CITY PERMIT REVOCATION IN WAKE OF RIOT: SOME CONSTITUTIONAL QUESTIONS

On July 27, 1970, a free rock music concert starring Sly and the Family Stone and sponsored by the Chicago Park District in downtown Grant Park erupted into a five-hour riot that spread into the Chicago Loop area and caused extensive personal and property injuries.[1] The following day, the Chicago Park District's Board of Commissioners unanimously adopted a resolution revoking the permit agreements for the remaining six rock concerts scheduled to be held in public facilities that year, citing a " 'clear and present danger to the health and safety of the citizens of the City of Chicago.' "[2] Five of the concerts, like the one that precipitated the riot, were to be free outdoor events sponsored by the Park District.[3] But the sixth concert, scheduled for September 13, 1970, was to be a paid-admissions

1. N.Y. Times, July 28, 1970, at 1, col. 7. The trouble began when members of the audience swarmed over the Grant Park Band Shell stage. The police moved in to clear the stage in order for the concert to continue. Suddenly, rocks and bottles were thrown at the police, beginning a riot which led to window smashing and some looting in downtown stores. There were approximately 5,000 rioters, both white and black, most of them young people. *Id.*

162 people were injured, including 126 policemen; 160 people were arrested. 35-50,000 people attended the concert, and according to the Park District President, 400 people started the riot, some of them having come to the park with chains and baseball bats. But some policemen said it was "spontaneous, touched off by beer and wine drinking, heat, the size of the crowd and a report that Sly and the Family Stone, a rock group, would not perform as scheduled." N.Y. Times, July 29, 1970, at 24, col. 1. Property damage was estimated at $80,000. Sly was not scheduled to appear until 6:30 p.m. A local band was performing when the riot broke out at 4 p.m. *Id.*

2. Contemporary Music Group, Inc. v. Chicago Park Dist., 343 F. Supp. 505 (N.D. Ill. 1972). The court went on to say: "The resolution also stated that numerous public statements and threats had been made by rioters and other persons at the scene at the time of and immediately following the disturbance, asserting that the rioting was part of a continuing plan to seek a violent confrontation with police officers and officials of the City of Chicago, and that said conduct would be repeated in the future. On the basis of these alleged facts, the Board of Commissioners of the Park District found 'that a continuation or repetition of a contemporary music concert at or near the Grant Park Band Shell will present a clear and present danger to the health and safety of the citizens of the City of Chicago . . . .' " *Id.* at 507.

3. N.Y. Times, July 29, 1970, at 24, col. 1.

concert in Soldier Field Stadium sponsored by the nonprofit Contemporary Music Group, Inc.

In *Contemporary Music Group, Inc. v. Chicago Park District*,[4] plaintiff, suing mainly for lost profits in the alleged amount of $1,500,000, claimed that the permit revocation not only was a breach of contract by the Park District but was also an unconstitutional infringement of its right to contract,[5] as well as a deprivation of property without due process of law.[6] In addition, plaintiff claimed the ban against rock concerts violated the equal protection clause of the fourteenth amendment,[7] the Civil Rights Act of 1871,[8] and the right of free speech and expression.[9] The federal district court dismissed the complaint for lack of a federal question,[10] holding the contracts clause inapplicable when an action for damages for a possible breach of contract can be maintained at the state court level.[11] The court dismissed outright the personal rights allegations.[12]

The doctrine is well-settled that a municipal ordinance has the effect of a state law for purposes of the contracts clause.[13] Yet the

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4. 343 F. Supp. 505 (N.D. Ill. 1972).

5. U.S. CONST. art. I, § 10.

6. 343 F. Supp. at 508.

7. *Id.* at 509.

8. 42 U.S.C. § 1983 (1970).

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id.

9. The Chicago Park District is a municipal corporation (343 F. Supp. at 507), and therefore its action is "state action" for purposes of the fourteenth amendment. The fourteenth amendment has been interpreted to protect first amendment rights.

10. The court held federal jurisdiction was lacking because no federal question was found. No claim based on diversity of citizenship was made. 343 F. Supp. at 507.

11. *Id.* at 508.

12. *Id.* at 509-10.

