific exemption of certain types of circulars which amounts to a legislative declaration as to the kind of handbills which will be permitted. See cases in classification C in footnote 14.

the prohibition of the activities being carried on by the petitioners is unreasonable. But it does not lay down or formulate any rules or standards by which it would be possible to measure or predict in advance what will be considered by the Court a reasonable exercise of such power. Each case involving even a slightly different set of circumstances will have to be taken to the Supreme Court to determine whether, in the particular instance, the exercise of the police power is reasonable.

S. C.