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# Constitutional Law: Freedom of Speech in Motion Pictures

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thoroughfares on the one hand and uncharted administrative discretion plus public parks on the other does not arise here in full, although an administrative finding that the bus service was reasonable and not uncomfortable — vague concepts at best — was calmly accepted by the majority. The factor of compulsion hardly bears analysis; one can buy or rent a car, hire a taxi, or walk, without contributing one cent to a privately owned transit company, but he is compelled by taxes to finance his public parks. Again, what passes for music today may frequently not appear as such to musicians, but at least it is less objectionable to the intelligent adult than blaring exhortations to embrace a different religion or to accept a political platform or candidate at face value.

In all probability the Court was heavily influenced by the carefully compiled record and by the desire of a large majority of the passengers to hear the broadcasts, coupled with the fact that each program was predominantly musical, presented no propaganda other than a few advertising puffs, was governmentally regulated on behalf of the public,[22] and was broadcast at a volume enabling the person of normal sensibilities to ignore it. Any future deviation from these standards may well evoke a converse ruling.

JAMES LAWRENCE KING

## CONSTITUTIONAL LAW: FREEDOM OF SPEECH IN MOTION PICTURES

*Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952)*

Appellant, a New York motion picture distributing corporation, obtained a license for the commercial exhibition of an Italian film, *The Miracle*[1]. The film was exhibited for eight weeks as part of a

[22]See p. 464: "Streetcars and busses . . . are for the common use of all of their passengers. The Federal Government in its regulation of them is not only entitled, but is required, to take into consideration the interests of all concerned."

[1]N. Y. EDUC. LAW §129 makes it unlawful to exhibit or release for exhibition for commercial advantage any motion picture not validly licensed by the Department of Education; §122 charges the director of the motion picture division of this department with the duty of examining submitted motion pictures and issuing a license unless the film is "obscene, indecent, immoral, inhuman, sacrilegious, or . . . its exhibition would tend to corrupt morals or incite to crime . . . ."

trilogy, *Ways of Love,* and occasioned comment and action, pro and con, by militant minorities.[2] The Chancellor of the New York Board of Regents, acting under statutory authority,[3] caused a committee to review the film, with the result that the allegations of its sacrilegious character were sustained. Upon failure of appellant at subsequent hearing to show cause why its license to exhibit this film should not be revoked the Commissioner of Education, acting on order of the Board of Regents, revoked the license. On review[4] the appellate division upheld the order of the Board of Regents;[5] the court of appeals affirmed;[6] and appeal was taken to the United States Supreme Court.[7] HELD, the New York motion picture licensing act is a state abridgment of freedom of speech and press and violates the Fourteenth Amendment[8] in that it establishes as a prerequisite to exhibition censorial approval governed by a standard as vague as the "sacrilegious" test.[9] Judgment reversed, with separate concurring opinions by Justices Frankfurter and Jackson jointly and by Justice Reed.

During the period of flux following the passage of the Fourteenth Amendment the guarantees of free speech and press contained in the First Amendment were assumed to be still inapplicable as restrictions on state action.[10] In 1915, while this assumption prevailed, an Ohio movie censorship statute was attacked in *Mutual Film Corp. v. Industrial Commission of Ohio*[11] on several grounds, including alleged violation of the Fourteenth Amendment. The federal district court held the first eight amendments inapplicable to state action,[12] and on appeal to the United States Supreme Court the sole point argued was

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[2]At pp. 509-516 of the opinion.

[3]N. Y. EDUC. LAW §101 (Board of Regents head of Education Department); §124 (Board of Regents may review denial of license).

[4]Pursuant to N.Y. CIV. PRAC. ACT §§1283 *et seq.;* N.Y. EDUC. LAW §124.

[5]278 App. Div. 253, 104 N.Y.S.2d 740 (3d Dep't 1951).

[6]303 N.Y. 242, 101 N.E.2d 665 (1951).

[7]Pursuant to 28 U.S.C. §1257(2) (Supp. 1952).

