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RELIGIOUS LIBERTY AND THE
FOURTEENTH AMENDMENT

By Ivan C. Rutledge*

SINCE the First World War the United States Supreme Court has found that it has powers theretofore disclaimed in the field of civil liberties. The Fourteenth Amendment has been found to be available to protect a person against governmental action on the part of a state which would without due process deprive him of freedom to disseminate information or freedom of worship. No attempt is here made to formulate a definition of religion or to delineate the concept of separation of church and state, except as it may become pertinent in analysis of judicial opinions. It is sufficient for present purposes if the claim of religion is raised and adjudicated in course of reaching a decision on the limits of the power of one of the states to act in the premises. Emphasis is placed on the determinations of the court of last resort, which, as matters now stand as indicated above, is the United States Supreme Court.

Two of the subtitles in the field of civil liberties were mentioned above without making an exhaustive catalogue of the rubrics that fall within this area. Other phases of civil rights as distinguished from claims which are substantially and directly connected with property or economic interests, had previously to 1925 received attention by the Supreme Court when the Fourteenth Amendment was invoked. But the often close relationship of freedom of the press with freedom of religion makes it appropriate to consider the year in which Gitlow v. New York was handed down as the starting point.

Probably no claim of freedom of religion could have been made in Gitlow v. New York, which was the progenitor of the expanded meaning given to the Fourteenth Amendment. It should not be overlooked, however, that in applying the First Amendment the Court had approved Jefferson’s distinction between the profession or propagation of principles and the eruption of those principles into overt acts against peace and good order. That interpretation was applied in a

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1. See Warren, "The New 'Liberty' of the Fourteenth Amendment," 39 Harv. L. Rev. 431 (1926). This able discussion reviews the repeated attempts to bring sundry civil rights within this Amendment.
2. For example, see Stumberg, "State Supervision of Education and the Fourteenth Amendment," 4 Texas Law Review 93 (1925).
case involving a claim of religious freedom. 4 It is submitted that such a distinction protects agitation of principles whether denominated religious, political, social, economic, or moral. If zealous loyalty and impassioned adherence are characteristics which mark the holder of religious principles, why may not Gitlow, and other advocates of salvation through violence, be categorized as religionists? However, the undisputed evidence was that Gitlow, as business manager of a Left Wing section of the Socialist party, organized in New York in 1919, was responsible for the circulation of a “Manifesto” of which some sixteen thousand copies were printed, calling on the proletariat of the world to final struggle by mass industrial revolt, and denouncing parliamentary methods in achieving “the full and free social and individual autonomy of the Communist order.” He was convicted of teaching the overthrow of government by force under a New York criminal statute. The Supreme Court “assumed” that “for present purposes . . . freedom of speech and of the press are among the ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the states.” The Court went on to affirm the conviction on the ground that the statute as applied was a reasonable safeguard against danger to public peace and the security of the state. It held that the danger from such utterances as those of which the prisoner stood convicted need not be measured “in the nice balance of a jeweler’s scale.” In this diffident manner did the Court assume the censorship of state legislation in respect to freedom of expression. It was to carry this burden for fifteen years before adding the problem of claims of freedom of religion, in Cantwell v. Connecticut. 6

The thread of doctrine which finds expression in this period is that state regulation which is so loosely drawn 7 or construed 8 or applied 9 as to operate as a prior restraint on innocent expression is unconstitutional. Unless states can devise criminal or injunctive sanctions which will operate with precision only against those whose conduct is harmful to public interests which may legitimately be protected, the public interest for which protection is desired will have to suffer. Some specific rules are evolved: Innocuous speeches cannot be punished be-

4. Reynolds v. U. S., 98 U. S. 145 (1879). The distinction here summarized was expounded at page 163. The question in the case was whether Congress could make bigamy a crime when the second marriage was performed by a church pursuant to its doctrines that its members must practice polygamy.
5. This holding represented an apparent qualification of the “clear and present danger” requirement necessary to Congressional curtailment of freedom of Speech as announced by Mr. Justice Holmes and laid down by the Court in Schenck v. U. S., 249 U. S. 47 (1919). The state legislature has some latitude in deciding what speech may later erupt into a clear danger which would at that time constitute a sudden threat to public safety.
8. Fiske v. Kansas, 274 U. S. 380 (1927). This was the first case in which a claim of freedom of speech was effective against a state statute. Not only must the legislature avoid censorship but it must not punish for publication of language which falls short of advocating unlawful acts. The requirement of a clear and present danger, however, was not made.
cause of sponsorship by organizations having forbidden objectives. Dissemination of non-commercial literature in the public streets cannot be subjected to discretionary licensing or forbidden in order to keep the streets clean, or to prevent breaches of the peace. A corporation or individual is entitled to protection from injunctive suppression or burdensome taxation of a newspaper. If the statute is carefully drawn and applied, it must nevertheless meet the "clear and present danger" test of Mr. Justice Holmes in Schenck v. U. S. Although there was some wavering in the Gitlow case and in Fiske v. Kansas about the verbal formulation of the judicial attitude in which to inspect a statute against which a claim of freedom of speech, press, or assembly is made, the classic motto was adhered to in Herndon v. Lowry in 1937 and in subsequent cases. "Clear and present danger" in this connection has to do with the technique of making factual determinations for purposes of constitutionality. One approach is to say that the challenger of constitutionality bears the risk of failing to persuade the court that the legislative determination of the need for the questioned enactment is unreasonable. "Clear and present danger" seems to be somewhere close to the opposite.

