MUNICIPAL ORDINANCE PROHIBITING ANONYMOUS HANDBILLS DECLARED UNCONSTITUTIONAL

Talley v. California
362 U.S. 60 (1960)

The defendant was convicted and fined $10 in a Los Angeles Municipal Court for violating a municipal ordinance making it a criminal offense to distribute "any handbill in any place under any circumstances," unless it had printed on it the name of the person who sponsored, printed, or distributed the bill.[1] The United States Supreme Court reversed, holding the ordinance void on its face as an invasion of freedom of speech and press protected in the first and fourteenth amendments.[2]

Municipal ordinances, adopted under the authority of a state, comprise state action, and as such, fall under the scrutiny of the fourteenth amendment protecting the fundamental liberties of speech and press against state infringement.[3] The constitutional right to express one's views in orderly fashion extends to the communication of ideas by the use of handbills, circulars, and pamphlets as well as by the spoken word.[4] Furthermore, the cloak of protection extends to distribution as well as publication.[5] Liberty to circulate literature has been held as essential to freedom as the liberty to publish, for one is of little use without the other.[6]

Immunity does not extend to all forms of speech, however, as other interests may claim judicial cognizance.[7] State action must be reasonable and related to the safety or other legitimate interests of the state or its citizens.[8]

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[1] Los Angeles, Cal., Municipal Code § 28.06:

"No person shall distribute any hand-bill in any place under any circumstances, which does not have printed on the cover, or the face thereof, the name and address of the following:

(a) The person who printed, wrote, compiled or manufactured the same.

(b) The person who caused the same to be distributed; provided, however, that in the case of a fictitious person or club, in addition to such fictitious name the true names and addresses of the owners, managers or agents of the person sponsoring said hand-bill shall also appear thereon."

[2] Talley v. California, 362 U.S. 60 (1960).

[3] Near v. Minnesota, 283 U.S. 697 (1931); Gitlow v. New York, 268 U.S. 652 (1925); Raymond v. Chicago Union Traction, 207 U.S. 20 (1907).

[4] Schneider v. Irvington, 308 U.S. 147 (1939); Lovell v. Griffen, 303 U.S. 444 (1938).

[5] *Ibid.*

[6] *Ex parte* Jackson, 96 U.S. 227 (1887).

[7] See *e.g.*, Feiner v. New York, 340 U.S. 315, (1950); Cantwell v. Connecticut, 310 U.S. 296, (1940).

[8] United States v. Harriss, 347 U.S. 612 (1954) (compulsory disclosure of lobbyists); Breard v. Alexandria, 341 U.S. 622 (1951) (upholding Green River ordinance); Feiner v. New York, *supra* note 7 (may not create a panic or riot); American Communications Ass'n CIO v. Douds, 339 U.S. 382 (1950) (may not advocate the violent overthrow of the government); Valentine v. Chrestenson, 316 U.S. 52 (1941); Lewis Publishing Co. v. Morgan, 229 U.S. 288 (1913) (compulsory disclosure of editor and owners of

Even though a sufficient state interest be found, a statute which permits within the scope of its language punishment of incidents within the protection of the guarantee of free speech is unconstitutional.[9] Thus, licensing statutes requiring a permit to distribute leaflets,[10] or statutes banning any distribution on the streets[11] have been held void. Nor will statutes be upheld which deter the exercise of constitutional freedoms by making the uncertain line of the fourteenth amendment's application determinative of criminality and by prescribing indefinite standards of guilt.[12]

When infringement of the rights of speech and press is claimed, the court must "weigh the circumstances" and "appraise the substantiality of the reasons advanced" in favor of the challenged regulations.[13] The governmental interest, if found sufficient, is weighed against the impact of that challenged regulation on the freedoms of speech and press. To limit the exercise of these freedoms, the danger of destruction of life or property must be clear and present, or the danger of a breach of the peace must be imminent.[14]

