Michigan Law Review

Volume 60 | Issue 4

1962

Constitutional Law - Freedom of Speech and Press - Prohibitions on the Publication or Distribution of Anonymous Campaign Literature

Frank G. Reeder S.Ed.
University of Michigan Law School

CONSTITUTIONAL LAW — FREEDOM OF SPEECH AND PRESS — PROHIBITIONS ON THE PUBLICATION OR DISTRIBUTION OF ANONYMOUS CAMPAIGN LITERATURE — Defendant was charged under a federal statute[1] with the publication and distribution of a pamphlet which concerned a candidate for

1 18 U.S.C. § 612 (1958) which provides a fine or imprisonment for "whoever willfully publishes or distributes or causes to be published or distributed . . . any . . . pamphlet, . . . writing, or other statement relating to or concerning any person who has publicly declared his intention [to be a candidate in any federal election], which does not contain the name of the persons, associations, committees, or corporations responsible for the publication or distribution of the same . . . ." A number of states have similar statutes. See, *e.g.*, KAN. GEN. STAT. ANN. § 25-1714 (1949); OHIO REV. CODE ANN. § 3599.09 (Page Supp. 1961); PA. STAT. ANN. tit. 25, § 3546 (1938). Such statutes have been held not to violate state constitutional guarantees. State v. Freeman, 143 Kan. 315, 55 P.2d 362 (1936); State v. Babst, 104 Ohio 167, 135 N.E. 525 (1922); Commonwealth v. Evans, 156 Pa. Super. 321, 40 A.2d 137 (1945). *But see Ex parte* Harrison, 212 Mo. 88, 110 S.W. 709 (1908).

United States Senator in a special senatorial election and which did not contain the name of the person or group responsible for its publication and distribution as required by the statute. The defendant alleged that his occupation as a farmer made him particularly subject to regulation by the federal government, and that he feared coercion or reprisals from the federal representatives with whom he dealt if he complied with the statute's disclosure requirement. On motion to dismiss the information on the ground that the statute was in violation of the first amendment of the Constitution, *held*, motion denied. Congress has the power to punish the publication and distribution of unsigned pamphlets concerning announced candidates in federal elections because the value to the public in knowing the source and purpose of such materials when evaluating their content outweighs the asserted right to publish and distribute political literature anonymously. *United States v. Scott*, 195 F. Supp. 440 (D.N.D. 1961).

In *Talley v. California*[2] the Supreme Court had before it a municipal ordinance which forbade the distribution of "any handbill in any place under any circumstances" which did not disclose on its face the name and address of the person who printed or wrote the handbill and the person who caused it to be distributed.[3] Finding the ordinance by its language to be unlimited in scope, and because of the lack of any legislative history which would indicate a contrary intent, the Court held it void on its face.[4] The Court noted that such an identification requirement would tend to restrict freedom of expression since fear of coercion or reprisals could deter lawful and significant public discussion.[5] Since disclosure was the only requirement imposed by the ordinance, the Court clearly recognized anonymity as necessary to the effective exercise of freedom of expression. Acknowledging that other factors might have to be weighed in future determinations, however, the Court in *Talley* carefully reserved the question raised by the principal case—the extent to which anonymity will be protected where required disclosure would tend to restrain political expression but where the disclosure requirement is directed at a specific evil.[6]

The court in the principal case did not analyze the restrictive nature of this statute closely. It focused on the effect of the statute upon this defendant, concluding that the possibility of actual reprisals by the government representatives with whom he dealt was remote. Therefore, the court did not find any restraint upon his first amendment freedoms.[7]

2 362 U.S. 60 (1960). "The Defendant stakes his position 'almost exclusively' as he stated on oral argument on the holding in Talley v. California . . . ." Principal case at 442.

3 362 U.S. 60 (1960).

4 *Id.* at 65.

5 *Id.* at 64, 65.

6 *Id.* at 64.

7 "The mere possibility of reprisal is not enough." Principal case at 443.

The *Talley* decision indicates that such a statute must be viewed in a broader perspective, however. There the Court, with no record evidence of coercion or reprisals before it,[8] concluded that such a disclosure requirement was inherently restrictive of freedom of expression.[9] The Court recognized that the interest to be weighed was not that of the particular defendant, but rather the interest of the people as a whole in being able to express themselves without fear of onerous consequences. This should be particularly true where, as in the principal case, the assertion of the right so intimately involves the elective process, the area in which first amendment freedoms are most often utilized and the very source of their characterization as "fundamental."[10] The restrictive effect of such a disclosure requirement is particularly offensive for two reasons. First, it operates as a prior restraint on freedom of expression, albeit a self-imposed one in contrast to the more typical cases of prior licensing.[11] Secondly, such an identification requirement has the greatest deterrent effect upon unpopular or dissident groups since few persons will hesitate to sign a pamphlet or writing expressing a currently popular opinion or viewpoint. It seems clear that such a disclosure requirement constitutes a direct and substantial restraint upon first amendment freedoms.