Even the dissenting justices in Gitlow v. New York agreed with the rest of the Court that the due process clause of the Fourteenth Amendment is a restriction on state power to regulate freedom of speech, though Mr. Justice Holmes in the dissenting opinion speculated that state legislatures have greater latitude thereunder than does Congress under the First Amendment. No distinction was made, in treatment of freedom of speech, among opinions on political, social, economic, and religious questions. On the other hand, the Court declined to hear claims based on a constitutional guaranty of freedom of religion, on the ground that no federal question was involved. Earlier, Mr. Justice McReynolds for the Court in Meyer v. Nebraska had said:

"Without doubt it (the liberty guaranteed by the Fourteenth Amendment) denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge,

15. Ibid.
21. 262 U. S. 390 (1923). The selection is at page 399.
to marry, to establish a home and bring up children, to worship
God according to the dictates of his own conscience, and generally
to enjoy those privileges long recognized at common law as es-
sential to the orderly pursuit of happiness by free men."

This asseveration proved to be endowed at least in part with
prophetic insight. Seventeen years later in Cantwell v. Connecticut a
unanimous Court, speaking through Mr. Justice Roberts, swept the
free exercise of religion into the palladium of federally protected
activities. In the meantime the Court in 1938 had struck down a city
ordinance as unconstitutionally infringing freedom to disseminate
literature, which five months previously it had refused to consider.
The previous attack being based on freedom of religion, the Court
had dismissed the appeal on the ground that no federal question was
involved. Such a determination seemed at the time to be well on the
way to crystallizing into a fixed rule, quite apart from the negative
evidence afforded by the long-standing application of the Fourteenth
Amendment principally to protect corporations and business men,
and only occasionally minority groups as such. In Coale v. Pear-
sen the appeal was dismissed as lacking a substantial federal ques-
tion. The appellant unsuccessfully sought equitable relief in the Maryland courts from attending classes in the military department of the
University of Maryland as a condition to being reinstated as a stu-
dent. He claimed to be a sincere, religious conscientious objejer
to preparation for war. A similar claim, stemming from Methodist and
Epworth League teachings as to the conscientious right to be a pacifist,
was presented in Hamilton v. Regent of the University of California. The Court held that no constitutional question could be based on
conscientious beliefs which made it necessary for appellants to pay for
their education in a non-tax-supported institution. However, Mr. Jus-
tice Cardozo, concurring, faced the question of applicability of the
Fourteenth Amendment and "assumed" that the religious liberty
protected by the First Amendment is protected by the Fourteenth.
Justices Brandeis and Stone joined him. This minority concurrence
seemed to have had no influence, however, when Dorothy Leoles ap-
pealed from the Supreme Court of the State of Georgia. Her appeal
was dismissed as presenting no federal question, just as in the Cole-

23a. See Mr. Justice Black, dissenting in Connecticut General Life Ins. Co. v. Johnson, 393
    U. S. 77, 90 (1936).
26. 293 U. S. 245 (1934). All students were required to take courses in military science as a con-
dition of remaining in school.
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man case at the same 1937 term. According to the Georgia report of the Leoles case, the only questions in the case were whether the expulsion of the petitioner from public school for refusal to salute the United States flag infringed the state constitution or the Fourteenth Amendment. The petitioner claimed to be a loyal citizen, a believer in the American form of government, and a sincere believer that God’s teachings forbid the worship of any emblem or image, and that for her to salute the flag would be worshipping an emblem or image. The dismissals of the appeals of Coleman and Leoles at the 1937 term, with the success of Lovell five months later against the same ordinance Coleman had attacked, suggest that the majority in Hamilton v. The Regents may have omitted to discuss the content of the Fourteenth Amendment by design. These three cases were cited as authority for dismissing the appeal of John and Ella Hering against the New Jersey state board of education two weeks prior to the decision in Lovell v. Griffin. In disposing of the question of religious freedom the Supreme Court of New Jersey had said that the command of the statute requiring a flag salute on pain of expulsion from the public schools could in no sense interfere with religious freedom because it is “by no stretch of the imagination” a religious rite, and because attendance at the public schools is not required.

A contrary view of Hamilton v. The Regents and the subsequent dismissals of appeals was taken by the learned judge in Gabrielli v. Knickerbocker. He held that religious liberty is included within the “liberty” protected by the due process clause of the Fourteenth Amendment, but that the public school requirement of a flag salute is not repugnant to it, just as the requirement of military science in a state university is not. But the fact remains that the Fourteenth Amendment had not as yet been applied on behalf of a claim of religion to strike down a state regulation. This alone would perhaps not be significant had not the ordinance of the City of Griffin, Georgia, escaped on the one test of religious freedom and been caught on the other of freedom of the press, as pointed out above.

