



UNC
SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 19 | Number 1

Article 14

12-1-1940

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Recommended Citation

Harvey A. Jonas Jr., *Constitutional Law -- Police Power -- Municipal Prohibition of House to House Peddling*, 19 N.C. L. REV. 65 (1940).
Available at: <http://scholarship.law.unc.edu/nclr/vol19/iss1/14>

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a waiver or abandonment of any rights which have accrued under the breached contract.²¹

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Constitutional Law—Police Power—Municipal Prohibition of House to House Peddling.

A Georgia city, having statutory authority to "license, regulate and control . . . peddlers of all kinds,"²¹ declared by ordinance that every solicitor, peddler, hawker, itinerant merchant and transient vendor of merchandise, who went uninvited to a private home for the purpose of conducting business, was a (public) nuisance.² *Held*, such an unqualified provision is an unreasonable and arbitrary interference with legal rights, in violation of the due process clause of the Federal Constitution.³

A preliminary question to be decided in every such case is: Has the legislature given the municipality power to pass such a law? This is of particular significance in that courts seem to find an affirmative grant of power a persuasive argument for constitutional validity. For, ordinances identical to the one under consideration have been upheld in all cases when passed by cities granted the specific power to "prohibit" hawkers and peddlers.⁴ Likewise, this ordinance has been upheld in the only case arising where passed by another city under the delegated power to "regulate" similar activities.⁵ Whenever a city had neither the power to regulate nor suppress this business, such an

²¹ In *Comey v. United Surety Co.*, 217 N. Y. 268, 111 N. E. 832 (1916), Cardozo, J., said of such an express provision in the second contract: "The contract itself . . . says in so many words that the old contract is not to be deemed revived, and that no rights that have accrued under it are waived. The cause of action against the defendant was thus plainly preserved." Even such an express reservation might leave some room for argument if the language of *Mr. Justice White in International Contracting Co. v. Lamont*, 155 U. S. 303, 15 Sup. Ct. 97, 39 L. Ed. 160 (1894), is to be taken literally. In that case it was said, at p. 310, "A party cannot avoid the legal consequences of his acts by protesting at the time he does them that he does not intend to subject himself to such consequences."

¹ LAWS OF GEORGIA 1901, Part III, Title I, Sect. 37.

² This ordinance is identical with that originated by Green River, Wyoming, and upheld in *Green River v. Fuller Brush Co.*, 65 F. (2d) 112 (C. C. A. 10th, 1933).

³ *De Berry v. La Grange*, 8 S. E. (2d) 146 (Ga. App. 1940).

⁴ *Green River v. Fuller Brush Co.*, 65 F. (2d) 112 (C. C. A. 10th, 1933) *rev'd* 60 F. (2d) 613 (D. C. Wyo. 1932); *McCormick v. Montrose*, 99 P. (2d) 969 (Colo. 1940) (court used this reasoning); *cf. Goodrich v. Busse*, 247 Ill. 366, 93 N. E. 292 (1910) (similar ordinance upheld for this reason).

⁵ *Shreveport v. Cunningham*, 190 La. 481, 182 So. 649 (1938). Accord: *Ex parte Camp*, 38 Wash. 393, 80 Pac. 547, 548 (1905). But *cf. Cosgrove v. City Council*, 103 Ga. 835, 31 S. E. 445 (1898); *Good Humor v. Board of Comm'rs.*, 124 N. J. L. 162, 11 A. (2d) 113 (1940); *Virgo v. Toronto*, 22 Can. Sup. Ct. 447 (1893) (passing on similar ordinances).

ordinance has been held invalid.⁶ However, this distinction is rarely articulated by the courts.

