THE DYNAMIC AMERICAN BILL OF RIGHTS

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The first ten amendments to the American Constitution, known as the Bill of Rights, guarantee to the people of the United States certain individual liberties. They have been the subject of much controversy both in and out of court. It is the purpose of this article to demonstrate the practical legal benefits that flow and have flowed in the United States from the operation of the Bill of Rights.

The American Constitution establishes a legislative, executive and judicial branch of government, as under the British system. But, instead of a legislature that can reduce, alter or abolish the other two branches, the written American Constitution provides for the powers of each and makes the courts the arbiter of the boundary lines between them. In addition to the spheres provided for the three branches of government, a certain area of activity is reserved to the individual citizen. On this no branch of government may trespass and, again, it is the courts that must determine the line between the rights of the individual and the authority of the legislature. Herein the American system differs from the English principle of a sovereign legislature unrestrained by any human power.

The traditional British view has contended that it is more practicable that the legislature should be free and unfettered to deal with problems as they arise. It has been said that, in Canada, there is an entire "absence of any attempt to fetter the freedom of our legislatures by fundamental limitations such as abound in the United States federal and state constitutions".[1] In other words, the appeal of persons injured by ill-considered legislation must be to those who elected the government, *i.e.*, the people. Remedy can be obtained only by long drawn-out political process.

The British theory was stated by Lord Herschell in the *Fisheries* case:

> The Supreme Legislative power in relation to any subject matter is always capable of abuse, but it is not to be assumed that it will be improperly used; if it is, the only remedy is an appeal to those by whom the Legislature is elected.[2]

In similar vein is the statement of Justice Strong of the Supreme Court of Canada in *Severn* v. *The Queen*, "'It does not belong to courts of justice to interpolate constitutional restrictions; their

[1] Lefroy, Canada's Federal System (1913), 49 Canada Law Journal 656.
[2] [1898] A.C. 700, at p. 713.

duty being to apply the law, not to make it' ".[3]

American courts, on the other hand, are not always bound to apply the laws as they are enacted by the legislatures. Whenever a statute trenches on the limitations set by the constitution, the courts can review it and declare it invalid. Thus the judiciary is supreme in matters of constitutional law. That the courts should be able to act as a check on the legislatures appears to have been the intention of the Founding Fathers of the American Constitution. During the struggle for the ratification of the Constitution, Oliver Ellsworth, Connecticut representative, said:

> If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and the judicial power, the national judges, who to secure their impartiality, are to be made independent, will declare it to be void.[4]

When the first Congress met, Mr. Madison discussed the duty of the courts to

> consider themselves in a peculiar manner the guardians of those rights; they would be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.[5]

This extraordinary power of the American judiciary has made the federal Constitution, and especially the Bill of Rights, a dynamic instrument in the hands of the people. By invoking through the courts the guarantees of the Constitution an American citizen is in the unusual position of being able to fight for his personal liberties against the legislative and executive branches of government themselves.

It is the duty, function and power of the judiciary to say what the law is and, if legislative or executive acts are found to be in conflict with the fundamental law, the Bill of Rights, to declare such acts invalid. In this way the legislative and executive departments are properly held within the bounds of their authority by the judicial power. The Constitution places the guardianship of the expressed and implied terms of the written Bill of Rights primarily in courts of justice. The dominance of judicial opinions in expressing the freedom of the individual in accordance with common-law principles and standards constitutes the basis of what is called the American doctrine of judicial supremacy.[6]

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[3] (1878), 2 S.C.R. 70, at p. 103.

[4] Farrand, Records of the Federal Convention, Vol. III, pp. 240-241.

[5] 1 Annals of Congress 439.

[6] Haines, The American Doctrine of Judicial Supremacy (University of California Press, 1932), pp. 23, 27; Haines, The Role of the Supreme Court in American Government and Politics 1789-1835, pp. 16, 112, 118, 150, 474-475.

To avoid oppression of the people by usurpation of power, the courts, as expositors and protectors of fundamental law, — especially the federal courts — carry the grave duty of maintaining the delicate balance between the rights of the individual and the power of the government. In discharging this supreme and direct responsibility to the people the courts cannot surrender their judicial power nor transfer to an executive or legislative agency their responsibility. This non-transferable jurisdiction must be maintained and exercised in order to preserve the treasures of liberty locked securely by the Founding Fathers in the Bill of Rights of the Constitution.

The insertion of the rights of the individual into the rock-ribbed provisions of the Constitution is in sharp contrast to the Anglo-Saxon custom of relying on vague, unwritten tradition. Traditions can be very elusive when the citizen asks a court to apply them against the government. The written Bill of Rights, on the other hand, has been vitalized through the exercise by citizens of their right to invoke its provisions to invalidate laws that invade their freedoms. Time and again the Bill of Rights has been brought by the higher courts to the rescue of victims of arbitrary action. Its corrective powers are available whether the encroachment on liberty is by the legislature, the executive or the lower courts.

Fundamentally the Bill of Rights expresses a philosophy of government, its limitation and its ends — a government recognizing the dignity of the person. The judiciary was contemplated as the means whereby the freedoms guaranteed by the Bill of Rights would be given practical protection.

In this generation the liberty of the people of many nations has disappeared like fog before the wind and sun. Since the end of the war there has been no marked improvement. In some countries the change of government from liberal to reactionary has altered the official policy from freedom to oppression. Even in countries such as those of the British Commonwealth, which rely on their unwritten constitutions, there lurks the ever-present danger that freedom may be lost by legislative decree or executive action.