Nevertheless the Cantwell case two years later proved the vitality of the concurrence in the Hamilton case and altered the significance of the dismissals of appeals in the flag salute cases decided prior to 1940. It also cast doubt on what the Court would do with an appeal like that in the Coleman case, though the Lovell case and others on

28. Supra note 23.
30. Supra note 22.
31. Hering v. Board of Education, 117 N. J. L. 455, 189 Atl. 629 (1937). Of course, attendance at school was required and therefore the result was either submission to the salute or greater expense of schooling or criminal prosecution. In the Hamilton case liability to criminal prosecution was not involved.
freedom to distribute pamphlets had made this question to an extent academic. Cantwell violated a statute which required him to get a permit to solicit any valuable thing for any alleged religious cause. Instead, without the permit, he went into a Roman Catholic neighborhood with a phonograph and phonograph records and books containing highly offensive strictures on the Roman Catholic Church in particular and on organized religion in general. Playing a record was preliminary to an effort to sell a book, and if he failed to make a sale he would solicit contributions toward the publication of pamphlets, one of which would be given the contributor on condition that he read it. He stopped two men on the street and received permission to play a record. Then they became incensed and told him to be on his way. He left. He was convicted of a common law breach of the peace and of violation of the statute. The conviction was reversed by the Supreme Court on both counts. By analogy to dissemination of information, the exercise of religion is to be free from prior restraint. It is recognized that arbitrary action by the licensing officer in refusing to classify a cause as religious was made subject to judicial correction, but as in Near v. Minnesota a judicial remedy does not relieve the regulated party of a prior restraint, which is a forbidden burden. The existence of a public interest to be protected is recognized as in Gitlow v. New York, but as in Schneider v. New Jersey the constitutional guaranty may fall in the way of the more efficient and convenient method of protection. Neutrality towards differences in religious faith is as emphatic a command as impartiality in matters of political belief. A method less burdensome to religious propaganda must be devised to protect the public from fraudulent solicitation.

In 1890 Charles E Shattuck concluded that the historic meaning of “liberty” in the standard form due process clause is limited to the habeas corpus principle of Anglo-American jurisprudence. It may be inferred that his conclusion on “life” and “property” would have been parallel: “life” means biological existence, and “property” means rights recognized by law eo nomine, including choses in action but possibly excluding good will and certainly excluding business opportunities or expectancies of property, just as “liberty” means the opposite of imprisonment of the body. He also observed that courts were not hewing to that line, and were bringing under the operation of the due process clause certain newcomer rights called civil rights. He pointed out that the broad construction was not the one intended because the historic terms had been employed, and because certain civil rights were given “absolute” protection and not the protection of due

33. Supra note 14.
34. Supra note 12.
process in depriving any person of them. Of course, "process" has long since been tortured into "substance" or "reasonableness," but the significance of the foregoing summary is that the conclusion of the article is a prophecy that if "liberty" is to be given the unhistorical and arbitrary meaning which includes "civil rights" in a limited sense it will be given an even larger meaning. If "civil rights" include the right to pursue any lawful trade they must also include the right to worship, print, speak, and exercise one's political privileges in any lawful manner. Warren and Green bring this hypothesis up to the present.

In short, the Cantwell case represents a torsion of the language of the Constitution in two aspects: deprivation of liberty (according to Shattuck, freedom of locomotion and no more) carries with it prohibition of the free exercise of religion; and prohibition of the free exercise of religion can be accomplished if done by due process, which means that the prohibition must be substantively reasonable as well as "due" in its "process." The absolute command of the First Amendment to make no law is reflected in the clear and present danger test imported into the Fourteenth Amendment when infringements of freedom of religion are measured by due process. But the general scorn of constitutional lawyers for canons of construction impels a jurisprudential approach which finds justification for the expansion of "liberty" and acceptance of the now settled lack of meaning of "process" in terms of a national interest in the protection of minority groups, as distinguished from a mere public interest in such protection. In any case to discuss the merits of First Amendment incorporation into the Fourteenth would be not only academic but beyond the scope of this paper. It may not be too late, however, to suggest that the results of that incorporation in the case of religion have not been altogether happy in so far as consistency and predictability are concerned.

Hardly had the ink dried on the opinion in the Cantwell case, unanimously decided, when in Minersville School District v. Gobitis, Mr. Justice Stone wrote a dissenting opinion and Mr. Justice McReynolds concurred in the decision of the majority without agreeing with the opinion. In fifteen cases in which opinions were handed down in the succeeding six years there were ten in which there were dissents. There were four five-to-four decisions, and perhaps five, de-
pending on which side Mr. Justice Frankfurter meant to take in the Struthers case.

It is convenient to classify the case in three groups: those which involve a discretionary licensing system or an outright prohibition; those which involve a tax; and those which involve the requirement of a test oath, or its equivalent. The Cantwell case is an example of the first, the Cox case of the second, and the Gobitis case of the third.

