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Constitutional Law: Free Speech--Judicial Review of Findings Made by the State Court

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"That it shall be unlawful for any person engaged in commerce . . . to discriminate in price between different purchasers of commodities, . . . where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce: Provided, That *nothing herein contained shall prevent . . . discrimination in price in the same or different communities made in good faith to meet competition: . . .*" (38 Stats. 730-731, 15 U. S. C. (1934 ed.), sec. 13, 15 U. S. C. A. sec. 13.)

The contention is made that under the majority's interpretation of the amended section that no change has been made in the heart of the defense. While this may be true still the change has affected some clarification. It limits the reductions to the "lower price" of the competitor, and thus eliminates the possibility of under cutting the competitor.

The defense, as it now exists, remains absolute, but is more limited in its scope than under the Clayton Act. (340 U. S. —, 71 S. Ct. 245, 95 L. Ed. —.) Any change in this result is, of course, a policy question to be determined by Congress.

While the bill was in the Legislature there was some confusion as to what was the desired result of the language, and what the actual result would be. It seems, from a reading of the legislative history, that there was an intention to retain the defense under the Clayton Act, with a limitation that the price set by competition could not be undercut. (H. R. No. 2287, 74th Cong. 2d Sess., p. 16; see, also, S. Rep. No. 1502, 74th Cong., 2d Sess., p. 4.) Also that prices were not to be set below cost. (80 Cong. Rec. 8235.) This apparently is the meaning of the "good faith" requirement under the proviso in 2(b). For a contra view supporting the dissent's contention see 80 Cong. Rec. 9418.

James W. O'Brien.

CONSTITUTIONAL LAW: FREE SPEECH—JUDICIAL REVIEW OF FINDINGS MADE BY THE STATE COURT.—In the recent United States Supreme Court decision, *Feiner v. People of State of New York* (1951), 71 S. Ct. 303, 95 L. Ed. 253, Syracuse city authorities granted a permit for O. John Rogge, a former Assistant Attorney General, to speak in a public building on March 8, 1948, on the subject of racial discrimination and civil liberties. On March 8th the authorities cancelled the permit. The Young Progressives, under whose auspices the meeting was scheduled, then arranged for Mr. Rogge to speak at the Hotel Syracuse. The gathering on the street where the petitioner spoke was held to protest the cancellation and to publicize the meeting at the hotel. It had been customary to have such street meetings in the same locale every Friday night. There were seventy-five to eighty people, white and colored, listening to the speaker; the crowd overflowed into the street. In connection with his speech, petitioner used derogatory but not profane language with reference to city authorities, President Truman, and the American Legion. After hearing some of these remarks, a policeman, who had been sent to the meeting by his superiors, reported to police headquarters by phone. To whom he reported or what was said does not appear on the record, but after returning from the call, he and another policeman started through the crowd toward the petitioner. Both officers swore that they did not intend to make an arrest when they started, and the trial court accepted these statements. They also said, and the court, sitting without a jury, believed, that they heard and saw "angry mutterings," "pushing," "shoving," "milling around," and "restlessness." Petitioner spoke in a "high

pitched voice." He said that "colored people don't have equal rights and they should rise up in arms and fight for them."¹

One man who heard these statements told the officers that if they did not take the "S . . . O . . . B . . . off the box" he would do it himself. The officers then approached the petitioner for the first time. One of them first asked the petitioner to get off the box, but the petitioner continued to urge his audience to attend Rogge's speech. The officer next told the petitioner to get down, but he did not do so. The patrolman arrested the petitioner, charging him first with unlawful assembly but later changing it to "disorderly conduct" under section 722(3) of the Penal Code of New York which allows a charge of disorderly conduct when one "congregates with others in a public street and refuses to move on when ordered by police."²

Chief Justice Vinson, writing for the majority, upheld the conviction and the validity of the statute as applied to these facts on the ground that the speaker passed the bounds of argument and persuasion. The petitioner was not arrested for the content of his speech, but it was the reaction actually engendered in the audience which was the basis for the arrest. The majority accepted the findings made by the trial judge that the speech tended to incite a riot. The free speech guarantees of the First and Fourteenth Amendments do not sanction speech inciting to riot. Justice Frankfurter concurred in the opinion, Justice Douglas, Minton, and Black dissented.

