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CONSTITUTIONAL LAW - MUNICIPAL CONTROL OF PUBLIC STREETS AND PARKS AS AFFECTING FREEDOM OF SPEECH AND ASSEMBLY

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COMMENTS

CONSTITUTIONAL LAW — MUNICIPAL CONTROL OF PUBLIC STREETS AND PARKS AS AFFECTING FREEDOM OF SPEECH AND ASSEMBLY—In recent years the United States Supreme Court completed the

incorporation of the provisions of the First Amendment into the Fourteenth Amendment's "due process" clause.[1] The right against abridgment of free speech, press, assembly, and religion by any governmental unit is now entirely under the aegis of the United States Constitution and firmly protected from state legislative encroachment. This recognition was not won without long and persistent efforts; however, its acquisition has created more problems than it has settled. If the right to self-government and individual liberty are to remain untrammelled, some power to regulate conduct that lies within the protected sphere of the Fourteenth Amendment (as it embodies the First Amendment) needs to be retained by the state and local governments. In other words, these rights cannot be called absolute.[2] To the Supreme Court of the United States has fallen the unexpected and thankless task of striking a satisfactory balance between the claims of individuals and the interests of society as a whole.[3]

It is the purpose of this comment to explore only one small part of the problem: the fight for freedom of speech and assembly as opposed by the municipality's police power to control its streets and parks. Three decisions handed down by the Supreme Court on January 15, 1951,[4] will form the basis for an appraisal of the Supreme Court's pres-

[1] The Supreme Court included freedom of speech and of the press as part of the liberty guaranteed under the Fourteenth Amendment's due process clause in Gitlow v. New York, 268 U.S. 652, 45 S.Ct. 625 (1925). In 1937, de Jonge v. Oregon, 299 U.S. 353, 57 S.Ct. 255, included the right to assemble peacefully. In 1940, Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, extended protection to the free exercise of religion. The incorporation of First Amendment freedoms into the Fourteenth Amendment was completed in Everson v. Board of Education, 330 U.S. 1, 67 S.Ct. 504 (1947), where the Supreme Court stated that no state can establish a religion, or "aid one religion, aid all religions, or prefer one religion over another." See Green, "The Supreme Court, the Bill of Rights and the States," 97 UNIV. PA. L. REV. 608 (1949).

[2] See Frohwerk v. United States, 249 U.S. 204 at 206, 39 S.Ct. 249 (1919) where Justice Holmes said, ". . . the First Amendment while prohibiting legislation against free speech as such cannot have been, and obviously was not, intended to give immunity for every possible use of language." Also see Patterson v. Colorado, 205 U.S. 454, 27 S.Ct. 556 (1907); Fox v. Washington, 236 U.S. 273, 35 S.Ct. 383 (1915); Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900 (1940); Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S.Ct. 766 (1942).

[3] Professor Chafee advocates an enlarged scope to the judicial function. In his book, FREE SPEECH IN THE UNITED STATES (1948) at 34, he quotes, with approval, this statement by Justice Holmes: "I think that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage. The duty is inevitable, and the result of the often proclaimed aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate and often unconscious." Recent Supreme Court justices have not been unanimous in entertaining this view of the extent of the Court's function in civil cases. For example see Justice Jackson's dissent in Saia v. New York, 334 U.S. 558 at 571, 68 S.Ct. 1148 (1949), where he says: "It is for the local communities to balance their own interests."

[4] Feiner v. New York, 340 U.S. 315, 71 S.Ct. 303 (1951); Kunz v. New York, 340 U.S. 290, 71 S.Ct. 312 (1951); Niemotko v. Maryland, 340 U.S. 268, 71 S.Ct. 325 (1951).

ent position in this area. However, the full import of these cases cannot be realized without first considering the history of the struggle and how the Court has dealt with it.

I. *The Calm Before the Storm: The Era of Legislative Dominance*

The *Boston Commons* case best reflects the attitude of the United States Supreme Court toward the municipality's restrictions on the use of public streets and parks during the late 1800's.[5] The defendant had made a speech on the Boston Common without the permit required by a city ordinance.[6] The Massachusetts Supreme Court, speaking through Justice Holmes, upheld the defendant's conviction under the ordinance and likened the municipality's proprietary right to control its parks to the right of a private citizen to control his dwelling place.[7] The court reasoned that the defendant could not complain that the ordinance allowed the mayor to issue permits in a discriminatory manner, since the city had the right to forbid absolutely all public speaking on the Common. The United States Supreme Court closely followed the state court's opinion in affirming the judgment.