The greatest degree of unanimity was achieved in the Cantwell group, which contains five unanimous decisions and only one, possibly none, of the five to four variety. In Cantwell the dictum was that: "Resort to epithets or personal abuse is not . . . communication of information or opinion . . . and its punishment as a criminal act would raise no questions . . ."42 In Chaplinsky v. New Hampshire this dictum became the law of the case, because a person claiming to be a preacher was convicted under a "fighting words" statute for calling a public officer a "God damned racketeer" and "a damned Fascist." The decision to affirm was unanimous and all concurred in the opinion of the Court, which was the only opinion written. Justices Byrnes and Jackson had replaced Justices McReynolds and Stone, who was elevated to succeed Mr. Chief Justice Hughes, since Cantwell. Mr. Justice Byrnes had resigned when the next two unanimous, single-opinion cases came down. They were Largent v. Texas and Jamison v. Texas. Largent was very similar to Cantwell in that it involved a discretionary licensing scheme applicable to booksellers, but it lacked even the specific provision for judicial review of denial of a license present in the Cantwell case. Jamison did, however, represent an additional step in protection. A prohibition against distribution of handbills advertising religious literature for sale and a religious meeting to which no admission charge was made, was struck down. Therefore the subject matter had been more or less ideological in character, rather than mere advertising. The fifth unanimous decision, with but a single opinion, came down three months later, concurrently with West Virginia State Board of Education v. Barnette. It was Taylor v. Mississippi, which followed Fiske v. Kansas in holding that since the flag salute could not be made compulsory under the Barnette case advocacy of refusal to salute the flag could not be made the basis of conviction of a crime since nothing unlawful was advocated.

In the meantime, however, the harmony of the Court had foundered on the case of Martin v. Struthers. Three majority opinions were written, and two for the minority. Mr. Justice Frankfurter attained the curious posture of apparently agreeing with the majority and at the same time joining in the opinion of a dissenter. The question was

42. 310 U. S. 296, 309-310.
whether the city of Struthers, Ohio, could make it a crime to summon the occupant of a house by means of a doorbell, or otherwise, to distribute leaflets advertising a religious meeting. Mr. Justice Black, for the Court, pointed out that statutes could be drawn which would protect the householder from unwanted visitors, such as a trespass after warning statute, or from criminals posing as canvassers, such as public registration and identification requirements, and concluded that the ordinance unduly restricted dissemination of ideas even though the inhabitants were industrial workers sleeping at odd hours. Mr. Justice Murphy, who joined in the opinion of the Court added that the ordinance offended the guaranty of freedom of religion by striking at an age-old method of proselyting. Justices Douglas and Rutledge agreed. Mr. Justice Frankfurter seems to have been inclined to believe, without being willing to decide, that the Court held the ordinance to be discriminatory, and he conceded that if it was he would agree with the opinion of the Court. Mr. Justice Reed, with whom Justices Roberts and Jackson joined, saw the ordinance as a fair adjustment between distributors and householders, and as a legitimate means of abating a nuisance. Mr. Justice Jackson, joined by Mr. Justice Frankfurter, protested that the Court had thrown into the scale against the ordinance a hypothetically hospitable householder, which was contrary to the evidence. He disagreed that an ordinance could be more narrowly drawn and suggested that this majority argument were mere makeweight. He asserted that the definition of the rights of the municipality was lacking in forthrightness, that ministry to congregations voluntarily attending services was not parallel to itinerant evangelists going from door to door, and that the First Amendment assures religious teaching no more license than secular discussion.

Near unanimity was achieved at the next term in *Prince v. Massachusetts*, when all of the Court except Mr. Justice Murphy abandoned a latitudinarian protection of the exercise of religion in favor of the authority of the state to prevent a parent from allowing his son under twelve years of age or his daughter under eighteen to sell religious literature (or black boots, or vend newspapers, etc.) on the streets. Mr. Justice Rutledge, for the Court, found that there is a clear and present danger to the state in the corrupt influences and physical dangers to which children in the streets are subject when carrying on the activity under consideration, whether or not called selling. The conclusion was that the statute was not too broadly drawn even though the parent accompanied the child and though the activity if conducted by an adult alone would not be subject to state interference. Mr. Justice Jackson, with whom Justices Roberts and Frankfurter joined,
dissented from the grounds of affirming the state court judgment. His opinion was that this activity had been in prior decisions given constitutional protection and that if those decisions were right the opinion of the Court was wrong either in allowing the state to apply child labor laws to it or in refusing to concede that they should also be applied to altar boys, youthful choristers, etc. He would not draw the line at age but rather between religious activities which concern only members of the faith and auxiliary secular activities. Mr. Justice Murphy's dissent was based on the same difficulty. He would not draw a line based on age either, but would deny that the danger was immediate and protect a child in his orderly worship of God on the streets.

