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CONSTITUTIONAL LAW-RIGHT TO IMPOSE A LICENSE TAX UPON DISSEMINATION OF RELIGIOUS LITERATURE - JONES v. OPELIKA REVERSED

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CONSTITUTIONAL LAW — RIGHT TO IMPOSE A LICENSE TAX UPON DISSEMINATION OF RELIGIOUS LITERATURE — JONES *v.* OPELIKA REVERSED — Petitioners were members of the religious sect "Jehovah's Witnesses," [1] who "sold" and/or donated religious tracts and literature, and in connection therewith used phonographs and records, in their door to door activities to spread their religious beliefs. They failed to obtain a license for the privilege of canvassing and soliciting, as required of all persons by an ordinance of the city of Jeannette, Pennsylvania,[2] and were convicted and fined for violation thereof. Petitions for

[1] See Mulder and Comisky, "Jehovah's Witnesses Mold Constitutional Law," 2 BILL RTS. REV. 262 (1942) for a brief history of the origin and development of the Jehovah's Witnesses.

[2] "That all persons canvassing for or soliciting within said Borough, orders for goods, paintings, pictures, wares, or merchandise of any kind, or persons delivering such articles under orders so obtained or solicited, shall be required to procure from the Burgess a license to transact said business and shall pay to the Treasurer of said Borough therefor the following sums according to the time for which said license shall be granted.

"For one day $1.50, for one week seven dollars ($7.00), for two weeks twelve dollars ($12.00), for three weeks twenty dollars ($20.00), provided that the provisions of this ordinance shall not apply to persons selling by sample to manufacturers or licensed merchants or dealers doing business in said Borough of Jeannette." Quoted in the principal case, 63 S.Ct. at 871-872.

leave to appeal to the Supreme Court of Pennsylvania were denied; the case came before the United States Supreme Court on petition for writ of certiorari.[3] It was contended by petitioners that one of the tenets of their faith was that they should teach "publickly, and from house to house," [4] and that the ordinance in question was an unconstitutional restriction upon their right of freedom of speech, press and religion.[5] *Held* (four justices dissenting),[6] that the judgment in *Jones v. Opelika* [7] is vacated; that a person cannot be compelled "to purchase, through a license fee or a license tax, the privilege freely granted by the constitution";[8] and that the ordinance of the city of Jeannette is unconstitutional as construed and applied to require religious colporteurs to pay a license tax as a condition of the distribution of religious literature and the spreading of their beliefs. *Murdock v. Pennsylvania*, (U.S. 1943) 63 S.Ct. 870.

It is a rare occasion when we find the United States Supreme Court expressly reversing a previous decision—and especially so when the prior holding is less than a year old; but that is what happened when the principal case overruled the case of *Jones v. Opelika*. In the *Opelika* case the majority of the Court

[3] The principal case was heard by the Court together with a rehearing of the case of Jones v. Opelika, 316 U.S. 584, 62 S.Ct. 1231 (1942). For citations of law review discussion of the Opelika case, see 41 MICH. L. REV. 1198, note 1 (1943).

[4] Acts 20:20.

[5] The freedoms of speech, press, and religion secured by the First Amendment against abridgment by the federal government are similarly secured to all persons by the Fourteenth Amendment against abridgment by the states. Gitlow v. New York, 268 U.S. 652, 45 S.Ct. 625 (1925); Whitney v. California, 274 U.S. 357, 47 S.Ct. 641 (1927); Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532 (1931); Grosjean v. American Press Co., 297 U.S. 233, 56 S.Ct. 444 (1936); De Jonge v. Oregon, 299 U.S. 353, 57 S.Ct. 255 (1937); Hendon v. Lowry, 301 U.S. 242, 57 S.Ct. 732 (1937); Lovell v. Griffin, 303 U.S. 444, 58 S.Ct. 666 (1938); Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900 (1940); Minersville School Dist. v. Gobitus, 310 U.S. 586, 60 S.Ct. 1010 (1940).

