Marquette Law Review

Volume 25
Issue 1 *December 1940: A Symposium on Freedom*

Article 6

Freedom of Speech

Edward A. Rebholz

FREEDOM OF SPEECH

EDWARD A. REBHOLZ

THE foundation for the right of free speech is found in the First Amendment of the United States Constitution in these words: "Congress shall make no law * * * abridging the freedom of speech or of the press." A similar limitation is placed upon any action by the state or any of its subdivisions by virtue of the Fourteenth Amendment of the Constitution.

Just what these rights include has been defined by a long line of judicial decisions of which two recent ones are *Schneider* v. *State of New Jersey*,[1] and *Thornhill* v. *State of Alabama*.[2]

The right of free speech is not an absolute right to utter freely whatever a person may please. The right has been defined as embracing the liberty to discuss *publicly* and *truthfully* all matters of *public concern* without previous restraint or fear of subsequent punishment.[3]

Now, opposed to this right, are the duties of the governmental units to preserve peace and order and to keep the streets free for locomotion and travel.

In order to accomplish these ends, we have seen our states and municipalities enact statutes and ordinances whereby they, by various means and methods, attempt to curb certain activites which eventually lead to the acts sought to be prevented. These governmental units have apparently enacted this legislation relying for authority upon the case of *Davis* v. *Commonwealth of Massachusetts*.[4] That case involved an ordinance which among other things prohibited making a public address in or upon any of the public grounds in the city of Boston. The state court said: "for a legislature absolutely and unconditionally to forbid public speaking in a highway, or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house." In answer, the Supreme Court of the United States, speaking through Mr. Justice White, held:

> "It is therefore conclusively determined there was no right in the plaintiff in error to use the Common except in such mode and subject to such regulations as the legislature may have deemed proper to prescribe. The Fourteenth Amendment to the Constitution of the United States does not destroy the power of

[1] 308 U.S. 147, 60 Sup. Ct. 146, 84 L.Ed. 155 (1939).
[2] 310 US. 88, 60 Sup. Ct. 736, 84 L.Ed. 1093 (1940).
[3] Thornhill v. Alabama, 310 U.S. 88, 60 Sup. Ct. 736, 84 L.Ed. 1093 (1940); Schneider v. State, 308 U.S. 147, 60 Sup. Ct. 146, 84 L.Ed. 155 (1939); Hague v. Committee for Industrial Organization, 307 U.S. 496, 59 Sup. Ct. 954, 83 L.Ed. 1423 (1939); Lovell v. Griffin, 303 U.S. 444, 58 Sup. Ct. 666, 82 L.Ed. 949 (1938); Stromberg v. California, 283 U.S. 359, 51 Sup. Ct. 532, 75 L.Ed. 1117 (1931).
[4] 303 U.S. 444, 58 Sup. Ct. 666, 82 L.Ed. 949 (1938).

> the states to enact police regulations as to the subjects within their control * * * and does not have the effect of creating a particular and personal right in the citizen to use public property in defiance of the constitution and laws of the state."

In view of this case, many lawyers, prior to the decisions of *Schneider* v. *State*[5] were of the opinion that legislation which declared as its purpose the maintenance of public order or the exercise of some police regulation and which accomplished such end was valid, especially if not enforced in an arbitrary method. That opinion was generally strengthened after the decision in *Lovell* v. *City of Griffin.*[6] The court in that case held the ordinance involved void on its face, but for the reason that it was not limited as to time and place; not limited to ways inconsistent with the maintanance of public order; not involving molestation or disorderly conduct or misuse or littering of streets.

Then the Supreme Court was confronted with the four cases reported under the title of *Schneider* v. *State.*[7] Although, technically, three of the cases relate to freedom of press, we shall consider them under this topic. One case involved canvassing without a permit; the other three involved distribution of handbills. Among the handbill cases one contained a notice of a meeting to discuss the Spanish War, another set of handbills announced a protest meeting, and the third set contained facts regarding a labor dispute.

Counsel representing the governmental units attempted to distinguish the cases from the *Griffin* case in different ways. Two urged that the restriction of civil rights was limited only to public streets and places; one argued that the evident purpose of the ordinance was to prevent littering of the streets and the fourth contended that the purpose of the legislation was to prevent frauds upon the public.

Out of this maze of facts and circumstances the Supreme Court through Justice Roberts laid down these principles:

1) The streets and public places are the natural and proper places for the dissemination of ideas and it is no excuse for the abridgment of the right that it could be exercised in some other places.
   (No reference is made in the decision to the apparently contradictory result reached in the *David* v. *Massachusetts* case, hereinbefore mentioned).
2) Police regulations may not abridge the liberties of speech and press secured by the constitution.
3) The fact that frauds may be perpetrated or streets may be littered as an indirect consequence of the exercise of civil liberties does not warrant the abridgment of those rights. (Fraud and littering may still be punished directly).

---

[5] 308 U.S. 147, 60 Sup. Ct. 146, 84 L.Ed. 155 (1939).
[6] 303 U.S. 444, 58 Sup. Ct. 666, 82 L.Ed. 949 (1938).
[7] *Supra,* note 5.

