Michigan Law Review

Volume 50 | Issue 4

1952

CONSTITUTIONAL LAW-DUE PROCESS-FREEDOM OF EXPRESSION- COMMERCE CLAUSE-CLAUSE-"GREEN RIVER" ORDINANCE AS APPLIED TO DOOR TO DOOR SOLICITATION FOR MAGAZINE SUBSCRIPTIONS

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CONSTITUTIONAL LAW—DUE PROCESS—FREEDOM OF EXPRESSION—COMMERCE CLAUSE—"GREEN RIVER" ORDINANCE AS APPLIED TO DOOR TO DOOR SOLICITATION FOR MAGAZINE SUBSCRIPTIONS—In their famous article on the right of privacy, Warren and Brandeis noted that the common law protection of the right of privacy in the home was far more highly developed than the protection given to individual privacy in other respects. "The common law has always recognized a man's house as his castle, impregnable, often, even to its own officers engaged in the execution of its commands."[1] The common law impregnability has met perhaps its stiffest test when those attacking it have sought constitutional protection. The recent decision of the Supreme Court in the case of *Breard v. City of Alexandria, La.*,[2] represents a victory for the forces of impregnability. Breard, a regional representative of a large inter-state magazine subscription agency was convicted of violating an ordinance which prohibited "the going in and upon private residences in the City of Alexandria, Louisiana by solicitors, peddlers, hawkers . . . not having been requested or invited so to do by the owner . . . of said private residences."[3] Breard attacked the ordinance on the grounds that it was contrary to the commerce clause, and that it violated the due process clause of the Fourteenth Amendment. The Supreme Court affirmed the decision of the Supreme Court of Louisiana[4] affirming Breard's conviction. Justice Reed delivered the majority opinion. Chief Justice Vinson dissented on the commerce

[1] Warren and Brandeis, "The Right to Privacy," 4 HARV. L. REV. 193 at 220 (1890).
[2] Breard v. City of Alexandria, La., 341 U.S. 622, 71 S.Ct. 920 (1951).
[3] Ordinance No. 500 of the City of Alexandria.
[4] City of Alexandria v. Breard, 217 La. 820, 47 S. (2d) 553 (1950).

clause question, and Justice Black dissented on the ground that the due process clause was violated by denial of freedom of expression. Justice Douglas joined in both dissents. This comment will examine the grounds of attack.

I. *Commerce Clause*

A. In general. There have been three principal views of the degree to which the negative implications of the commerce clause restrict state regulation where there is no federal legislation in the field. Very generally, they may be stated as follows: (1) the strict view set forth by Marshall that interstate commerce is immune from state regulation, except for certain necessary police power regulations;[5] (2) the so-called "Cooley" view, that the constitutionality of a state regulation should be decided on the basis of a careful weighing of local as against federal interests in the subject matter of the regulation;[6] and (3) the "Taney" view, presently espoused by Justice Black, that a nondiscriminatory state regulation of interstate commerce is generally valid until Congress enacts a law inconsistent with it.[7] The "Cooley" view seemed firmly entrenched until the recent case of *Hood and Sons v. Dumond*,[8] in which a New York statute regulating the milk industry was declared invalid in an opinion which did very little weighing of interests and gave rise to comments to the effect that a majority of the Court had abandoned the "Cooley" approach and was moving in the direction of Marshall's stricter point of view.[9] The *Breard* case does little to clarify the Court's present basic philosophy in this field. While there are overtones of interest-weighing throughout, it comes most to the fore in the section of the opinion dealing with freedom of the press, rather than in that devoted to the commerce clause.[10] At one point the Court seems to say that where the regulation is of the conventional police power type rather than of the economic variety, there will be no weighing at all, and the Court will look only for a "reasonable basis."[11] Certainly

[5] Gibbons v. Ogden, 9 Wheat. (22 U.S.) 1 (1824); Brown v. Maryland, 12 Wheat. (25 U.S.) 419 (1827).

[6] Cooley v. Board of Wardens, 12 How. (53 U.S.) 299 (1851); Milk Board v. Eisenberg Co., 306 U.S. 669, 59 S.Ct. 773 (1939); Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307 (1943).

[7] License Cases, 5 How. (46 U.S.) 504 (1847); dissent in Southern Pacific Co. v. Arizona, 325 U.S. 761, 65 S.Ct. 1515 (1945).

[8] 336 U.S. 525, 69 S.Ct. 657 (1948).

[9] 47 MICH. L. REV. 1216 (1949); 37 CALIF. L. REV. 667 (1949).

[10] 341 U.S. 622 at 640, 71 S.Ct. 920 (1951).

