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RECENT CASE NOTES

Constitutional Law—Police Power—Compulsory Military in Land Grant Colleges. Appellants, each the son and grandson of a Methodist minister, were suspended from the University of California for refusing, for conscientious reasons, to enroll in the Local ROTC. They applied to the state supreme court for a writ of mandate compelling the university to admit them as students. Appellants' contentions are that the enforcement of the order of the regents of the university, prescribing instruction in military science and tactics as a required course deprives them of their "liberty," safeguarded under the due process clause of the Fourteenth Amendment. The writ was refused and appealed to the Supreme Court of the United States. Held, that the enforcement of an order of the board of regents of a state university prescribing instruction in military science and tactics as a required course does not unconstitutionally abridge the privileges or immunities of citizens of the United States or deprive any person of liberty without due process of law in violation of the Fourteenth Amendment to the Federal Constitution.¹

This unanimous decision of the supreme court has already caused "a tremendous fluttering in the dovescotes," and, in the opinion of the Committee on Militarism in Education, is "of a surprizingly reactionary character;" it may be "constitutionally correct, but it is remote from approximating ultimate wisdom and justice" and "is deaf to the ground swell of opposition in the colleges and the country at large to compulsory military training for another war." The committee goes even further, considering it "an ominous sign if the Constitution can not adapt itself to the mind and will to peace which is emerging out of America's religious life."²

Though in his opinion Mr. Justice Butler makes no specific mention of the source of the state's authority in the matter of requiring compulsory military training in its university, it does, of course, arise out of the police power, the power inherent in a government to enact laws to protect order,

¹ Hamilton v. Regents of the University of California (1934), 79 L. Ed. Advance Opinions 159.

² Literary Digest, Dec. 15, 1934, at 7.

safety, health, morals, and the general welfare of society.³ The magnitude and importance of the police power may be inferred from the following language of the Wisconsin Supreme Court. "Without it the purpose of civil government could not be attained. It has more to do with the well being of society than any other power. Properly exercised it is a crowning beneficence. Improperly exercised it would make of sovereign will a destructive despot, superseding and rendering innocuous some of the most cherished principles of constitutional freedom."⁴ Out of the police power we find that from a few and necessary regulations we have developed the largest branch of our law and what is rapidly becoming one of the most vital questions in our national life. Characterized by indefiniteness, and declared to be as broad as the general welfare, it is natural that the extent to which the law-making body may encroach upon the rights and property of the individual in the valid exercise of the police power should always have been a much controverted question. A vast mass of litigation testifies to this fact.⁵ However, "a police regulation, correctly speaking, is no more legitimate than a law in any other field if it in fact violates any principle entrenched in the constitution."⁶ The police power never in fact authorizes an act depriving a citizen of his liberty or property rights protected under the constitution, though courts sometimes refer to it in this light.⁷

Any exercise of the police power must be for a reasonable purpose.⁸ The police power cannot be used as a cloak for the unreasonable invasion of personal rights or private property, nor can it be used for the exclusive benefit of certain individuals or classes. Providing the purpose of a statute or ordinance is reasonable no constitutional right is abridged. Furthermore, the reasonableness or unreasonableness of the purpose of a law passed under the police power may properly be separated from a consideration of judicial precedent. Old cases and old laws dealing with police regulations are of little help except as they serve to guide the court, and insofar as they expound general principles applicable to special circumstances.⁹ In the final analysis, the determination of the question must depend on the particular conditions, and, as is also suggested in the case of *State v. Feigold*,¹⁰ "In drawing the line which separates the field of arbitrary interference with protected rights of property and freedom in personal action, from that of protective legislation in behalf of public safety, each case must fall on one or the other side in accordance with its particular circumstances."

³ *Ex Parte Rameriz* (1924), 193 Cal. 633, 226 P. 914; *People v. Blanchard* (1918), 174 N. Y. S. 276, 105 Misc. Rep. 401; *City of Cincinnati v. Harth* (1920), 101 Oh. St. 344, 128 N. E. 263; *Strawberry Hill Land Corp. v. Starbuck* (1918), 124 Va. 71, 97 S. E. 362; *Mill Creek Coal & Coke Co. v. Public Service Commission* (1919), 84 W. Va. 662, 100 S. E. 557; *East Side Levee & Sanitary Dist. v. East St. Louis & Co.* (1917), 279 Ill. 123, 116 N. E. 720; *Connecticut Co. v. Town of Stamford* (1920), 95 Conn. 26, 110 A. 554; *Conger v. Pierce County* (1921), 116 Wash. 27, 98 P. 377.