To justify such a limitation, "the subordinating interest of the state must be compelling."[12] The court found that Congress intended to proscribe anonymous publications in the federal elective process as being evil in themselves.[13] No legislative history was cited to indicate the precise

8 362 U.S. 60, 69 (1960) (Mr. Justice Clark dissenting).

9 *Id.* at 64. Compare Bates v. Little Rock, 361 U.S. 516, 523-24 (1960); NAACP v. Alabama, 357 U.S. 449, 462-63 (1958). In each case, the Court, in denying the state's right to compel the NAACP to produce its membership lists, had before it record evidence that previous disclosures of membership in the organization had resulted in public hostility, threats and economic reprisals. In Shelton v. Tucker, 364 U.S. 479, 486 (1960) the Court held unconstitutional an Arkansas statute requiring all the state's teachers to disclose every organization with which they had been associated over the past five years. The Court was willing to assume there would be no public disclosure of the teachers' associational ties, yet it found sufficient restrictive effect on their right of free association in the fact that these ties would be disclosed to the persons who controlled their future employment as teachers.

10 See, *e.g.*, Schneider v. State, 308 U.S. 147, 161 (1939); Lovell v. Griffin, 303 U.S. 444, 451 (1938); DeJonge v. Oregon, 299 U.S. 353, 364 (1937); Grosjean v. American Press Co., 297 U.S. 233, 244 (1936).

11 See, *e.g.*, Thomas v. Collins, 323 U.S. 516 (1945); Cantwell v. Connecticut, 310 U.S. 296 (1940); Lovell v. Griffin, 303 U.S. 444 (1938).

12 Sweezy v. New Hampshire, 354 U.S. 234, 265 (1957) (Mr. Justice Frankfurter concurring).

13 Compare Commonwealth v. Evans, 156 Pa. Super. 321, 40 A.2d 137 (1945), in which the court upheld a state statute similar to the one in the principal case against allegations that it violated state constitutional guarantees of freedom of the press. The court held that the "essence of the crime is anonymity," but argued disclosure was justified since it did not deny anyone his right to print information; disclosure merely made the writer assume responsibility for his material just as a speaker, exercising his

nature or extent of this evil,[14] nor did the court consider any other evidence relevant to the necessity for such legislation. The court seemed to assume that a significant danger existed and that the power of Congress to legislate concerning the federal elective process[15] was sufficient justification for this statute. This finding must be read, however, in light of the court's prior determination that the statute did not operate restrictively in this case.[16]

The court's failure to examine closely the public interest here involved is not consistent with the Supreme Court's approach in previous cases involving federal statutes requiring registration or disclosure. These statutes have generally been upheld, but only after a careful consideration of congressional findings as to the nature and seriousness of the threat to the governmental interest asserted, and the appropriateness of the means adopted to combat the specific evil.[17] When necessary, the Supreme Court has then narrowly construed a statute so as to avoid any serious constitutional objection.[18] The lack of a definitive congressional examination and determination of the pertinent factors bearing upon this statute casts doubt on both the sufficiency and pertinency of the legislative interest to justify such a significantly restrictive statute. Thus this case presents a closer balance of interests, and the factors involved deserve closer scrutiny, than the court indicates.

Frank G. Reeder, S.Ed

right to free speech, identifies himself by his presence. See other cases cited note 1 *supra*. This same argument was made by the dissenting Justices in *Talley* as the grounds for refusing to recognize a right to anonymous expression. Talley v. California, 362 U.S. 60, 71 (1960).

14 The only pre-enactment material pertaining to this statute seems to be S. REP. No. 1390, 78th Cong., 2d Sess. (1944), referring to the legislation as "implementing the Federal Corrupt Practices Act" and facilitating the enforcement of certain reporting provisions thereof. Compare Communist Party of the United States v. Subversive Activities Control Bd., 367 U.S. 1, 97 n.39 (1961) (four Justices dissenting) where the Court referred to 18 U.S.C. § 612 as an example of a situation "in which secrecy or the concealment of associations has been regarded as a threat to public safety and to the effective, free functioning of our national institutions [and] Congress has met the threat by requiring registration or disclosure."

15 United Pub. Workers v. Mitchell, 330 U.S. 75 (1947); Burroughs v. United States, 290 U.S. 534 (1934). See also United States v. Harriss, 347 U.S. 612 (1954).

16 See text accompanying note 7 *supra*.

17 United States v. Harriss, 347 U.S. 612 (1954); United States v. Rumely, 345 U.S. 41 (1953); Viereck v. United States, 318 U.S. 236 (1943); Burroughs v. United States, 290 U.S. 534 (1934); Lewis Publishing Co. v. Morgan, 229 U.S. 288 (1913).

18 *Ibid.*