[11] "When there is a reasonable basis for legislation to protect the social as distinguished from the economic, welfare of a community, it is not for this court because of the commerce clause to deny the exercise locally of the sovereign power of Louisiana." 341 U.S. 622 at 640, 71 S.Ct. 920 (1951).

there is little indication of the tendency toward a stricter Marshall-type approach which *Hood and Sons v. Dumond*[12] was thought to presage. There is, in fact, language surprisingly suggestive of the Taney-Black point of view.[13] The fear of a vacuum in the regulation of local affairs, which is the basis of that approach, seems to receive emphasis.

Two other general aspects of the commerce section of the opinion are worthy of comment. The first is the concern with "alternatives"—both the availability of alternative methods of getting the product to the consumer,[14] and the unavailability of alternative means of regulation.[15] This concern is more apparent than in previous cases. The second concerns the practice of looking beyond the face of the statute into its actual operation for effects discriminatory against interstate commerce. In his dissent, Chief Justice Vinson expresses a feeling that the Court is not here following this practice as carefully as it has in the past.[16]

B. *Door to Door Solicitation.* Hawkers and peddlers have long been subject to the strictest regulation.[17] But solicitors for interstate commerce have been in a protected position because that which they sell has not yet entered the stock of goods of the state.[18] Thus in a long line of so-called "drummer" cases, starting with *Robbins v. Shelby County*[19] and reviewed in *Nippert v. Richmond,*[20] solicitation has been held exempt from local taxation. There is a certain amount of appeal to the argument that since taxation of door to door solicitation is an unreasonable burden on interstate commerce, it follows ipso facto that flat prohibition must be an even greater and more intolerable burden.[21] Yet any regulation is prohibitory in some degree. When the type of ordinance with which we are here concerned came before the courts

[12] 336 U.S. 525, 69 S.Ct. 657 (1949).

[13] E.g., "As we said above, the usual methods of seeking business are left open by the ordinance. That such methods do not produce as much business as house-to-house canvassing is, constitutionally, immaterial and a matter for adjustment at the local level in the absence of federal legislation." 341 U.S. 622 at 638 (1951).

[14] See note 17 infra.

[15] The Court distinguishes Dean Milk Co. v. City of Madison, 340 U.S. 349, 71 S.Ct. 295 (1951): "Nor does the clause as to alternatives apply to the Alexandria ordinance. Interstate commerce itself knocks on the local door. It is only by regulating that knock that the interests of the home may be protected by public as distinct from private action." 341 U.S. 622 at 636-637 (1951).

[16] Vinson cites Dean Milk Co. v. Madison, 340 U.S. 349, 71 S.Ct. 295 (1917); Real Silk Hosiery Mills v. Portland, 268 U.S. 325 45 S.Ct. 525 (1925); Minnesota v. Barber, 136 U.S. 313, 10 S.Ct. 862 (1890).

[17] Emert v. Missouri, 156 U.S. 296, 15 S.Ct. 367 (1895).

[18] Robbins v. Shelby County Taxing District, 120 U.S. 489, 7 S.Ct. 592 (1887).

[19] Ibid.

[20] 327 U.S. 416, 66 S.Ct. 586 (1946).

[21] See note, 18 MINN. L. REV. 475 (1934).

in the "Green River" cases,[22] the point of view was taken that the ordinance did not prohibit solicitation, but merely regulated one aspect of it—location. When the Green River ordinance was brought before the Supreme Court, the case was dismissed for want of a substantial federal question.[23] In the state courts, "Green River" ordinances have been upheld in five states, and struck down in eleven, but the latter cases were for the most part decided on nonfederal grounds.[24]

The *Breard* case can be readily distinguished from the "Drummer" line of cases because it involves a police power, rather than a purely economic regulation. If the decision represents anything new in the fields of solicitation and of interstate commerce in general, it is a slight broadening of the area of police power to protect, to a greater extent than before, the right of privacy in the home plus a willingness to leave more to the local legislative discretion in police power cases.

II. *Due Process*

A. *The Right To Carry On a Legitimate Business.* The right to carry on a legitimate business is regarded as a property right and therefore entitled to protection under the due process clause of the Fourteenth Amendment.[25] Yet, of the grounds urged by *Breard* for invalidation of the Alexandria ordinance, this was the most tenuous, for it has long been recognized that such protection is subject to the reasonable exercise of police power by the states.[26] Since "police power," once restricted to questions of public health, safety, peace, and morals has come to include matters of general welfare and public convenience,[27] and since the feeling has grown that the "reasonableness" of police power regulation is largely a matter for local legislative determination as long as there are reasonable bases,[28] the susceptibility of ordinances of this type to objection on grounds of deprivation of property without

[22] Town of Green River v. Fuller Brush Co., (10th Cir. 1933) 65 F. (2d) 112; Town of Green River v. Bunger, 50 Wyo. 52, 58 P. (2d) 456 (1936). The Green River ordinance forbade solicitors, peddlers, etc., to go in or upon private residences without prior invitation.