The Supreme Court recognizes that there must be some limitation upon the right. It states that a person could not stand in the middle of a crowded street and stop *all* traffic or permit *no* pedestrian to pass who would not accept a tendered leaflet.

It will be interesting to observe the legislation which will now be enacted to curb undesirable activities. These interesting questions will undoubtedly arise:

Can the state or municipality under this decision prohibit the exercise of rights on certain streets and thoroughfares because of traffic? Can they either limit the length of time or prescribe during what hours the right may be exercised? What regulations will be valid regarding the use of amplification equipment?

Granted that in the exercise of the right, all traffic cannot be stopped, just how much can be stopped within the valid exercise of the right?

There is bound to be much new legislation and litigation as a result of this decision to decide and determine a line of demarcation between valid limitation and abridgment. The Supreme Court itself has invited such litigation by stating that when abridgment is alleged, the courts should *astutely* examine the effect of the legislation, weigh the circumstances and appraise the substantiality of reasons advanced in support of the regulation of the free enjoyment of the right.

In passing from this decision, it is interesting to note that two of the cases involved the advertisement of meetings. Does such advertising come within the scope of civil liberty? When is it the exercise of the right and when is it commercial advertising?

The case of *Thornhill* v. *Alabama,*[8] decided April 22, 1940, involved a state statute prohibiting any person without just cause or legal excuses from loitering or picketing about a place of business with the intent of influencing others not to deal with the proprietor or of hindering, delaying or interfering with the business. The State urged that the purpose of the statute is the protection of the community from violence and breach of the peace, which, it asserted, were concomitants of picketing. The appellant argued that the statute constituted a violation of his right of free speech. The contention of appellant was upheld.

The Supreme Court after reiterating the statement in the *Schneider* case that the streets are natural and proper places for the dissemination of information and opinion and after repeating the proposition set forth in the cases of *Senn* v. *Tile Layers Union,*[9] and *Hague* v. *C. I. O.*[10] to the effect that the dissemination of ideas concerning a labor dispute

[8] 310 U.S. 88, 60 Sup. Ct. 736, 84 L.Ed. 1093 (1940).
[9] 301 U.S. 468, 57 Sup. Ct. 857, 81 L.Ed. 1229 (1937).
[10] 307 U.S. 496, 59 Sup. Ct. 954, 83 L.Ed. 1423 (1939).

related to a topic of public concern and thus within the guaranty of free speech under the Constitution held:

> "In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within the area of free discussion that is guaranteed by the Constitution. * * * It is recognized now that satisfactory hours and wages and working conditions in industry and a bargaining position which makes these possible have an importance which is not less than the interests of those in the business or industry concerned. The health of the present generation and of those as yet unborn may depend on these matters, and the practices in a single factory may have economic repercussions upon a whole region and affect widespread systems of marketing. The merest glance at State and Federal legislation on the subject demonstrates the force of the argument that labor relations are not matters of mere local or private concern. Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society. The issues raised by regulations, such as are challenged here, infringing upon the right of employees effectively to inform the public of the facts of a labor dispute are part of this larger problem."

There is a most interesting discussion of the effect of this case contained in an article by Prof. Gregory of the University of Chicago Law School, in the September issue of the American Bar Association Journal. The nub of his discussion is this: Does picketing constitute the exercise of the right of free speech (argument intended to achieve intellectual conquest) or is it pure and unadulterated coercion?

New problems are likely to be presented by possible legislation in view of the chaotic conditions existing in our world today. Many will remember the Espionage laws enacted at the time of the last World War. The act provides severe penalties for anyone who, while the United States is at war, utters or publishes disloyal, profane, scurrilous or abusive language about our form of government, the Constitution, the military forces, or the uniform of the Army or Navy of the United States, intending to bring them into scorn or disrepute, or intending to encourage resistance to the United States or encouraging the cause of our enemies or urging curtailment of production of necessities or opposing the cause of the United States. This legislation was upheld as constitutional in a series of cases decided at that time.[11]

---

[11] Abrams v. United States, 250 U.S. 616, 40 Sup. Ct. 17, 63 L.Ed. 1173 (1919); Schenck v. United States, 249 U.S. 47, 39 Sup. Ct. 247, 63 L.Ed. 470 (1919); Frohwerk v United States, 249 U.S. 204, 39 Sup. Ct. 249, 63 L.Ed. 561 (1919); Debs v. United States, 249 U.S. 211, 39 Sup. Ct. 252, 63 L.Ed. 566 (1919).

The basis for upholding the constitutionality of such legislation was stated by Mr. Justice Holmes in the *Schenck* case as follows:

> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no court could regard them as protected by any constitutional right. It seems to be admitted that if an actual obstruction of the recruiting service were provided, liability for words that produced that effect might be enforced."

There is much talk today about the gravity of our international situation. We in America are making as feverish an attempt to prepare as we did at the time of the World War. Would it not be wise to extend the prohibitions of the Espionage Act to a time such as this and if so, would not such restrictions be constitutional?