This case raises the important issue as to the judicial function of the United States Supreme Court in reviewing the findings of fact made by state courts, when a federal right is involved. The court is not in agreement as to the nature of its judicial review of findings made by state courts when a federal right is involved. There are two extreme positions as to the nature of this judicial review, one represented by Mr. Justice Frankfurter, and other represented by Mr. Justice Black. The majority of the court is somewhere in the middle.

Mr. Justice Frankfurter is of the opinion that the Supreme Court should never reexamine a determination of state courts on findings of fact, where the state courts have made a fair appraisal of the facts. Nor will Mr. Justice Frankfurter make any exception in civil liberties cases on the judicial function of reviewing findings made by the state court. Writing in the *Ferner* opinion he expresses his attitude when he says "A state court cannot, of course, preclude review of due process questions merely by phrasing its opinion in terms of an ultimate standard which itself satisfies due process. *Watts v. State of Indiana*, 338 U. S. 49, 50, 69 S. Ct. 1347, 1357, 93 L. Ed. 1801. But this court should not reexamine determination of state courts on those matters which are usually termed issues of fact, *Watts v. State of Indiana*, *supra*. And it should not overturn a fair appraisal of facts made by the state courts in light of their knowledge of local conditions."

Mr. Justice Black takes another view. He feels that not only does the court have the power to make an independent examination of the evidence offered by state court when a federal question is involved, but that the court in civil liberties cases is under

¹There was conflicting testimony as to whether this phrase was used. Reliable witnesses swore that he said his listeners "could rise up and fight for their rights by going over to the Hotel Syracuse, black and white alike, to hear John Rogge." The appellate court in New York and six judges of the Supreme Court accepted the findings of the trial judge.

²Section 722 of New York Penal Code: "Anyone who with the intent to provoke a breach of peace, or whereby a breach of peace might be occasioned, commits any of the following acts shall be deemed to have committed an offense of disorderly conduct: (1) Uses offensive, disorderly, threatening, abusive, or insulting language, conduct or behavior. (2) Acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others. (3) Congregates with others on a public street and refuses to move on when ordered by the police."

a *duty* to make an independent examination of the evidence, and make its own findings. Mr. Black implies that the court should not only go behind the findings made by the state court in civil liberties, but should also attempt to ascertain the credibility of the witnesses. This may seem to be rather an extreme view in light of the fact that the trial court has the advantage of watching the demeanor of witnesses, an important factor in the credibility of evidence. However, where the tensions over political issues are high or when a trial is being dominated by mob action, and witnesses and the state court are part of this social pressure, the safeguards of due process may necessitate ascertaining the credibility of witnesses. In *Moore v. Dempsey*, 261 U. S. 86, 43 S. Ct. 265, 67 L. Ed. 543 some negroes were on trial for murder. The court and neighborhood were thronged with an adverse crowd that threatened the most dangerous consequences to anyone interfering with the desired result. The Supreme Court reversed a conviction on the ground that the mob dominated the trial, and took into account the factor of the credibility of the witnesses under such social conditions.

In the *Feiner* case, *supra*, we find that the majority of the court gave lip service to the principle that it is within the judicial power of the court to make an independent examination of the evidence, and make its own findings. However, it should be noted that the Supreme Court in this case did not here make an independent examination of the evidence in the record. The Supreme Court did not hesitate to accept the findings of the trial judge in New York, as supported by two appellate courts of the state of New York.

Where the Supreme Court is today on its view as to the judicial function in reviewing state findings of fact in civil liberties cases is not certain. The court has not abandoned the principle that it has the power to make its own findings on the record of the state court. The court has not adopted the view of Mr. Justice Black that it is under a duty to exercise this power in every civil liberties case where the facts are in controversy. However, the court has not adopted the view of Mr. Justice Frankfurter, that the Supreme Court should never reexamine determinations of fact made by the state courts in civil liberty cases, where the state courts have made a fair appraisal of the facts.

