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CONSTITUTIONAL LAW - DUE PROCESS OF LAW - FREEDOM OF EXPRESSION IN COMMERCIAL HANDBILLS

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CONSTITUTIONAL LAW — DUE PROCESS OF LAW — FREEDOM OF EXPRESSION IN COMMERCIAL HANDBILLS — Petitioner desired to display for profit a privately owned submarine. Upon application, he was denied permission to tie up at the New York City docks, and so he obtained permission to use state-owned docks. He petitioned the police commissioner for permission to distribute handbills advertising his display, but because of a New York City ordinance [1] providing that any handbill which was commercial in nature could not be circulated, this was refused. Petitioner then prepared a handbill with commercial matter referring to the display on one side, and on the other side a protest against the city's refusal to allow petitioner to tie up at its docks. Permission to circulate this handbill was refused under the same ordinance, whereupon petitioner sought an injunction against the enforcement of the ordinance, contending that it denied freedom of expression and thus violated due process of law under the Fourteenth Amendment. *Held*, without deciding the validity of an ordinance prohibiting purely commercial handbills, the ordinance as applied to a handbill which combined a public protest with advertisement is unconstitutional. One judge dissented. *Chrestensen v. Valentine*, (C. C. A. 2d, 1941) 122 F. (2d) 511.[2]

Handbills may be divided into three classes: handbills in which (1) the sole design is to express an opinion on some public matter; (2) the purposes are purely commercial; and (3) the purposes are to present both commercial and noncommercial matter. The state is interested in the prohibition of the distribution of each type of handbill in order to prevent distribution of obscene literature, littering of streets, molestation of the public, disorderly conduct, nuisances and the possibility of fraudulent appeals and other crimes.[3] Noncommercial handbills have been given broad protection, and the interests of the state have been held subordinate to those of the individual's interest in freedom

[1] New York City Sanitary Code, § 318 (Health Dept. Regulations, art. III, § 318): "No person shall . . . distribute, or cause to be . . . distributed any handbill. . . . This section is not intended to prevent the lawful distribution of anything other than commercial and business advertising matter." This ordinance is set out in 122 F. (2d) 511 at 512 (1941).

[2] For lower court opinion, see Chrestensen v. Valentine, (D. C. N. Y. 1941) 34 F. Supp. 596.

[3] That these are the interests of the state or municipality is clearly recognized. See Lindsay, "Council and Court: The Handbill Ordinances, 1889-1939," 39 MICH. L. REV. 561 at 567 et seq. (1940).

of expression.[4] The Supreme Court has not decided whether the distribution of commercial handbills may be prohibited,[5] but it can be argued that the interests of the state in preventing the prescribed evils should prevail over the interests of the individual.[6] Freedom of expression is not absolute,[7] but is subject to limitations. Obscene literature may be prohibited; [8] legislation has required registration of securities and has forbidden the issuance of securities if registration statements are fraudulent; [9] and motion pictures are subject to censorship and prohibition.[10] The reasons why the channels of free speech must be kept open in cases of political, religious, social, or economic discussion is to protect "those political processes which can ordinarily be expected to bring about repeal of undesirable legislation." [11] This reason is inapplicable where commercial handbills are concerned. If such handbills are prohibited, business men would have to resort to newspaper advertising, and it is admitted that the increased cost and decreased effectiveness of such advertising might be injurious, but this alone should not be a reason for protecting commercial handbills. Undoubtedly, the prohibition of commercial handbills would inspire an amalgamation of commercial and noncommercial matter, and in such a case it would be difficult to classify the handbill as either commercial or noncommercial. It has been suggested that if the "primary purpose" of the handbill was commercial

[4] Lovell v. City of Griffin, 303 U. S. 444, 58 S. Ct. 666 (1938); Schneider v. New Jersey, 308 U. S. 147, 60 S. Ct. 146 (1939). Further consideration of noncommercial handbills is without the scope of this note. For an excellent and full treatment of this matter, see Lindsay, "Council and Court: The Handbill Ordinances, 1889-1939," 39 MICH. L. REV. 561 (1941).

[5] In Schneider v. New Jersey, 308 U. S. 147 at 165, 60 S. Ct. 146 (1939), the Court specifically stated that it does not hold that distribution of commercial handbills may not be regulated. See Lindsay, "Council and Court: The Handbill Ordinances, 1889-1939," 39 MICH. L. REV. 561 at 588 et seq. (1941), where prohibition of commercial handbills is considered.

[6] Principal case 122 F. (2d) 511 at 517 et seq.

[7] It is thought that Paine and others seeking freedom of expression did not seek absolute freedom of expression, but merely the right to express themselves freely on matters of a political, religious, economic, or social nature. For a history of free expression, see Grosjean v. American Press Co., 297 U. S. 233 at 245 et seq., 56 S. Ct. 444 (1936); Near v. Minnesota ex rel. Olson, 283 U. S. 697, 51 S. Ct. 625 (1931); 2 COOLEY, CONSTITUTIONAL LIMITATIONS, 8th ed., 885 (1927).

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

[9] No case was found where it was argued that such legislation violated freedom of expression.

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

[11] United States v. Carolene Products Co., 304 U. S. 144 at 152, note 4, 58 S. Ct. 778 (1938). The Court scrutinizes legislation concerning civil liberties carefully and recognizes no presumption of constitutionality. Compare Lovell v. City of Griffin, 303 U. S. 444, 58 S. Ct. 666 (1938), with Nebbia v. New York, 291 U. S. 502, 54 S. Ct. 505 (1934), which deals with property interests. The rationale of the cases seems to be that the protection of channels of free expression protects political minorities guaranteeing to them a means of airing their political views.

it should be prohibited.[12] Such a test can be criticized on the ground that it would impose upon the police commissioner or other administrative officers quasi-judicial powers in determining the nature of the handbill. If the courts were to decide the question, they would be overburdened with this type of litigation. A somewhat more practicable solution would require a strict severance of commercial and noncommercial matter within the same handbill. A skillfully drawn handbill might cause difficulty in deciding what properly was included with the noncommercial aspects of the bill, but it is suggested that such a handbill would ostensibly be noncommercial and therefore should be permitted.[13]

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[12] Both opinions in the principal case apply this test. No case was found in which the test was used. People v. La Rollo, (N. Y. City Mag. Ct. 1940) 24 N. Y. S. (2d) 350, possibly suggests this test. Counsel for the city in the principal case attempted to distinguish many cases as having been decided by an application of this test. See the majority opinion in the principal case. 122 F. (2d) 511 at 515 (1941).

[13] Certiorari has been granted in the principal case. Valentine v. Chrestensen, 10 U. S. LAW WEEK 3176 (1941). The difficulties in determining whether a handbill is of a commercial or noncommercial nature will no doubt be considered by the court in reaching its decision.