St. John's Law Review

Volume 15, November 1940, Number 1 Article 12

Constitutional Law--Freedom of Speech and of Religion--Fourteenth Amendment (Cantwell, et al. v. Connecticut, 310 U.S. 296 (1940))

St. John's Law Review

objective examination is not always possible, tests should be reasonably calculated to show merit and fitness and not merely unfettered preferences or judgment of the examiners. These principles, stated in relation to the examination itself, apply with equal force to the standards which are prescribed to be fulfilled as a condition to taking it. It is, therefore, apparent that, if such standards are unreasonable, or if arbitrary or discriminatory limitations are placed upon those permitted to take the examination, the test fails to assume the competitive form and is violative of the competitive principle. The courts, upon proof of such abuse of discretion, can require postponement or direct the cancellation of the examination and order the revision of the requirements to conform to the standards of reasonableness and propriety.[11] In the instant case, the court found the quality of reasonableness lacking in the action of the Commission in assigning a relative weight of only 40% to the written examination and giving a weight of 60% to "training, experience and *general qualifications*".[12] In addition, the court held that the requirement of graduation from a recognized law school is an unreasonable and arbitrary discrimination against the lawyer who is not a graduate from a recognized law school, but who may have qualified in New York as attorney and counsellor at law under the rules authorized by statute [13] and rules promulgated by the Court of Appeals.[14]

P. C.

CONSTITUTIONAL LAW—FREEDOM OF SPEECH AND OF RELIGION —FOURTEENTH AMENDMENT.—Newton Cantwell and his two sons, Jesse and Russell, members of a religious group known as Jehovah's Witnesses, were convicted of violating Section 6294 of the General Statutes of Connecticut.[1] They, in the course of distributing per-

1938) (Wherein the Civil Service Commission granted preference to applicants for the position of Social Investigator who had had experience with the Emergency Relief Bureau by giving more credit to such applicants for experience and college training than to employees of private agencies in grading the examination. The court held such act improper and directed regrading).

[11] Matter of Keymer, 148 N. Y. 219, 42 N. E. 667 (1896); Barthelmess v. Cukor, 231 N. Y. 435, 132 N. E. 140 (1921); Barlow v. Berry, 245 N. Y. 500, 157 N. E. 834 (1927); Mendelson v. Kern, 278 N. Y. 568, 16 N. E. (2d) 106 (1938); People ex rel. Sweeney v. Rice, 279 N. Y. 70, 17 N. E. (2d) 772 (1938); Sheridan v. Kern, 255 App. Div. 57, 5 N. Y. S. (2d) 336 (1st Dept. 1938).

[12] The court said: "The mandate for competition becomes futile when as here, we find that a candidate's 'general qualifications'—wholly subjective to the examiners and unappraised by objective standards of any kind—are made a test of fitness and, with training and experience, are given a rating weight of 60%."

[13] See note 1, *supra.*

[14] See note 2, *supra.*

[1] "No person shall solicit money, services, subscriptions or any valuable thing for any alleged religious, charitable or philanthropic cause, from other than a member of the organization for whose benefit such person is soliciting or within the county in which such person or organization is located unless such

suasive literature, solicited money and subscriptions for their alleged religious cause, from persons who were not Witnesses. They did not possess a certificate, as required by Section 6294, issued in the discretion of the secretary of the public welfare council. Newton Cantwell was also convicted of inciting a breach of the peace, a common law offense. He played, with the permission of his two listeners, a phonograph record which attacked the religion and church of the two men, who were Catholics. The propaganda so incensed the men that they were tempted to strike Cantwell unless he went away, hence he promptly left. Cantwell was not personally offensive, but what he preached did offend the listeners. The convictions were upheld in the highest court of Connecticut. On appeal to the United States Supreme Court, *held,* reversed. The conviction for inciting a breach of the peace is a violation of the right of freedom of speech and of religion and the statute forbidding solicitation for alleged religious cause without a certificate is unconstitutional as here applied.[2] *Cantwell, et al.* v. *Connecticut,* 310 U. S. 296, 60 Sup. Ct. 900 (1940).

Freedom of religion and of speech protected by the First Amendment against invasion by the Federal Government is protected by the Fourteenth Amendment against invasion by the states.[3] Absolute restraints upon the free exercise and expression of religion according to the dictates of conscience are not lawful under any of the American constitutions.[4] However, one cannot commit disorder and crime in the name of religion.[5] Though the state may be absolutely forbidden to restrain religious belief and opinion, it may and must be allowed

---

cause shall have been approved by the secretary of the public welfare council. Upon application of any person in behalf of such cause, the secretary shall determine whether such cause is a religious one or is a bona fide object of charity or philanthropy and conforms to reasonable standards of efficiency and integrity, and, if he shall so find, shall approve the same and issue to the authority in charge a certificate to that effect. Such certificate may be revoked at any time. Any person violating any provision of this section shall be fined not more than one hundred dollars or imprisoned not more than thirty days or both." Instant case at 301, 302.

