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Constitutional Law -- Freedom of Speech

an expression of a congressional desire for a state to enter the field.[11] Moreover, in a recent case the Court seemingly granted to a state the right to act under its police power even when Congress had entered the field, when such action was merely complementary or supplementary to the congressional regulation and did not conflict with the federal legislation.[12]

Although Congress has the power to regulate the transmission of telephone and telegraph messages over state lines as interstate commerce,[13] the Court has upheld state regulations that impose penalties on communication companies for the failure to meet certain prescribed duties already owed to the public.[14] A telephone or telegraph company is duty bound to refuse to render services,[15] or to discontinue them[16] when such services contribute to, or facilitate, gambling operations. Therefore, merely conducting these activities under the guise of interstate commerce does not hinder the power of a state in its efforts to protect the morals and welfare of the public.[17] In reality, a statute such as this affects commerce only to the extent that it deprives those employed in its violation of the fruits obtained from paving the way for unlawful enterprises.[18]

The mere creation of a federal agency and granting to it the right to control commerce does not in itself interfere with state regulation conducive to the public well-being.[19] The state's power to control the use of private wires should be circumscribed only when Congress acts to make this a matter of national concern or future events prove this to be a field demanding uniform federal regulation.

CONSTITUTIONAL LAW — FREEDOM OF SPEECH

Defendant was convicted by a New York Magistrate's Court for conducting a religious meeting on the public streets without a permit.[1] He had previously been issued a permit, which later was revoked after a hearing before the police commissioner wherein complaints were presented and proven that defendant had aroused animosity by violently

11. The Minnesota Rate Cases, 230 U.S. 352 (1912).
12. California v. Zook, 336.U.S.725 (1949), 4 MIAMI L.Q. 106.
13. Western Union Tel. Co. v. Speight, 254 U.S. 17 (1920).
14. Western Union Tel. Co. v. Crove, 220 U.S. 364 (1911); Western Union Tel. Co. v. Commercial Milling Co., 218 U.S. 406 (1910); Western Union Tel. Co. v. James, 162 U.S. 650 (1890).
15. Andrews v. Chesapeake & Potomac Tel. Co., 83 F. Supp. 966 (D. D.C. 1949).
16. Hamilton v. Western Union Tel. Co., 34 F. Supp. 928 (N.D. Ohio 1940).
17. State v. Stripling, 113 Ala. 120, 21 So. 409 (1897).
18. State v. Harbourne, 70 Conn. 484, 40 Atl. 409 (1897).
19. Missouri, Kansas & Texas Ry. v. Harris, 234 U.S. 412 (1914).

1. ". . . Any clergyman or minister of any denomination . . . may conduct religious services . . . in any public place or places specified in a permit therefor which may be granted and issued by the police commissioner. . . ." ADMINISTRATIVE CODE OF THE CITY OF NEW YORK, § 435-7.0.

castigating two religions. Defendant appealed the conviction, claiming that the statute requiring a permit was unconstitutional in that it allowed the police commissioner to determine as a censor who could address the public on the streets. *Held,* that the statute is constitutional, being only a necessary and reasonable regulation of the use of public streets. *People v. Kunz,* 90 N.E.2d 455 (N.Y. 1949).

The First Amendment to the United States Constitution declares that Congress shall make no law abridging the freedom of speech or assembly.[2] Judicial interpretation of the Fourteenth Amendment[3] has rendered the legislatures of the states as incapable as Congress to enact such laws.[4] However, the freedom of speech guaranteed by these provisions is not an absolute right[5] but is subject to certain restraints. Therefore, when freedom of speech is involved, the problem is to determine the nature and extent of restraints permissible in the interest of society.

The imposition of a prior restraint,[6] or censorship, upon free speech has been condemned since the time of Blackstone.[7] Though the court has invalidated injunctions,[8] license taxes,[9] registration requirements,[10] and permit requirements[11] on the basis that a prior restraint upon civil liberties was thereby imposed, the fact that a statute may or may not impose a prior restraint is not a sufficient guide in determining the constitutionality of the statute. This is true since a penal statute may be as effective as a prior restraint in curtailing free expression and dissemination of ideas.[12] However, prior restraints, imposed either by prohibitive or penal provisions, have been upheld when the public interest has so demanded.[13] Conversely, even though no prior restraint was actually exercised,[14] statutes have been held unconstitutional where the exercise of wide discretionary power by an official was possible. It appears that two factors are to

2. U.S. CONST. AMEND. I.

3. U.S. CONST. AMEND. XIV, § 1 (Due process clause).

4. *See* Gitlow v. New York, 268 U.S. 652, 666 (1923); Stromberg v. California, 283 U.S. 359, 368 (1931) (freedom of speech protected by Fourteenth Amendment). United States v. Cruikshank, 92 U.S. 542, 552 (1875) (freedom of assembly protected by Fourteenth Amendment).

5. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942).

6. See the discussion of prior restraints in Near v. Minnesota, 283 U.S. 697, 714 (1931.)

7. 4 BL. COMM. 151, 152.

8. Near v. Minnesota, 283 U.S. 697 (1931).

9. Murdock v. Pennsylvania, 319 U.S. 105 (1943); Follett v. Town of McCormick, 321 U.S. 573 (1944).

10. Thomas v. Collins, 323 U.S. 516 (1945).

11. Saia v. New York, 334 U.S. 558 (1948); Cantwell v. Connecticut, 310 U.S. 296 (1940); Lovell v. City of Griffin, 303 U.S. 444 (1938).

12. *See* Thornhill v. Alabama, 310 U.S. 88, 98 (1939).