13. White, C.J., wrote, "It is no longer open to question that 'a by-law or ordinance of a municipal corporation may be such an exercise of legislative power delegated by the legislature to the corporation as a political subdivision of the State, having all the force of law within the limits of the municipality, that it may properly be considered as a law, within the meaning of the article [art. I, § 10] of the Constitution of the United States.'" St. Paul Gaslight Co. v. City

Supreme Court has often been reluctant to use that doctrine in actually finding municipal impairments of contracts. At the turn of the century, when the landscape of American cities was rapidly changing, a host of cases came before the federal courts involving municipalities revoking their contracts with private companies in order to provide more modern public services. In cases dealing with waterworks,[14] viaduct repairs,[15] sewer systems,[16] and street paving,[17] the Court found nothing more than a "naked case of breach of contract,"[18] an issue for the state, not federal, courts.

The leading case in this field is *St. Paul Gaslight Co. v. City of St. Paul*,[19] in which plaintiff had contracted with the city to supply its gas street lamps. The city subsequently began installing new electric lamps and passed an ordinance that required the company to remove the gas lamps standing in electric neighborhoods and allowed for the city's nonpayment of the interest on the cost of the unused gas lamps. Suing for the interest as promised in the charter granted by the city, the company based its claim of federal jurisdiction on the contracts clause of the United States Constitution.[20] The Court found

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of St. Paul, 181 U.S. 142, 148 (1901). *See also* Atlantic Coast Line R.R. v. City of Goldsboro, 232 U.S. 548, 555 (1914); Ross v. Oregon, 227 U.S. 150, 163 (1913); Grand Trunk W. Ry. v. Railroad Comm'n, 221 U.S. 400, 403 (1911); Northern Pac. Ry. v. Minnesota *ex rel.* City of Duluth, 208 U.S. 583, 590 (1908); Hamilton Gaslight & Coke Co. v. Hamilton City, 146 U.S. 258, 266 (1892); New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co., 125 U.S. 18, 31 (1888).

14. City of Dawson v. Columbia Ave. Saving Fund, Safe Deposit, Title & Trust Co., 197 U.S. 178 (1905). The mortgagee of a waterworks company sued to enforce the city's contract to pay the company, the city refusing after deciding by ordinance to build its own waterworks. The Court reversed and remanded to the federal circuit court with instructions to dismiss for want of diversity jurisdiction; but Holmes, J., speaking for the Court, added, "We repeat that something more than a mere refusal of a municipal corporation to perform its contract is necessary to make a law impairing the obligation of contracts or otherwise to give rise to a suit under the Constitution of the United States." *Id.* at 182. *Contra,* Mercantile Trust Co. v. City of Columbus, 203 U.S. 311 (1906); Knoxville Water Co. v. City of Knoxville, 200 U.S. 22 (1906); Vicksburg Waterworks Co. v. City of Vicksburg, 185 U.S. 65 (1902); Walla Walla City v. Walla Walla Water Co., 172 U.S. 1 (1898).

15. Northern Pac. Ry. v. Minnesota *ex rel.* City of Duluth, 208 U.S. 583 (1908).

16. Shawnee Sewerage & Drainage Co. v. Stearns, 220 U.S. 462 (1911).

17. McCormick v. Oklahoma City, 236 U.S. 657 (1915).

18. City of Dawson v. Columbia Ave. Saving Fund, Safe Deposit, Title & Trust Co., 197 U.S. 178, 181 (1905).

19. 181 U.S. 142 (1901).

20. 343 F. Supp. at 507-08.

no impairment and dismissed plaintiff's appeal for want of federal jurisdiction, explaining:

> This amounts only to the contention that every case involving a controversy concerning a municipal contract is one of Federal cognizance, determinable ultimately in this court. Thus to reduce the proposition to its ultimate conception is to demonstrate its error.[21]

For the same reason, the Court has disposed of the companion "deprivation of property without due process of law" argument with the observation that it, too, is simply a matter for possible state remedial action.[22]

Although distinguishing an "impairment" of right from a simple "breach" is not always easy,[23] the court in the principal case found no impairment of the contract right nor any deprivation of property without due process because Music Group retained its remedy in a state action to compel full performance.[24] The court then carried its reasoning a step further by relying on *National Cold Storage Co. v. Port of New York Authority*,[25] holding that the Board's anti-rock concert resolution could not be a "law" under the contracts clause because the resolution only applied to a particular situation for a limited time and "did not possess the characteristics of a law of general application."[26] In other words, the Board's response to the July

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21. 181 U.S. at 149. *See* Manila Inv. Co. v. Trammell, 239 U.S. 31 (1915). *Contra,* Northern Ohio Traction & Light Co. v. Ohio, 245 U.S. 574 (1918); Iron Mountain Ry. v. City of Memphis, 96 F. 113 (6th Cir. 1899).