It is frequently questioned whether such activity actually constitutes a public nuisance. Although a public nuisance is indictable, a visitation which merely offends a householder may be only a private nuisance and not punishable as a crime. Cities cannot by ordinance declare to be a public nuisance that which is not one in substance.⁷ Although one solicitation may not, of itself, be such a nuisance as to be punishable, the types of salesmen prohibited by the ordinance in question are increasing to such an extent that each uninvited visit may be deemed a public nuisance because of the frequent repetition of calls by one solicitor after another. Such annoyances have become so general and common that a court has taken judicial notice that the frequent ringing of doorbells of private residences by the prohibited persons is in fact a nuisance to the occupants of homes.⁸ After all, the terms "public" and "private" are but labels descriptive of conclusions yet given as reasons for decisions. In the final analysis, the problem is whether the courts feel that there exists a *public need* of suppression so as to empower the city to pass such an ordinance:

Aside from the question of authorization, the validity of such an ordinance is usually, and particularly in a case of this nature, held to depend upon its being a proper exercise of police power. Of necessity this power is one of indefinable flexibility, and represents an ever-changing compromise in a "contest between the restraining power of due process of law and the legitimizing energy of police control."⁹ In its liberal present-day scope, it has been said to include interference

⁶ *Prior v. White*, 132 Fla. 1, 180 So. 347 (1938); *Jewel Tea Co. v. Bel Air*, 172 Md. 536, 192 Atl. 417 (1937) (court used this reasoning); *McAlester v. Tea Co.*, 98 P. (2d) 924 (Okla. 1940) (court used this reasoning); *Orangeburg v. Farmer*, 181 S. C. 143, 186 S. E. 783 (1936); *White v. Culpeper*, 172 Va. 630, 1 S. E. (2d) 269 (1939).

⁷ *Prior v. White*, 132 Fla. 1, 180 So. 347 (1938); *McAlester v. Tea Co.*, 98 P. (2d) 924 (Okla. 1940); *White v. Culpeper*, 172 Va. 630, 1 S. E. (2d) 269 (1939). But see *McCormick v. Montrose*, 99 P. (2d) 969, 972 (Colo. 1940); 1 BISHOP, CRIMINAL LAW (9th ed. 1923) §234 ("whenever the public deems an act of private wrong to be of a nature requiring its intervention for the protection of the individual, it holds the act punishable at its own suit; in other words, makes it a crime").

⁸ *Green River v. Fuller Brush Co.*, 65 F. (2d) 112 (C. C. A. 10th, 1933). The prohibited persons frequently claim exemption from the ordinance on grounds of implied invitation to call, and because usage and custom would constitute them at least licensees. However, the ordinance simply abolishes existing implied consent, if any, and creates a presumption of lack of consent until an invitation can be shown. Each householder may withdraw consent at any time and so constitute persons entering, trespassers; it would be a strange anomaly in our law if the people individually could accomplish an act which they could not do collectively through their government. *McCormick v. Montrose*, 99 P. (2d) 969, 974 (Colo. 1940); see *Windsor v. Blake*, 49 N. C. 332, 334 (1875).

⁹ 3 WILLOUGHBY, CONSTITUTIONAL LAW OF THE UNITED STATES (2d ed. 1929) §1168, p. 1765.

by the state wherever the public interests require it, since the government is obligated to protect and promote the public welfare.¹⁰ A profitable comparison may be made between the instant ordinance and past exercises of the police power which received judicial approval. Hawkers and peddlers have been confined to certain districts;¹¹ the ordinance in question forbids uninvited visitation of private homes. The sale of drugs or medicines by itinerants has been forbidden;¹² whereas the ordinance regulates not what is sold but only the place of sale. To promote public order and comfort, itinerants have been forbidden to sell within certain distances of religious meetings and fairs.¹³ Are not people in their homes entitled to like consideration?

Since entering private premises against the consent of the owner may be forbidden,¹⁴ it appears that a majority of the people, acting through their representatives, might decree any vendor's entrance to be against the consent of the owner, until an actual invitation is obtained. Zoning laws go further than the ordinance in question inasmuch as they prevent one from using his own property for certain purposes,¹⁵ while the ordinance at issue merely declares that one shall not use *another's* property for his own business purposes without the invitation of the owner.

In *Williams v. Arkansas*,¹⁶ the United States Supreme Court held valid a statute making it unlawful to solicit business on the trains or in the depots of any railroad operating within the state, and unlawful for any railroad knowingly to permit such practices. Certainly people in their own homes are entitled to as much protection against unpleasantness and annoyance as those who travel, especially as the latter voluntarily expose themselves to business contacts, while the individual in the home seeks escape from uninvited disturbance. The ordinance in the principal case is not as stringent as that upheld by the above

¹⁰ *Fuller Brush v. Green River*, 60 F. (2d) 613, 615 (D. Wyo. 1932); 2 COOLEY, CONSTITUTIONAL LIMITATIONS (8th ed. 1927) 1226 ("The public need is the polestar of the enactment, interpretation, and application of the law.")