The vital question is raised as to whether the evidence in this case does support the finding that the petitioner's statements did tend to incite a riot. The findings of fact do not appear to show an imminent threat of riot or uncontrollable disorder. In the application of the clear and present danger doctrine, the test is not whether the speech tends to produce disorder or a riot in the future, but whether there is an imminent danger of a substantive evil. In the case of *Gillow v. New York* (1925), 268 U. S. 652, 69 L. Ed. 1138, 45 S. Ct. 625, where the petitioner was arrested for circulating the Communist manifesto under a criminal syndicalism law which prevented circulation of such material, the majority of the court upheld the conviction on the ground that the words "had a natural tendency to incite those who read them." The court did not emphasize the requirement that an immediate effect had to be shown. If the words tended to incite future action it was sufficient. Holmes dissented in this decision, citing *Schenck v. U. S.*, 249 U. S. 47, 63 L. Ed. 470, 39 S. Ct. 247, where the clear and present danger doctrine was enunciated, an element of which is the necessity of showing that the words tended to create an immediate disorder of a substantive evil, not a future disorder. The "natural tendency test" has been disavowed in favor of the clear and present danger doctrine as construed by Mr. Justice Holmes.

In the *Feiner* decision the court did refer to the clear and present danger test. However, the weight of a judicial formula will not be determined by abstract reference to it, but by the application of the formula to a particular set of facts within a particular

context. The findings in the Feiner case showed there was shoving, pushing, milling around, restlessness. It would not be realistic to expect to have street meetings on political issues where such activity by the audience is not present. But such activity does not indicate an imminent riot. The crowd may have been angry with the speaker, and may have showed disagreement with the speaker in one form or another. But in the case of *Terminiello v. Chicago*, 337 U. S. 1, 93 L. Ed. 1131, 69 S. Ct. 894, the United States Supreme Court reversed a conviction of Terminiello, when his speech did in fact cause a mass riot, on the ground that the instruction of the trial judge in defining a breach of the peace was erroneous when he said "speech which stirs people to anger, invites public dispute, or brings about a condition of unrest" is a breach of the peace. One may ask, at what point beyond the inciting to anger does a breach of peace occur? It would not seem that one isolated threat to assault the speaker would foreshadow an imminent disorder, especially where, as here, the man who made the threat was accompanied by his wife and two small children, and who, as far as the record shows in the Feiner case, was never close enough to the petitioner to carry out his threat.

In the case of *Cantwell v. Conn* (1940), 310 U. S. 296, 84 L. Ed. 1213, 60 S. Ct. 900, a member of the group known as Jehovah's Witnesses played a phonograph record on the public street containing an attack on an organized religious system. The petitioner was arrested on the common law charge of breaching the peace. The court pointed out that although the content of the record not unnaturally aroused animosity, the defendant's conduct in absence of a statute narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the state, raised "no such clear and present danger to public peace and order as to render him liable to conviction."

But let us assume that the facts do indicate a critical situation in that a breach of peace has not yet occurred but police action is necessary to prevent a breach of the peace. The police do have the power to prevent a breach of the peace. The majority opinion implied that the police have no obligation to protect the petitioner's right to speak in exercise of their power to prevent a breach of the peace. In the Feiner case there is no showing that the police tried to prevent a breach of the peace in any other manner than to arrest the speaker. There was no showing that the police attempted to quiet the crowd, or clear a path for pedestrians on the sidewalk. One person threatened to assault the speaker, but the officers did nothing to discourage this when even one word might have sufficed. Mr. Justice Black, in the dissent, says, on this issue of alternative methods of preserving public order, that it was the duty of the police to protect the petitioner's right to talk, even to the extent of arresting the man who threatened the interference. In *Schneider v. State*, 308 U. S. 147, 84 L. Ed. 155, 60 S. Ct. 146, where the court held that a purpose to prevent littering of the streets was insufficient to justify an ordinance which prohibited a person lawfully on the street from handing literature to one willing to receive it. The court pointed out there were obvious methods of preventing littering, among which is the punishment of those who actually throw papers on the streets. In *Dean Milk Co. v. Madison* (1951), 95 L. Ed. 228, the court held invalid a municipal health ordinance under the commerce clause because of a belief that the city could have accomplished its purpose by reasonably adequate alternatives. Mr. Justice Black comments that the court should certainly not be less alert to protect free speech than it is to protect freedom of trade.