[8]The current theory of the Court assumes that the First Amendment prohibitions of federal action are implicit in the due process clause of the Fourteenth and accordingly apply to state action also.

[9]See also Gelling v. Texas, 343 U.S. 960 (1952) (city ordinance banning movies "prejudicial to the best interests of the people" struck down for indefiniteness).

[10]*See, e.g.,* Prudential Ins. Co. v. Cheek, 259 U.S. 530, 543 (1922); see Kittleson and Smith, *Free Speech: Slogans v. States' Rights,* 5 U. OF FLA. L. REV. 227, 237 (1952).

[11]236 U.S. 230 (1915).

[12]Mutual Film Co. v. Industrial Comm'n of Ohio, 215 Fed. 138 (N.D. Ohio 1914).

alleged violation of the Ohio Constitution. In a broadly worded opinion, however, the Court impliedly excluded motion pictures from that class of communicative media entitled to speak or write freely.[13]

Subsequently, beginning in 1925, a line of decisions repudiated the earlier assumption of the inapplicability of the content of the First Amendment against state action and adopted the position that freedom of speech and press were protected by the due process clause of the Fourteenth Amendment.[14] Following this interpretation the Court indicated in several dicta a desire to review the *Mutual* decision.[15] Nevertheless, when the opportunity arose in the instant case the Court narrowly restricted its reversal: "We hold only that under the First and the Fourteenth Amendments a state may not ban a film on the basis of the censor's conclusion that it is 'sacrilegious' . . . ."[16]

From the above caveat of the majority through the special concurrence of Justices Frankfurter and Jackson[17] to the words of Justice Reed[18] the opinions studiously avoid enunciating a general rule. This wariness in expression may be due in part to the current reluctance of the Court to declare unconstitutional any federal or state acts limiting economic or social freedom or curtailing acquisition and enjoyment of property, and to its highly erratic actions in the so-called civil liberties field.[19] On the other hand, the instant case is the first to accord protective consideration to a complex pictorial medium transmitting its message through several highly refined arts and thereby

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[13]Mutual Film Co. v. Industrial Comm'n of Ohio, 236 U.S. 230, 244 (1915): ". . . the exhibition of motion pictures is a business . . . originated and conducted for profit, like other spectacles, not to be regarded, nor intended to be regarded by the Ohio constitution . . . as part of the press of the country, or as organs of public opinion."

[14]Gitlow v. New York, 268 U.S. 652, 666 (1925): "Freedom of speech and of the press — which are protected by the First Amendment from abridgement by Congress — are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." *Cf.* Schneider v. New Jersey, 308 U.S. 147 (1938); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931).

[15]*E.g., see* United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948): ". . . we have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment . . . ."

[16]At p. 506.

[17]At pp. 507-533.

[18]At pp. 506-507.

[19]See Kittleson and Smith, *supra* note 10, at 236-240; Richardson, *Freedom of Expression and the Function of Courts*, 65 HARV. L. REV. 1 (1951).

differing radically from all other previously protected forms of communication.

Although the effect of the instant decision is to raise the motion picture to the status of a protected form of communication, the precise character of the state law involved will largely determine the force of the judicial impact. Such laws fall generally into three categories: prior restraint, subsequent restraint, and "blue laws."

At least one fourth of the states have censorship laws employing prior restraint by license in the realm of direct censorship,[20] and a few have restricted their censorship to obscene or indecent films.[21] Florida, in a statute that requires no license but provides a general penalty for violation of its terms,[22] bases authority to exhibit on the approval of the national board of review or the New York censorship board.

In spite of the Court's condemnation of censorship by prior restraint[23] these statutes are not necessarily void. The Court points out that exceptions exist,[24] and elsewhere recognizes certain classes of unprotected speech, including the lewd, obscene, and libelous,[25] thereby

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[20]*E.g.*, CONN. REV. GEN. STAT. §3702 (1949); FLA. STAT. §§521.01-521.04 (1951); KAN. GEN. STAT. ANN. §§51.101-51.112 (1949); LA. REV. STAT. ANN. §§4:301-4:307 (West Supp. 1951); MD. ANN. CODE c. 66A (1951); N.Y. EDUC. LAW §129; OHIO CODE ANN. §154-47 (Page Supp. 1952); PA. STAT. tit. 4, §§41-57 (Cum. Supp. 1952); VA. CODE tit. 2, §§98-116 (Supp. 1952).