¹¹ *Ex parte Hogg*, 70 Tex. Crim. Rep. 161, 156 S. W. 931 (1913); *Stevens Point v. Bocksbaum*, 225 Wis. 373, 274 N. W. 505 (1937); see *Ex parte Camp*, 38 Wash. 393, 395, 80 Pac. 547, 548 (1905); Note (1936) 105 A. L. R. 1051.

¹² Notes (1928) 54 A. L. R. 730, 735.

¹³ *State v. Reynolds*, 77 Conn. 131, 58 Atl. 755 (1904); *Meyers v. Baker*, 120 Ill. 567, 12 N. E. 79 (1887); *State v. Cate*, 58 N. H. 240 (1878); *State v. Stoval*, 103 N. C. 416, 8 S. E. 900 (1889); *State v. Read*, 12 R. I. 137 (1879).

¹⁴ *McCormick v. Montrose*, 99 P. (2d) 969, 975 (Colo. 1940); *Saxton v. Peoria*, 75 Ill. App. 397 (1897); *Brownsville v. Cook*, 4 Neb. 101 (1875); *State v. Glenn*, 118 N. C. 1194, 23 S. E. 1004 (1896).

¹⁵ *Reinman v. Little Rock*, 237 U. S. 171, 35 Sup. Ct. 171, 59 L. ed. 900 (1914); *Hadacheck v. Sebastian*, 239 U. S. 394, 36 Sup. Ct. 143, 60 L. ed. 348 (1915); *Texas Co. v. Tampa*, 100 F. (2d) 347 (C. C. A. 5th, 1938); 2 COOLEY, *op. cit. supra* note 10, at 1315 (zoning laws upheld).

¹⁶ 217 U. S. 79, 30 Sup. Ct. 493, 54 L. ed. 673 (1910), *aff'g* 85 Ark. 464, 108 S. W. 838 (1908).

decision, since it reserves to the householder the power to invite the prohibited persons for any desired business. It has been said that all lawful occupations are subject to reasonable regulations, including licensing, and a recognized mode of regulation is by prescribing the places where a given occupation may or may not be conducted.¹⁷ The ordinance in the principal case does not suppress the business of peddling, but merely prohibits a particular phase of it in an effort to protect the privacy of homes.

Some courts insist that if the law seeks to relieve the occupant of the house from disturbance, then it is not sufficiently comprehensive because it fails to cover solicitors of alms and charity.¹⁸ However, a state may, without arbitrary discrimination, direct its laws against what it deems the existing evil, without covering the whole field of possible abuses.¹⁹ And here there seems ample reason for the discrimination so as to constitute no denial of equal protection. Certainly the prohibited class is a conspicuous example of what the legislative body seeks to prevent. Solicitors of alms appear less frequently than hawkers and peddlers and a householder is ordinarily more willing to hear charitable requests than to be urged to buy something he does not desire sufficiently to invite the seller onto his premises. Where home-merchants are specifically exempted from the application of ordinances like the one in question, courts have found discrimination;²⁰ but in the principal ordinance there is no such discrimination because resident merchants are subject to the same restrictions.

The constitutionality of the law when applied to solicitors for out-of-state firms hinges upon whether such prohibition is a direct burden on interstate commerce. In *Green River v. Fuller Brush Co.*,²¹ the Circuit Court of Appeals upheld an identical ordinance saying that interstate commerce was only indirectly affected, and that the commerce clause did not prevent the state from exercising its police power, at least in the absence of Congressional regulation. A regulation discriminating against interstate commerce or designed to gain local benefit at its expense, is almost invariably invalidated as a direct burden.²² However, the fact that its subject matter is one not requiring

¹⁷ *Ex parte Quong Wo*, 161 Cal. 220, 118 Pac. 714 (1911) (and cases cited); *ex parte Barmore*, 174 Cal. 286, 163 Pac. 50 (1917).

¹⁸ *Fuller Brush v. Green River*, 60 F. (2d) 613 (D. C. Wyo. 1932).