During this period the Supreme Court maintained a consistent hands-off policy with regard to legislation for police power purposes.[8] It was theoretically possible that the Supreme Court would upset a state legislature's act or state judiciary's findings of fact or law as violative of the Fourteenth Amendment's requirement for due process of law.[9] Yet, as a practical matter, the states were left undisturbed to exercise what each considered to be proper police power control. In the field of civil rights it was generally conceded that the state could enact "reasonable" ordinances regulating or prohibiting the distribution of handbills, circulars, samples and other advertising matter in such manner as will ordinarily result in littering the streets, sidewalks, or other public places.[10] Typical of still later state action, the Wisconsin

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

[6] 162 Mass. 510 at 510 (1895): "Section 66 of chapter 43 of the 'Revised Ordinances of the City of Boston, 1892,' is as follows: 'No person shall, in or upon any of the public grounds, make any public address . . . except in accordance with a permit from the mayor.'"

[7] Davis v. Massachusetts, 162 Mass. 510, 39 N.E. 113 (1895).

[8] See CHAFEE, FREE SPEECH IN THE UNITED STATES 412 (1948). See also the discussion in 22 A.L.R. 1484 (1923) and 114 A.L.R. 1446 (1938).

[9] The Court required a finding that the legislature or state courts acted completely arbitrarily or capriciously before it would invalidate their action. See Fox v. Washington, 236 U.S. 273, 35 S.Ct. 383 (1915).

[10] Wettengel v. Denver, 20 Colo. 552, 39 P. 343 (1895); In re Anderson, 69 Neb. 686, 96 N.W. 149 (1903); Zinn v. State, 88 Ark. 273, 114 S.W. 227 (1908); Intl. Textbook Co. v. District of Columbia, 35 App. D.C. 307 (1910); Sieroty v. Huntington Park,

Supreme Court, in 1931, upheld, as not violating the constitutional guaranty of free speech, a Milwaukee ordinance prohibiting distribution of "circulars, handbills, cards, posters or dodgers" as applied to circulars setting forth political and economic views.[11] Even as late as 1935 the New Jersey Supreme Court upheld an ordinance which prohibited canvassing, solicitation, or distribution of circulars or other matter without first having reported to, and having obtained a written permit from, the police, as applied to persons distributing pamphlets disseminating their religious conceptions and soliciting their sale.[12]

II. *Liberty Takes the Field: Enter Jehovah's Witnesses*

The decision, in 1925, in *Gitlow v. New York*[13] made clear that freedom of speech and press were finally included within the protection of the Fourteenth Amendment's "due process" clause. Yet this result certainly did not determine the *degree* of protection that need be accorded these rights. The majority in the *Gitlow* case said: "Every presumption is to be indulged in favor of the validity of the statute. . . . [Each case] . . . is to be considered 'in the light of the principle that the State is primarily the judge of regulations required in the interest of public safety and welfare;' and that its police 'statutes may only be declared unconstitutional where they are arbitrary or unreasonable attempts to exercise authority vested in the State in the public interest.'"[14] According to this view, it would seem that the incorporation of the guarantee of free speech into the Fourteenth Amendment had effected little change in our concept of due process. This conclusion seems further justified when we look at the type of state regulations indirectly sanctioned during this period by the Supreme Court's refusal to grant certiorari.[15]

Nevertheless, *Gitlow v. New York* had created a theoretical chink in the legislature's armor; through this chink, in 1937, *Lovell v.*

111 Cal. App. 377, 295 P. 564 (1931); San Francisco Shopping News Co. v. South San Francisco, (9th Cir. 1934) 69 F. (2d) 879, cert. den. 293 U.S. 606, 55 S.Ct. 122 (1935).

[11] Milwaukee v. Kassen, 203 Wis. 383, 234 N.W. 352 (1931).

[12] Dziatkiewicz v. Maplewood Twp., 115 N.J.L. 37, 178 A. 205 (1935). See also Coleman v. Griffin, 55 Ga. App. 123, 189 S.E. 427 (1936), appeal dismissed by United States Supreme Court in 302 U.S. 636, 58 S.Ct. 23 (1937).

[13] 268 U.S. 652, 45 S.Ct. 625 (1925).

[14] Id. at 668-9.

[15] See San Francisco Shopping News Co. v. South San Francisco, (9th Cir. 1934) 69 F. (2d) 879, cert. den. 293 U.S. 606, 55 S.Ct. 122 (1934). Also see Coleman v. Griffin, 55 Ga. App. 123, 189 S.E. 427 (1936), appeal dismissed by United States Supreme Court *"for the want of a substantial federal question"* and "for the want of a properly presented federal question" in 302 U.S. 636, 58 S.Ct. 23 (1937) (italics added).