22. Hays v. Port of Seattle, 251 U.S. 233 (1920). After dispensing with the contracts clause argument of plaintiff, the Court went on to say, "Assuming he had property rights and that they were taken, it clearly was done for a public service, and there was adequate provision for compensation . . . ." by maintaining a state court action for his remedy; that satisfies due process. *Id.* at 238. *See* Manila Inv. Co. v. Trammell, 239 U.S. 31 (1915); McCormick v. Oklahoma City, 236 U.S. 657 (1915); City of Dawson v. Columbia Ave. Saving Fund, Safe Deposit, Title & Trust Co., 197 U.S. 178 (1905).

23. Holmes, J., suggests one difference is that a state law passed expressly authorizing a city to do what the city has already authorized someone else to do would be an impairment, while if no legislative act is passed subsequent to the contract and there is no showing that the city is acting under color of a state law, that would be a breach. City of Dawson v. Columbia Ave. Saving Fund, Safe Deposit, Title & Trust Co., 197 U.S. 178, 181-82 (1905).

24. 343 F. Supp. at 508.

25. 286 F. Supp. 1016 (S.D.N.Y. 1968).

26. 343 F. Supp. at 508.

riot *in this instance* was administrative, not legislative,[27] and therefore was not cloaked within the federal purview of the contracts clause.[28]

The Board's legal justification for revoking the concert permit in the court's opinion was the Board's inherent right to exercise its police power when threatened with the "clear and present danger" of future violence at rock concerts.[29] The court essentially posed the issue of the case: can a municipal corporation revoke a permit in the light of a clear and present danger to the city? The court held that it could. A problem arises, however, when the issue is turned around to read: *was there* a clear and present danger sufficient to warrant revoking the permit for Music Group's September 13th concert? The Supreme Court has held that danger of riot or public disorder must be *immediate* to justify any state incursion into the protected freedoms of the first and fourteenth amendments.[30] Music Group's con-

27. In National Cold Storage Co. v. Port of N.Y. Authority, 286 F. Supp. 1016 (S.D.N.Y. 1968), the court found that the resolutions of the Board of Commissioners of the New York Port Authority were not laws "within the framework of the contracts clause" because they were "merely the method by which a body corporate bestirs itself to action in the conduct of its affairs as a functioning entity." *Id.* at 1018. *See* Washington v. Maricopa County, 152 F.2d 556 (9th Cir. 1945), which held that resolutions of county supervisors and state loan commissioners were not legislative but administrative in character.

28. A persistent theme running throughout this entire line of contracts cases is that the federal courts are the wrong forums in which to bring most of these actions. "To hold that this court has jurisdiction would be, in effect, to hold that whenever a state . . . agency is alleged to have breached . . . an innumerable range of possible contracts, the federal court has jurisdiction. Such a holding would be a massive interference with the principles of federalism by making the federal court the primary forum . . . ." 286 F. Supp. at 1018. *See* Brody v. McCoy, 257 F. Supp. 209 (S.D.N.Y. 1966): "If plaintiffs were correct, there would be a wide door to the federal courts, through the 'contract' clause of all things, for the litigation of obviously and peculiarly state questions." *Id.* at 213.

29. It is a well-settled rule that the state's police power supersedes any contract. "[T]he right to exercise the police power is a continuing one; that it cannot be contracted away, and that a requirement that a company, or individual comply with reasonable police regulations without compensation is the legitimate exercise of the power and not in violation of the constitutional inhibition against the impairment of the obligation of contracts." Northern Pac. Ry. v. Minnesota *ex rel.* City of Duluth, 208 U.S. 583, 596 (1908); *see, e.g.*, New York & New England R.R. v. Bristol, 151 U.S. 556, 567 (1894); Budd v. New York, 143 U.S. 517, 544 (1892); Mugler v. Kansas, 123 U.S. 623, 659 (1887).