Two years later a cleavage slightly different from that in the Struthers case appeared. In two cases decided in January, 1946, Marsh v. Alabama and Tucker v. Texas, the validity of statutes making it a crime to remain on premises after being asked to leave was questioned. The "trespasser" in each case was an orderly distributor of religious literature. The "premises" were located in company towns laid out for normal community life, in one case by a private corporation, in another by the United States. The Court, in opinions by Mr. Justice Black, held that the statute could not constitutionally be so applied, that the property interests of the owners of land which is used for municipal purposes are not determinative of whether dissemination of information and the exercises of religion can be barred from such areas. Mr. Justice Frankfurter, in concurring opinions, agreed that a company owned town is first a town, in adjusting relations of the kind before the court, that state determinations of local property questions were not controlling, but disagreed with arguments drawn from restrictions of the Commerce Clause on state commercial regulation. Mr. Justice Reed dissented on the ground that a trespasser could not possibly be expressing his views in orderly fashion, a requisite of constitutional protection. A comparison with the judicial mosaic in the Struthers case discloses that Mr. Justice Frankfurter more firmly concurs, bowing to precedent, that Mr. Justice Burton succeeded Mr. Justice Roberts not only on the bench but in his views in this case, and that Mr. Chief Justice Stone has crossed the line, dissenting with Justices Reed and Burton. It is difficult to see how the late Chief Justice could have dissented here when in the Struthers case it would not have been an impossible feat to rationalize
that persons who rang doorbells to disseminate propaganda were by the ordinance made trespassers.\textsuperscript{43}

With the exception of the concurring opinion of Mr. Justice Murphy in the \textit{Struthers} case, and some of the language in the \textit{Prince} case, this group of cases could have been decided solely on the basis of freedom of speech and press. It is necessary only to recognize that human personality gives of itself communicatively in many fields of ideas and emotion not for profit, in order to phrase the central problem of all these cases in terms of freedom of communication or expression. Troublesome difficulties about what is a place of worship, and more fundamentally what is the exercise of religion, will not then have to be decided by a secular tribunal in which it seems the members gallantly go to the defense of religions which attack their own personal faiths, as in the case of Mr. Justice Murphy, and then members of a different faith take up the defense of the faith of a colleague, as in the case of Mr. Justice Jackson.\textsuperscript{44}

The second group of cases is like the first, except that instead of the activity being wholly banned or subjected to the discretion of a licensing officer, it is taxed by means of a non-discretionary licensing scheme violation of which is a crime. These cases contain only one unanimous opinion, three five-to-four decisions, and one vote of six to three. The difficulty a secular organ of government has in defining the exercise of religion as above suggested is apparent in the discordant pattern of these cases. The Court was the same as that in the \textit{Cantwell} case, except that Mr. Justice McReynolds had retired, when \textit{Cox v. New Hampshire} was decided in a unanimous opinion written by Mr. Chief Justice Hughes. It held that a city could require registration and payment in advance of a fee of not to exceed \$300 per day as a condition precedent to holding a parade through the city streets, and that this requirement could be applied to an orderly parade which provoked no breaches of the peace and participants in which took part from a sense of religious obligation. Public order requires that the city have authority to determine the times, places, and manner of a parade, if the determination is made impartially and for the purpose of maximum use of the streets. The fee arrangement was held to be one which would tend to conserve the liberty sought, since it was to be assessed on the basis of the actual cost of

\textsuperscript{43} Of course this was the very kind of statute approved by the majority in the \textit{Struthers} case. In that case the will of the landowner was not determinative of the offense, but the landowner was not complaining of being deprived of his choice of doorbell-ringers. The real problem here is how much alteration takes place in the relationship between a person and "his" land when he uses it for a town site but retains "possession" under state law. Mr. Chief Justice Stone simply adhered to the general and traditional view of the common law that interests in land are given a high degree of protection. He followed the general tendency of modern law to assimilate corporations to private individuals no matter what the question involved. But quere: Could the shipbuilding corporation have forbidden residents of its town to convene in a "public" park to petition for incorporation within the city limits of Mobile?\textsuperscript{44}

\textsuperscript{44} And note that Mr. Justice Frankfurter of a minority group defends the rights of the majority. References to these justices is occasioned by reading the \textit{Struthers} opinions.
permitting the activity in terms of extra policing, and not for revenue. The conclusion is that the state can recoup its expenses incident to the preservation of order in connection with free speech and religion; that is, speech and religion can be made to pay their way for any direct governmental outlays on their behalf.

At the next term, the Chaplinsky Court anticipated the cleavage which was to appear in Struthers in the case of Jones v. Opelika. The question was whether the requirement of paying its way was to be applied to the dissemination of information and the exercise of religion to the extent of exacting a license fee for general revenue purposes. The majority, Justices Reed, Roberts, Frankfurter, Byrnes, and Jackson, which later became a minority by the resignation of Mr. Justice Byrnes and appointment of Mr. Justice Rutledge, held that so long as the fee is reasonable and non-discriminatorily applicable to the ordinary commercial phases of transactions which partake more of commerce than religion or education, it may be exacted for the general expenses of government. The minority, later to become majority, joined in two opinions. The opinion by Mr. Chief Justice Stone contended that the majority was in error in its treatment of a provision for arbitrary revocation of the license contained in one of the ordinances. The fact that the appellant had not applied for a license ought not to prevent the Court from finding on the face of the ordinances an arbitrary weapon in the hands of the licensing officer, in the absence of a state construction of the separability clause. In this opinion, it was not conceded that any non-discriminatory tax based on gross receipts collected for religious or educational purposes could be levied.45 From such a position, it was argued that a flat tax unrelated to the extent of activities or amount of collections would be even worse, and was prohibited as to interstate commerce. Mr. Justice Murphy in the other opinion emphasized the purpose of the collection of funds as determinative of the character of the activity and the burdensome effect of a tax unrelated to ability to pay or to the cost of regulating the activity. On the latter aspect he pointed to the history of the odious stamp taxes of Revolutionary times exacted for purely revenue purposes. Not only is the pamphlet an historic weapon for impecunious but militant minorities, but the use of religious books

