



**DAVIS v. MASSACHUSETTS**  
**SUPREME COURT OF THE UNITED STATES**  
**167 U.S. 43**  
**May 10, 1897**  
**[9 - 0]**

**It was charged against the plaintiff in error, in the municipal court of the city of Boston, that 'in and upon certain public grounds of said city, within said district, called the 'Common,' he 'did make a public address, the same not being then and there in accordance with a permit from the mayor of said city' [in accordance with city statutes.]**

The ordinance claimed to be violated...reads as follows:

'Sec. 66. **No person shall**, in or upon any of the public grounds, **make any public address**, discharge any cannon or firearm, expose for sale any goods, wares or merchandise, erect or maintain any booth, stand, tent or apparatus for the purposes of public amusement or show, **except in accordance with a permit from the mayor.**'

...It was substantially asserted that the ordinance violated rights alleged to be secured to the accused by the constitution of the state, and by the fourteenth amendment to the constitution of the United States...

In behalf of the accused, 11 instructions were requested to be given to the jury, all of which were refused, and exceptions were reserved to such refusal. But one of these requested instructions set up alleged rights under the constitution of the United States, as follows:

'That said ordinance, and the proceedings under said ordinance and in enforcement thereof, are in conflict with the constitution of the United States, and the first section of the fourteenth amendment thereof; that the power given to the mayor of the city of Boston by said ordinance is in derogation of the rights secured to the defendant by said amendment, and said ordinance is null and void.'

There was a verdict of guilty...[Massachusetts] sentenced Davis to pay a fine and the costs of the prosecution, and the cause was brought here for review.

**OPINION: WHITE**...In the brief of counsel for plaintiff in error, many presumed errors are elaborately discussed, all of which, when analyzed, rest on the assumption that there was a right

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in the plaintiff in error to use the common of the city of Boston free from legislative or municipal control or regulation. It is argued that:

'Boston Common is the property of the inhabitants of the city of Boston, and dedicated to the use of the people of that city and the public in many ways; and the preaching of the gospel there has been, from time immemorial to a recent period, one of these ways. For the making of this ordinance in 1862, and its enforcement against preaching since 1885, no reason whatever has been or can be shown.'

...The assertion that, although it be conceded that the power existed in the state or municipality to absolutely control the use of the common, the particular ordinance in question is nevertheless void, because arbitrary and unreasonable, in that it vests in the mayor the power to determine when he will grant a permit, in truth, while admitting on the one hand the power to control, on the other denies its existence. The right to absolutely exclude all right to use necessarily includes the authority to determine under what circumstances such use may be availed of, as the greater power contains the lesser. The finding of the court of last resort of the state of Massachusetts, being that no particular right was possessed by the plaintiff in error to the use of the common, is in reason, therefore, conclusive of the controversy which the record presents, entirely aside from the fact that the power conferred upon the chief executive officer of the city of Boston by the ordinance in question may be fairly claimed to be a mere administrative function vested in the mayor in order to effectuate the purpose for which the common was maintained and by which its use was regulated. The plaintiff in error cannot avail himself of the right granted by the state, and yet obtain exemption from the lawful regulations to which this right on his part was subjected by law.

Affirmed.