Griffin[16] drew first blood.[17] Jehovah's Witness Lovell had distributed religious tracts in Griffin, Georgia, without applying for permission as required by a city ordinance. Lovell was indicted and convicted under this ordinance, which forbade the distribution of advertising and so-called literature of any kind, free or sold, without prior written permission from the city manager. The Supreme Court held the ordinance unconstitutional *on its face* as a previous restraint on publication.[18]

Two years later, in *Schneider v. Irvington*,[19] the Supreme Court invalidated a drastic permit ordinance which required the applicant to be photographed and fingerprinted so as to prevent people from soliciting money fraudulently or getting into houses for criminal purposes. Since the ordinance gave sole discretion to the chief of police to refuse the permit and prescribed no standards to guide his conduct, the system could be used to censor unpopular ideas. On this basis, the Court found the ordinance void on its face, if it applied to persons like the defendant, a Jehovah's Witness, who solicited pursuant to her religious convictions, though the Court indicated that such an ordinance might be valid as applied to commercial soliciting and canvassing.

In three other cases handed down at the same time as the *Schneider* decision, the Supreme Court invalidated ordinances which absolutely prohibited distribution of handbills in the streets, where littering was encouraged.[20] The Supreme Court felt that the purpose of keeping the streets clean did not justify denial of the right of distribution.[21] Thus, the legislature was no longer the final judge as to the propriety of police power legislation which conflicted with civil rights. If such legislation was not to be found arbitrary and capricious, the evil designed to be prevented had to be substantial enough to justify the invasion of individual liberties. Although the presumption was still in favor of the validity of the legislation, as in the *Gitlow* case, the Supreme Court would now closely question the necessity and advisability of such legislation.

[16] 303 U.S. 444, 58 S.Ct. 666 (1938). See also Largent v. Texas, 318 U.S. 418, 63 S.Ct. 667 (1943) where the Supreme Court held a similar ordinance void.

[17] This case marked the beginning of a long series of successful onslaughts against state police regulations by a religious sect known as the Jehovah's Witnesses. See the article by Waite, "The Debt of Constitutional Law to Jehovah's Witnesses," 28 MINN. L. REV. 209 (1944).

[18] Patterson v. Colorado, 205 U.S. 454, 27 S.Ct. 556 (1907), stated that the federal government could impose no previous restraints on the press under the First Amendment, though the majority intimated that this prohibition did not extend to the states.

[19] 308 U.S. 147, 60 S.Ct. 146 (1939).

[20] Young v. California, Snyder v. Milwaukee, Nichols v. Massachusetts. These were discussed together with Schneider v. Irvington in 308 U.S. 147, 60 S.Ct. 146 (1939).

[21] For a later case where the Supreme Court invalidated such an ordinance see Jamison v. Texas, 318 U.S. 413, 63 S.Ct. 669 (1943).

Finally, in 1939, the *Boston Commons* case[22] was overturned. In *Hague v. CIO*[23] it was held that a city did not have the right to exercise every kind of power over its parks, no matter how discriminatory. In this case, an ordinance of Jersey City, New Jersey, required a permit for meeting on public ground.[24] The permit could be refused by the licensing official only "for the purpose of preventing riots, disturbances, or disorderly assemblages."[25] However, the construction given the ordinance by the New Jersey courts vested the licensing officials with wide discretion and it was evident that the licensing power had been abused in the past to suppress unpopular views.[26] The Supreme Court held the ordinance invalid on its face as an abridgment of freedom of assembly, now included within the protection of the Fourteenth Amendment. The petitioner had been refused a license, according to the New Jersey officials, because of fear of disorder. Although the facts of the case show that no such danger was imminent,[27] the Supreme Court refused to decide the case on its facts. A far-reaching result of this decision was the elimination of prior restraints against speech and assembly in public places, solely in the interest of preventing violence. Because of the *Hague* case, local officials had to permit a public meeting to take place, even if their fears of disorder were well-founded, and to permit the meeting to continue until there was a "clear and present danger" of force and violence.[28]

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

[23] 307 U.S. 496, 59 S.Ct. 954 (1939).

