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CONSTITUTIONAL LAW - PROTECTION OF FREEDOM OF SPEECH UNDER THE FOURTEENTH AMENDMENT

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CONSTITUTIONAL LAW — PROTECTION OF FREEDOM OF SPEECH UNDER THE FOURTEENTH AMENDMENT — The appellant, a negro member of the Communist Party, was engaged in work as a paid party organizer in Atlanta in 1932. Shortly after leading a hunger march of unemployed he was arrested, and was tried and convicted under a state statute, enacted in the Reconstruction Period, which made criminal "any attempt, by persuasion or otherwise, to induce others to join in any combined resistance to the lawful authority of the State." [1] At the time of his arrest the appellant had in his possession evidence of his organization activities and also a quantity of party literature, but there was no proof that he had distributed the latter, or advocated any doctrine of forcible subversion of the authority of the state. An earlier appeal to the Supreme Court was dismissed for lack of jurisdiction [2] and upon his commitment the appellant sought the writ of habeas corpus. The state court reversed a judgment ordering his discharge and on appeal to the Supreme Court it was held with four justices dissenting, (1) that the application given the statute unreasonably limited freedom of speech and freedom of assembly and therefore

[1] Ga. Code (1933), § 26-902.

[2] Herndon v. Georgia, 295 U. S. 441, 55 S. Ct. 794 (1934), criticized in 35 COL. L. REV. 1145 (1935).

violated the Fourteenth Amendment, and (2) that the statute did not furnish a sufficiently ascertainable standard of guilt.[3] *Herndon v. Lowry*, (U. S. 1937) 57 S. Ct. 732.

The only specific guaranty of freedom of speech found in the Constitution is a restriction on the power of the Federal Government,[4] but in recent years the Court has held that freedom of speech is a fundamental "liberty" protected by the Fourteenth Amendment against infringement by the states.[5] This freedom is not absolute,[6] and following the war the Court upheld the Espionage Act against this constitutional objection, with the limitation that it could not be used to penalize utterances unless there was a "clear and present danger" that they would result in the "substantive evils" that Congress had power to prevent.[7] When the limitation on the power of the state to impair freedom of speech was first recognized, the Court distinguished the statute in question from the Espionage Act.[8] The distinction, reiterated in the principal case,[9] is between a statute prohibiting certain acts, and one prohibiting utterances of a certain kind. The test of "clear and present danger" is confined to the former for the determination of the question whether utterances complained of are likely to bring about the prohibited acts. In considering the second type of statute the legislative determination that the danger exists in a certain class of utterance is said to be conclusive, though Justice Brandeis has urged that the statute only creates a rebuttable presumption which could be overcome by showing that there was no "clear and present danger." [10] The Court did recognize that this legislative power was subject to the usual due process requirement that

[3] NEW YORK TIMES 1:5 (April 27, 1937); TIME, p. 17 (May 3, 1937).

[4] U. S. Const., Amendment I: "Congress shall make no law . . . abridging the freedom of speech. . . ."

[5] Gitlow v. New York, 268 U. S. 652, 45 S. Ct. 625 (1925). See Warren, "The New 'Liberty' Under the Fourteenth Amendment," 39 HARV. L. REV. 431 (1926). Earlier it had been intimated that the right was not protected under this amendment. Prudential Insurance Co. v. Cheek, 259 U. S. 530, 42 S. Ct. 516 (1921). Freedom of assembly is similarly protected against state interference. De Jonge v. Oregon, (U. S. 1937) 57 S. Ct. 255, noted in 35 MICH. L. REV. 1171 (1937).

[6] For an historical approach to the meaning of the limitation see, Pound, "Equitable Relief Against Defamation," 29 HARV. L. REV. 640 at 650 (1916); Corwin, "Freedom of Speech and Press under the First Amendment: A Résumé," 30 YALE L. J. 48 (1920).

[7] Schenck v. United States, 249 U. S. 47, 39 S. Ct. 247 (1919); Frohwerk v. United States, 249 U. S. 204, 39 S. Ct. 249 (1919); Debs v. United States, 249 U. S. 211, 39 S. Ct. 252 (1919). Although these "substantive evils" have never been specifically indicated by the Court, they are said to mean "successful interference with the particular power of Congress that is in question," such as the war power. CHAFEE, FREEDOM OF SPEECH, 88 (1920).

The power of Congress to legislate against interference with enlistment of men for the military forces is not exclusive and a state may enact a like statute. Gilbert v. Minnesota, 254 U. S. 325, 41 S. Ct. 125 (1920).

[8] Gitlow v. New York, 268 U. S. 652 at 670, 45 S. Ct. 625 (1925).

[9] Herndon v. Lowry, (U. S. 1937) 57 S. Ct. 732 at 739.

[10] Whitney v. California, 274 U. S. 357 at 379, 47 S. Ct. 641 (1927).

it be reasonable and not arbitrary.[11] Although a statute may be constitutional in itself, it may be so applied that it denies the guaranteed freedom of speech and the Court will also protect this right against such application.[12] So in the principal case the Court held that an application of the statute that made membership in the Communist Party and solicitation of members for that party a criminal offense was an unreasonable denial of the right of free speech.[13] Due process of law requires that any criminal statute shall be definite in its requirements so that a person may be properly informed of the duty imposed on him and so that there will be a fixed standard of guilt for the guidance of the jury.[14] The statute involved in this case was found lacking in that regard.[15] The state court had construed the act so that forcible action must have been contemplated by the defendant, but further held that "if he intended that it should happen at any time within which he might reasonably expect his influence to continue to be directly operative in causing such action by those whom he sought to induce" a conviction could be sustained.[16] This would seem to leave more to the imagination of the jury than usual even if conscientiously applied.[17]

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[11] Id., at 371.

[12] Fiske v. Kansas, 274 U. S. 380, 47 S. Ct. 655 (1927).

[13] Compare Whitney v. California, 274 U. S. 357, 47 S. Ct. 641 (1927), upholding a state statute which made it a crime for a person to assist in the organization, or knowingly become a member, of an organization advocating criminal syndicalism.

State and federal cases involving the particular problems under discussion are annotated in 1 A.L.R. 336 (1919); 20 A. L. R. 1535 (1922); 73 A. L. R. 1494 (1931). See CHAFEE, THE INQUIRING MIND (1928), and Hall, "The Substantive Law of Crimes—1887-1936," 50 HARV. L. REV. 616 at 619 (1937).

[14] Connally v. General Construction Co., 269 U. S. 385, 46 S. Ct. 126 (1926).

[15] Also see Stromberg v. California, 283 U. S. 359, 51 S. Ct. 532 (1931).

[16] Herndon v. State, 179 Ga. 597 at 600, 176 S. E. 620 (1934), quoted by the Supreme Court in 57 S. Ct. at 738.

[17] It is questionable whether any test approved by the Supreme Court will influence the jurors and it is interesting to note that the jury in the principal case was actually instructed that in order to convict the defendant "it must appear . . . that immediate serious violence against the State of Georgia was to be expected or advocated." 57 S. Ct. at 737.