¹⁹ *Green River v. Bunger*, 50 Wyo. 52, 58 P. (2d) 456 (1936) (citing *Central Lumber Co. v. South Dakota*, 226 U. S. 157, 160, 33 Sup. Ct. 66, 67, 57 L. ed. 164 (1912)); 2 COOLEY, *op. cit. supra* note 10, at 1226.

²⁰ *Jewel Tea Co. v. Bel Air*, 172 Md. 536, 192 Atl. 417 (1937) (identical ordinance with additional clause exempting home-merchants); *Good Humor v. Board of Comm'rs.*, 124 N. J. L. 162, 11 A. (2d) 113 (1940), *rev'g*. 123 N. J. L. 21, 7 A. (2d) 824 (Sup. Ct., 1939).

²¹ 65 F. (2d) 112 (C. C. A. 10th, 1933).

²² *South Carolina State Highway Dep't. v. Barnwell Bros.*, 303 U. S. 177, 185, 58 Sup. Ct. 510, 82 L. ed. 734, 739 (1937) (and cases cited); ROTTSCHAEFER, CONSTITUTIONAL LAW (1939) 283.

uniformity of national regulation is frequently relied upon to support regulation which only affects interstate commerce incidentally.²³ Regulation accomplished by the instant ordinance seems purely a matter of local interest, and one which affects interstate commerce only indirectly. It has been said that this type of ordinance is not aimed at the solicitation of orders for purchase of goods which flow through interstate commerce, but at the "place" of solicitation.²⁴ The ordinance does not prohibit the former, but only the latter.

In the principal case, appellant pleaded that his constitutional rights as a Jehovah's Witness were contravened by the ordinance.²⁵ Admittedly a deprivation of the right to propagate religious belief is unconstitutional.²⁶ Yet the same clause of the Constitution also protects all from having religious beliefs of others thrust upon them against their will.²⁷ The Constitution does not guarantee protection to the form of worship of a particular sect.²⁸ In neither the principal decision nor in other decisions involving similar ordinances has there been any discussion of freedom of worship. For it seems that the constitutional guaranty of such freedom does not insure the right to sell from house to house as the appellant was attempting to do.

Since all reasonable doubts should be resolved in favor of the constitutionality of a law, the Georgia Court in the principal case might well have reached an opposite conclusion. Furthermore, there is a growing need for upholding such ordinances, since it is a matter of common knowledge that the restricted types of persons are noticeably increasing, to the annoyance, inconvenience, and disturbance of the public in their homes, against which private redress is of slight value as a remedy. This ordinance does not prohibit business; rather it regulates the "place" of carrying it on. There are numerous ways of obtaining the required invitation if the property owner is really interested in the merchandise.

HARVEY A. JONAS, JR.

²³ South Carolina State Highway Dep't. v. Barnwell Bros., 303 U. S. 177, 58 Sup. Ct. 510, 82 L. ed. 734 (1937); cf. Best & Co. v. Maxwell, 216 N. C. 115, 3 S. E. (2d) 292 (1939); Note (1939) 18 N. C. L. REV. 48 (direct or indirect burden of taxation on interstate commerce).

²⁴ Green River v. Fuller Brush, 65 F. (2d) 112 (C. C. A. 10th, 1933); Green River v. Bungler, 50 Wyo. 52, 58 P. (2d) 456 (1936); cf. Real Silk Hosiery Mills v. Portland, 268 U. S. 325, 45 Sup. Ct. 525, 69 L. ed. 982 (1925) (license tax and examination required by ordinance for purpose of preventing fraud, declared direct burden on interstate commerce).

²⁵ De Berry v. La Grange. In appellant's brief, pp. 21 to 42, he pleaded that his sect's Biblical Principle commanded him to go to everyone with the scriptures, and that this ordinance prohibited that practice.

²⁶ 2 COOLEY, *op. cit. supra* note 10, at 969.

²⁷ Pittsburgh v. Ruffner, 134 Pa. Super. 192, 4 A. (2d) 224, 227 (1939); 2 COOLEY, *op. cit. supra* note 10, at 969, n. 1.

²⁸ Davis v. Beason, 133 U. S. 333, 10 Sup. Ct. 299, 33 L. ed. 637 (1890); Maplewood Township v. Albright, 13 N. J. Misc. 46, 176 Atl. 194 (C. P., 1934); McMasters v. State, 21 Okla. Cr. 318, 207 Pac. 566 (1922).