The "clear and present danger" test has been devised by the Supreme Court as the most satisfactory standard for determining the constitutionality of federal and state legislation affecting civil rights under the First and Fourteenth Amendments, respectively. Schenck v. United States, 249 U.S. 47, 39 S.Ct. 247 (1919); Abrams v. United States, 250 U.S. 616, 40 S.Ct. 17 (1919); dissent of Holmes, J., in Gitlow v. New York, 268 U.S. 652, 45 S.Ct. 625 (1925); Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736 (1940); Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900 (1940); Schneider v. New Jersey, 308 U.S. 147, 60 S.Ct. 146 (1939). This concept has been somewhat broadened to include "words likely to cause an average addressee to fight." Chaplinsky v. New Hampshire, 315 U.S. 568 at 573, 62 S.Ct. 766 (1942).

The literature distributed in the principal case was branded by the court as "provocative, abusive, and ill-mannered." 63 S.Ct. at 876. A denial of permission to distribute the literature would undoubtedly have been upheld under an ordinance prohibiting distribution of handbills tending to incite breach of peace.

[6] Justices Reed, Roberts, Frankfurter and Jackson dissented. In the case of Jones v. Opelika the Chief Justice and Justice Douglas, Black and Murphy dissented. These justices, together with the most recent appointee to the court, Justice Rutledge, concur in the majority opinion in the principal case.

[7] See note 3, supra.

[8] Blue Island v. Kozul, 379 Ill. 511 at 519, 41 N.E. (2d) 515 (1942), quoted in principal case 63 S.Ct. at 875.

had upheld a city ordinance imposing a license tax upon all persons selling books and pamphlets on the streets of the city or from house to house, even as applied to persons selling religious books and tracts expounding the tenets of their faith. This result was obtained by finding that the sales of the religious material partook more of commercial than religious or educational transactions.[9] In the instant case, however, the Court minimizes the commercial aspect of petitioners' activities,[10] and states that "The constitutional rights of those spreading their religious beliefs through the spoken and printed word are not to be gauged by standards governing retailers or wholesalers of books." It has never been doubted that the freedoms of worship, speech, and the press[11] are not absolute in that they may be subjected to reasonable state regulation when necessary to protect and insure public safety and convenience and to uphold good public morals;[12] but the Court apparently retains the power in itself to determine when the restriction imposed upon civil rights is a proper exercise of the state's police power.[13] The Jeanette ordinance was not so drawn as to be considered a safeguard to the people of the community in their homes against the evils of solicitation, and the question therefore arises whether the exercise of these freedoms may be conditioned upon the payment of license fees levied for purposes of taxation. The Court has never held that religious groups[14] or owners of newspapers[15] are immune from any of the ordinary forms of taxation for support of the govern-

[9] Jones v. Opelika, 316 U.S. 584 at 598, 62 S. Ct. 1231 (1942). The language of Lovell v. Griffin, 303 U.S. 444, 58 S. Ct. 666 (1938), (holding unconstitutional an ordinance requiring license for distribution of noncommercial literature) would seem to have been broad enough to cover all noncommercial literature, regardless of whether sold or distributed free of charge.

[10] 63 S. Ct. at 874: "But the mere fact that the religious literature is 'sold' by itinerant preachers rather than 'donated' does not transform evangelism into a commercial enterprise." The selling activities were found to be merely incidental and collateral to the main object, which was to preach and publicize the doctrines of their order.

[11] For a recent discussion of the legal problems presented by the constitutional guarantees of freedom of worship, see Miner, "Religion and the Law," 21 CHI-KENT L. REV. 156 (1943).

[12] Cox v. New Hampshire, 312 U.S. 569, 61 S. Ct. 762 (1941) (ordinance which required persons to obtain a special license to parade in public places held constitutional as applied to Jehovah's Witnesses who paraded without a license while carrying informative placards); Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S. Ct. 766 (1942) (statute which forbade any person to address offensive words to another in a public place held not unreasonably to impinge upon freedom of speech); Reynolds v. United States, 98 U.S. 145 (1878), practice of polygamy prohibited.