Opponents of a Bill of Rights contend that it has left the American Government in a legal straitjacket. Can it really be said that the growth and progress of the United States, socially and economically, has been retarded by the existence of a Bill of Rights? Has the right of the people to enter the courts and fight for their freedoms, even against the government, impaired the

efficiency of the state? Though the United States leaves much to be desired, the liberty that exists there and the remarkable strides made by the nation industrially and scientifically bespeak a healthy national life. Dictatorial rulers may regard as impotent a government that cannot deprive (as they often do) the people of their liberties. What they describe as the "bourgeois" freedoms they consider impractical luxuries. But the philosophy of fairness, non-discrimination and equality before the law that is inherent in the Constitution of the United States has contributed in its progressive growth to higher stature among the world powers.

The American Bill of Rights and the legal sanctions for its enforcement are unique. They deserve careful consideration.

I

Constitutional Guarantees in Theory

The First Amendment to the American Constitution, which is Article I of the Bill of Rights, reads:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition of the government for a redress of grievances.

The First Amendment, it will be noted, limits the powers of Congress only. The principles contained in it were applied and extended by the Fourteenth Amendment, Section I of which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; 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.

This Article, adopted following the Civil War, has been construed to make applicable to the States, and to all creatures of the States, certain of the limitations placed upon the powers of the Federal Government, particularly those relating to civil liberties. Thus the rights accorded the individual were secured against encroachment by any and all governmental authority.

It was the purpose of the Constitution to provide a restraint against extreme measures at any time. Even during the troubled days of the Civil War the Supreme Court held to this principle. Mr. Justice Davis, speaking for the court, refused to countenance

the argument that the constitutional guarantees could be suspended in time of emergency. He said:

> Those great and good men [the Founding Fathers] foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.[7]

The respect for human dignity provided by the American Constitution is precarious, if not non-existent, in countries with a totalitarian form of government. They take the view that freedom of speech and press are in the nature of magnanimous gifts which an all-wise and all-powerful government concedes to the people. In a democratic state, however, the masses of the people are recognized as responsible citizens having a contribution to make to the welfare of the state, whether by use of the ballot or the free expression of opinion in other ways. Thomas Jefferson, one of the Founding Fathers, caused to be inserted in his Virginia Statute of Religious Liberty the fundamental concept of the Bill of Rights:

> that it is time enough for the rightful purposes of civil government, for its officers to interfere, when principles break out into overt acts against peace and good order; and finally, that truth is great and will prevail, if left to herself; that she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict, unless by human interposition disarmed of her natural weapons, free argument and debate; errors ceasing to be dangerous when it is permitted freely to contradict them.[8]

In the case of *Gilbert* v. *Minnesota*[9] Mr. Justice Brandeis expressed his belief in the practical value of free speech in the following words:

> The right to speak freely concerning functions of the Federal Government is a privilege or immunity of every citizen of the United States which, even before the adoption of the Fourteenth Amendment, a State was powerless to curtail. . . . Full and free exercise of this right by the citizen is ordinarily also his duty; for its exercise is more

[7] *Ex parte Milligan* (1865), 4 Wall. 2, at pp. 120-121.
[8] 12 Hening's Statutes at Large of Virginia (1823), c. 34, p. 84.
[9] (1920), 254 U.S. 325, at pp. 337, 338. Though Justices Holmes and Brandeis were dissentients in early cases involving individual liberties, their views were later adopted by the Supreme Court.

> important to the Nation than it is to himself. Like the course of the heavenly bodies, harmony in national life is a resultant of the struggle between contending forces. In frank expression of conflicting opinion lies the greatest promise of wisdom in governmental action; and in suppression lies ordinarily the greatest peril.

These profound and liberal thinkers envisioned democratic government as embracing liberty of expression in the fullest possible sense. If the ideas expressed are wrong, their impact on the public mind may be corrected by reply from those of contrary views. Discussion and controversy stir up thought and bring more minds, more ideas, more viewpoints, to bear on the problem. None may be entirely correct, but by the balancing influence of all shades of opinion, wisdom is most apt to be reached. It is from suppression, not expression, that hatred and violence flow.

II

The Judiciary Makes the Bill of Rights A Living Law

A. *The "clear and present danger" test*

It is in the Supreme Court of the United States that the most important principles relating to the Bill of Rights have been established, and these chiefly since the emergency of World War I. The judgments immediately following the war left much to be desired from the standpoint of a liberal application of the principles of the Constitution. During this period there was much divergence of opinion among the members of the Supreme Court as to what speech was permissible and what was not.

One school of thought followed the English principle established during the political prosecutions of the eighteenth century. Under this common-law rule words were punishable if they were considered to have a "reasonable tendency", no matter how remote, to cause the evils forbidden by the law. What was forbidden was couched in such vague and indefinite language that the law was in reality a dragnet which could enmesh any ideas that were at the moment in popular disfavour. To ask a jury to decide whether the words used by the accused could have a "remote bad tendency" to cause some indefinite evil like "disturb the tranquility of the state", or "excite disaffection", was in reality an invitation to convict anyone with whose views they did not agree.

The opposing line of thought on the subject of what speech is legally permissible was adopted first by Justices Holmes and Brandeis. Mr. Justice Holmes laid down the "clear and present danger" test. On this view of the law, speech is permissible

unless there is a clear, *i.e.*, apparent, obvious, real, danger that the speech or writing will cause unlawful action and that the action will be taken immediately or in a short time. This test is much more definite and enables the jury or court to reach a conclusion on the evidence and not on pure speculation.