⁴ *Mehlos v. Milwaukee* (1914), 156 Wis. 191, 146 N. W. 882.

⁵ Samuel M. Soref, "The Doctrine of Reasonableness in the Police Power," (1930) 15 *Marquette L. Rev.* 3.

⁶ *State v. Redmon* (1907), 134 Wis. 89, 114 N. W. 137; Cf. *Ex Parte White* (1915), 82 Tex. Cr. R. 85, 198 S. W. 583; *Goldman v. Crowther* (1925), 147 Mo. 282; *People v. Witte* (1924), 315 Ill. 282, 146 N. E. 178; *Durgin v. Minot* (1909), 203 Mass. 26, 89 N. E. 144; *Enos v. Hauff* (1915), 98 Nebr. 245, 152 N. W. 397.

⁷ *Catholic Bishop of Chicago v. Village of Polos Park* (1918), 286 Ill. 400, 121 N. E. 561. The court said, "An act depriving a citizen of his liberty or property rights cannot be sustained under police power unless the public health, comfort, safety, or welfare authorizes the enactment."

⁸ See cases in Notes 13, 14, 15, 16, 17, 18, 19, 20.

⁹ *Wrights v. Hart* (1905), 182 N. Y. 330, 75 N. E. 404; Samuel M. Soref, "The Doctrine of Reasonableness in the Police Power," (1930) 15 *Marquette L. Rev.* 3.

¹⁰ (1904), 77 Conn. 326, 59 A. 211.

As indicated above, the only question brought before the court in the instant case was whether in the respondents' ordinance there was an obstruction by the state "to the free exercise" of religion contrary to the United States Constitution. Before this question arises we must assume, as Mr. Justice Cardozo points out in his concurring opinion, that "the religious liberty protected by the First Amendment against invasion by the nation is protected by the Fourteenth Amendment against invasion by the states, as the phrase was understood by the founders of the nation, and by the generations that have followed." As the last would indicate, the guaranty of religious freedom in the Constitution is not to be interpreted literally. As one law writer puts it, "All persons professing the Christian religion are equally entitled to the protection of their religious liberty."¹¹ We are a Christian nation. But even past this, as the courts tell us, "Laws are made for the government of actions, and, while they cannot interfere with mere religious beliefs, they may with practices."¹² The prohibition of acts inconsistent with the peace, good order, or safety of the state is not a violation of the constitutional guaranty of the freedom of religion.¹³ Constitutional provisions guaranteeing freedom of religion do not render void a school board regulation requiring pupils, as a condition of admission to the public schools, to submit to a physical examination¹⁴ or vaccination,¹⁵ nor do they render void a statute requiring male persons applying for a marriage license to file with the clerk a certificate stating that they are free from acquired venereal disease.¹⁶ Further, legislation against faith healing,¹⁷ blasphemy,¹⁸ bigamy and polygamy,¹⁹ conducting certain types of activity on Sunday²⁰ have all been upheld as regulations proper under the police power.

A multitude of social interests have supported the legislation passed under the police power in all of these cases. In the principal case the social interest supporting this exercise of the police power is unquestionably that in the security of the political institution.²¹ The first social interest histori-

¹¹ B. H. Hartogensis, "Denial of Equal Rights to Religious Minorities and Non-Believers in the United States," and large collection of cases and Statutes, (1930) 39 Yale L. J. 659. See the constitutions of Connecticut, Massachusetts, and New Hampshire. See also the view of Judge Samuel Chase, later Chief Justice of the United States, in *Runkel v. Winemiller* (Md. 1799), 4 H. & McH. 429, 450: "All sects and denominations of Christians are placed upon the same equal footing, and are equally entitled to protection in their religious liberty." See also Clarence E. Martin, Esq., "The American Judiciary and Religious Liberty," (1928) 62 Am. Law Rev. 658.

¹² *McMasters v. State* (1922), 21 Okl. Cr. R. 218, 207 P. 566.

¹³ *City of St. Louis v. Hellscher* (1922), 295 Mo. 293, 242 S. W. 652; *Shapiro v. Lyle* (1929), 30 F. (2d) 971.

¹⁴ *Streich v. Aberdeen Bd. of Educ.* (1914), 34 S. D. 169, 147 N. W. 779.