13. Cox v. New Hampshire, 312 U.S. 569 (1941); Chaplinsky v. New Hampshire, *supra.*

14. United States v. C.I.O., 335 U.S. 106 (1948); Thornhill v. Alabama, *supra.*

be considered in adjudicating restraints upon free speech: first, whether discretionary power is vested in any administrative or judicial official and, second, the point at which freedom of speech interferes excessively with the rights and privileges of others.

In reference to the power of officials, the vice which the Supreme Court abhors is a vagueness in the restraining statute which allows possible discretionary action on the part of the official.[15] Thus, if a statute is narrowly drawn to prohibit a specific substantial evil, the fact that a local official is invested with a restraining or punishing power is not repugnant to the letter or spirit of the Constitution.[16] However, a finding that the statute does not vest an official with wide discretionary power is not determinative of the problems since free speech may not be restrained beyond certain limits regardless of the narrowness of the statute. Though the Court has held that no constitutional problem is raised by the prevention or punishment of the "lewd and obscene, the profane, the libelous, the insulting or 'fighting' words—those which by their very utterance tend to incite an immediate breach of the peace,"[17] such a standard is too narrow to be applicable in all situations where the exercise of free speech comes in conflict with public comfort, convenience or safety. Rather, the Court has decided that the limit beyond which freedom of speech does not extend is where such speech creates a clear and present danger of a substantial evil.[18] Such a line of demarcation is flexible and has fluctuated according to the state of national affairs,[19] but nevertheless has proven to be the most satisfactory standard yet proposed.

In cases directly involving the use of public streets and other public places for the dissemination of ideas, the courts have considered both the limits of free speech and the possibility of discretionary action on the part of a local official. As a limitation upon free speech, interference with traffic has been deemed to be a substantial evil justifying the invoking of the clear and present danger rule.[20] Therefore, certain discretionary powers may be granted to an official in the issuance of permits as a condition to the use of the public place.[21] However, this discretion

15. *See* Saia v. New York, *supra* at 560; Cantwell v. Connecticut, *supra* at 311; Carlson v. California, 310 U.S. 106, 112 (1940).

16. *See* People v. Hass, 299 N.Y. 190, 192, 86 N.E.2d 169, 171 (1949); People v. Nahman, 298 N.Y. 95, 102, 81 N.E.2d 36, 38 (1948); Cox v. New Hampshire, *supra* at 574.

17. *See* Chaplinsky v. New Hampshire, *supra* at 572.

18. Schenck v. United States, 249 U.S. 47 (1919). For a discussion of the development and application of the clear and present danger doctrine, see, Comment, 4 MIAMI L.Q. 67 (1949).

19. *See* O'Brien, *Restraints Upon Individual Freedom in Times of National Emergency*, 26 CORNELL L.Q. 523.

20. Cantwell v. Connecticut, *supra* at 308.

21. Cox v. New Hampshire, *supra*; Cantwell v. Connecticut, *supra*.

must be specifically confined to a consideration of time and place of the speech. When the discretion extends to a determination of the permissible contents of a speech, the statute is unconstitutional.[22]

In the present case, the statute in question makes no provision for any discretionary action. However, the court decided that a discretionary power of revocation was implied. But the necessary standards of limitation upon the discretion of the commissioner are not present in the statute. Nor did the court, through its decision, provide a basis upon which permits may be refused. Rather, it only finds a power to prevent possible religious riots analogous to the power to ban all raucously noisy advertising devices.[23] The court decided that defendant had no constitutional right to wantonly wound the feelings of others and thus create a possibility of riot necessitating the presence of police. But, the fact that a speech arouses animosity is not a sufficient clear and present danger of a substantial evil to justify restraint.[24] Nor can free speech be suppressed under the guise of maintaining desirable conditions.[25] It may be that the speech came within the fighting words doctrine of the *Chaplinsky* case[26] and that defendant could have been punished for a breach of the peace. However, an absolute restraint upon the right to speak in the future because of past misconduct is not in keeping with the Supreme Court's views.[27]

Though the statute requiring a permit for street preaching appears to be constitutional on its face as being only a necessary and reasonable regulation of the use of public streets, the court's decision has placed an unconstitutional power of discretion and censorship in the police commissioner, such decision being as effective as if the statute had been so amended.[28] Because of the unlimited power of discretion by the commissioner, the statute should be held unconstitutional without the necessity of deciding if the defendant's action came either within the *Chaplinsky* rule or created a clear and present danger of a substantial evil.

CONSTITUTIONAL LAW — SEARCHES AND SEIZURES — SEARCH OF PREMISES WITHOUT WARRANT REASONABLE AS INCIDENT TO LEGAL ARREST

Federal officers, knowing well in advance that defendant had committed the crime of selling forged and altered postal stamps with intent to defraud[1]

22. Hague v. C.I.O., *supra*; Schneider v. State, 308 U.S. 147 (1939); Lovell v. City of Griffin, *supra*.

23. Kovacs v. Cooper, 336 U.S. 77 (1949). See also 3 MIAMI L.Q. 452 (1949).

24. Terminiello v. Chicago, 337 U.S. 1, 4 (1949).

25. *See* Hague v. C.I.O., 307 U.S. 496, 514 (1939).

26. *See* Chaplinsky v. New Hampshire, *supra* at 572.

27. Near v. Minnesota, *supra*; *but cf.* Milk Drivers Union v. Meadowmoor Co., 312 U.S. 287 (1941) (Picketing enjoined because of past violence).

28. *See* Winters v. New York, 33 U.S. 507, 514 (1947).

1. 18 U.S.C. § 268 (1946).