In construing the application of the First and Fourteenth Amendments, the Supreme Court has established the constitutional freedoms as fields of activity on which the authority of government must not encroach. If Congress or a state legislature passes a statute that prohibits the promulgation of certain ideas through speech or press, the Supreme Court can examine the terms of the statute in the light of the "clear and present danger" test. If there is no immediate or real danger that the actions or words prohibited will interfere successfully with the operation of some valid law, then the attempted legislative restriction on speech is void. If the legislation is valid *per se*, the court can still consider the behaviour that is questioned under it. If the words or writing are not likely to cause an early outbreak of lawlessness, they are not punishable and the conviction will be quashed. Thus the Supreme Court has looked, not only at the law itself, but at what is done under the law, so that individual liberties cannot be denied on the pretext that there is nothing wrong with the statute *per se*.

The series of cases that established the constitutional limitations as they now exist began to reach the Supreme Court in 1919. The excitement of the war period had fathered a number of statutes, both federal and state, which were broad enough to interfere, on a wide construction, with free expression of ideas.[10] This era saw also the revival of a number of statutes that had become a dead letter in the interval since their passing.[11]

The effort to raise an army quickly and to whip the public mind into a conviction that the Government's actions were unquestionably correct, did not, to some authorities, allow for even mild disagreement or criticism. Prosecutions were begun for what would ordinarily be regarded as innocuous statements. The decisions in these cases caused the First and Fourteenth Amendments to assume a new practical importance in the field of civil liberties.

The first case of importance following World War I was *Schenck* v. *United States*.[12] This was one of the few instances

[10] Criminal Syndicalism Act (1919), Cal. General Laws Act, 8428; also Arkansas, Arizona, Louisiana, Massachusets.
[11] *I.e.*, Criminal Anarchy Act (1902), New York Penal Law, pp. 160-166.
[12] (1919), 249 U.S. 47.

where the evidence revealed a direct incitement to resist the draft. The accused had mailed circulars to draftees denouncing conscription as unconstitutional despotism and in impassioned language had urged the draftees to assert their rights. No real question of free speech arose, since the statements counselled unlawful action and were a direct interference with the power of Congress to raise armies. The charge was laid under the federal Espionage Act.[13]

The Supreme Court unanimously sustained the conviction, but Mr. Justice Holmes, speaking for the court, laid down the "clear and present danger" test, which later became of the utmost importance in determining the true scope of the First Amendment. He said:

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a *clear and present danger* that they will bring about the substantive evils that Congress has a right to prevent.

Although the "substantive evils" are not specifically defined, it became clear in later cases that they mean substantial interference with the particular power of Congress that is in question — in this instance, the war power. The judgment of Mr. Justice Holmes makes it impossible to punish a man for the "remote bad tendency" of his words to bring about the evil against which Congress has the right to legislate. His test makes it necessary that the speech be a virtual incitement to breach of the law. In this case the concept of freedom of speech received for the first time an authoritative judicial interpretation in accord with the purpose of the framers of the Constitution. Here a line was drawn to show the limit of the right of expression. The succeeding cases present a very interesting picture of the effort to apply the "clear and present danger" test.

The next case of importance on the subject of the First Amendment was *Abrams* v. *United States*,[14] which also arose under the Espionage Act. Some leaflets had been published denouncing American intervention in Russia and urging curtailment of war production. The indictment charged *inter alia* that the accused delivered the leaflets "with intent by such curtailment to cripple or hinder the United States in the prosecution of the war". The war, however, was with Germany and the statements made were in relation to the undeclared war with Russia.

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[13] Espionage Act (Federal) (1917), now 60 U.S.C.A. 33.
[14] (1919), 250 U.S. 616, at pp. 621, 630.

Seven judges of the Supreme Court upheld the conviction, Justices Holmes and Brandeis dissenting. Mr. Justice Clarke, speaking for the court, said:

> . . . Men must be held to have intended, and to be accountable for, the effects which their acts were likely to produce . . . the plan of action which they adopted necessarily involved, before it could be realized, defeat of the war program of the United States, for the obvious effect of this appeal, if it should become effective, as they hoped it might, would be to persuade persons . . . not to aid government loans and not to work in ammunition factories.

While Justices Holmes and Brandeis admitted that the statute was valid on its face, they dissented on the ground that the construction put upon it by the lower courts extended its operation into the area of non-punishable speech protected by the Constitution, and hence they would have voided the conviction, though not the statute. They could not see in the words used any "present danger of immediate evil or an intent to bring it about that warrants Congress in setting up a limit to the expression of opinion". Mr. Justice Holmes said also:

> . . . But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. . . . While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.

In these dissents, Mr. Justice Brandeis and Mr. Justice Holmes showed how free speech could be destroyed by an over-zealous enforcement of the Espionage Act and failure to apply reasonably the First Amendment.

The next case under the Espionage Act was *Schaefer* v. *United States*,[15] which involved publication of slighting reference to the country's war strength and of falsifications consisting of slight additions to and omissions from news reports. The Supreme Court upheld the conviction by a majority of six to three. Mr. Justice Clarke dissented on procedural grounds; Holmes and Brandeis because the conviction violated rights granted by the First Amendment.

[15] (1920), 251 U.S. 466, at pp. 482-483.

Mr. Justice McKenna wrote the majority opinion, Brandeis the dissenting opinion. The difference of approach is significant. Mr. Justice McKenna regarded the issue from the standpoint of war power. He expressed surprise that the Constitution should have been invoked to protect "the activities of anarchy or of the enemies of the United States". He adopted the 18th century test, namely, if the jury thought the writing might have a *tendency* to interfere with the war effort, then it should be *presumed* that the accused intended to do so. In the net result the question for him was: Could the words published have a bad tendency, no matter how remote?

