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CONSTITUTIONAL LAW-FREEDOM OF ASSEMBLY-EQUAL PROTECTION OF THE LAW

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CONSTITUTIONAL LAW—FREEDOM OF ASSEMBLY—EQUAL PROTECTION OF THE LAW—The ordinance here involved prohibited any person from addressing a political or religious meeting in any public park. At a meeting involving no disturbances or breaches of the peace, plaintiff, a Jehovah's Witness, was arrested when he addressed a meeting in a public park. The state supreme court upheld a conviction under the ordinance.[1] *Held,* reversed. The principal case is on all fours with *Niemotko v. Maryland.*[2] The state conceded at oral argument that the meeting was a religious one and that the ordinance as construed and applied did not prohibit church services in the park. Therefore, since Catholics and Protestants could hold their services there, it would be treating the religious services of the Jehovah's Witnesses differently if they were denied use of the park. The *Niemotko* case decided that such discrimination was barred by the First and Fourteenth Amendments. *Fowler v. Rhode Island,* 345 U.S. 67, 73 S.Ct. 526 (1953).

No better case than the principal one could be cited in support of Justice Jackson's admonition against the view that the brief oral argument before the Supreme Court is but "a vestigial formality with little effect on the result."[3] In both reported state court opinions and in the briefs submitted by the parties in the principal case, very little attention was devoted to the equal protection question; instead almost exclusive concern was had with whether *Davis v. Massachusetts*[4] should be overruled. In that case the Court sustained an ordinance of Boston very much like the one here considered.[5] In avoiding this seemingly central issue the Court indicates that unlike the *Niemotko* case, which was considered decisive, the result here turns almost exclusively, if not entirely, upon the "usual last resort of constitutional arguments"[6]—the equal protection of the Fourteenth Amendment and not upon the deprivation of First Amendment freedoms.[7] Although the Court has once again successfully avoided expressly overruling the *Davis* holding, the principal case follows the trend of previous decisions which have substantially diminished its value as a precedent.[8] In a number of cases, many of them resulting from the actions of Jehovah's Witnesses,

[1] State v. Fowler, (R.I. 1951) 83 A. (2d) 67; State v. Fowler, (R.I. 1952) 91 A. (2d) 27.

[2] Niemotko v. Maryland, 340 U.S. 268, 71 S.Ct. 325 (1951).

[3] Jackson, "Advocacy Before the Supreme Court," 37 A.B.A.J. 801 (1951).

[4] Davis v. Massachusetts, 167 U.S. 43, 17 S.Ct. 731 (1897).

[5] Massachusetts has itself invalidated an ordinance like the one it and the Supreme Court had sustained in the Davis case. Commonwealth v. Gilfedder, 321 Mass. 335, 73 N.E. (2d) 241 (1947).

[6] Buck v. Bell, 274 U.S. 200 at 208, 47 S.Ct. 584 (1927).

[7] Frankfurter concurred separately to indicate agreement with the majority opinion "except insofar as it may derive support from the First Amendment." Fowler v. Rhode Island, 345 U.S. 67 at 70, 73 S.Ct. 526 (1953).

[8] Hague v. C.I.O., 307 U.S. 496, 59 S.Ct. 954 (1939); Schneider v. Irvington, 308 U.S. 147, 60 S.Ct. 146 (1939); Jamison v. Texas, 318 U.S. 413, 63 S.Ct. 669 (1943); Saia v. New York, 334 U.S. 558, 68 S.Ct. 1148 (1948); Niemotko v. Maryland, note 2 supra; Kunz v. New York, 340 U.S. 290, 71 S.Ct. 312 (1951).

the Court has indicated[9] that all prior restraints of the fundamental,[10] cognate[11] freedoms of speech and religion will be examined most carefully.[12] This remains true despite the presumption usual in other areas[13] that the statute comes before the Court "encased in the armor wrought by prior legislative deliberation."[14] Thus a license or permit which must be secured, or a tax which must be paid, or a usual "practice" which must be complied with, prior to exercising the freedom,[15] is almost certain to be unconstitutional unless there are clear, non-arbitrary, and reasonable criteria for fixing the tax or determining whether the license should issue.[16] Equally obnoxious as a discriminatory prior license or tax are blanket prohibitions which prevent any exercise by any one of a basic freedom, as when a statute as construed and applied prohibits the distribution of all leaflets or books,[17] or prevents any house-to-house canvassing for religious purposes.[18] These decisions invalidating blanket prior restraints on First Amendment freedoms when exercised in the public streets, as well as the language of some members of the Court,[19] indicate that it is unlikely that there is a valid distinction between public streets and public parks[20] as regards ordinances exerting prohibitions on fundamental freedoms. Such considerations suggest that when the Court is compelled to re-examine the *Davis* case, it is likely to lose its remaining vestige of vitality.

[9] Follett v. McCormick, 321 U.S. 573, 64 S.Ct. 717 (1944). On prior restraints generally, see Near v. Minnesota, 283 U.S. 697, 51 S.Ct. 625 (1931).

[10] West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178 (1943).