[2] U. S CONST. AMEND. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech * * *"); U. S. CONST. AMEND. XIV ("* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws").

[3] Gitlow v. People of State of N. Y., 268 U. S. 652, 45 Sup. Ct. 625 (1925); Grosjean v. American Press Co., 297 U. S. 233, 56 Sup. Ct. 444 (1936); DeJonge v. Oregon, 299 U. S. 353, 57 Sup. Ct. 255 (1937); Lovell v. City of Griffin, 303 U. S. 444, 58 Sup. Ct. 666 (1938); Stromberg v. California, 283 U. S. 359, 51 Sup. Ct. 532 (1939); Schneider v. State, 308 U. S. 147, 60 Sup. Ct. 146 (1939).

[4] N. Y. CONST. art. I, § 3; 2 COOLEY, CONSTITUTIONAL LIMITATIONS (8th ed. 1927) 966–969.

[5] Reynolds v. United States, 98 U. S. 145 (1879); Davis v. Beason, 133 U. S. 333, 10 Sup. Ct. 299 (1890); People v. Pierson, 176 N. Y. 201, 68 N. E. 243 (1903); Commonwealth v. Plaisted, 148 Mass. 375, 19 N. E. 224 (1889).

to interfere with religious practices.[6] Freedom of speech is, likewise, not absolute but subject to the regulations for the common good. The state may regulate it in the course of exercising its police power,[7] but public power ends where an infringement of the fundamental rights begins.[8] A statute which allows an arbitrary denial and censorship of religion and speech is unconstitutional.[9] Regulation must be in the public interest, and non-discriminatory. In the instant case the right to solicit is made to depend upon the approval or disapproval of a particular religion by an administrative official. Such censorship violates the constitutional guaranties,[10] although a court may overrule the official's judgment. The state has the power to punish subsequent abuses and such power is consistent with the constitutional privileges.[11] Whether one has been denied the liberties guaranteed by the Fourteenth Amendment must appear from the facts of the case.[12] The state cannot abridge the constitutional liberty of one rightfully upon the street to impart information by speaking or distributing pamphlets, but it can lawfully regulate the conduct of those using the streets.[13] Treating the conviction of inciting a breach of the peace as analogous to a conviction under a statute containing the elements of that common law offense we see that the liberty of Cantwell has been unlawfully abridged. He preached his notion of religion and tried to persuade others to believe with him as he had a right to do under the Constitution.

L. S.

CONSTITUTIONAL LAW—RELIGIOUS FREEDOM—FLAG SALUTE IN PUBLIC SCHOOLS.—The Gobitis children, members of the sect known as "Jehovah's Witnesses", were expelled[1] from the Miners-

[6] *Ibid.*

[7] Gitlow v. People, 268 U. S. 652, 45 Sup. Ct. 625 (1925); Near v. Minnesota, 283 U. S. 697, 51 Sup. Ct. 625 (1931); State v. McKee, 73 Conn. 18, 46 Atl. 409 (1900); People v. Most, 171 N. Y. 423, 64 N. E. 175 (1902); N. Y. PEN. LAW §§ 160, 161 (anarchy).

[8] Near v. Minnesota, 283 U. S. 697, 51 Sup. Ct. 625 (1931); Schneider v. State, 308 U. S. 147, 60 Sup. Ct. 146 (1939).

[9] Lowell v. City of Griffin, 303 U. S. 444, 58 Sup. Ct. 666 (1938); Hague v. C.I.O., 307 U. S. 496, 59 Sup. Ct. 954 (1939); Schneider v. State, 308 U. S. 147, 60 Sup. Ct. 146 (1939) ("Conceding that fraudulent appeals may be made in the name of charity and religion, we hold a municipality cannot, for this reason, require all who wish to disseminate ideas to present them first to police authorities for their consideration and approval, with a discretion in the police to say some ideas may, while others may not, be carried to the homes of citizens; some persons may, while others may not, disseminate information from house to house. Frauds may be denounced as offenses and punished by law. Trespasses may similarly be forbidden").

[10] Schneider v. State, 308 U. S. 147, 60 Sup. Ct. 146 (1939).

[11] Near v. Minnesota, 283 U. S. 697, 51 Sup. Ct. 625 (1931).

[12] Schenck v. United States, 249 U. S. 47, 39 Sup. Ct. 247 (1919).

[13] Schneider v. State, 308 U. S. 147, 60 Sup. Ct. 146 (1939).

[1] Action of Superintendent claimed to be pursuant to regulation of Miners-