Mr. Justice Brandeis expressed alarm at the employment of the Espionage Act to "discourage criticism of the government". He pointed out that the "clear and present danger" test was not being applied and that rigorous limitations of such statutes were essential to preserve the constitutional rights of speech and press. He said:

> This [the clear and present danger test] is a rule of reason. Correctly applied, it will preserve the right of free speech both from suppression by tyrannous, well-meaning majorities, and from abuse by irresponsible, fanatical minorities. Like many other rules for human conduct, it can be applied correctly only by the exercise of good judgment, and to the exercise of good judgment, calmness is, in times of deep feeling and on subjects which excite passion, as essential as fearlessness and honesty. . . . If the words were of such a nature and were used under such circumstances that men, judging in calmness, could not reasonably say that they created a clear and present danger that they would bring about the evil which Congress sought and had a right to prevent, then it is the duty of the trial judge to withdraw the case from the consideration of the jury; . . .

In the cases just mentioned (to which could be added *Gilbert* v. *Minnesota*[16] and *Gitlow* v. *New York*[17]) the majority of the court, while never expresslly overruling the "clear and present danger" test, had honoured it more in the breach than in the observance. The 18th century tests of "reasonable tendency" and "presumptive intent" were being used to justify conviction.

B. *Liberal views of dissenters become rule of the court*

In the decisions quoted in the section immediately preceding, Justices Holmes and Brandeis were virtually alone among the members of the Supreme Court in their stand for the rights of the individual under the First Amendment. Their voices, however, were not unheard and the trend of decision swung gradually to their liberal views.

[16] (1920), 254 U.S. 325.
[17] (1925), 268 U.S. 652.

In *Whitney* v. *California*[18] Anita Whitney was convicted of violating the California Criminal Syndicalism Act. She was charged with having taken an active part in organizing the Communist Labour Party in California. Because of her activities and the fact that this party was found to have advocated violent revolution against the United States Government, the Supreme Court affirmed the judgment of conviction. In this case Justices Holmes and Brandeis concurred. Mr. Justice Brandeis pointed out carefully that a defendant in such a case should have the right to submit to the jury the question of whether in fact there was a "clear and present danger" that harm would actually result. He also took occasion to clarify the clear and present danger rule enunciated by Mr. Justice Holmes in the *Schenck* case. Because of the importance of the Brandeis' judgment to the later change in the court's view, it is quoted from at length:

> To reach sound conclusions on these matters, we must bear in mind why a State is, ordinarily, denied the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence.
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> Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. . . . But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope, and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law — the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.
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> Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. . . . Every denunciation of existing law tends in some measure to increase the probability that there will be violation of it. . . . But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on. The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind. In order to support a finding of clear and present danger it must be shown either that immediate serious violence

[18] (1927), 274 U.S. 357, at pp. 374-378.

> was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated.
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> Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.
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> . . . The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the State. Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech and assembly. . . .

On the day the *Whitney* case was decided the Supreme Court handed down another opinion which shows that the majority adopted the views of Justice Brandeis in the *Whitney* case as the rule to be followed in the future. The case is *Fiske* v. *Kansas*,[19] where an I.W.W. organizer had been convicted under the Kansas statute prohibiting the advocacy of criminal syndicalism orally or through the distribution of printed matter.

The official views subscribed to by Fiske were in evidence. He testified that he did not advocate crime, sabotage or other illegal acts and did not believe in syndicalism. The state court upheld his conviction on the ground that the evils prohibited by the statute could be read between the lines of the literature distributed by him, and stated that they did not accept defendant's testimony as a candid and accurate statement. In spite of this conclusion the Supreme Court set aside the conviction, holding that it was "an arbitrary and unreasonable exercise of the police power or the state unwarrantably infringing the liberty of the defendant".

In the *Fiske* case, for the first time, the Supreme Court actually protected the right of free speech and made practical use of the guarantees of the Constitution.

The court breathed additional vitality into the First and Fourteenth Amendments in the next important case dealing with their application. *Stromberg* v. *California*[20] involved a young woman who was supervisor of a children's camp. Every day she ran up a red flag to which the chidren were asked to pledge

[19] (1927), 274 U.S. 380.
[20] (1931), 283 U.S. 359, at p. 369.

allegiance. She was charged with violating the California Penal Code prohibiting display of a red flag in a public assembly "as a sign, symbol or emblem of opposition to organized government. . . or as an aid to propaganda that is of a seditious character".[21] In declaring the statute invalid Chief Justice Hughes said:

> The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guarantee of liberty contained in the Fourteenth Amendment.

Technically the raising of a flag is neither a speech nor a use of the press, but it is a means of communicating ideas. The case is important also in holding a criminal statute void for indefiniteness, a frequent characteristic of sedition and "dragnet" statutes.

A leading case dealing with the subject of a free press was *Near* v. *Minnesota*.[22] A state statute allowed the courts to issue injunctions to restrain as a public nuisance "malicious, scandalous, and defamatory" newspapers, magazines and other periodicals.[23] The *Saturday Press*, a weekly paper in Minneapolis, had violently attacked local officials, and the state courts granted and maintained an injunction against its publication. The Supreme Court invalidated the state law as being in conflict with the Fourteenth Amendment. While admitting the undesirable nature of this particular journal, the court upset the state-imposed ban and condemned censorship of the press.