¹⁵ *Jacobson v. Massachusetts* (1905), 197 U. S. 11, 29, 25 S. Ct. 358, 49 L. Ed. 645, 651; *City of New Braunfels v. Waldschmidt* (1918), 109 Tex. 302, 207 S. W. 303; *Cooley*, "Constitutional Limitations," at 880 (b) n.; see *Mathews v. Bd. of Educ.* (1901), 127 Mich. 530, 86 N. W. 1036, and *State v. Burdge* (1897), 95 Wis. 390, 70 N. W. 347, where it is held that this requirement in the absence of imminent danger is void; Cf. *Burns' Ann. St.* 1926, § 8168, Const. U. S. Amend. 1, Const. Ind., art. 1, §§ 2-4; *Vonnegut v. Baun* (1934), 188 N. E. 677.

¹⁶ *Peterson v. Widule* (1914), 157 Wis. 641, 147 N. W. 966.

¹⁷ *People v. Pierson* (1903), 176 N. Y. 201, 68 N. E. 243; *Smith v. People* (1911), 51 Colo. 270, 117 P. 612; *State v. Marble* (1905), 72 Oh. St. 21, 73 N. E. 1063.

¹⁸ *State v. Mockus* (1921), 120 Me. 84, 113 A. 39.

¹⁹ *Davis v. Beason* (1889), 133 U. S. 333; see 7 C. J., Bigamy, sec. 2.

²⁰ *State v. Blair* (1930), 130 Kan. 863; *Komen v. City of St. Louis* (1927), 289 S. W. 838; *Elliot v. State* (1926), 242 P. 340; see *Cooley*, "Constitutional Limitations," at 859 and cases cited; see Benjamin G. Reeder, "A Monograph on Religious Freedom," (1925) 31 W. Va. L. Q. 192; Cf. *City of Pineville v. Marshall* (1928), 222 Ky. 4, 299 S. W. 1072; *City of Louisiana v. Bottoms* (1928), 300 S. W. 316.

²¹ 28 Harv. L. Rev. 343, 445; Willis, "Introduction to Anglo-American Law," at 17; *Selective Draft Law Cases* (1918), 245 U. S. 366, 38 S. Ct. 159.

cally recognized was that in the preservation of the peace, out of which powers necessarily accrued to the state.²² Out of this larger historical social interest has come our present primary social interest in the security of the political institution, recognized in the separate states in the form of the police power. In the light of this particular social interest the police powers of the state are exceedingly broad, and laws enacted for its protection may be harsh and oppressive without contravening constitutional inhibition, that is, they may still be reasonable in the light of their purpose.²³ When the liberties of the constitution are read in the light of a century and a half of history and judicial interpretation it must be clear that instruction in military science, unaccompanied by any pledge of military service, is not an interference by the state with the free exercise of religion.

The appellants then were wrong in their assertion of an absolute right of personal liberty. No one has such a right. All personal liberty is subject to a proper exercise of the police power. If they had contended that the kind of social control exercised in this case was not a proper exercise of the police power they also would have been wrong, since there was a sufficient social interest for it. Their only possible contention would have had to be that even though there was a sufficient social interest for this form of social control the particular method employed in this case to protect it was not accomplishing any results and therefore was unreasonable as a matter of method or form. A reasonable relation must exist between the character of the legislation and the policy to be subserved.²⁴ That relationship has been expressed in various forms. In *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*,²⁵ the court said, "The state cannot exercise its police powers arbitrarily and despotically, nor unless there exists a reasonable relation between the character of the legislation and the policy to be subserved." In *Welch v. Swasey*,²⁶ the court similarly held that statutes passed in the exercise of the police power should be so tested by the courts as to see "whether they are reasonably directed to the accomplishment of the purpose on which the constitutional authority rests." Every police regulation must answer for its legitimacy at the bar of reasonableness, not only as to purpose but also as to method and form adapted to that purpose.²⁷

The question of reasonableness of method need not, of course, be introduced where a law is clearly violative of some constitutional restriction so that its purpose is unreasonable. And, since a statute or ordinance may satisfy the criterion of reasonableness of method and still be invalidated because of some constitutional prohibition, it is best, wherever possible, to keep the matter of reasonableness of method separate and distinct from constitutional considerations.²⁸

In the instant case appellants by their contentions regarding their religious liberty alone and without regard to the necessary reasonable character of the

²² Willis, *op. cit.*, at 17.

²³ *Southern Bell Telephone & Telegraph Co. v. Town of Calhoun* (1923), 287 F. 381.