30. Cantwell v. Connecticut, 310 U.S. 296 (1940).

> When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious.

cert was to occur seven weeks after the riot, and it was the only cancelled concert not sponsored by the Park District and not open to a free audience. Music Group contended its civil and personal rights had been violated, in addition to its property rights, and therefore sued the individual park commissioners[31] under the Civil Rights Act of 1871,[32] the fourteenth amendment, and the first amendment.

Justice Stone, in his famous concurring opinion in *Hague v. CIO*,[33] explained that the Civil Rights Act of 1871 applies to personal, not property, rights.[34] In a recent, well-reasoned case, Judge Friendly held that the Civil Rights Act of 1871 was inapplicable when alleging the mere loss of money.[35] Because Music Group's sole remedy for which it sued was $1,500,000 (primarily lost profits), the court in the prin-

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> Equally obvious is it that a State may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions.

Id. at 308. *See, e.g.*, Tinker v. Des Moines School Dist., 393 U.S. 503 (1969); Cox v. Louisiana, 379 U.S. 536, 544-52 (1965); Dennis v. United States, 341 U.S. 494 (1951); Feiner v. New York, 340 U.S. 315, 320 (1951); Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949); Herndon v. Lowry, 301 U.S. 242, 255 (1937); Schenck v. United States, 249 U.S. 47, 52 (1919).

31. A municipal corporation is not a "person" within the meaning of the Civil Rights Act of 1871 (42 U.S.C. § 1983); thus, no cause of action can be maintained against a city; Monroe v. Pape, 365 U.S. 167, 187-192 (1961); Egan v. City of Aurora, 365 U.S. 514 (1961). A corporation is, however, a "person" within the meaning of the fourteenth amendment equal protection and due process clauses; *see* NAACP v. Button, 371 U.S. 415, 428 (1963); Grosjean v. American Press Co., 297 U.S. 233, 244 (1936).

32. 42 U.S.C. § 1983 (1970).

33. 307 U.S. 496 (1939).

34. *Id.* at 531. 28 U.S.C. § 1343 (1970) (§ 1983's implementation provision) applies "whenever the right or immunity is one of personal liberty, not dependent for its existence upon the infringement of property rights." *Id. See* Holt v. Indiana Mfg. Co., 176 U.S. 68 (1900); McManigal v. Simon, 382 F.2d 408 (7th Cir. 1967); Ream v. Handley, 359 F.2d 728 (7th Cir. 1966).

35. Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969). Judge Friendly wrote: "So far as our research has disclosed, Mr. Justice Stone's definition would encompass all the cases in which the Supreme Court has sustained jurisdiction under 28 U.S.C. § 1343(3), with the possible exception of King v. Smith, 392 U.S. 309 (1968)." Friendly goes on to say that *King* could arguably fit under Stone's definition (*King* struck down Alabama's "substitute father" regulation which denied payments to some welfare families). 421 F.2d at 564. Since *Music Group*, the Supreme Court has expressly rejected the distinction between personal and property rights under the Civil Rights Act of 1871, thus rendering the district court's argument on this point moot. Lynch v. Household Fin. Corp., 405 U.S. 538 (1972).

cipal case dismissed the Civil Rights Act claim, as well as the equal protection argument.[36]

Plaintiff's claim based on the first amendment was not as easily disposed of as was the civil rights claim. The Supreme Court in *Winters v. New York* laid down the broad proposition that the first amendment protects entertainment.[37] Only libel, obscenity, "fighting words,"[38] and expressions posing a clear and present danger[39] to public safety have not been given first amendment protection. Plays,[40] films,[41] topless dancing,[42] burlesque shows,[43] and live sexual entertainment[44] have all been held to be forms of speech and expression within the scope of the first amendment.

East Meadow Community Concerts Association v. Board of Education[45] is a case closer to point. Folksinger Pete Seeger had been sched-

36. The court dismissed the fourteenth amendment equal protection argument that the Park District had shown "invidious discrimination" in singling out rock music concerts in its resolution by merely citing Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955) and Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35, 50 (1966). *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967); Morey v. Doud, 354 U.S. 457, 463 (1957); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

37. 333 U.S. 507 (1948). "We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine." *Id.* at 510.

38. Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942); *see, e.g.*, Roth v. United States, 354 U.S. 476, 483, 492 (1957); Beauharnais v. Illinois, 343 U.S. 250, 266 (1952).

