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RECENT DECISIONS

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RECENT DECISIONS

ADMINISTRATIVE LAW — SCOPE OF JUDICIAL REVIEW UNDER SECTION 402 (a) OF THE FEDERAL COMMUNICATIONS ACT OF 1934 — The Federal Communications Commission, after an extensive investigation of chain broadcasting,[1] issued an order [2] under authority of section 303 (i) [3] of the Federal Communications Act providing that no license should be issued to any broadcasting station which entered into specified kinds of contracts with a network organization. Appellant had contracts with one hundred and fifteen stations containing certain of the proscribed provisions involved in the commission's order. Pursuant to section 402 (a) [4] of the Federal Communications Act, appellant brought suit in a federal district court to enjoin enforcement of the commission's order, alleging that affiliated stations, because of fear that their licenses would not be renewed, threatened to repudiate their affiliation contracts, with the result that the efficient and profitable conduct of appellant's broadcasting business was seriously impaired. The federal district court granted appellee's motion to dismiss the complaint for want of jurisdiction, but stayed operation of the order pending direct appeal to the Supreme Court.[5] *Held*, when regulations promulgated by order of the commission in exercise of its rule-making power have the force of law even before their sanctions are invoked, and expected conformity to them causes injury cognizable by a court of equity, they are subject to review under section 402 (a) of the Federal Communications Act. *Columbia Broadcasting System v. United States*, (U. S. 1942) 62 S. Ct. 1194.[6]

Section 402 (a) of the Federal Communications Act incorporates by reference the scope of review provided for orders of the Interstate Commerce Commission by the Urgent Deficiencies Act of 1913.[7] Previous decisions of the Supreme Court laying out the boundaries of this concept of a reviewable order

[1] FEDERAL COMMUNICATIONS COMMISSION, REPORT ON CHAIN BROADCASTING (1941) (Order No. 37, Docket No. 5060).

[2] 6 FED. REG. 2282 (May 2, 1941).

[3] ". . . the Commission from time to time, as public convenience, interest, or necessity requires, shall . . . (i) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting." 48 STAT. L. 1082 (1934), as amended, 47 U. S. C. (1940), § 303.

[4] "The provisions of the Act of October 22, 1913, Ch. 32, 38 Stat. 219, relating to the enforcing or setting aside of the orders of the Interstate Commerce Commission, are hereby made applicable to suits to enforce, enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except any order of the Commission granting or refusing an application for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, or suspending a radio operator's license), and such suits are hereby authorized to be brought as provided in that Act." 48 Stat. L. 1093 (1934), as amended, 47 U. S. C. (1940), § 402(a).

[5] (D. C. N. Y. 1942) 44 F. Supp. 688.

[6] National Broadcasting Co. v. United States, (U. S. 1942) 62 S. Ct. 1214, decided the same day, involves substantially similar facts and issues of law.

[7] 38 Stat. L. 219 at 220 (1913), 28 U. S. C. (1940), § 47.

have determined that judicial review is premature until there is impingement on private rights or the threat of impingement with immediate irreparable injury.[8] Mere abstract declarations by an administrative agency defining status or condition, and orders intermediate in an incomplete process of administrative adjudication not determining rights or obligations or imposing liabilities, are not final and hence not subject to judicial review.[9] The principal case raises the question whether a general regulation, not operating of its own force to cancel or deny a license, is a reviewable order within the meaning of section 402 (a) of the Federal Communications Act. The Court finds ground for jurisdiction to review in the reasonably anticipated injury to appellant's broadcasting business through cancellation or refusal to renew contracts by affiliated stations to avoid loss of their licenses.[10] Appellant's rights are affected presently and not on the contingency of future administrative action,[11] since the only future determination is as to whether a contract in a given case falls within the proscribed classes. Appellant's rights are not protected adequately by the possibility of intervention in future proceedings involving either applications for renewal of licenses by affiliates or cancellation of their licenses. The irreparable injury to appellant's business results currently from wholesale cancellation of affiliates' licenses, induced by their desire to avoid the legal consequences of noncompliance with the regulations; and this cannot be avoided by any action that may be taken in later proceedings. Nor is the order any the less reviewable because in form it affects rights generally, as distinct from the rights of any particular person or corporation,[12] or because it is not certain that the administrative

[8] United States v. Los Angeles & S. L. R. R., 273 U. S. 299, 47 S. Ct. 413 (1927); Rochester Telephone Corp. v. United States, 307 U. S. 125, 59 S. Ct. 754 (1939).