Chief Justice Hughes for the majority pointed out that:

> . . . Public officers, whose character and conduct remain open to debate and free discussion in the press, find their remedies for false accusations in actions under libel laws providing for redress and punishment, and not in proceedings to restrain the publication of newspapers and periodicals.
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> . . . While reckless assaults upon public men, and efforts to bring obloquy upon those who are endeavoring faithfully to discharge official duties, exert a baleful influence and deserve the severest condemnation in public opinion, it cannot be said that this abuse is greater, and it is believed to be less, than that which characterized the period in which our institutions took shape. Meanwhile, the administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions,

[21] California Penal Code 403a.
[22] (1931), 283 U.S. 697, at pp. 718-720.
[23] Minn. Laws (1925), c. 285.

> and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press, especially in great cities.

The court here clearly accepts the fact that, while there are undoubtedly some objectionable features about freedom of the press, public weal in the long run is best protected by allowing free discussion.

De Jonge v. *Oregon* was decided in 1937.[24] It held that mere participation in a Communist meeting did not warrant the application of the state's syndicalism act. Again the court set aside the conviction. Chief Justice Hughes said:

> . . . The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.

An important case where a man was convicted on the basis of statements published by him was that of *Herndon* v. *Lowry*.[25] The appellant was a negro Communist who was charged under a Georgia statute of 1832, which provided that "Any attempt, by persuasion or otherwise, to induce others to join in any combined resistance to the lawful authority of the State shall constitute an attempt to incite insurrection".[26] The statute was enforced for the first time in 1932. In this case Mr. Justice Roberts, for the Supreme Court, repudiated the "reasonable tendency" view of the earlier cases. The conviction was set aside because it abridged freedom of speech. The statute was valid, but by misconstruction of it, the accused had been denied privileges of free speech accorded him by the unrepealable terms of the Constitution.

Justice Roberts denied that "the standard of guilt may be made the 'dangerous tendency' of his words". He went on:

> The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government. The judgment of the legislature is not unfettered. The limitation upon individual liberty must have appropriate relation to the safety of the state. Legislation which goes beyond this need violates the principle of the Constitution.

[24] (1937), 299 U.S. 353, at p. 365.
[25] (1937), 301 U.S. 242, at pp. 258, 262-263.
[26] Georgia Code 4214, (1861).

Mr. Justice Roberts continued by illustrating the dangerous lengths to which the reasonable tendency argument might lead:

> If the jury conclude that the defendant should have contemplated that any act or utterance of his in opposition to the established order or advocating a change in that order, might, in the distant future, eventuate in a combination to offer forcible resistance to the State, or as the State says, if the jury believe he should have known that his words would have 'a dangerous tendency' then he may be convicted. To be guilty under the law, as construed, a defendant need not advocate resort to force. . . . Proof that the accused in fact believed that his effort would cause a violent assault upon the state would not be necessary to conviction. It would be sufficient if the jury thought he reasonably might foretell that those he persuaded to join the party might, at some time in the indefinite future, resort to forcible resistance of government. The question thus proposed to a jury involves pure speculation as to future trends of thought and action. . . .
>
> The statute, as construed and applied, amounts merely to a dragnet which may enmesh anyone who agitates for a change of government if a jury can be persuaded that he ought to have forseen his words would have some effect in the future conduct of others. No reasonably ascertainable standard of guilt is prescribed. So vague and indeterminate are the boundaries thus set to the freedom of speech and assembly that the law necessarily violates the guarantees of liberty embodied in the Fourteenth Amendment.

The demand of the court that a conviction for objectionable speech must show a "reasonable apprehension of danger to organized government" is in reality an adaptation of the "clear and present danger" test. Holmes and Brandeis were impliedly vindicated by the foregoing judgment, but in the later case of *Bridges* v. *California*[27] the Supreme Court expressly approved the views expounded by the "great dissenters" following World War I. Their liberal views have become the law of the land and suppression of speech for its supposed ill-tendency, which allows a jury to convict on pure speculation, has been abolished by the penetrating power that the First and Fourteenth Amendments have given the Supreme Court.

III

Lawful Methods of Disseminating Opinion

Basically the right of free speech and press is the right to disseminate information and to try proposals, theories and men at the bar of public opinion. The foregoing cases have discussed chiefly the limits of *what* may be said or proposed within the law. The right to reach the public with one's views, however, is not

[27] (1941), 314 U.S. 252.

completed by a determination of *what* can be said. Assuming the ideas are perfectly legitimate, *how* can they be said? What bars can be placed between the speaker or writer and the public? To answer that he can use the newspapers does not tell the whole story. Not every man can buy a million dollar newspaper industry. Is that a pre-requisite to the right of expression or is the constitutional privilege open to the poor man also?

A. *Censorship by licensing*

Freedom of speech, press and worship in the United States, as authoritatively determined by the Supreme Court, comprehend the right of one individual to speak or to distribute his opinions in printed form and the right of others to hear or consider if they so desire. Whether or not he will listen, is a choice to be made by each individual and the decision cannot be made for him by the community or state in which he lives. If any law, whether on its face or by the construction put upon it, discriminates against or interferes with the free dissemination of information it is invalid. In addition to prosecution for the words spoken, there has also been a number of cases where the Supreme Court has declared unlawful efforts to interfere with freedom of the press by stopping distribution of literature.

The majority of cases involving the right to disseminate opinions have been fought by Jehovah's witnesses. Since 1938 they have had in the Supreme Court of the United States over forty cases on questions of free speech and freedom of worship. The first of these was *Lovell* v. *City of Griffin*.[28] The case involved their primitive preaching as evangelists in the City of Griffin, Georgia. The missionary was distributing tracts, describing the Kingdom of God as the only hope for mankind, in the course of her preaching from door to door. The city had an ordinance that forbade the distribution of literature without a permit from the City Manager. A conviction followed, which the Supreme Court overruled. Chief Justice Hughes wrote the opinion of the unanimous court:

> Legislation of the type of the ordinance in question would restore the system of license and censorship in its baldest form.
>
> The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others . . . abundantly attest. The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion. . . .