[24] The Bill of Rights Committee of the American Bar Association filed a brief amicus curiae in the Hague case, which is set out in Hague v. CIO, 307 U.S. 496 at 678, 59 S.Ct. 954 (1939). This brief stressed the importance of freedom of assembly to the American democratic system and pointed out that "the outdoor meeting is especially adapted to the promotion of unpopular causes, since such causes are likely to command little financial support and therefore must often be promoted by persons who do not have the financial means to 'hire a hall' or purchase time on the radio." It further pointed out that "as a practical matter a city has a virtual monopoly of every open space at which a considerable open meeting can be held, because vacant private land in cities has become scarce and expensive."

[25] The ordinance is set out in Hague v. CIO, 307 U.S. 496 at 502, 59 S.Ct. 954 (1939).

[26] See CHAFEE, FREE SPEECH IN THE UNITED STATES 411 (1948).

[27] See the majority opinion of Justice Roberts in Hague v. CIO, 307 U.S. 496 at 502, 59 S.Ct. 954 (1939).

[28] This "clear and present danger" test was first proposed by Justice Holmes in Schenck v. United States, 249 U.S. 47, 39 S.Ct. 247 (1919), as a test of the applicability of a criminal conspiracy statute to the individual defendant. "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." Id. at 52. The majority in the Gitlow case, 268 U.S. 652, 45 S.Ct. 625 (1925), stated that this was no general test of constitutionality but merely a manner of construing a broad, general statute. Judge Learned Hand suggests in United States v. Dennis, (2d Cir. 1950) 183 F. (2d) 202, that the "clear and present danger"

Nevertheless, the *Hague* decision does not seem to have gone so far as to say that a city could not subject its streets and parks to reasonable regulation, for in *Cox v. New Hampshire*,[29] the Supreme Court upheld a narrowly drawn statute requiring a permit and license fee for parades. This license could be refused only for "considerations of time, place and manner so as to conserve the public convenience . . . [and] the [license] fee was . . . 'to meet the expense incident to the administration of the Act and to the maintenance of public order in the manner licensed.' "[30]

The *Hague* decision, then, left intact a limited area where the municipality is free to exert prior restraints against speech and assembly.[31]

Futher amplifying the *Hague* decision,[32] *Cantwell v. Connecticut*[33] seemingly defined the scope of the municipality's authority to quell disturbances resulting from public meetings. Justice Roberts explained the test as follows: "When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the state to prevent or punish is obvious."[34]

III. The Tide of Battle Turns: Preferred Place of Freedom of Speech

The year 1943 marked the beginning of a new attitude on the part of the United States Supreme Court toward legislation which interfered with civil liberties.[35] Recent years had found the Supreme Court sustaining as constitutional an ordinance which made the "flag salute" in public schools compulsory.[36] It also sustained nondiscriminatory taxes on the sale of religious literature.[37] In 1943, these cases were

concept can be equated with the balancing of the public interest against the private right invaded. Judges need "ask whether the gravity of the 'evil' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."

[29] 312 U.S. 569, 61 S.Ct. 762 (1941).

[30] Id. at 575-7.

[31] Sellers v. Johnson, (2d Cir. 1947) 163 F. (2d) 877, followed the Hague doctrine that a proposed meeting cannot be prohibited in advance because hostile factions threaten a riot or police officers believe breaches of peace will occur if the rights of free speech and assembly are exercised. The Supreme Court refused to grant certiorari in 332 U.S. 851, 68 S.Ct. 356 (1948).

[32] 307 U.S. 496, 59 S.Ct. 954 (1939).

[33] 310 U.S. 296, 60 S.Ct. 900 (1940).

[34] Id. at 308.

[35] Professor Waite, in 28 MINN. L. REV. 209 (1944) traces this new viewpoint back to 1941 and the decision in Bridges v. California, 314 U.S. 252, 62 S.Ct. 190 (1941), but his conclusion as to the time of origin of the new attitude seems of doubtful validity.

[36] Minersville School District v. Gobitis, 310 U.S. 586, 60 S.Ct. 1010 (1940).

[37] Jones v. Opelika, 316 U.S. 584, 62 S.Ct. 1231 (1942).

overruled.[38] However, the real significance of these overruling decisions was that they seemingly marked the end of the Supreme Court's deference to the legislature. In the *Barnette* case,[39] three of the majority referred to the "preferred" position of free speech; since that time the term has occupied a prominent place in the Supreme Court's opinions.[40] Justice Murphy[41] and Justice Rutledge[42] would say that this "preferred position" means that legislation impinging on freedom of speech is prima facie invalid and that the *burden is on the state* to prove the reasonableness and necessity of such legislation. Although it is doubtful that the other justices who have applied this appellation would carry its implications that far, still the result of the use of this term is significant. For, as Green has stated,[43] "in the balancing of interests there must be placed in the scales, against the social value of the governmental abridgment, a heavy (and uniform) weight representing the absolute value of the freedom, apart from and in addition to the Court's estimate of the social value of the utterance in the particular case."

