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Article 11

Constitutional Law - Ordinance Requiring Permit to Solicit Membership for a Union Invalid as Prior Restraint

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case, the Superior Court of Delaware after admitting that the older rule originally evolved as dictum, nevertheless rejected the reasoning of the *Rodgers* case, and refused to enforce the tax law. Apparently the Delaware court felt that such a change must come from the legislature. On the other hand the Supreme Court of Arkansas believes that the so called modern trend of allowing enforcement as a matter of comity is now the majority view.[23] The American Law Institute lends its weight to this belief in its 1948 Supplement to the Restatement of Conflict of Laws. Whereas the 1934 edition read, "No action can be maintained by a foreign state to enforce its license or revenue laws, or claims for taxes,"[24] the 1948 Supplement provides, "The Institute expresses no opinion whether an action can be maintained by a foreign state on a claim for taxes."[25] When it is considered that practically all the American cases favoring the doctrine of non-enforcement of foreign revenue laws have arisen in the State of New York, while those supporting the modern doctrine have arisen in four separate jurisdictions, it is evident that the Arkansas court might be correct.

[23] State ex rel. Oklahoma Tax Commission v. Neely, 225 Ark. 230, 282 S.W.2d 150, 152 (1955).

[24] Rest., Conflict of Laws §610 c (1934).

[25] Rest., Conflict of Laws §610 c (Supp., 1948).

CONSTITUTIONAL LAW–ORDINANCE REQUIRING PERMIT TO SOLICIT MEMBERSHIP FOR A UNION INVALID AS PRIOR RESTRAINT

Defendant, a salaried employee of the International Ladies Garment Workers Union, was attempting to organize the employees of a manufacturing company located in the town of Hazelhurst, Georgia. Many of these employees lived in Baxley, a nearby city. An ordinance of the City of Baxley provided that no one could lawfully solicit membership for any union or other organization requiring membership fees before first securing a permit from the Mayor and City Council. This permit could be granted or denied on the basis of the character of the applicant, the nature of the organization, and its effects upon the "general welfare" of the citizens.[1] Defendant went to Baxley and, without applying for a permit as

[1] The Baxley ordinance is set out in the instant case at 78 S. Ct. 277, 278 (1958). "Section I. Before any person or persons, firms or organizations shall solicit membership for any organization, union or society of any sort which requires from its members the payment of membership fees, dues or is entitled to make assessment against its members, such person or persons shall make application in writing to Mayor and Council of the City of Baxley for the issuance of a permit to solicit members in such organization from among the citizens of Baxley. . . . Section IV. In passing upon such application the Mayor and Council shall consider the character of the applicant, the nature of the business of the organization for which members are desired to be solicited, and its effects upon the general welfare of citizens of the City of Baxley. . . ."

required under the ordinance, talked with several employees at their homes about joining the union. Charged with the violation of the ordinance, the defendant was convicted despite her contention that it violated the First and Fourteenth Amendments of the United States Constitution. The judgment was affirmed in the lower State courts, and the Supreme Court of Georgia denied certiorari. The United States Supreme Court reversed, holding the ordinance invalid because it created, in the city officials, a power of arbitrary suppression of, and prior restraint upon freedom of speech. *Staub v. City of Baxley*, 78 S.Ct. 277 (1958).

The freedoms of speech, press, assembly, religion and petition guaranteed by the First Amendment are within the liberties safeguarded by the due process clause of the Fourteenth Amendment, from invasion by state action.[2] Accordingly, it has been held that a state, by denying freedom of thought and speech, denies "due process of law."[3] A municipal ordinance, adopted under state authority, has been held to constitute "state action" within the meaning of the Fourteenth Amendment.[4]

Since municipal ordinances are within the prohibition of the Fourteenth Amendment, it becomes necessary to ascertain the criteria applied by the Supreme Court in past cases dealing with the constitutionality of city licensing laws.

Though a municipality may enact regulations in the interest of the public safety, health, welfare or convenience,[5] the regulations may not abridge the individual liberties secured by the Constitution to those who wish to write, speak, print or circulate information or opinion.[6] Thus, statutes or ordinances *prohibiting* the solicitation of persons to join an organization or society, or to pay membership dues or fees, have been held invalid as violating the constitutional right of freedom of speech.[7] On the other hand, city ordinances which forbid unlicensed door to door solicitation or selling without the consent of the owners or occupiers do not contravene the constitutional guarantees of free speech and press.[8]

The Supreme Court has repeatedly held that an ordinance which makes the peaceful enjoyment of First Amendment freedoms contingent upon

[2] Burstyn v. Wilson, 343 U.S. 495 (1952).

[3] Schneider v. State, 308 U.S. 147 (1939).

[4] Carlson v. California, 310 U.S. 106 (1940); Lovell v. City of Griffin, 303 U.S. 444 (1938); Home Telephone & Telegraph Co. v. Los Angeles, 227 U.S. 278 (1913).

[5] Cox v. New Hampshire, 312 U.S. 569 (1941); Stromberg v. California, 283 U.S. 359 (1931); Davis v. Beason, 133 U.S. 333 (1890); Reynolds v. United States, 98 U.S. 145 (1878).