[28] (1938), 303 U.S. 444, at p. 452.

> The ordinance cannot be saved because it relates to distribution and not to publication. 'Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.'

A similar municipal ordinance came under review in the following year in *Schneider* v. *New Jersey*.[29] The conviction of another of Jehovah's witnesses was again set aside by the Supreme Court, because the ordinance, although ostensibly a police safety measure, provided for censorship of the press, contrary to the Constitution. Mr. Justice Roberts, speaking for the court, also gave consideration to the limitation of police power. He said:

> In every case therefore, where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights.

In *Cantwell* v. *Connecticut*[30] one of Jehovah's witnesses was convicted of a breach of the peace for playing to two Catholics a phonograph speech to which they took exception. The conviction was set aside by the Supreme Court because it conflicted with the rights under the First and Fourteenth Amendments.

Here for the first time in its history the Supreme Court faced squarely the question of whether the First Amendment protected the right to believe *and* preach an unorthodox Christian faith. Setting at rest any previous doubts that existed on the matter, the court held unequivocally that the "amendment embraces two concepts — freedom to believe and freedom to act".

In voiding the breach of peace conviction based on Cantwell's playing of the phonograph record, Mr. Justice Roberts said for the court:

> We find in the instant case no assault or threatening of bodily harm, no truculent bearing, no intentional discourtesy, no personal abuse. On the contrary, we find only an effort to persuade a willing listener to buy a book or to contribute money in the interest of what Cantwell, however misguided others may think him, conceived to be true religion.
>
> In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point

[29] (1939), 308 U.S. 147, at p, 161.
[30] (1940), 310 U.S. 296, at p. 310.

> of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.
>
> The essential characteristic of these liberties is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed. Nowhere is this shield more necessary than in our own country for a people composed of many races and of many creeds. . . .

B. *Censorship by taxation*

It was said by Chief Justice Marshall very early in American history that "The power to tax is the power to destroy".[31] While the right of expression, both verbally and by the printed word, was made free by the Constitution, efforts were made to deny it without previous payment of a tax.

Towns in the states of Alabama, Arizona and Arkansas had ordinances that required peddlers and vendors of merchandise upon the streets and from door to door to pay a licence tax. Jehovah's witnesses were prosecuted in Opelika, Alabama, Casa Grande, Arizona, and Fort Smith, Arkansas, for receiving contributions while distributing literature, on the ground that this constituted selling literature without prior payment of the licence tax. These cases reached the Supreme Court at about the same time and were grouped together for submission and decision. In June 1942 the court in *Jones* v. *Opelika*,[32] by a vote of 5 to 4, upheld the ordinances as valid. The bare majority of one held that the activities of Jehovah's witnesses were subject to the licence tax because money passed during their distribution of literature, which (it was claimed) made the transaction commercial. The four dissenters contended that the licence taxes restricted the freedoms secured by the First Amendment. They were compared to the newspaper taxes imposed by the British Government, which were a contributing cause to the American Revolution.

There was no question that the laws imposing the taxes were valid in themselves. It was when they were extended by construction and applied to activities within the protection of the Constitution that they became unlawful. As long as it was merely a matter of interpreting state laws, the state courts were supreme.

[31] *McCulloch* v. *Maryland* (1819), 4 Wheat. 316.
[32] (1942), 316 U.S. 584.

Directly, however, the construction put upon the state laws interfered with rights of free speech and freedom of worship, the jurisdiction of the Supreme Court could be invoked to review the cases.

A petition for rehearing was filed during the 1942 summer recess of the court. Before the rehearing Mr. Justice Bynres, one of the majority, resigned from the court to become Director of Economic Stabilization. The President appointed as his successor Judge Wiley Rutledge of the Court of Appeals for the District of Columbia. The new justice had previously expressed the opinion, in his dissent in *Busey* v. *District of Columbia*,[33] that such licence taxes were invalid. His stand on the question in the *Busey* dissent made it obvious that the complexion of the court would change from a majority against, to a majority in favour of, the position taken by Jehovah's witnesses on the licence taxes.

Thirteen cases came before the Supreme Court in March 1943 for re-argument of the issue. Three cases were being reheard and ten additional cases had been brought into the court on certiorari.

The cases were decided in May of the same year, reversing the previous conclusion. Ten opinions were written by the various justices considering the issue. The new judgment in *Jones* v. *Opelika*[34] reversed and vacated the original holding. Of the thirteen cases, the appeal was allowed in twelve[35] and dismissed in the remaining case on procedural grounds. In Pennsylvania the application of Jehovah's witnesses for an injunction to restrain criminal prosecution was dismissed on the ground, among others, that an injunction was no longer necessary, since the court had invalidated the licence tax laws.[36] They were held invalid, not in themselves, but in so far as they were applied to non-commercial activities, which were guaranteed as "free" by the Constitution. The Supreme Court also held as unconstitutional a municipal ordinance of Struthers, Ohio, prohibiting a distributor of ideas for Jehovah's witnesses from summoning the householder to the door: *Martin* v. *Struthers*.[37]

The court declared that the licence taxes were invalid as applied to those cases because they were destructive of missionary evangelistic activity secured by the provisions of the First Amendment guaranteeing freedom of religion. The application of the laws was held also to be an abridgment of freedom of the press. The decisions filled out the protecting limbs of the tree of freedom

[33] (1942), 129 F. 2d 24, at p. 34.
[34] (1943), 319 U.S. 103.
[35] *Murdock* v. *Pennsylvania* (1943), 319 U.S. 105.
[36] *Douglas* v. *Jeannette* (1943), 319 U.S. 157.
[37] (1943), 319 U.S. 141.

of worship and freedom of the press planted in the Constitution. They built high the constitutional refuge against prohibition, censorship and taxation of ideas, information and opinion on Biblical and political subjects.