This new attitude manifested itself in *Saia v. New York*[44] where the majority opinion of Justice Douglas indicated that the "preferred position of free speech" need be taken into account in adjudging the constitutionality of an ordinance which required a license from the chief of police for use of sound amplification devices in public places. The Court held the ordinance invalid for it did not prescribe standards to be applied in passing upon a license application, though there was no indication that a license had ever been refused for discriminatory

[38] West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178 (1943), overruled the Gobitis case, 310 U.S. 586, 60 S.Ct. 1010 (1940). Murdock v. Pennsylvania, 319 U.S. 105, 63 S.Ct. 870 (1943) was recognized as analogous to Jones v. Opelika, 316 U.S. 584, 62 S.Ct. 1231 (1942), and was decided contrary to that decision. A rehearing of Jones v. Opelika was held in 319 U.S. 103, 63 S.Ct. 890 (1943) and the original judgment vacated.

[39] 319 U.S. 624, 63 S.Ct. 1178 (1944).

[40] The Court has not been unanimous in according freedom of speech a preferred position. Justice Frankfurter and Justice Jackson, in particular, have repeatedly refused to subscribe to this doctrine. While Justice Jackson would have the Court refrain from interfering with legislative findings altogether, Justice Frankfurter advocates the more moderate approach of Holmes and Brandeis: he would uphold the legislation unless clearly unreasonable and would use the Holmes "clear and present danger" test in applying the legislation to the facts of an individual case.

[41] See Justice Murphy's dissent in Prince v. Massachusetts, 321 U.S. 158 at 173, 64 S.Ct. 438 (1944).

[42] See Justice Rutledge's concurrence in United States v. CIO, 335 U.S. 106 at 140, 68 S.Ct. 1349 (1948).

[43] Green, "The Supreme Court, the Bill of Rights and the States," 97 UNIV. PA. L. REV. 608 at 636 (1949).

[44] 334 U.S. 558, 68 S.Ct. 1148 (1948), noted in 47 MICH. L. REV. 111 (1948) and 58 YALE L.J. 335 (1949).

reasons.[45] However, the significance of this decision is somewhat nullified by the fact that an ordinance which, in effect, banned the operation of all sound trucks was sustained one year later in *Kovacs v. Cooper*.[46]

Not all language was said to occupy this "preferred position" however. *Chaplinsky v. New Hampshire*[47] reaffirmed *Cantwell v. Connecticut*[48] where the Court had said: "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument."[49]

Chaplinsky, a Jehovah's Witness, had stirred up public resentment as he distributed handbills on the streets. A city marshal attempted to lead Chaplinsky to a police station in order to protect him from threatened violence. On the way, Chaplinsky allegedly called the marshal a "damned racketeer" and "damned fascist." Chaplinsky was indicted and convicted for these statements under a city ordinance[50] which declared punishable the "addressing of any offensive, derisive or annoying word to any other person lawfully in any street or any other public place, or calling him by any offensive or derisive name." The Supreme Court upheld the conviction stating that while the Fourteenth Amendment protects the individual from abridgment of freedom of speech, such protection is not absolute in nature. Speaking through Justice Murphy, the Court said: "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 very utterance inflict injury or tend to incite an immediate breach of the peace."[51]

IV. *Recent Decisions*

At first glance, the holdings in the three most recent Supreme Court decisions touching on this field seem to add little to the approach

[45] See Justice Frankfurter's concurring opinion to the Niemotko, Feiner and Kunz cases, 340 U.S. 273 at 280, 71 S.Ct. 328 (1951).

[46] 336 U.S. 77, 69 S.Ct. 448 (1949).

[47] 315 U.S. 568, 62 S.Ct. 766 (1942), discussed in 2 BILL OF RIGHTS REV. 224 (1942).

[48] 310 U.S. 296, 60 S.Ct. 900 (1940).

[49] Id. at 309.

[50] N.H. P.L., c. 378, §2.

[51] 315 U.S. 568 at 571, 62 S.Ct. 766 (1942). However, the use of the term "Fascist" was found not to be a "fighting word" in Cafeteria Employees Union v. Angelos, 320 U.S. 293, 64 S.Ct. 126 (1943).

of recent years. These decisions are highly significant, however, for, considered as a unit, they suggest that a more empirical attitude has been adopted toward reconciling the private and public interests. The first of these decisions, *Niemotko v. Maryland*,[52] is important only in that it reaffirms certain fundamental safeguards for freedom of speech, press and religion. Yet, it serves as a reassurance that if the court has retreated from its advanced position in regard to civil liberties, as feared by Justice Black in *Feiner v. New York*,[53] it has certainly not abdicated its role as final arbiter.