45. There is disagreement in limine on whether, since the appellant did not raise the question of a tax invidiously aimed at speech or the exercise of religion below, or a tax tending to constrict speech or the exercise of religion, it is proper for the Court to find as a fact that this is such a tax. It seems clear that the provision for arbitrary revocation should be open to inspection notwithstanding the failure of appellant to apply for and obtain a license. Thornhill v. Alabama, supra note 7. But as to the exaction of a tax, a distinction should be made as to what is to be taxed. It is clear that this tax is not levied on propagation of information or gospel as such. So long as no collection of funds, whether by appeal to give a contribution or to buy a book, is present, no tax could be levied. If so, should not the defendant have to show, and the state have the opportunity to negative, that the tax was suppressive? The Thornhill doctrine becomes unmanageable and leads to judicial speculation on matters for which evidence could be adduced, if carried too far. But the dissenting opinion either put taxation or funds-raising activities in the same category as prohibition of the activities they support, or make no distinction, at least when they are conducted simultaneously.
is an old and effective mode of worship and means of proselytizing. The right to carry a gospel to every living creature is even more dear to many individuals than free speech and press are important to a free citizenry. A year later Mr. Chief Justice Stone and Justices Douglas, Black, Murphy and Rutledge vacated the prior judgment and reversed the judgment of the state court, against the dissent of the former majority members which was expressed in two opinions. Mr. Justice Reed, who had written for the Court before, wrote one of them in which he emphasized that other questions would be raised if it were contended that the fees were excessive in amount or discriminatorily enacted or applied. He distinguished a tax on voluntary contributions and characterized the sale of Watchtower publications, along with sponsoring bazaars or selling Bibles to raise money for religious purposes, as commercial. Justices Roberts, Frankfurter, and Jackson agreed. Mr. Justice Frankfurter gave an opinion which Mr. Justice Jackson concurred. He met the argument of the majority against a flat tax with the contention that such a tax would be unconstitutional if it had been shown that it was oppressive in its effect, and that no constitutional distinction could be made on the basis of the purpose of the tax. Nice distinctions cannot be made as to how public revenues are disbursed. This flat tax only imposed a burden commensurate with the benefits received from government.

At the same day the decision in Murdock v. Pennsylvania came down, with Mr. Justice Douglas writing for the Court, which adopted the views of the minority in Opelika I. The "high, constitutional position" of the liberties of itinerant evangelists was restored. No tax can be levied by a state for privileges guaranteed by the federal constitution. Lack of allocation to, and admeasurement by, policing expenses is fatal to the tax. The activity in question is more like passing a collection plate in church than huckstering and peddling wares and merchandise. The dissenting opinions of Justices Reed and Frankfurter have been summarized in connection with Opelika II and of Mr. Justice Jackson in connection with Struthers, decided the same day.

46. This opinion clearly regards the two aspects of the transaction as indistinguishable constitutionally. Mr. Justice Stone's opinion emphasizes the purpose rather than the quality of the activities. 47. This interesting logic is parallel to the assertion sometimes made (see 41 Mich. L. Rev. 323 (1942)) that in Opelika I freedom of religion was balanced against a social value no higher than the public need for revenue. The same reasoning could be applied to the Cox case. The subject of taxation there was not the expression, but the burden on the local community of the overt acts employed by the taxpayer as a means of making the expression of opinion or information effective. In the Opelika-Murdock group of cases the subject of the tax is the burden on the local community of the overt acts employed by the taxpayer to finance his expression of opinion or information. The difference is that this tax is for general revenue purposes rather than the cost of policing. Does it follow that such a tax is necessarily restrictive of speech or religion? It might be pointed out that the cash collections came from Caesar and were tangibly secular rather than spiritual, however much an act of devotion soliciting the contributions was to the collector. After Murdock it may be asked whether the principal of the Cox case is restricted to its facts; and how far the source of revenue must be removed from the propagation of information, to be subject to taxation.
One case in this group remains: *Follett v. McCormick*. The cleavage of *Murdock* and *Struthers* remained, except that Mr. Justice Reed accepted *Murdock* and *Ophelia II* as law and wrote a concurring opinion. The Court, through Mr. Justice Douglas, held that the town of McCormick, South Carolina, could not levy a license tax on book agents doing business in the town so as to make it applicable to a resident full-time evangelist who made his living by “selling” religious books (in the same manner as in *Cantwell* and the other cases). Mr. Justice Murphy added that calling such a result a subsidy of religion meant no more than that substance was given to constitutional rights. He distinguished between: essentially religious activities; and investments made for profit, though that profit be devoted to religious causes. Justices Roberts, Frankfurter, and Jackson wrote a joint opinion to the effect that this situation went further than *Murdock*, on the ground that there the tax was oppressive, or was so deemed by the Court because applicable to itinerant evangelists.