[9] Id.

[10] The Court argues (62 S. Ct. 1194 at 1200) that if an applicant for a license has entered into a proscribed contract, the commission must reject the application; and if a licensee renews his affiliation contract, the regulations implemented by § 312 (a) of the Communications Act authorize the commission to cancel his license. Section 312 (a) provides that "Any station license may be revoked . . . for violation of or failure to observe any of the restrictions and conditions of this Act or of any regulation of the Commission authorized by this Act. . . ." 48 Stat. L. 1086 (1934), 47 U. S. C. (1940), § 312 (a).

[11] The Court distinguishes the principal case from United States v. Los Angeles & S. L. R. R., 273 U. S. 299, 47 S. Ct. 413 (1927), on the ground that in the latter case complainant's rights were affected only on the contingency of future administrative action. 62 S. Ct. 1194 at 1201-1202.

[12] Assigned Car Cases, 274 U. S. 564, 47 S. Ct. 727 (1927), involving an order of the Interstate Commerce Commission prescribing for all railroads subject to its jurisdiction a rule governing the distribution of cars among bituminous coal mines in times of car shortage; U. S. v. Baltimore & O. R. R., 293 U. S. 454, 55 S. Ct. 268 (1935), involving an order of the Interstate Commerce Commission providing that all railroads subject to its jurisdiction should equip steam locomotives with a specified type of reverse gear; American Telephone & Telegraph Co. v. United States, 299 U. S. 232, 57 S. Ct. 170 (1936), involving an order of the Federal Communications Commission prescribing records and accounts for telephone companies subject to its jurisdiction.

agency will institute proceedings to enforce the penalties of noncompliance.[13] "The ultimate test of reviewability is not to be found in an overrefined technique, but in the need of the review to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow, the results of which the regulations purport to control." [14] The dissenting opinion, written by Justice Frankfurter, presents a sharply contrasting philosophy with respect to the scope of judicial review. Although grounded on want of administrative finality, it raises the much broader question of distribution of legal authority between two law-enforcing governmental agencies—the administrative and the judicial. "To say that the courts should reject the doctrine of administrative finality and take jurisdiction whenever action of an administrative agency may seriously affect substantial business interests, regardless of how intermediate or incomplete the action may be, is, in effect, to imply that the protection of legal interests is entrusted solely to the courts." [15] If the provisions for judicial review incorporated in the Urgent Deficiencies Act and in section 402(a) of the Federal Communications Act are to be more than idle gestures, the test adopted by the majority would seem essential. The wisdom of avoiding premature judicial review in the absence of administrative finality is conceded; but in a case where, as here, the effective operation of the regulations is not made contingent upon any future administrative determination, the argument of want of the requisite degree of finality seems difficult to support.[16]

CONSTITUTIONAL LAW — COMPULSORY STERILIZATION STATUTE — An Oklahoma statute [1] provided for the sterilization on proceeding by the Attorney General of criminals who, having been twice convicted of felonies involving moral turpitude, were thereafter convicted of such a felony in Oklahoma and sentenced to imprisonment in that state. Notice, an opportunity to be heard, and the right to jury trial were provided. The only issues triable, however, were whether the defendant was an habitual criminal and whether sterilization would be detrimental to his general health. "Offenses arising out of the violation of the prohibitory laws, revenue acts, embezzlement, or political offenses" were expressly excluded from the terms of the act. Defendant, once convicted of chicken stealing and twice of robbery with firearms, was ordered sterilized. On appeal, the Oklahoma Supreme Court upheld the constitutionality of the law.[2] *Held*, by the United States Supreme Court on certiorari, the decision of the Oklahoma Supreme Court should be reversed. The majority opinion was based upon a denial of equal protection of the laws by reason of the above named exceptions in the statute. One concurring opinion found a failure to satisfy the procedural requirements of due process, while the other agreed with both of the