The Court in the principal case reacted to the all-inclusiveness of the municipal ordinance regulating "any handbill in any place under any circumstances." The identification requirement, the majority felt, would tend to restrict distribution of literature, and thereby limit freedom of expression. Careful identification of the relevant facts and issues and the judicial process of weighing competing values is missing from the majority's opinion. The presentation of the relevant facts and issues is also generally absent from the briefs of counsel. No reference is made to the operation of the ordinance or the contents of the handbill distributed by petitioner. The impact upon protected rights and the resulting injury to Talley is neither discussed nor adequately presented to the Court. Furthermore, meager evidence was produced as to the necessity or practicality of the ordinance in question. Faced with an obvious lack of legislative facts, and motivated by a "presumption of constitutionality," the dissenters felt the ordinance should stand in the absense of a showing that restraint upon freedom of speech would result from the enforcement of the ordinance. On the other hand, the majority reasoned that the ordinance would have the general effect of restricting the exercise of protected freedoms. Thus, this freedom of anonymity was upheld over the state's unsupported contention that the ordinance itself was not so restricted.

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newspapers seeking second-class mail privileges); United States v. Peace Information Center, 97 F. Supp. 255 (D.D.C. 1951) (distribute fraudulent advertising); Annot., 114 A.L.R. 1446 (1938) (advertising matter); Annot., 22 A.L.R. 1484 (1923).

[9] Herndon v. Lowry, 301 U.S. 413 (1936); Stromberg v. California, 283 U.S. 359 (1931).

[10] Schneider v. Irvington, *supra* note 4.

[11] Jamison v. Texas, 318 U.S. 413 (1943).

[12] Thornhill v. Alabama, 310 U.S. 88 (1940); Winters v. New York, 333 U.S. 507 (1948).

[13] Lovell v. Griffen, *supra* note 4.

[14] Winters v. New York, *supra* note 12.

The majority believed the ordinance fell within the ban set by prior cases. Yet, as the dissent strongly asserts, the Los Angeles ordinance does not fall precisely under any of these cases. The earlier cases either "forbade the distribution" without exception,[15] without a license,[16] or created outright bans or prior restraints[17] on the distribution of handbills. The term "prior restraint" is used to mean that type of restriction which permits distribution subject only to the power of a public official to determine what literature may be distributed and who may distribute it.[18] In this sense, even though the Los Angeles ordinance prescribed a certain action before printing, it is not dependent upon the exercise of an official's discretion. Thus, the Court seems to be building on these past cases rather than applying them strictly as precedents.

Had the issues and facts been stated with particularity in the principal case, the outcome would probably not have been different, even though the previous handbill cases are not precisely in point. The mere existence of the Los Angeles ordinance may deter the exercise of protected freedoms for fear of exposure and public hostility. The Court's recognition of this deterrent effect is expressed in recent cases involving freedom of association. In *NAACP v. Alabama*,[19] the Court immunized petitioner's membership lists from state scrutiny on the ground that members could pursue their lawful interests privately without fear of arbitrary disclosure. Such disclosure was likely to have a deterrent effect on the members' freedom to associate and on the willingness of others to join the NAACP, and indeed, the NAACP showed that revelations of identity in the past had led to public hostility, coercion, both physical and economic, as well as loss of employment. Membership lists were also protected in *Bates v. Little Rock*[20] because fear of reprisal might deter peaceful discussions of public matters of importance. The apparent gap between the principal case and the previous handbill cases has been filled by the Court's realization of the dangers of exposure of new or unpopular ideas as expressed in the NAACP cases.

The value of the principal case as precedent is severely limited by the absence of a presentation and a subsequent investigation of the competing interests. A recent case, *Shelton v. Tucker*,[21] arrived at a similar result by a more careful evaluation of the interests at stake. Because of the differences in methods used by the Court in these two cases, further investigation is inescapable. An Arkansas statute required all teachers in public schools to submit affidavits listing all organizations to which they had belonged or contributed within the preceding five years as a prerequisite to employment.[22] This is distinguishable from the NAACP cases and *Talley* as here

[15] Jamison v. Texas, *supra* note 11.

[16] Niemotko v. Maryland, 340 U.S. 268 (1951); Schneider v. Irvington, *supra* note 4; Hague v. CIO, 307 U.S. 496 (1939).

[17] Lovell v. Griffen, *supra* note 4.

[18] Schneider v. Irvington *supra* note 4, at 163.

[19] 357 U.S. 449 (1958).

[20] 361 U.S. 516 (1960).

[21] 81 Sup. Ct. 247 (1960).