39. *See* note 30 *supra.*

40. *See, e.g.*, Schacht v. United States, 398 U.S. 58 (1970); Time, Inc. v. Hill, 385 U.S. 374 (1967). For cases protecting the free expression of the rock musical *Hair* see Southeastern Promotions, Ltd. v. City of Mobile, 457 F.2d 340 (5th Cir. 1972); Southeastern Promotions, Ltd. v. City of Atlanta, 334 F. Supp. 634 (N.D. Ga. 1971); Southeastern Promotions, Ltd. v. City of Charlotte, 333 F. Supp. 345 (W.D.N.C. 1971).

41. *See, e.g.*, Freedman v. Maryland, 380 U.S. 51 (1965); Kingsley Pictures Corp. v. Regents of S.U.N.Y., 360 U.S. 684 (1959); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); United States v. A Motion Picture Film Entitled "I Am Curious-Yellow," 404 F.2d 196 (2d Cir. 1968).

42. *In re* Giannini, 69 Cal. 2d 563, 446 P.2d 535, 72 Cal. Rptr. 655 (1968).

43. Hudson v. United States, 234 A.2d 903 (D.C. Mun. Ct. App. 1967); Adams Theatre Co. v. Keenan, 12 N.J. 267, 96 A.2d 519 (1953).

44. California v. LaRue, 409 U.S. 109 (1972).

45. 18 N.Y.2d 129, 219 N.E.2d 172, 272 N.Y.S.2d 341 (1966).

uled to perform in a public school auditorium. Because of Seeger's controversial political views and actions, the permit granted to the nonprofit association sponsoring the concert was withdrawn three months before the concert date with the explanation that Seeger's presence might provoke a disturbance. The New York Court of Appeals granted Community Concerts a declaratory judgment, finding that although the action was now moot, because the concert date had passed, the constitutional issues raised were too important to overlook, and this type of situation could arise again. The court held:

> Consequently, if there were no danger of *immediate* and irreparable injury to the public weal, the defendant's refusal to permit Seeger to appear at the March 12 concert would be an unlawful restriction of the constitutional right of free speech and expression.[46]

Cases prohibiting the prior restraint of free speech are numerous.[47]

The court in *Music Group* misread *Community Concerts* when it said that case has no application here.[48] Denying Music Group's right to put on a concert because its permit application said nothing about seeking a platform for anything but rock music[49] presupposes that to exercise one's first amendment rights, prior notice must be given to prevent forfeiture of those rights. This conclusion is certainly illogical, and *Community Concerts* maintains precisely the opposite: that the *right* of free expression exists independent of any governmental action. Seeger's right to perform had nothing to do with whether or not the association's permit expressly said he was going to exercise that right. And that is equally true in *Music Group*. With no finding of a *clear and present* danger to Chicago seven weeks after the riot, the court's statement that free speech cannot be deprived by the "good faith exercise of the police power"[50] cannot be, and is not, explained.

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46. *Id.* at 134, 219 N.E.2d at 175, 272 N.Y.S.2d at 345 (emphasis added).

47. *See, e.g.,* Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175 (1968); Terminiello v. City of Chicago, 337 U.S. 1 (1949); Lovell v. City of Griffin, 303 U.S. 444 (1938); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931); Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring); Gitlow v. New York, 268 U.S. 652 (1925).

48. 343 F. Supp. at 510.

49. *Id.*

50. *Id.*

Yet *Music Group's* holding that plaintiff has no federal case is justified. The Park District impaired no contract right by revoking the permit because Music Group had a clear case of breach of contract in a state action. Music Group, however, buttressed its weak contracts clause contention with the strong first amendment argument that no clear and present danger existed to occasion banning a far-off concert. The case was thus cast in terms of property and personal rights. Because Music Group sued for lost profits after the concert date, and not for an injunction and declaratory judgment before the concert date, which would have been Music Group's proper relief, the property rights argument was clearly the point and substance of the complaint.

Despite the unquestionable authority of a municipal corporation to exercise its revoking power, a more perplexing question still remains—at what point can that power be exercised without violating one of the constitutional guarantees? *Music Group,* by confusing that question with the issue of municipal authority, merely reaffirms the constant dilemma between the need for appropriate municipal response to a possibly inflammatory situation and the danger of municipal power encroaching upon vital constitutional rights.

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