[13] United States v. Baltimore & O. R. R., 293 U. S. 454, 55 S. Ct. 268 (1935); Rochester Telephone Corp. v. United States, 307 U. S. 125, 59 S. Ct. 754 (1939).

[14] 62 S. Ct. 1194 at 1204.

[15] 62 S. Ct. 1194 at 1213-1214.

[16] Principal case also discussed in 56 HARV. L. REV. 121 (1942).

[1] Okla. Stat. Ann. (1941), tit. 57, § 171 et seq.

[2] Skinner v. State ex rel. Williamson, 189 Okla. 235, 115 P. (2d) 123 (1941).

foregoing opinions except in so far as they repudiated one another. *Skinner v. Oklahoma ex rel Williamson*, (U. S. 1942) 62 S. Ct. 1110.

There appears to be little basis to disagree with the decision reached by the Supreme Court. Of greater interest are the possible reasons and the reasons relied upon in reaching that decision. The Court does not discuss bills of attainder or ex post facto laws, prohibited by article 1, section 10 of the Federal Constitution. Neither does it consider "cruel and unusual punishments." It is quite improbable that any of these grounds would have been sufficient to invalidate the statute,[3] and obviously the other findings of the Court make them unnecessary. The substantive aspects of due process go unmentioned except in a bare intimation by Justice Jackson that the statute might have failed for this reason. The point is debatable. The recent tendency of the Supreme Court has been to devitalize substantive due process as far as economic and business interests are concerned.[4] At the same time, those rights transposed by judicial interpretation from the first ten amendments to the Fourteenth Amendment maintain a favored position.[5] The statute under consideration would appear to fall within the latter category.[6] Nevertheless, to have placed the decision on this basis would have meant the rejection of criminality as a determinative in sterilization and

[3] "Not being a penal statute it avoided the stigma of 'cruel and unusual punishment,' 'bill of attainder' or 'ex post facto law.'" 30 CAL. L. REV. 189 at 189-190 (1942). For a similar viewpoint, see also 13 OKLA. B. A. J. 69 (1942). (Both of these articles treat the decision of the Oklahoma Supreme Court.) It may be argued, however, that the statute falls so far short in its eugenic purposes that it should not be permitted to masquerade under this guise. See 55 HARV. L. REV. 285 (1941) (also dealing with the decision of the state court). If we do go so far as to consider the statute as penal, it must encounter serious difficulties under the "ex post facto" clause of art. 1, § 10 of the Federal Constitution, for it was not passed until after the commission of the last offense by defendant. The point is brought out in the following decisions by state tribunals: State v. Dowden, 137 Iowa 573, 115 N. W. 211 (1908); Armstrong v. Commonwealth, 177 Ky. 690, 198 S. W. 24 (1917); Taylor v. State, 114 Neb. 257, 207 N. W. 207 (1926); State v. Zywicki, 175 Minn. 508, 221 N. W. 900 (1928). The Supreme Court of Oklahoma recognized this difficulty.

The Federal Constitution does not contain a "cruel and unusual punishments" clause prohibitory upon the states, but this might be read into the Fourteenth Amendment. See Seaboard Air Line Ry. v. Seegers, 207 U. S. 73, 28 S. Ct. 28 (1907), and St. Louis, I. M. & S. Ry. v. Williams, 251 U. S. 63, 40 S. Ct. 71 (1919). Here too we would probably have to take the rather drastic step of calling the Oklahoma statute penal.