[11] De Jonge v. Oregon, 299 U.S. 353 at 364, 57 S.Ct. 255 (1937).

[12] Even where subsequent punishment is imposed for having exercised a basic freedom, the record is likely to be examined most cautiously. For example, in Terminiello v. Chicago, 337 U.S. 1, 69 S.Ct. 894 (1949), the majority rested their opinion on a hitherto unnoticed sentence in the record.

[13] Although recent cases, e.g., Dennis v. United States, 341 U.S. 494, 71 S.Ct. 857 (1951), suggest that the Court has not accepted his view, Justice Stone indicated that as regards the basic freedoms there may even be a presumption of invalidity to any statute seeking to abridge them. See United States v. Carolene Products Co., 304 U.S. 144, 58 S.Ct. 778 (1938); Dowling, "The Methods of Mr. Justice Stone in Constitutional Cases," 41 COL. L. REV. 1160 at 1175 (1941). See also Kovacs v. Cooper, 336 U.S. 77, 69 S.Ct. 448 (1949).

[14] Bridges v. California, 314 U.S. 252 at 261, 62 S.Ct. 190 (1941).

[15] A license: Lovell v. City of Griffin, 303 U.S. 444, 58 S.Ct. 666 (1938); a permit: Schneider v. Irvington, note 8 supra; a tax: Murdock v. Pennsylvania, 319 U.S. 105, 63 S.Ct. 870 (1943); a prior practice: Niemotko v. Maryland, note 2 supra.

[16] Cox v. New Hampshire, 312 U.S. 569, 61 S.Ct. 762 (1941).

[17] Religious leaflets: Jamison v. Texas, note 8 supra; informational leaflets: Snyder v. Milwaukee, 308 U.S. 147 at 155, 60 S.Ct. 146 (1939). The distribution of primarily commercial leaflets may be prohibited. Valentine v. Chrestensen, 316 U.S. 52, 62 S.Ct. 920 (1942).

[18] Martin v. Struthers, 319 U.S. 141, 63 S.Ct. 862 (1943); however, the vitality of this holding is made questionable by Breard v. City of Alexandria, 341 U.S. 622, 71 S.Ct. 920 (1951), where an ordinance prohibiting all house to house canvassing was sustained by a six to three decision.

[19] See, e.g., Roberts, J., speaking also for Black, J., in Hague v. C.I.O., note 8 supra.

[20] Such a distinction is attempted in People v. Nahman, 70 N.Y.S. (2d) 29 (1947). But compare Commonwealth v. Gilfedder, note 5 supra; also note, 47 COL. L. REV. 1234 (1947).

A question of interest is presented by the broad language used in announcing the Court's opinion in the principal case. It is there said by Justice Douglas that "it is no business of courts to say that what is religious practice or activity for one group is not religion under the protection of the First Amendment. . . . To call the words which one minister speaks to his congregation a sermon, immune from regulation, and the words of another minister an address, subject to regulation, is merely an indirect way of preferring one religion over another."[21] It is believed that such language solves none of the very delicate problems here involved, but rather attests to the veracity of the observation that "Generalizations are treacherous in the application of large constitutional concepts."[22] If the talk delivered after prayers was to urge violence and the overthrow of government by force, would we still say it was a sermon delivered by a minister to his congregation? It is clear that merely labeling an activity as religious does not make it immune from regulation. The legislature and courts have regulated[23] certain "religious" activities when they were found to be dangerous, commercial, interfering with activities reserved to licensed professionals, fraudulent, or contrary to the health or welfare of the children subject to the activity.[24] The legitimacy of such regulation compels acceptance of one horn of a dilemma: either we must say that those activities which may be regulated are not religious, or we must admit that it is not unconstitutional to prefer certain religious activities over others. If we accept the former, then the language quoted above begs the question, for we must first decide what is religious activity. If we accept the latter then we admit counter examples to the general propositions relied upon by the Court. It is believed that neither history nor precedent compels acceptance of the broad language used by the Court in the above quoted passage.

S. I. Shuman

[21] Principal case at 70.

[22] Hughes v. Superior Court of California, 339 U.S. 460 at 469, 70 S.Ct. 718 (1950).

[23] See generally, Lake, "Freedom to Worship Curiously," 1 FLA. L. REV. 203 (1948).

[24] Dangerous snake handling: State v. Massey, 229 N.C. 734, 51 S.E. (2d) 179 (1949), appeal dismissed sub nom. Bunn v. North Carolina, 336 U.S. 942, 69 S.Ct. 813 (1949); see note in 2 VAND. L. REV. 694 (1949); fortune telling: Dill v. Hamilton, 137 Neb. 723, 291 N.W. 62 (1940); giving medications: State v. Verbon, 167 Wash. 140, 8 P. (2d) 1083 (1932); involving fraud: New v. United States, (9th Cir. 1917) 245 F. 710, cert. den. 246 U.S. 665, 38 S.Ct. 334 (1918); see also United States v. Ballard, 322 U.S. 78, 64 S.Ct. 882 (1944); child labor: Prince v. Massachusetts, 321 U.S. 158, 64 S.Ct. 438 (1944).