What is the apparent effect of the Feiner decision? Mr. Justice Black sums it up well when he says:

"This conviction makes a mockery of free speech guarantees of the First and Fourteenth Amendments. The end result of the affirmance here is to approve a simple and ready available technique by which cities and states can with simplicity subject all

speeches, political or otherwise, on streets or elsewhere, to the supervision and censorship of local police. I will have no part and parcel in this holding which I view as a long step toward totalitarian authority."

But this decision reveals also a shift in attitude on the part of the United States Supreme Court in construing the free speech guarantees of the First and Fourteenth Amendments. To get some light on this shift in attitude we need only compare the attitude of the court in this case with that in *Cantwell v. Conn.*, *supra*, where Mr. Justice Roberts, writing the majority opinion, said:

"In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one may seem rankest ever to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times resorts to exaggeration, to vilification of men who have been or are prominent in church or state, and even to false statements. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of citizens and democracy."

Conclusion

The Supreme Court, when exercising its judicial function of review of the decision of a state court in civil liberties cases, says that it has the power to make an independent examination of the evidence in the record. But as the *Feiner* case points out, the court in fact does not in every instance make an independent examination of the facts in the record. The court sometimes accepts the findings made in the trial court, and in case of controversy on the facts, the court accepts the evidence that the trial judge reasonably concluded to be true, at least where his findings are accepted by two reviewing state courts. The majority of the court has not accepted the views of Mr. Justice Black, who is of the opinion that the Supreme Court is under a duty in every instance, where civil liberties are involved, to reach its own conclusions on an independent review of the facts presented in the record on appeal. Nor has the majority of the court gone to the extreme of Mr. Justice Frankfurter, who believes that the court should never re-examine determinations of facts made by the state courts in civil liberties cases, where the state courts have made a "fair appraisal of the facts."

The question as to whether the police are under a duty to give reasonable police protection to a street speaker as an alternative method of preserving public order was not discussed in the majority opinion. Mr. Justice Black believes such a duty does exist.

The Supreme Court has established and continues to follow a line of decisions to the effect that statutes and ordinances which require that a permit be obtained from local officials as a prerequisite to the use of public places for religious and street meetings are invalid when they do not contain narrowly drawn, reasonable, and definite standards for licensing officials to follow.³

³This policy was applied in two decisions rendered on the same day as the *Feiner* case, *supra*. In *Niemotko v. State of Maryland*, 71 S. Ct. 325, where there was no evidence of disorder, threats of violence or riot at the time of the arrest of the defendants, who were members of a group known as Jehovah's Witnesses, on a charge of disorderly conduct, and the only basis for the arrest was that the defendant was using the public park for Bible talks without permit from city officials, although no statute or ordinance prohibiting the use of parks without use of permit was in existence, their conviction was held a violation of the exercise of freedom of speech and religion protected by the Fourteenth Amendment. In *Kunz v. State of New York*, 71 S. Ct. 312, Kunz was convicted by a magistrates' court of the City of New York for unlawfully conducting a religious meeting without a permit, in violation of the Administration Code of New York, section 435-7.0. Mr. Chief Justice Vinson held that the New York city ordinance making it unlawful to hold public worship meetings on streets without first obtaining a permit from the city police commission is invalid as vesting a power of preliminary restraint over the right to speak on religious subjects in an administrative official without providing appropriate standards to guide his actions.