While the cases just mentioned showed a sharp cleavage in the court, which was divided five to four, there is little ground to suppose that the law will be changed. Mr. Justice Reed, who was a vigorous dissenter in the *Murdock* v. *Pennsylvania* case, concurred with the majority in a subsequent decision invalidating another licence tax: *Follett* v. *McCormick*.[38] In this instance a licence tax law of South Carolina was held invalid even against a local full-time evangelist who earned his entire living from door-to-door missionary work.

In the *Murdock* case the judgment of the court, delivered by Mr. Justice Douglas, went very deeply into the practical problem of keeping open the channels of information. In it he said:

> Petitioners are 'Jehovah's witnesses'. They went about from door to door in the City of Jeannette distributing literature and soliciting people to 'purchase' certain religious books and pamphlets, all published by the Watch Tower Bible & Tract Society. . . . None of them obtained a license under the ordinance. Before they were arrested each had made 'sales' of books. . . .
>
> Petitioners spread their interpretations of the Bible and their religious beliefs largely through the hand distribution of literature by full or part time workers. They claim to follow the example of Paul, teaching 'publickly, and from house to house'. Acts 20:20. They take literally the mandate of the Scriptures, 'Go ye into all the world, and preach the gospel to every creature'. Mark 16:15. In doing so they believe that they are obeying a commandment of God.
>
> The hand distribution of religious tracts is an age-old form of missionary evangelism — as old as the history of printing presses. It has been a potent force in various religious movements down through the years. This form of evangelism is utilized today on a large scale by various religious sects whose colporteurs carry the Gospel to thousands upon thousands of homes and seek through personal visitations to win adherents to their faith. It is more than preaching; it is more than distribution of religious literature. It is a combination of both. Its purpose is as evangelical as the revival meeting. This form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits. It has the same claim to protection as the more orthodox and conventional exercises of religion. It also has the same claim as the others to the guarantees of freedom of speech and freedom of the press. . . .
>
> The alleged justification for the exaction of this license tax is the fact that the religious literature is distributed with a solicitation of funds. Thus it was stated in *Jones* v. *Opelika*, *supra*, 316 U.S. at 597,

[38] (1944), 321 U.S. 573.

that when a religious sect uses 'ordinary commercial methods of sales of articles to raise propaganda funds', it is proper for the state to charge 'reasonable fees for the privilege of canvassing'. . . . But the mere fact that the religious literature is 'sold' by itinerant preachers rather than 'donated' does not transform evangelism into a commercial enterprise. If it did, then the passing of a collection plate in church would make the church service a commercial project. . . . It should be remembered that the pamphlets of Thomas Paine were not distributed free of charge. It is plain that a religious organization needs funds to remain a going concern. But an itinerant evangelist, however misguided or intolerant he may be, does not become a mere book agent by selling the Bible or religious tracts to help defray his expenses or to sustain him. Freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way. As we have said, the problem of drawing the line between a purely commercial activity and a religious one will at times be difficult. On this record it plainly cannot be said that petitioners were engaged in a commercial rather than a religious venture. . . .

The judgment in *Jones* v. *Opelika* has this day been vacated. Freed from that controlling precedent, we can restore to their high, constitutional position the liberties of itinerant evangelists who disseminate their religious beliefs and the tenets of their faith through distribution of literature. The judgments are reversed and the causes are remanded to the Pennsylvania Superior Court for proceedings not inconsistent with this opinion.[39]

The Supreme Court opinion in the *Struthers* case was delivered by Mr. Justice Black:

For centuries it has been a common practice in this and other countries for persons not specifically invited to go from house to house and knock on doors or ring doorbells to communicate ideas to the occupants or to invite them to political, religious, or other kinds of public meetings. . . .

While door to door distributors of literature may be either a nuisance or a blind for criminal activities, they may also be useful members of society engaged in the dissemination of ideas in accordance with the best tradition of free discussion. The widespread use of this method of communication by many groups espousing various causes attests its major importance. . . . Of course, as every person acquainted with political life knows, door to door campaigning is one of the most accepted techniques of seeking popular support, while the circulation of nominating papers would be greatly handicapped if they could not be taken to the citizens in their homes. Door to door distribution of circulars is essential to the poorly financed causes of little people.[40]

The foregoing cases on the right to express opinions through the medium of the printed word have immeasurably strengthened and fortified the liberty of the individual. A well-known legal commentator, Judge Edward F. Waite,[41] in his article, The Debt

[39] (1943), 319 U.S. 105, at pp. 106-107, 108-109, 110-111, 117.
[40] (1943), 319 U.S. 141, at pp. 145, 146.
[41] District Court for the Fourth District of Minnesota.

of Constitutional Law to Jehovah's Witnesses,[42] discusses the significance of these cases:

> . . . For it was field-day for Jehovah's Witnesses. Thirteen cases involving their beliefs and activities were decided. . . .
>
> It is plain that present constitutional guarantees of personal liberty, as authoritatively interpreted by the United States Supreme Court, are far broader than they were before the spring of 1938; and that most of this enlargement is to be found in the thirty-one Jehovah's Witnesses cases (sixteen deciding opinions) of which *Lovell* v. *City of Griffin* was the first. If 'the blood of the martyrs is the seed of the Church', what is the debt of Constitutional Law to the militant persistency — or perhaps I should say devotion — of this strange group?