In the *Niemotko* case, although there was no ordinance prohibiting or regulating the use of the city's public park, it had been customary for organizations and individuals desiring to use it for meetings and celebrations of various kinds to obtain a permit from the park commissioner, and religious groups had never been denied permission when the park was available. A local Jehovah's Witness group requested permission from the commissioner for use of the park for Bible talks on certain Sundays. The commissioner refused to grant their request, and they petitioned the city council, which rejected their petition after a hearing at which the applicants appeared and were questioned by the council about their views on saluting the flag, the Catholic Church, and service in the armed forces.[54] No questions were asked about matters relating to public order or convenience in the use of the park. The Witnesses proceeded to hold their meeting after their request had been denied, and the petitioner, *Niemotko*, was arrested shortly after he began his lecture. He was convicted of disorderly conduct, although there was no evidence of disorder, threats of violence, or riot at the time of his arrest. The Supreme Court of the United States reversed the conviction by the Maryland circuit court[55] on the grounds (a) that the licensing requirement was an invalid prior restraint on the rights of religion and assembly;[56] (b) that the petitioner's group had been

[52] 340 U.S. 268, 71 S.Ct. 325 (1951).

[53] 340 U.S. 315 at 322-323, 71 S.Ct. 303 (1951).

[54] See Niemotko v. Maryland, 340 U.S. 268 at 274, 71 S.Ct. 325 (1951).

[55] Under the constitution of Maryland, Art. 15, §5, the jury is the judge of the law as well as the facts, and so there is normally no appellate review of any question depending on the sufficiency of the evidence. The court of appeals of Maryland thus declined to take the case up on appeal or to grant certiorari, finding the issues not to be matters of public interest.

[56] Licensing requirements constitute invalid prior restraints on freedom of speech, press and religion unless they prescribe narrowly drawn, reasonable and definite standards for the licensing authorities to follow, as in Cox v. New Hampshire, 312 U.S. 569, 61 S.Ct. 762 (1941), where the Supreme Court permitted use of the licensing system under a statute requiring a permit for parades and which was narrowly construed by the state courts to permit refusal only for considerations of time, place and manner so as to conserve the public

denied equal protection of the laws; and (c) that actual breach of the peace could not have been the basis for the conviction since there was no evidence of violence or riot at the time of the petitioner's arrest.

Kunz v. People of the State of New York[57] presents a problem similar to that in the *Niemotko* case—the attempt of a city to exert a prior restraint on freedom of religious speech by means of a licensing system. However, defendant Kunz does not present the sympathetic picture that Niemotko did. For this reason, Justice Jackson, who joined in the unanimous *Niemotko* holding, dissented from the reversal of Kunz's conviction for speaking at Columbus Circle without the permit required by a New York City ordinance.

In the *Kunz* case, a narrowly drawn New York ordinance[58] made it unlawful to hold public worship meetings on the streets without first obtaining an annually issued permit from the city police commissioner. The ordinance made no reference to any power to revoke the permit, nor did it mention any grounds on which a permit could be denied. Kunz, an ordained Baptist minister, applied for, and obtained, a permit for the year 1946. According to the city authorities his meetings brought in complaints that he was making scurrilous attacks on Catholics and Jews. Kunz's own testimony revealed that his utterances caused so much hostility on the part of his audiences that he continually needed police protection.[59] The city revoked Kunz's permit in November 1946, for "ridiculing and denouncing other religious beliefs" and his applications for permits in 1947 and 1948 were disapproved by the police commissioner, who gave no reason for this action. Kunz was arrested in 1948 for speaking at Columbus Circle in New York City without a permit. The New York court of appeals construed the ordinance to require that all initial requests for permits by eligible applicants need be granted, but that a permit could be revoked "for cause" and subsequent applications denied. The United States Supreme Court reversed the conviction on the grounds that the ordinance, as construed, operated as an invalid prior restraint on the exercise of religious freedom.

Justice Jackson's dissent did not meet the main argument raised by

convenience. A narrowly drawn licensing statute which was construed by the courts and applied by the licensing authorities as placing complete discretion in the mayor to refuse the permit was invalidated in Hague v. CIO, 307 U.S. 496, 59 S.Ct. 954 (1939).

[57] 340 U.S. 290, 71 S.Ct. 312 (1951).