[4] United States v. Carolene Products Co., 304 U. S. 144, 58 S. Ct. 778 (1938); Olsen v. Nebraska ex rel Western Reference & Bond Assn., 313 U. S. 236, 61 S. Ct. 862 (1941); Federal Power Commission v. Natural Gas Pipeline Co. of America, 315 U. S. 575, 62 S. Ct. 736 (1942).

[5] Id. Minersville School Dis. v. Gobitis, 310 U. S. 586, 60 S. Ct. 1010 (1940), and Jones v. Opelika, (U. S. 1942) 62 S. Ct. 1231 (noted 41 MICH. L. REV. 323, infra) must be regarded as exceptions.

[6] To the effect that the due process clauses both of the Fifth Amendment and of the Fourteenth Amendment prohibit unreasonable interference with one's physical person, see ROTTSCHAEFFER, CONSTITUTIONAL LAW 729 (1939).

perhaps even of compulsory sterilization in its entirety. This would have marked at least a partial overruling of the principles enunciated in the leading cases of *Buck v. Bell*[7] and *Jacobson v. Massachusetts*.[8] The court was undoubtedly discreet in turning to less disputable grounds. The distinctions made by the Oklahoma legislature are so clearly arbitrary and unsupported by medical authority as to involve a denial of equal protection.[9] This is too patent to be disregarded even considering the ordinary reluctance of the Court to examine the soundness of legislative schemes.[10] Moreover, Chief Justice Stone's assertion that the statute, by failing to provide for an inquiry into inheritability of criminal tendencies

[7] 274 U. S. 200, 47 S. Ct. 584 (1927), upholding statute providing for sterilization of inmates of state supported institutions who were found to be afflicted with an hereditary form of insanity or imbecility.

[8] 197 U. S. 11, 25 S. Ct. 358 (1905), upholding statute authorizing city boards of health to require vaccination of inhabitants under penalty of a forfeiture.

[9] "Oklahoma's line between larceny by fraud and embezzlement is determined, as we have noted, 'with reference to the time when the fraudulent intent to convert the property to the taker's own use' arises. Riley v. State, [64 Okla. Cr. 183, 78 P. (2d) 712 (1938)]. We have not the slightest basis for inferring that that line has any significance in eugenics nor that the inheritability of criminal traits follows the neat legal distinctions which the law has marked between those two offenses." 62 S. Ct. at 1113.

Stone says, in disapproving the majority opinion based upon equal protection, that that clause does not require an application of the measure "to all criminals in the first instance or to none." Although it is true that such statutes need be neither perfect nor complete in their marking off of classes [Rosenthal v. New York, 226 U. S. 260, 33 S. Ct. 27 (1912); Patsone v. Pennsylvania, 232 U. S. 138, 34 S. Ct. 281 (1914); Keokee Consol. Coke Co. v. Taylor, 234 U. S. 224, 34 S. Ct. 856 (1914); Miller v. Wilson, 236 U. S. 373, 35 S. Ct. 342 (1915)] nevertheless, their imperfections and incompleteness should be dictated by necessity or practicality. The Virginia statute involved in Buck v. Bell, 274 U. S. 200, 47 S. Ct. 584 (1927), would appear to satisfy this test.

[10] "Since then vaccination, as a means of protecting a community against smallpox, finds strong support in the experience of this and other countries, no court, much less a jury, is justified in disregarding the action of the legislature simply because in its or their opinion that particular method was—perhaps or possibly—not the best either for children or adults." Jacobson v. Massachusetts, 197 U. S. 11 at 35, 25 S. Ct. 358 (1905). "In view of the general declarations of the legislature and the specific findings of the Court, obviously we cannot say as matter of law that the grounds do not exist, and if they exist they justify the result." Buck v. Bell, 274 U. S. 200 at 207, 47 S. Ct. 584 (1927).