²⁴ *Lawton v. Steele* (1894), 152 U. S. 133, 14 S. Ct. 499; *Weaver v. Palmer Bros. Co.* (1926), 270 U. S. 402; *Laurel Hill Cemetery v. San Francisco* (1910), 216 U. S. 358; *Pennsylvania Coal Co. v. Mahon* (1922), 260 U. S. 393; *Smith v. Texas* (1914), 233 U. S. 630; *City of Aurora v. Burns* (1926), 319 Ill. 84, 149 N. E. 784; *Appeal of White* (1926), 287 Pa. 256, 134 Atl. 409; *Barrett v. State* (1917), 220 N. Y. 423, 116 N. E. 99; *United States v. Cohen* (1920), 268 F. 420; *Young v. Lemieux* (1907), 79 Conn. 440, 65 Atl. 436; *State v. Wagener* (1890), 77 Minn. 483, 80 N. W. 635; *Gaines & Co. v. Holmes* (1922), 154 Ga. 344, 114 S. E. 327.

²⁵ (1924), 268 U. S. 510, 45 S. Ct. 571.

²⁶ (1907), 193 Mass. 364, 79 N. E. 745.

²⁷ Samuel M. Soref, "The Doctrine of Reasonableness in the Police Power," (1930) 15 *Marquette L. Rev.* 3.

²⁸ *Ibid.*

relation between the order of the regents and the policy to be subserved failed to occasion the court's consideration of this problem in this particular exercise of the police power. We don't presume to suggest that had the appellants included this problem in their contentions the result would have been different in the instant case, more especially in view of the presumption in favor of reasonableness.²⁹ However, we do submit that the decision of the court is entirely sound on the facts so far as they relate to police power, and the "fluttering of the dovescotes," referred to above, and vain mutterings against the Supreme Court and the Constitution by agitators and reformers grow largely out of an ignorance of the issues here before the court.

Compulsory military training in the first two years of the college curriculum so far as it relates to a reasonable means of accomplishing a socially desirable result is at least vulnerable.³⁰ Besides the opposition to it which has come from conscientious objectors there is that which comes from students and their instructors who regard it as a waste of time and an incongruity in an institution devoted to the peaceful arts. They argue that only a minor fraction of ROTC cadets joins the Organized Reserve after graduation and that a still smaller fraction remains in it; that the training is wholly inadequate to the making of fighters for modern warfare, and that meanwhile it cuts into the pursuit of other subjects and activities of much greater consequence.³¹ It may well be that such views are not without foundation, and that, if military matters were not so completely surrounded with an air of mystery and the notion encouraged by those in charge that they are too deep to be understood by the civilian mind,³² compulsory military training in colleges would definitely appear to be clearly unreasonable in the sense that it has no reasonable relation to the policy to be subserved. However, these are matters that must be left to public opinion for correction, if correction is needed. In the instant case the court, as we have said, was not given the opportunity on the issues to consider the expediency of the ROTC plan.

C. Z. B.

Divorce—Effect of Decree Prohibiting Remarriage. Plaintiff brought suit in equity in the District of Columbia alleging that she was the widow of Daniel Loughran, Jr., deceased, whose estate was beneficiary of the trust in question. Plaintiff originally had been married to Henry Daye in the District of Columbia but had there been divorced by him in 1924 on the grounds of adultery, and under the Code of the District was prohibited from remarriage. Plaintiff, however, married Loughran in Florida in 1926, after both parties had lived there for over two years, but later, in 1929, obtained a divorce from him a mensa et thoro in Virginia. She sought to enforce in the District of Columbia, as Loughran's widow, certain rights in the nature of dower and to recover unpaid alimony. Held, that a statute of the domicile forbidding remarriage of a spouse has only territorial effect and does not invalidate a marriage solemnized in another State in conformity with the laws thereof,

²⁹ This presumption extends to both reasonableness of purpose and the reasonable character of the relation between the statute or ordinance and the policy to be subserved. See *Terrace v. Thompson* (1923), 263 U. S. 197, 44 S. Ct. 15; *Mack v. Westbrook* (1919), 148 Ga. 690, 98 S. E. 339; *Bowman v. Virginia State Entomologist* (1920), 128 Va. 351, 105 S. E. 141; *Ex Parte Farb* (1918), 178 Cal. 592, 174 P. 320; *Union Fishermen's Co-Operative Packing Co. v. Shoemaker* (1921), 98 Or. 659, 194 P. 854; *Lawton v. Steele* (1894), 152 U. S. 133, 14 S. Ct. 499.

³⁰ *Literary Digest*, Dec. 15, 1934, at 7.

³¹ *Ibid.*

³² *Chicago Tribune* (editorial), *Weds.*, Jan. 2, 1935.