[23] Bunger v. Green River, 300 U.S. 638, 57 S.Ct. 510 (1937).

[24] See Breard v. City of Alexandria, La., 341 U.S. 622 at 628, note 6, 71 S.Ct. 920 (1951).

[25] Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625 (1923).

[26] Williams v. Arkansas, 217 U.S. 79, 30 S.Ct. 493 (1910).

[27] Eubank v. City of Richmond, 226 U.S. 137, 33 S.Ct. 76 (1912); C.B. & Q. v. Drainage Commrs., 200 U.S. 561, 26 S.Ct. 341 (1906).

[28] Arizona v. California, 283 U.S. 423, 51 S.Ct. 522 (1931); Henneford v. Silas Mason Co., 300 U.S. 577, 57 S.Ct. 524 (1937); Schmidinger v. Chicago, 226 U.S. 578, 33 S.Ct. 182 (1913).

due process has been comparatively slight. The holding of the Court on this question should come as no surprise.

B. *Freedom of Expression.* In the past fifteen years the constitutional protection given to distribution of ideas in printed form from restrictive municipal ordinances has been considerably expanded. Probably the leading case in this field is *Lovell v. Griffin,*[29] decided in 1938, which involved a broadly drawn ordinance forbidding a distribution of literature of any kind without the permission of the city manager, who apparently operated with uncontrolled discretion. The ordinance was held invalid as striking at the very foundation of freedom of the press by subjecting it to license and censorship. In the next step in the expansion of this doctrine, the "handbill" cases,[30] the interest of the municipality in preventing molestation of its citizens and in preventing littering or misuse of its streets was held insufficient to justify the ordinances in question. The ordinance in the "handbill" case most like the *Breard* case[31] prohibited canvassing and solicitation without a permit, the police chief having discretion to deny the permit where the applicant was not of good character or was canvassing for a project not free from fraud. This was thought to have the effect of giving the police chief powers of censorship with resultant danger of discrimination against those expressing unpopular ideas. But even without the presence of this element, in *Martin v. Struthers,*[32] the "case that comes nearest to supporting appellant's contention" in the *Breard* case,[33] an ordinance forbidding the summoning of home occupants to the door to receive advertisements was held invalid as applied to an advertisement for a religious meeting; and in *Murdock v. Pennsylvania,* decided at the same time, the Court said, "The fact that the ordinance is 'nondiscriminatory' is immaterial—such equality in treatment does not save the ordinance. Freedom of press, freedom of speech, freedom of religion are in a preferred position."[34]

Clearly the protection of the doctrines thus built up should not be extended to every kind of printed matter. Justice Jackson has expressed the basic philosophy of the First Amendment thus: "The very purpose of the First Amendment is to foreclose public authority from assuming guardianship of the public mind through regulating the press, speech,

[29] Lovell v. City of Griffin, 303 U.S. 444, 58 S.Ct. 666 (1938).

[30] Schneider v. State (Town of Irvington), 308 U.S. 147, 60 S.Ct. 146 (1939). Kim Young v. California, Snyder v. Milwaukee and Nichols v. Massachusetts were decided at the same time.

[31] Ibid.

[32] Martin v. Struthers, 319 U.S. 141, 63 S.Ct. 862 (1943).

[33] 341 U.S. 622 at 642, 71 S.Ct. 920 (1951).

[34] Murdock v. Pennsylvania, 319 U.S. 105 at 115, 63 S.Ct. 870 (1943).

and religion. In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us."[35] Thus, freedom of speech and of the press refers not to self expression on all and sundry matters, but only on "subjects of general concern,"[36] such as political, sociological, religious and economic subjects.[37] In the field with which we are here concerned, the distinction has been drawn in terms of "commercial" as opposed to "noncommercial" matters.[38] One could not bring advertising within the protected area merely by attaching to it a "civic appeal, or a moral platitude."[39] On the other hand, merely attaching to a handbill announcing a religious meeting an appeal to buy a religious book for a nominal price did not remove it from the protected area;[40] and in *Murdock v. Pennsylvania* it was held that "the mere fact that the religious literature is 'sold' by itinerant preachers rather than 'donated' does not transform evangelism into a commercial enterprise."[41] In effect, the question was whether the commercial aspects of a particular undertaking were primary, or merely incidental. But in *Martin v. Struthers* the Court seemed to lose sight of the basic philosophy discussed above, and spoke in terms broad enough to include all "literature," excepting only "commercial advertising."[42]