The Supreme Court was undoubtedly influenced in the principal case both by the seriousness of the measure provided for in the statute and by the grave doubts as to its scientific merit. For authorities on the medical aspects of sexual sterilization, see 55 HARV. L. REV. 285 (1941) and 30 CAL. L. REV. 189 (1942). The conflict between medical authorities is well brought out by a comparison of GILLIN, CRIMINOLOGY AND PENOLOGY, rev. ed., 119-130 (1935) and HOOTON, THE AMERICAN CRIMINAL (1939). See also Shartel, "Sterilization of Mental Defectives," 24 MICH. L. REV. 1 (1925).

in the individual case, denied procedural due process is likewise well-founded.[11] Both the majority opinion as expressed by Justice Douglas and the concurring opinion of Chief Justice Stone, however, appear to lack the breadth of that of Justice Jackson. By supporting both viewpoints except in so far as they reject one another, he indicates a greater appreciation of the unavoidable interdependency of the provisions of the Fourteenth Amendment. As he correctly suggests, had the statute fully satisfied either of the above mentioned requisites, it might by that fact alone have satisfied the other.[12]

CONSTITUTIONAL LAW — CRIMINAL LAW AND PROCEDURE — RIGHT TO ASSISTANCE OF COUNSEL — At the joint trial of petitioner and four others on a charge of conspiracy to defraud the United States, one of the co-defendants became dissatisfied with his counsel. The trial court suggested that petitioner's attorney serve as counsel for both. The attorney pointed out to the court that a possible conflict of interest might develop because of inconsistency in defenses and petitioner requested that he alone be represented by his attorney. Subsequently the co-defendant and attorney indicated willingness to accept the appointment, and petitioner, who was present, did not object at the time of appointment nor throughout the trial. *Held*, two justices dissenting, conviction of petitioner reversed and a new trial granted. A federal court cannot constitutionally deprive an accused in a criminal proceeding in a federal court of the assistance of counsel guaranteed by the Sixth Amendment nor can such assistance be impaired by a court order requiring that one attorney represent co-defendants whose interests are conflicting.[1] *Glasser v. United States*, 315 U. S. 60, 62 S. Ct. 457 (1942).

The Sixth Amendment of the Federal Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." "Assistance of counsel" under the Federal Con-

[11] The statutes involved in Buck v. Bell, 274 U. S. 200, 47 S. Ct. 584 (1927); Davis v. Walton, 74 Utah 80, 276 P. 921 (1929), and State v. Troutman, 50 Idaho 673, 299 P. 668 (1931), all provided for an investigation of the transmissibility of the defendant's traits.

The statute in Jacobson v. Massachusetts, 197 U. S. 11, 25 S. Ct. 358 (1905), does not set forth the procedure to be followed and goes little further than to authorize regulations by city boards of health. In that case the Supreme Court was ready to assume, until presented with contrary evidence, that the law would be fairly administered and proper procedure established for each individual case. No such presumption is possible with the Oklahoma statute. It sets forth in detail the procedure to be followed, and, by specifying in § 182 that the subjects of inquiry are to be whether defendant is an habitual criminal and whether sterilization will impair his general health, it may be construed to exclude any other matters from investigation.

[12] The principal case is also discussed in 51 YALE L. J. 1380 (1942), and 91 UNIV. PA. L. REV. 155 (1942).

[1] Petitioner contended that he was denied an impartial trial because of the alleged exclusion from the jury panel of all women not members of the Illinois League of Women Voters. Since the record showed no tender of proof of this contention, it was not material to the decision of the case.

stitution, as defined by previous decisions of federal courts, requires that appointment of counsel be made when the accused is incapable of providing for his own defense because of ignorance, illiteracy, or lack of funds;[2] that counsel be competent;[3] that counsel be given reasonable opportunity to prepare the accused's defense;[4] and that counsel be present during all stages of the trial.[5] The principal case adds to the content of "assistance of counsel" the right to have the exclusive services of such counsel during the course of the trial.[6] This would seem essential if the procedural safeguard is to be more than a mere formal requirement. When the defenses of the co-defendants are inconsistent, the case is clear. The Court, however, goes further and indicates that even in the absence of such conflict of interest, the same rule will apply, since counsel's efficiency may be impaired if he is required to act in a dual capacity. The right to assistance of counsel may be waived by the accused, but whether or not there has been a waiver depends upon the facts of each case, including the experience, background, and conduct of the accused.[7] The majority in the principal case, indulging every reasonable presumption against a waiver of fundamental constitutional rights,[8] does not find such action by the petitioner. This finding was on the grounds that petitioner never affirmatively waived his initial objection,[9] that the trial court made no effort to reascertain petitioner's wishes when the co-defendant and counsel indicated their willingness to accept the appointment, and that the manner in which the appointment was accepted indicated that the parties thought they were following the wishes of the trial court. The minority, on the other hand, relies heavily upon petitioner's silence during and after the trial[10] and the