[58] N.Y. Admin. Code, c. 10, §435-7.0.

[59] See Justice Jackson's dissent in the Kunz case, 340 U.S. 290 at 295-297, 71 S.Ct. 312 (1951).

both the majority opinion of Chief Justice Vinson and the concurring opinion of Justice Frankfurter: as construed by the New York court of appeals, the ordinance would have vested unlimited discretion in the police commissioner to deny renewal applications, as well as authority to revoke existing permits, since it prescribed no standards to guide the commissioner's conduct. This licensing system manifestly could be abused in order to censor unpopular religious views.

However, Justice Jackson does raise an interesting question suggested by the facts of the *Kunz* case: he asks whether the Kunzes need be continually surrounded by phalanxes of police to protect them from the audiences enraged each time they speak.[60] Need the city, each time, await the inevitable "fighting words," such as "Christ-Killer" before its police can intervene to stop the speaker? If we follow the implications of *Hague v. CIO*,[61] the city must permit such speakers to cause an actual disturbance before it can interfere. Yet there is a faint inkling in the majority opinion, and a definite commitment on the part of Justice Frankfurter, that this may not be true. If a narrowly drawn ordinance provided for revocation or denial of such a permit, setting out in detail the reasons for which such revocation, or denial, could be made, and giving detailed administrative procedure to eliminate abuses, it might prove constitutional especially if the permit could be withheld for only a reasonable time. Although such a result would be heartily condemned by those who feel that even the "fighting words" doctrine of the *Chaplinsky* decision[62] represents an unjustified inroad on the First Amendment freedoms,[63] it actually would be more in accordance with the views entertained by other free speech advocates.[64]

The highly controversial holding in the third of the recent decisions, *Feiner v. People of the State of New York*,[65] is in complete contrast to the predictable results of the *Kunz* and *Niemotko* decisions. The *Feiner* case presents the question at what point can the munici-

[60] Justice Jackson's dissent, 340 U.S. 301 and 302, 71 S.Ct. 312 (1951).

[61] 307 U.S. 496, 59 S.Ct. 954 (1939). Also see Sellers v. Johnson, (2d Cir. 1947) 163 F. (2d) 877, cert. den. 332 U.S. 851, 68 S.Ct. 356 (1948).

[62] 315 U.S. 568, 62 S.Ct. 766 (1942).

[63] See Antieau, "The Rule of Clear and Present Danger: Scope of Its Applicability," 48 MICH. L. REV. 811 (1950).

[64] See MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 99 (1948). Also see the brief filed amicus curiae by the Bill of Rights Committee of the American Bar Association in Hague v. CIO, 307 U.S. 496 at 678, 59 S.Ct. 954 (1939) set out in 25 A.B.A.J. 7 (1939). The committee advised permitting local officials to prohibit proposed meetings, if this is necessary to avoid a clear and present danger of real disorder. A permit ordinance is valid if it be carefully worded to require a genuine fear based on substantial evidence.

[65] 340 U.S. 315, 71 S.Ct. 303 (1941), discussed in 49 MICH. L. REV. 896 (1951).

pality intervene to stop speaking on the public streets in order to prevent disorder. Feiner, a college student, stood on a soap-box at the edge of a sidewalk and addressed a mixed group of Negroes and Whites through a loud-speaker, urging them to attend a meeting on racial discrimination and civil liberties to be held that evening at a local hotel. This meeting had previously been scheduled to take place in a public school building, but the city authorities had cancelled the permit that very day. Feiner heatedly criticized the city authorities for their actions but did not use profane language. On their arrival at the scene, two police officers found a crowd of seventy-five to eighty persons gathered around the speaker, filling the sidewalk, and spilling over into the street, compelling pedestrians to walk in the street to avoid the crowd. The officers described the crowd as restlessly shoving and milling around. The speaker had urged the Negro populace to fight for civil equality and this had engendered both approval and hostility on the part of the crowd. However, the evidence is in conflict as to the gravity of the situation. The officers feared that uncontrolled disorder or even a racial riot was imminent and requested the speaker to break up the meeting. He ignored their request and continued talking. After Feiner ignored the officers' second request, he was placed under arrest and charged with disorderly conduct in violation of Penal Law of New York, section 722, subdivision 1-3.[66] He was duly convicted and the conviction was affirmed by the New York appeal courts. The United States Supreme Court affirmed Feiner's conviction, Justices Black, Douglas, and Minton dissenting. Where there is contradictory evidence of clear danger of disorder, the trial judge's findings that the police officers have exercised proper discretionary power to prevent a breach of peace rather than to suppress the speaker's views, when supported by the state appeal courts, will be respected by the United States Supreme Court. The majority opinion emphasized that Feiner had "passed the bounds of argument and persuasion" and undertaken "incitement to riot."