Thus in this group of cases, also, the difficulty of determining what is an exercise of religion played havoc with doctrine and the change of Court personnel in one seat changed the result while leaving the rule more than ever in doubt. One might hazard that it is better to avoid the necessity of harnessing two judicial passions, one for freedom of speech and the other for freedom of religion, if leaving freedom of religion out of the picture would achieve a more certain protection of similar interests under the heading of freedom of speech. The more precious the interests involved, the greater the desirability of precise delimitation of their extent. It would be clearly understandable that no informational activity, including or not including advertisements of informational activity or books, could be taxed, except in the *Cox* manner, i.e., for the additional expense of policing required, but such is clearly not the rule and nothing else clearly is.

The next group of cases is different in kind from the others. It involves a requirement by the state of an affirmative declaration of state of mind or belief, in short, a test oath. In two cases, one overruling the other, it is a flag salute. In another, it is a declaration of willingness to bear arms and otherwise use force in defense of the state. In the two cases it is made a condition to remaining in public schools at an age when school attendance is required. In the third it is made a prerequisite of admission to practice law.

The *Gobitis* case was the first case in which the Court discussed the power of a state to exact a flag salute as a prerequisite of access to the public schools. Mr. Justice Frankfurter, for the Court, said that the interest of national unity, which is the basis of national security, is as

48. Mr. Justice Rutledge for Mr. Justice Byrnes.
important a legal value as there is, and that the Court are not sufficiently competent as psychologists to overturn the legislative determination that this method is the best for the promotion of national unity. Mr. Justice Stone, the sole dissenter, said that other ways could be found which would not command a violation of religious convictions. The legislative judgment should be subjected to as careful scrutiny when religious convictions are involved as when the remedial channels of political agitation are threatened. Justices Black, Murphy, and Douglas expressed agreement with him two years later when he, then Chief Justice, led the dissent in the first Opelika case. Therefore, when the Murdock Court was presented with the case of West Virginia State Board v. Barnette there was a majority, with the addition of Mr. Justice Rutledge, for overruling the Gobitis case. But Mr. Justice Jackson also joined the Murdock majority to make the vote six to three and write the opinion of the Court. That left Justices Roberts, Reed, and Frankfurter in their original position. The majority opinion emphasized that the conflict is not among individuals but between authority and the individuals, that no clear and present danger was shown to be created by remaining passive during a flag salute ritual. Compulsion to coerce coherence is doomed to achieve the unanimity of the graveyard if successful, and questions of competence of the justices are irrelevant when state authority invades the sphere of intellect and spirit. Justices Black and Douglas explained their new alignment by stating that though they were reluctant to make the Constitution a rigid bar against state regulation of conduct and still believed that reluctance a sound principle, it was wrongly applied in Gobitis. Mr. Justice Murphy also added that official compulsion to affirm what is contrary to one's religious beliefs is the antithesis of freedom of worship.

Mr. Justice Frankfurter, apparently not joined by his fellow dissenters, was left to defend the original position of the Court alone. His opinion was as follows: Private notions of policy should be excluded altogether from the bench. There is no appeal from failure to employ judicial self-restraint. The Court has no supervisory powers over legislation and no means of rewriting legislation. It can but nullify it. Dissidents cannot justifiably claim immunity from civic measures of general applicability because of conscientious scruples. This measure is civic, not religious. The Hamilton case cannot satisfactorily be distinguished. In the words of Mr. Justice Cardozo: "The right of private judgment has never yet been so exalted above the powers and the compulsion of the agencies of government." Can similar objections now be successfully urged against the following activities in public schools: Bible reading? teaching evolution? chau-
vindicist teaching of history? The clear and present danger test is applicable only when the state forbids the use of certain kinds of language, or advocacy, and not when it requires affirmative action by the individual. Nor is this an oath test; it suppresses no belief; the participants in the ceremony may disavow as publicly as they please the meaning others attach to the meaning of the salute. Only the two most recent appointees to the bench have not at least once before passed on such a requirement favorably. The liberal spirit cannot be enforced by judicial invalidation of illiberal legislation. This Court has reached the outer and forbidden limits of judicial review.

When a state requirement for admission to semi-public office came before the Court in the case of In re Summers not only did Mr. Justice Jackson rejoin the Murdock minority but the original dissenter in this group, Mr. Chief Justice Stone, anticipating his position in Marsh and Tucker, altered his alignment, and the result was a five-to-four decision. Mr. Justice Reed wrote for the Court that refusal to promise to serve in the armed forces if called upon for militia duty, to which men of his age were subject by state law, is equivalent to the refusal to take courses in military tactics in the Hamilton case, and is the same as the valid Congressional requirement for admission to citizenship. Mr. Justice Black, joined by Justices Douglas, Murphy, and Rutledge, insisted that the semi-public position is analogous to the attendance at school in the Barnette case. Quakers under this requirement could not practice law in Illinois, the state involved. Language from the dissenting opinions in Schwiner v. U. S.49 and Macintosh v. U. S.50 was quoted with approval. Willingness to bear arms is no more appropriate for practicing law than working as a plumber or prison chaplain.