[2] Powell v. Alabama, 287 U. S. 45, 53 S. Ct. 55 (1932).

[3] Achtien v. Dowd, (C. C. A. 7th, 1941) 117 F. (2d) 989.

[4] Thomas v. District of Columbia, (App. D. C. 1937) 90 F. (2d) 424; Avery v. Alabama, 308 U. S. 444, 60 S. Ct. 321 (1940).

[5] Powell v. Alabama, 287 U. S. 45, 53 S. Ct. 55 (1932).

[6] In People v. Bopp, 279 Ill. 184, 116 N. E. 679 (1917), and People v. Rose, 348 Ill. 214, 180 N. E. 791 (1932), a new trial was granted when co-defendants with opposing interests were represented by the same counsel. In neither case, however, did the court state the reason for its decision. In People v. McCaffrey, 336 Ill. 111, 167 N. E. 795 (1929), one attorney acted for co-defendants, but the court held that prejudice to defendants was not shown by the appointment of counsel in a dual capacity, distinguishing the case from the Bopp case, supra, where the defenses differed and the interests of co-defendants were inconsistent.

[7] Wilson v. Hudspeth, (C. C. A. 10th, 1939) 106 F. (2d) 812.

[8] Aetna Ins. Co. v. Kennedy, 301 U. S. 389, 57 S. Ct. 809 (1937); Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U. S. 292, 57 S. Ct. 724 (1937).

[9] United States v. Rollnick, (C. C. A. 2d, 1937) 91 F. (2d) 911, involved assignment by the court of a trial lawyer to act for three co-defendants who made no objection at the time of the appointment. The court rejected the allegation of a conflict of interest to the prejudice of defendants as an "absurd afterthought."

[10] "Not until twenty weeks after Stewart had become counsel for the co-defendant Kretske, and fifteen weeks after the trial had ended, did Glasser discover that he had been deprived of his constitutional rights." Principal case, 315 U. S. at 88-89.

fact that he himself was an attorney with special experience in criminal cases.[11] The majority position, in the face of what would seem substantial evidence of waiver, indicates that the Court will protect with vigor the guarantees of the Bill of Rights and that no mere formal compliance will be allowed to impair constitutional safeguards. This position, however, should be interpreted in the light of the weakness of the case against petitioner,[12] and may account for the seemingly slight weight given by the majority to the factors regarded as so significant by the minority.[13]

CONSTITUTIONAL LAW — DUE PROCESS — FREEDOM OF EXPRESSION IN NONCOMMERCIAL PUBLICATIONS — The petitioners, regularly ordained ministers of Jehovah's Witnesses, challenged the validity of various city ordinances imposing a license fee upon the sale of printed matter as impinging upon freedom of press and religion guaranteed by the Fourteenth Amendment.[1] In the exercise of their beliefs they went from house to house playing phonographic transcriptions of Bible lectures and distributing books setting forth the tenets of their faith in return for pecuniary contributions. It did not appear that their motives were commercial, for if the householder was unwilling to contribute he was given a pamphlet free. The Opelika ordinance provided that all licenses were subject to revocation in the discretion of the city commission, with or without notice. Two of the cases came before the Supreme Court on certiorari and one on appeal.[2] *Held*, with four justices dissenting, that the ordinances do not violate the due process clause of the Federal Constitution. Freedom of press and religion are not absolute; therefore when the proponents of any theory employ the usual commercial methods for the dissemination of their ideas, they may be restricted "to times, places and methods . . . not at odds with the preservation of peace and good order." [3] *Jones v. City of Opelika*, (U. S. 1942) 62 S. Ct. 1231.