[13] Schneider v. New Jersey, 308 U.S. 147 at 161, 60 S. Ct. 146 (1939), "In every case, therefore, where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. . . . And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights." (The purpose of keeping the streets clean was here held not to justify the application of an ordinance prohibiting the littering of streets to persons distributing noncommercial literature to those willing to receive it, even though such persons afterwards threw it on the sidewalk.

[14] See principal case, 63 S. Ct. at 874.

[15] Grosjean v. American Press Co., 297 U.S. 233 at 250, 56 S. Ct. 444 (1935).

ment;[16] but the Court found that the license tax was imposed directly upon the exercise of a privilege guaranteed by the Federal Constitution, and that the state had given no quid pro quo for which it might make a charge.[17] Imposition of such a tax could be used by the state to control and suppress the enjoyment of constitutionally guaranteed privileges, and could be used as effectively as the power of censorship, which the Supreme Court has repeatedly stricken down.[18] Furthermore the opinion in the principal case places the Court once again in line with its position prior to the *Opelika* case, which denies to statutes and ordinances restricting the exercise of civil rights guaranteed by the Federal Constitution the same presumption of constitutionality which it accords other types of legislative enactments.[19] The fears which the Opelika case aroused concerning the preservation of our civil rights are now allayed by the reversal thereof.

[16] A tax upon the proceeds received from religious activities, upon the property used in connection therewith, or on income of a preacher would fall within the Court's concept of "ordinary forms of taxation for support of the government." Justice Reed in his dissent states, 63 S. Ct. at 877, 896: "we conclude that cities or states may levy reasonable, non-discriminatory taxes on such activities as occurred in these cases. Whatever exemptions exist from taxation arise from the prevailing law of the various states [and not from the guarantees of freedom of worship and freedom of the press contained in the First Amendment]."

[17] The Court indicated, 63 S. Ct. 875, that if the fee had been a nominal one to defray costs of registering solicitors, providing identification cards, and other expenses of policing the activities, such a charge would have been constitutionally acceptable.

[18] The cases have unanimously held that advance action cannot be taken by the states which constitutes a "prior restraint" upon the exercise of a constitutionally guaranteed right. Lovell v. Griffin, 303 U.S. 444, 58 S. Ct. 666 (1938); Cantwell v. Connecticut, 310 U.S. 296, 60 S. Ct. 900 (1940); Near v. Minnesota ex rel. Olson, 283 U.S. 697, 51 S. Ct. 625 (1931). A license tax imposed on the exercise of such a right would seem to fall in face of the same constitutional objection. The instant case stated: "*On their face* [license taxes] are a restriction of the free exercise of those freedoms which are protected by the First Amendment." 63 S. Ct. at 875.

Ordinances giving municipal officers complete discretion in the granting of licenses, or unlimited power of revocation, are likewise held unconstitutional. Cantwell v. Connecticut, supra; Schneider v. New Jersey, 308 U.S. 147, 60 S. Ct. 146 (1939); Lovell v. Griffin, supra, and dissent of Stone, C. J. in the Opelika case.

The motion picture industry has not been accorded the constitutional guarantees of the First Amendment, Mutual Film Corp. v. Industrial Commission of Ohio, 236 U.S. 230, 35 S. Ct. 387 (1915), and under such an interpretation the Supreme Court has upheld state censorship statutes which provide a sufficient standard for the exercise of the discretion of the board of censors. See 39 COL. L. REV. 1383 at 1391-1395, (1939), which suggests that the motion picture industry, having now reached a state of maturity, should be allowed self-regulation and brought under the protection of the First Amendment.

[19] See 41 MICH. L. REV. 323 (1942) for a discussion of the Opelika case as indicating a trend on the party of the Supreme Court to make civil rights conform with economic rights by according the same presumption in favor of the constitutionality of both types of legislation. This trend is reversed by the principal case—the Supreme Court constituting itself, in effect, a superlegislative body with respect to statutes affecting civil rights.