Were it not for In re Summers it might have been assumed that, the minority in Barnette having been reduced to three, the law for the test oath group after a false start had been settled. Waxing confusion, however, characterizes this group perhaps even more than the tax group. Affirmative pressure to make a declaration which would violate the beliefs of some people was greater perhaps in the Barnette and Gobitis cases than in the Summers case, because it is easily conceivable that in a particular case a child could not for financial reasons be sent to a private school, which would expose the parent of the conscientious objector as well as the objector himself to the force of the state. On the other hand, at most all the prospective lawyer has lost is the investment in his education of time and money, and he can salvage part of that by going into another state or another occupation where

49. 278 U. S. 644 (1928).
50. 283 U. S. 605 (1931). These cases involve the First Amendment proper, on whether Congress can deny naturalization to persons who will not declare willingness to bear arms. Mr. Justice Holmes leads the dissent.
the same requirement is not made. Furthermore, the qualifications of lawyers are intimately related to the public interest, so that greater coercion would be justified. The minimum of coercion is present in the Hamilton case, because that compulsion is represented by the share of taxes paid by the parties which is devoted to the state university. The Hamilton case is not exactly in point, however, because no declaration of belief or state of mind was there required.

For the sake of symmetry it might be possible to consider the test oath group also as freedom of expression cases, under the subheading of freedom not to speak. But then a distinction would have to be made between official requirements of informational reports necessary for the business of government and statements of belief presumably necessary for the purity of the public or official mind.

However, there is unexplored vitality in the language of the Fourteenth Amendment which if properly employed would make superfluous the logomachy of incorporating the absolute terminology of the First Amendment within the due process requirement of the Fourteenth. It is possible to allow "liberty" to settle back into its historical place in the habeas corpus tradition, as "the principle of non-interference has withered" in economic regulation and practically taken away the means of liberty of contract or liberty to pursue an occupation from the meaning of that "liberty." A genuine basis for inquiry into the substantive content and mode of application of state legislation is supplied by the phrase "equal protection of the laws." It carries with it a legitimate meaning singularly appropriate to the national protection of minority groups from state oppression. Using it as a springboard a new judicial beginning may be made, in which the confusions attendant upon determining whether a minority group is unified on the basis of religion or politics, race or nationality, economics or sociology, can be ignored.

Undertaking to prevent state denial of the equal protection of the laws obviously would not provide a mechanical solution which would make unnecessary the qualities of wisdom and astuteness in making qualitative judgments of policy so essential in judicial review of state legislation, however convenient it might be for the Court to leave questions of constitutionality entirely to the legislatures. But such an approach might focus the questions of fact within a manageable

51. The language is that of Mr. Justice Frankfurter, dissenting in the Barnette case, 319 U. S. 624, 640.
52. "... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The writer is not unaware that the due process clause has for the most part eclipsed the rest of this section of the Fourteenth Amendment. E.g., Grosjean v. American Press Co., supra note 13. It is also obvious that this proposal entails not only a continuation of the necessary legalistic refinement of precedent in the books, but a broad and daring application of judicial review to state legislation, on complaint of a member of a minority group, to inspect the legislative structure of a given state as a whole. The complainant, however, should be required to demonstrate the lack of symmetry which operates upon him oppressively, both in law and in fact.
compass on a secular level for the bench and bar. How is it possible for a civil court to say whether religion is involved when the regulated party asserts that it is and the state denies it? A board of philosophers would probably disagree with equal vehemence. Certainly the judges on plural courts do.

Practical operation of the new approach would entail recognition that the prohibitions of the First Amendment are more specific than those of the Fourteenth, but it would not necessarily alter the results in cases like Cantwell, Largent, Jamison, and Taylor on the one hand, or Cox and Prince on the other. Pamphlets would still be said to be for the underprivileged what full-page newspaper advertising or radio messages about “private enterprise” are for the mighty. Consequently, regulation which bears unequally in the two categories would result in “unreasonable classification.” The little man as well as the big man must pay his part of the costs of government and submit to police regulation for the welfare of his children. The problems exemplified by Opelika, Murdock, and McCormick and by Struthers, Marsh, and Tucker would remain knotty situations, in which interest must be balanced, but the central question would be whether there is persecution, and by whom, as Mr. Justice Jackson so pointedly asked in his Murdock dissent.

Finally, the lessons of great opinions in this field should not be ignored. Not only must each case be judged by the evidence in it, but where unpopular persons or causes are involved the record is suspect, and the language of the statute in the light of its purposes and the availability of other means for the attainment of legitimate ends must be carefully considered. Above all, respect for the private judgment of any man, be he the President of the United States or the humblest of alien immigrants, should preclude constitutional toleration of the attempt of any state to use any degree of official coercion which tempts one to stultify his conscience by stating positively that which he does not believe to be true about his political, religious, economic, or social beliefs. Private opinion or judgment cannot thwart the processes of government, but a test oath is a slipshod and unreliable means of discovering a personal belief. Necessity in this case dictates that where it is in the legitimate public interest to know a man’s beliefs they must be determined by his actions. Otherwise the possessors of “habits of hypocrisy and meanness” have the advantage, and the sincere are denied the equal protection of the laws.
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