[21]*E.g.*, VA. CODE tit. 2, §98 (Supp. 1952).

[22]FLA. STAT. §521.02 (1951): "It is unlawful for any person to display, exhibit or promulgate in the State of Florida any motion picture film that has not been approved by the national board of review, its appointees or successors, or by the state censorship board of the State of New York." Sec. 521.04 provides a general penalty for violation.

[23]At p. 503: ". . . such a previous restraint is a form of infringment on freedom of expression to be especially condemned . . . ," citing Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931).

[24]*Ibid.* The Court quoted p. 716 of the *Near* case, *supra* note 23: "The protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases . . . ."

[25]As Justice Murphy conceded in Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942): "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words — those which by their utterance inflict injury or tend to incite an immediate breach of the peace." *But see* Kovacs v. Cooper, 336 U.S. 77, 82 (1949), for language indicating prohibition of prior censorship. See Beauharnais v. Illinois, 343 U.S. 752 (1952) (constitutionality of group

indicating that some of these classes, notably obscene communications, embrace motion pictures and permit prior restraint whenever the standards governing it are clearly expressed. Statutes barring obscene films, as well as those portions of the New York statute not condemned in the instant case, accordingly remain valid. Florida, inasmuch as its censorship is based on that of the New York Board of Regents, will have to permit the showing of *The Miracle,* but it can still prohibit the exhibition of films banned in New York for their obscene, indecent, immoral, and perhaps even inhuman qualities.[26] Even if the protection of prior restraint statutes were stripped away, the majority of states would still have, as has Florida, a subsequently restraining general statute prohibiting the possession or showing of obscene or indecent films.[27] As an exercise of the police power to protect public morals such a statute is not in danger of being overthrown if its standards are sufficiently definite to comply with due process.

The third class of laws to be brought to test under the First Amendment provisions implicit in the Fourteenth are the "blue laws" prohibiting the exhibition of motion pictures on Sundays or certain holidays. These enactments, whether based on local option,[28] state-wide referendum,[29] or implied absolute prohibition,[30] are often the focal point of local dissension[31] and therefore seem destined now for constitutional testing. The problem is unique in this context, inasmuch

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libel prohibition); Kittleson and Smith, *supra* note 10, at 227, 233.

[26]Another question, beyond the scope of this Comment, is the possible invalidity of FLA. STAT. §521.02 (1951) as an attempt to delegate formulation of Florida substantive law to an agency outside the state; see Florida Industrial Comm'n v. State *ex rel.* Orange State Oil Co., 155 Fla. 772, 21 So.2d 599 (1945), especially at 780, 21 So.2d at 603.

[27]FLA. STAT. §§847.01-847.03 (1951).

[28]*E.g.,* ALA. CODE ANN. tit. 14, §421 (Supp. 1951); MISS. CODE ANN. §2370 (Cum. Supp. 1952); VT. REV. STAT. §8568 (1947).

[29]*E.g.,* PA. STAT. tit. 4, §§60-66 (Cum. Supp. 1952).

[30]*E.g.,* S.C. CODE §§1732-1737, as modified, Supp. 1941, 1942, 1948; see note 31 *infra.*

[31]S.C. CODE §1737-1 (1941) impliedly amended c. 82, which sets forth the South Carolina blue laws, by authorizing issuance of a local permit to show motion pictures after 2:00 P.M. on Sundays in only those counties with military bases, provided such schedule does not conflict with church services. This law was effective for only two years, but in 1942 it was extended for the duration of World War II. In 1948 §1732-2 extended the permission to certain population brackets, including most resorts, thereby indicating reluctant response to pressure by vacationers and business men in vacation areas.