[6] Schneider v. State, 308 U.S. 147 (1939).

[7] Herndon v. Lowry, 301 U.S. 242 (1937); Pittman v. Nix, 152 Fla. 378, 11 So.2d 791 (1943).

[8] Beard v. City of Alexandria, 341 U.S. 622 (1951); City of Manchester v. Leiby, 117 F.2d 661 (C.A. 1st, 1941).

the arbitrary discretion of a state or city official in granting a license or permit is unconstitutional and invalid, as being a prior restraint upon the enjoyment of these freedoms. An illustration of this general holding is *Cantwell v. Connecticut.*[9] In that case, an Act prohibited the solicitation for "any religious, charitable or philanthropic cause" without approval of the "cause" by the Secretary of the Public Welfare Council of the state. The Supreme Court held the legislation invalid and unconstitutional, since it gave the Secretary arbitrary discretion in determining what was a "religious, charitable or philanthropic cause," and therefore constituted a prior restraint on the freedom of religion. Speaking for a unanimous court, Mr. Justice Roberts said:

> He [Secretary] is not to issue a certificate as a matter of course. His decision to issue or refuse it involves appraisal of facts, the exercise of judgment, and the formation of an opinion. He is authorized to withhold his approval if he determines that the cause is not a religious one. . . . To condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of the liberty protected by the Constitution.[10]

As contrasted to the cases involving religious groups,[11] there have been only a few Supreme Court decisions relating to the constitutionality of city and state regulation of union membership solicitation. However, the following two cases bear an instructive relationship to the instant case.

The 1939 case of *Hague v. C.I.O.*[12] dealt with a city ordinance which prohibited the leasing of a hall for a public speech or the holding of public meetings without a permit from the Chief of Police. Members of a labor union sought permission to hold public meetings in the city for the "organization of unorganized workers into labor unions."[13] Permission was refused on the ground that such meetings would cause disorder. The labor union members then procured an injunction against the city restraining it from interfering with their rights of free speech and peaceable assembly. On certiorari, the Supreme Court affirmed the restraining order. Mr. Justice Roberts said:

> [U]ncontrolled official suppression of the privilege [free speech and assembly] cannot be made a substitute for the duty to maintain order in connection with the exercise of the right.[14]

To the same effect is the 1945 Supreme Court decision in *Thomas v. Collins.*[15] A Texas Statute forbade the solicitation of memberships in labor

[9] 310 U.S. 296 (1940).

[10] Ibid., at 305, 307.

[11] Kunz v. New York, 340 U.S. 290 (1951); Niemotko v. Maryland, 340 U.S. 268 (1951); Saia v. New York, 334 U.S. 558 (1948); Marsh v. Alabama, 326 U.S. 501 (1946); Largent v. Texas, 318 U.S. 418 (1943); Lovell v. City of Griffin, 303 U.S. 444 (1938).

[12] 307 U.S. 496 (1939).

[13] Ibid., at 504.

[14] Ibid., at 516.

[15] 323 U.S. 516 (1945).

unions without first obtaining an organizer's card. Defendant, a C.I.O. vice president, in Texas on a temporary visit, addressed a public meeting inviting workers to join his organization. This was done in violation of a temporary restraining order issued because defendant refused to fulfill the requirements of the statute. In holding the statute invalid as a prior restraint on freedom of speech and assembly, and in contravention of the Fourteenth Amendment, the Supreme Court said:

> The case confronts us . . . to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. . . . That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right not of the limitation, which determines what standard governs the choice. For these reasons, any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger.
>
> The right thus to discuss and inform people concerning the advantages and disadvantages of unions and joining them is protected not only as a part of free speech, but as part of free assembly.[16]

The factual situation closest to the instant case is that in the 1946 California decision of *In re Porterfield*.[17] There, a city ordinance made it unlawful to solicit membership for any organization requiring payment of dues, without first obtaining a license from the city council. The license would issue only, "If the city council is satisfied that said applicant is of good moral character and will not resort to force . . . or corrupt means in his proposed work of solicitation. . . ."[18] Defendant, a labor union representative, was convicted for violating the ordinance. In allowing his petition for habeas corpus, the California court held that the standards for granting a license were indefinite and:

> [P]rovide a mechanism for the deprival of constitutional rights, not only on the basis of the guaranties applicable to free speech but also on the basis of those protecting the right to engage in lawful fashion in a lawful activity. . . . Satisfaction may be circumscribed by individual whim, caprice, or personal prejudice.[19]

Considering the language of the Baxley ordinance, it must be concluded that the instant case clearly echoes the spirit and rationale of the foregoing decisions. The Supreme Court has displayed not the slightest inclination to deviate from the policy it has established throughout the years, in safeguarding the First Amendment freedoms from arbitrary impairment by state laws or municipal ordinances.

[16] Ibid., at 529, 530, 532.

[17] 28 Cal. 2d 91, 168 P.2d 706 (1946).

[18] Ibid., at 711.

[19] Ibid., at 719.