[11] In Wilson v. Hudspeth, (C. C. A. 10th, 1939) 106 F. (2d) 812, where defendant was familiar with court procedure, having been tried on two previous criminal charges, and Walker v. Chitty, (C. C. A. 9th, 1940) 112 F. (2d) 79, where defendant was a member of the bar, the courts indicated that familiarity with court procedure was a significant factor in determining waiver of the right to assistance of counsel.

[12] "In all cases the constitutional safeguards are to be jealously preserved for the benefit of the accused, but especially is this true where the scales of justice may be delicately poised between guilt and innocence." Principal case, 315 U. S. at 67.

[13] The principal case has also been noted in 9 UNIV. CHI. L. REV. 733 (1942).

[1] "The Opelika ordinance required book agents to pay $10.00 per annum, transient distributors of books (annual only) $5.00. The license fee in Casa Grande was $25 per quarter, that in Fort Smith ranged from $2.50 per day to $25 per month." 62 S. Ct. at 1236.

[2] For lower court decisions see: Jones v. City of Opelika, 241 Ala. 279, 3 So. (2d) 76 (1941); Cole v. City of Fort Smith, 202 Ark. 614, 151 S. W. (2d) 1000 (1941); State v. Jobin, (Ariz. 1941) 118 P. (2d) 97.

[3] Principal case, 62 S. Ct. at 1238.

Starting with the proposition that freedom of press and religion are not absolute,[4] but must be exercised in conjunction with other social needs, the courts have necessarily had to weigh conflicting public and individual interests to determine which will predominate.[5] In this process civil liberties have been accorded most favorable treatment. Whenever the public interest involved is obviously superior to the individual interest, as in the prohibition of obscene literature [6] and the advocacy of crime,[7] or in the censorship of motion pictures,[8] the legislation preventing the prescribed evils has been upheld with little difficulty. Generally, however, when freedom of expression or religion is limited by governmental action, the Supreme Court has carefully scrutinized the legislation and consistently refused to recognize the presumption of constitutionality usually accorded state and municipal legislation.[9] The principal case indicates a tendency to depart from this approach, a tendency already manifested, as the dissenting justices point out, in the *Gobitis* case.[10] The trend, apparently, is to pull civil rights more into line with economic rights by applying a presumption in favor of the legislation in both types of cases until rebutted by a showing of arbitrary or capricious abridgment of these rights. For example, the Court uses this language in the principal case: "It is prohibition and unjustifiable abridgment which is interdicted, not taxation," [11] and then proceeds to treat the case as involving a simple tax measure.[12] The distinction made between complete

[4] "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic." Schenck v. United States, 249 U. S. 47 at 52, 39 S. Ct. 247 (1919). Also see Frohwerk v. United States, 249 U. S. 204, 39 S. Ct. 249 (1919), with regard to the First Amendment; 2 COOLEY, CONSTITUTIONAL LIMITATIONS, 8th ed., 885 (1927).

[5] For an excellent discussion of this aspect of judicial process, see CHAFEE, FREE SPEECH IN THE UNITED STATES (1941).

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

[7] Fox v. State of Washington, 236 U. S. 273, 35 S. Ct. 383 (1915).

[8] Mutual Film Corp. v. Ohio Industrial Commission, 236 U. S. 230, 35 S. Ct. 387(1915). See also, 32 YALE L. J. 185 (1922).

[9] The doctrine was accorded footnote recognition in United States v. Carolene Products Co., 304 U. S. 144 at 152, note 4, 58 S. Ct. 778 (1938). It culminated in a definite assertion in Schneider v. New Jersey, 308 U. S. 147, 60 S. Ct. 146 (1939), and in Lovell v. City of Griffin, 303 U. S. 444, 58 S. Ct. 666 (1938). Compare the protection afforded economic rights in Nebbia v. New York, 291 U. S. 502, 54 S. Ct. 505 (1934).