The actual points decided in these cases, however, dealt only with the two extremes—literature of a clearly religious nature, and commercial advertising. Things which have commercial aspects, but are not simply advertising, pose more difficult problems. The newspaper, of course, has been regarded as primarily concerned with subjects of general interest and thus entitled to fullest protection.[43] The motion picture, on the other hand, has been held to be primarily a medium of entertainment only.[44] But instead of looking closely into the question

[35] Jackson, concurring in Thomas v. Collins, 323 U.S. 516 at 545, 65 S.Ct. 315 (1945).

[36] CHAFEE, FREE SPEECH IN THE UNITED STATES 31 (1948).

[37] Resnick, "Freedom of Speech and Commercial Solicitation," 30 CALIF. L. REV. 655 at 658 (1942).

[38] The distinction was referred to in the "handbill" cases: "We are not to be taken as holding that commercial soliciting and canvassing may not be subjected to such regulation as the ordinance requires." Schneider v. State, 308 U.S. 147 at 165, 60 S.Ct. 146 (1939).

[39] Valentine v. Chrestensen, 316 U.S. 52 at 55, 62 S.Ct. 920 (1942).

[40] Jamison v. Texas, 318 U.S. 413, 63 S.Ct. 669 (1943).

[41] Murdock v. Pennsylvania, 319 U.S. 105 at 111, 63 S.Ct. 870 (1943).

[42] Martin v. Struthers, 319 U.S. 141 at 142, 143, 63 S.Ct. 862 (1943).

[43] Near v. Minnesota, 283 U.S. 697, 51 S.Ct. 625 (1931); Grosjean v. American Press Co., 297 U.S. 233, 56 S.Ct. 444 (1936).

[44] Mutual Film Corp. v. Ohio Industrial Comm., 236 U.S. 230, 35 S.Ct. 387 (1915). The question was decided in an interpretation of the state, rather than the federal constitution. Even the motion picture, "The Birth of a Baby" has been held to come within its doctrine. American Committee on Maternal Welfare, Inc. v. Cincinnati, 11 Ohio Op. 366, 5 Ohio Supp. 425 (1938).

of how *Newsweek* and the *Saturday Evening Post* should be categorized in this respect, the Court in the *Breard* case contents itself with saying that the fact that an "element of the commercial" is involved is sufficient to distinguish the case from *Martin v. Struthers*,[45] and to make the question merely one of weighing interests as between householders and solicitors.[46] This might be interpreted as signifying that while a publication is subject to prior restraint[47] only if primarily commercial, it is subject to subsequent regulation on the same basis as other economic activities if it contains only an "element of the commercial."[48] At any rate, what amounts to an "element of the commercial" is left largely in doubt, since there is no intimation that such decisions as *Murdock v. Pennsylvania*,[49] where there was clearly some "element of the commercial" involved, are being overruled. Thus the decision may be criticized for leaving the law in a rather unsettled state. Yet the writer cannot help sympathizing with the result, for together with other fairly recent cases,[50] it seems to mark the end of a tendency to extend constitutional protection to anything to which the magic words "freedom of speech" may be attached[51] at the expense of other rights, perhaps not so highly publicized, but equally important.[52]

C. E. Lombardi, Jr., S.Ed.

[45] 319 U.S. 141, 63 S.Ct. 862 (1943).

[46] 241 U.S. 622 at 642-643 (1951).

[47] For a discussion of "prior restraint" see ROTTSCHAEFFER, AMERICAN CONSTITUTIONAL LAW 758, 759 (1939).

[48] But cf. Grosjean v. American Press Co., 297 U.S. 233, 56 S.Ct. 444 (1936), in which limitations on circulation were considered prior restraints on publication.

[49] 319 U.S. 105, 63 S.Ct. 870 (1943).

[50] Kovacs v. Cooper, 336 U.S. 77, 69 S.Ct. 448 (1949); Feiner v. New York, 340 U.S. 315, 71 S.Ct. 303 (1951); comment, 49 MICH. L. REV. 1185 (1951).

[51] The comment of Justice Black in his dissent, 341 U.S. 622 at 649-650, to the effect that the majority has abandoned the "preferred position" doctrine as to First Amendment liberties does not clarify the meaning and connotations of this doctrine. It is discussed in 49 MICH. L. REV. 1185 at 1192 (1951).

[52] "Freedom of the home is as important as freedom of speech." CHAFEE, FREE SPEECH IN THE UNITED STATES 407 (1948).