[22] Ark. Stat. ch. 10 §§ 1-7 (1958).

there is a substantial correlation between the asserted governmental interest and the state's effort to compel disclosure of organizational affiliations. The state has an admittedly valid interest in investigating the competence and fitness of those it hires to teach in its schools, and a state would be concerned about teachers who spent an excessive amount of time in outside activities, or who were members of subversive groups. The dissenters assert that the statute provides a reasonable method of obtaining needed information even though irrelevant information will also be received. No claim of bias or discrimination had been made even though the act may have been a veiled attempt to detect members of certain unpopular organizations. The dissenters also assert that the act would have to be construed so as to prohibit public disclosure of the affidavits. This contention does not fully meet the majority's position and the difference in positions is clarified by an analysis and statement of competing interests. The harm that this act would cause, states the majority, is the reluctance of teachers to join organizations not held in high regard by school authorities. This unwillingness to exercise protected rights is the same interest referred to in *Talley;* here, however, the interest is supported by evidence that fear of reprisal is more than theoretical and by an understanding, although unexpressed, of existing social conditions. Furthermore, the presentation of the affidavits to the school board permits its scrutiny to fall on those belonging to unpopular groups. Whether Talley would be harmed by disclosure was not expressed. Assuming that information on the Arkansas affidavits was kept from public inspection, there is always the chance that the information will somehow find its way outside. For the Court to wait for an example of discrimination before it acts, as the dissenters suggest, would expose some teachers to public hostility and economic loss as well as deter others from their right to associate. If narrower means of achieving the legitimate governmental end are possible, and such alternatives are discussed in this opinion, then a method which broadly stifles personal liberties cannot be pursued.[23] The careful specification and distinction of competing interests—the effects of the legislation on the petitioners and on other members of the affected class, and the state's need for competent teachers—is a technique to be desired. A more meaningful opinion in *Talley,* useful as a precedent in the future, would have specified the legislative facts and the interests protected.[24]

Aside from the structural defects, the aim of the *Talley* majority is clearly in the direction of the protection of anonymous speech, or, the protection of anonymity from arbitrary infringement. Two factors must be considered in the future. First, any regulation designed to prohibit certain evils should be specifically worded and applied so that individual action which falls outside the perimeter of such regulation will not be penalized or deterred. Second, identification requirements will be deemed to restrict the free expression of beliefs.

A shadow of doubt has been cast upon the validity of corrupt practices

[23] Kunz v. New York, 340 U.S. 290 (1951); Cantwell v. Connecticut, *supra* note 7.

[24] See Karst, "Legislative Facts in Constitutional Litigation," The Supreme Court Review, 75-112 (1960).

acts prohibiting distribution of anonymous publications with reference to elections or candidates found in over thirty states.[25] A federal statute prohibits publications concerning candidates for public office in the federal government without the names of persons or organizations responsible.[26] The Ohio Supreme Court has upheld such a statute[27] as being regulatory in nature and intended to prevent the abuse of the right of free speech.[28] It must be noted that the Ohio Constitution expressly states that every citizen may freely speak, write, and publish, "being responsible for the abuse of this right."[29] Neither the Ohio statute, nor any other similar state statute, has ever been brought before the United States Supreme Court as a violation of the federal constitution. Nevertheless, the Supreme Court has given a strong impetus to the dissemination of political and social views by permitting this activity to be free from the fears of public action hostile to the ideas being presented.

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[25] *E.g.*, Kan. Gen. Stat. Ann. § 25-1714 (1949); Minn. Stat. Ann. § 211.08 (1939); Ohio Rev. Code § 3599.09 (1957); Pa. Stat. Ann. tit. 25, § 3546 (1937).

[26] 64 Stat. 475 (1950), 18 U.S.C. § 612 (1951), amending 62 Stat. 724 (1948).

[27] Ohio Rev. Code § 3599.09 (1957);

"(A) No person shall write, print, post, or distribute . . . a notice, placard . . . or any other form of publication which is designed to promote the nomination of a candidate, or to promote the adoption or defeat of any issue, or to influence the voters in any election, unless there appears on such form of publication . . . either the name and address of the chairman or secretary of the organization issuing the same or the person who issues, makes or is responsible therefor with his name and address."

[28] State v. Babst, 104 Ohio St. 167, 135 N.E. 525 (1922).

[29] Ohio Const. art. 1, § 11, Bill of Rights.