[10] Minersville School District v. Gobitis, 310 U. S. 586, 60 S. Ct. 1010 (1940). In this case the Jehovah's Witnesses protested a compulsory flag salute as contrary to the tenets of their faith. The ordinance was upheld as a proper means of securing national unity.

[11] Principal case, 62 S. Ct. at 1239. Compare language used here with that in Lovell v. City of Griffin, 303 U. S. 444, 58 S. Ct. 666 (1938), and in Schneider v. New Jersey, 308 U. S. 147, 60 S. Ct. 146 (1939). For a further comparison see Cox v. New Hampshire, 312 U. S. 569, 61 S. Ct. 762 (1941).

[12] Both the majority and dissenting justices agree that a purely religious transaction may not be taxed by the state, but they disagree upon the category in which the petitioners' activities should be placed. The majority feels that the solicitation of funds lends a commercial character to the transaction, while the minority fails to see anything other than an exercise of freedom of expression.

prohibition on the one hand and mere regulation or taxation on the other will afford state legislatures considerable latitude in formulating their future legislation. This spells a significant weakening of the protection previously accorded civil liberties. Earlier cases involving similar restrictions upon freedom of expression indicated that the Court would permit a greater degree of governmental control over commercial than over noncommercial publications.[13] The instant case further distinguishes between noncommercial literature which is sold and that which is distributed free, denying to the former that degree of protection afforded the latter. The decision is surprising in the light of the *Lovell* case,[14] the language of which seemed broad enough to encompass all noncommercial publications regardless of their mode of distribution. Indeed, the distinction between the two cases made is sufficiently superficial to give substance to the thought that the *Lovell* case will be limited in the future to its particular facts.[15] In view of the vigorous dissenting opinions of four justices, it is difficult to predict how long or how far this new treatment of civil liberties will be carried. The doctrine of Chief Justice Stone that "discrete and insular minorities" should be afforded particularly effective protection against governmental action [16] seems to have gained three new advocates in Justices Murphy, Black, and Douglas, who took this occasion to reverse their stand in the *Gobitis* case.[17]

[13] The Supreme Court has not decided whether the distribution of commercial handbills may be prohibited, but in Schneider v. New Jersey, 308 U. S. 147, 60 S. Ct. 146 (1939), the Court specifically stated that it does not hold that they may not be regulated. In the light of the principal case the conclusion that they may be regulated seems certain. See, Lindsay, "Council and Court: The Handbill Ordinances, 1889-1939," 39 MICH. L. REV. 561 at 588 ff. (1941).

[14] Lovell v. City of Griffin, 303 U. S. 444 at 451, 58 S. Ct. 666 (1938), where it was said: "Whatever the motive which induced its adoption, its character is such that it strikes at the very foundation of the freedom of the press by subjecting it to license and censorship. The struggle for freedom of the press was primarily directed against the power of the licensor."

[15] In Lovell v. City of Griffin, supra, note 14, the discretionary authority was in the official to refuse the license, while in the principal case the authority was to revoke the license at will. The reasoning which makes the one valid and the other invalid is very vague, for in either case enjoyment of the fredom is dependent upon the uncontrolled will of the licensing officer. The state courts have already reached the position of limiting the Lovell case to its facts. For a discussion of this process see, Lindsay, "Council and Court: The Handbill Ordinances, 1889-1939," 39 MICH. L. REV. 561 (1941).

[16] First given recognition in United States v. Carolene Products Co., 304 U. S. 144 at 152, note 4, 58 S. Ct. 778 (1938), and later in the dissenting opinion of Chief Justice Stone in Minersville School District v. Gobitis, 310 U. S. 586, 60 S. Ct. 1010 (1940).

[17] The principal case is also noted in 42 COL. L. REV. 1200 (1942), and 91 UNIV. PA. L. REV. 75 (1942.