Justice Black, in his dissenting opinion in the *Feiner* case, regards the majority's approach as a distinct departure from the Supreme

[66] "§722. Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct:

1. Uses offensive, disorderly, threatening, abusive or insulting language, conduct or behavior;
2. Acts in such manner as to annoy, disturb, interfere with, obstruct, or be offensive to others;
3. Congregates with others on a public street and refuses to move on when ordered by the police. . . ."

Court's recent position in the sphere of civil liberties. As Justice Black points out, Feiner was not uttering "fighting words," so, under the Hague doctrine,[67] the police had the primary duty to protect his constitutional right of free speech even to the extent of arresting those who physically threatened him. There is no evidence that additional police reinforcements were not available to defend Feiner adequately from his hostile audience, nor is there clearly a preponderance of evidence of a "clear and present danger of riot or disorder" to justify the termination of the meeting. There is ample evidence of an "interference with traffic upon the public streets" but the police made little attempt to expedite the traffic, and it seems clear that this was not the primary factor behind their stopping the meeting. The Supreme Court deferred to the state court's findings that Feiner was "inciting to riot," but Justice Black is quite correct that the Supreme Court of recent years has refused to accept controversial fact findings in cases involving invasion of civil liberties.[68] If free speech has a "preferred" place in regard to state legislative action, it should occupy an equally "preferred" place in regard to police action.

V. *Conclusion*

The *Feiner* decision represents a long-awaited and much-needed trend away from the Court's over-solicitude in protecting the individual in the exercise of his First Amendment rights. The Supreme Court has been so zealous of late in defending the individual from the encroachments of government that it has left the mass of individuals—society—a helpless prey to the vagaries of a few. A reversal of Feiner's conviction, for example, would have tied the hands of municipal peace officers to cope effectively with the problem of possible serious public disorder. As it is doubtful that even a trial judge can put himself in the place of the officer confronted with the possibility of imminent rioting, so is it true of the Supreme Court, there being substantial evidence on the record to support the officer's actions.

Perhaps the *Feiner* decision means that the Supreme Court will reconsider the extreme stand it has taken in other civil liberties decisions. It is submitted that the Supreme Court went too far in not deciding *Lovell v. Griffin*,[69] *Douglas v. City of Jeannette*,[70] *Saia v. New York*,[71]

[67] Hague v. CIO, 307 U.S. 496, 59 S.Ct. 954 (1939).

[68] Norris v. Alabama, 294 U.S. 587, 55 S.Ct. 579 (1934); Pennekamp v. Florida, 328 U.S. 331, 66 S.Ct. 1029 (1945); Craig v. Harney, 331 U.S. 367, 67 S.Ct. 1249 (1947).

[69] 303 U.S. 444, 58 S.Ct. 666 (1938).

[70] 319 U.S. 157, 63 S.Ct. 877 (1943).

[71] 334 U.S. 558, 68 S.Ct. 1148 (1948). Sound trucks seem "nuisances" whereby the

and *Cantwell v. Connecticut*,[72] among others, entirely on their facts. The individual should be completely free in his own home, as well as on the public streets, from the annoyances of religious proselyting or political haranguing. As Professor Chafee says, "Great as is the value of exposing citizens to novel ideas, home is one place where a man ought to be able to shut himself up in his own ideas if he so desires."[73]

Too little consideration has been given by the Court in the past to the plight of the Common Man, whom the Court purports to be defending. When a man's religious convictions can be assailed at every turn with the Supreme Court's blessing, as in *Cantwell v. Connecticut*,[74] when a housewife cannot be protected by the municipality from the annoyance of answering her doorbell all day in response to religious solicitors, as in *Douglas v. City of Jeannette*,[75] this is surely liberty gone mad. If the *Feiner* decision is evidence that the Supreme Court is adopting a more reasonable attitude toward the problem of free speech, this writer welcomes the change.

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individual's home privacy can be invaded, as Justice Frankfurter's dissent in the Saia case indicates, rather than constitutionally protected speech devices.

[72] 310 U.S. 296, 60 S.Ct. 900 (1940).
[73] CHAFEE, FREE SPEECH IN THE UNITED STATES 406 (1948).
[74] 310 U.S. 296, 60 S.Ct. 900 (1940).
[75] 319 U.S. 157, 63 S.Ct. 877 (1943).