Supplementary Material

Chapter 7: The Republican Era—Democratic Rights/Free Speech/Public Property, Subsidies, Employees, and Schools

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Commonwealth v. Davis, 162 Mass. 510 (1895)

William F. Davis was convicted of making a public address on the Boston Commons without a permit from the mayor, in violation of a city ordinance passed in 1892. He appealed that decision to the Supreme Judicial Court of Massachusetts. The Supreme Judicial Court unanimously sustained the conviction. The state supreme court's discussion of public property and free speech was written by Justice Oliver Wendell Holmes, seven years before he was appointed to the U.S. Supreme Court. Holmes later became known as a champion of free speech. Does his opinion in Davis *betray any awareness that significant free speech issues might be raised? Why does he reject the free speech claim?*

Most state courts in the late nineteenth century struck down laws that permitted the mayor to decide whether a person could speak or parade on public grounds. Davis *was the most important exception to that practice. The Supreme Court of the United States in* Davis v. Commonwealth of Massachusetts *(1897) accepted the Holmesian view that states could give elected officials or their surrogates the power to determine who spoke on public property. Why might the justices have adopted the more speech restrictive view?*

JUSTICE HOLMES

. . . There is no evidence before us to show that the power of the Legislature over the Common is less than its power over any other park dedicated to the use of the public, or over public streets the legal title to which is in a city or town. As representative of the public, it may and does exercise control over the use which the public may make of such places, and it may, and does, delegate more or less of such control to the city or town immediately concerned. For the Legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house. When no proprietary right interferes, the Legislature may end the right of the public to enter upon the public place by putting an end to the dedication to public uses. So it may take the lesser step of limiting the public use to certain purposes.

. . . It is argued that the ordinance really is directed especially against free preaching of the Gospel in public places, as certain Western ordinances seemingly general have been held to be directed against the Chinese. But we have no reason to believe, and do not believe, that this ordinance was passed for any other than its ostensible purpose, namely, as a proper regulation of the use of public grounds.

It follows that, as we said at the outset, the only question open is the construction of the present ordinance. We are of opinion that the words "No person shall . . . make any public address," . . . have as broad a meaning as the words "No person shall . . . deliver a sermon, lecture, address, or discourse," in the Revised Ordinances of 1883, under which *Commonwealth v. Davis* was decided. Whether lecture, political discourse, or sermon, a speech on the Common addressed to all persons who choose to draw near and listen is a public address, and the omission of the superfluous words in the last revision is only a matter of style and the abridgment properly sought for in codification.