C. *Bill of Rights assures freedom in company-owned towns*

The Bill of Rights has continued to overcome barriers to the operation of its principles. While the legal right of one citizen to speak, and of another to determine for himself whether he will hear or not, seemed to be fairly decided after the *Lovell–Murdock* series of decisions, some areas of the United States still tried to stop dissemination of opinion.

A suburb of Mobile, Alabama, is a company-owned town and the company decided it would not allow Jehovah's witnesses to disseminate their printed Bible sermons within its boundaries. The argument was tantamount to saying that a company-owned town is not a part of this democracy but a separate entity where the principles of free expression as laid down by the Supreme Court are not operative.

The same controversy arose in relation to the Hondo Navigation Village at Hondo, Texas. This was a housing project owned by the federal government. The manager claimed the right to prohibit door-to-door calls by Jehovah's witnesses on the ground that it was a privately-owned area.[43] In both these cases Jehovah's witnesses continued their activities and were convicted for trespass. The convictions were voided by the Supreme Court.

In the Mobile case, *Marsh* v. *Alabama*,[44] Mr. Justice Black delivered the decision of the court:

> Whether a corporation or a municipality owns or possesses the town, the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free. . . .
>
> Many people in the United States live in company-owned towns. These people, just as residents of municipalities, are free citizens of their

[42] (1944), 28 Minnesota Law Review 209, at p. 246.
[43] *Tucker* v. *Texas* (1946), 326 U.S. 517.
[44] (1946), 326 U.S. 501, at pp. 507, 508-509.

> State and country. Just as all other citizens they must make decisions which affect the welfare of community and nation. To act as good citizens they must be informed. In order to enable them to be properly informed their information must be uncensored. There is no more reason for depriving these people of the liberties guaranteed by the First and Fourteenth Amendments than there is for curtailing these freedoms with respect to any other citizen.

Thus the Bill of Rights, interpreted and enforced by the courts, has demonstrated its vitality by penetrating every corner of the nation. Nothing but its dynamic force could have emerged victorious from so many struggles against oppression.

IV

Freedom of Worship and Conscience

The cases discussed in the previous section have involved the right to perform positive acts, but during the same period the Supreme Court had to consider repeatedly whether or not the Constitution protected a person who did *not* wish to join in a prescribed ceremony. This controversy resulted in some of the deepest and most heart-searching judgments in the history of the Constitution.

The first case on this phase of the question was *Minersville School District* v. *Gobitis*.[45] Children of Jehovah's witnesses had been expelled from school for refusing to join in the compulsory ceremony of saluting the flag, after an unsuccessful attempt to be excused from the exercise. In their view the ceremony was a violation of the Biblical injunction at Exodus 20:3–4 against the making of or bowing to images or the likeness of any thing. The undisputed evidence showed that there was no danger, clear or present, that any serious injury would result to the state or the morale of other pupils because of their refusal.

In the *Gobitis* case, the court upheld the compulsory exercise by a majority of eight to one. Mr. Justice Stone (later Chief Justice) wrote a long and brilliant dissenting opinion. The opinion of the majority was delivered by Mr. Justice Frankfurter. He declined to review the constitutionality of the legislation, though admitting the power of the judiciary to review legislative enactments:

> To the legislature no less than to courts is committed the guardianship of deeply-cherished liberties. . . . Where all the effective means of inducting political changes are left free from interference, education in the abandonment of foolish legislation is itself a training in liberty. To fight out the wise use of legislative authority in the forum of public

[45] (1940), 310 U.S. 586, at p. 600.

> opinion and before legislative assemblies, rather than to transfer such a contest to the judicial arena, serves to vindicate the self-confidence of a free people.

This decision removed religious liberty from the protection of the Constitution and put it back in the forum of public opinion. Under it minorities have a right to their opinions only in so far as they are tolerated by the majority. It constitutes an alteration of the Constitutional guarantee which gives the individual a right to worship his Maker in his own way regardless of tolerance or lack of it on the part of the majority. On the *Gobitis* view of the law the courts are powerless to protect fundamental rights from arbitrary legislative or executive invasion of their freedom.

Mr Justice Frankfurter had refused to review the action of the school board on the ground that to do so would make the court "the school board for the country". The court declined to protect constitutional rights and thus shifted that responsibility to the school boards. Wholesale expulsion of school children began immediately throughout the nation. Parents repeatedly appealed without success to local school boards to make an exception for those who had conscientious objection to the flag salute. This nation-wide fight by Jehovah's witnesses during the two and a half years following the *Gobitis* decision did not result in "abandonment of foolish legislation". It was not "a training in liberty" and did not serve "to vindicate the self-confidence of a free people" as suggested by Mr. Justice Frankfurter. Unquestionably it resulted in the very antithesis of these desirable ends.

"The forum of public opinion" did not prove to be a means of protecting minority rights. Thousands of Jehovah's witnesses were refused a fair hearing on their petitions to have the regulations amended and so permit their children to be excused from ceremonies of this character. All these petitions were denied under the "authority" of the *Gobitis* decision. The result was that children were denied education and parents their constitutional rights in all forty-eight states of the Union. State after state, never previously concerned in the controversy, passed statutes to make this exercise compulsory in all schools. Compulsory flag-saluting became the subject of a national witch-hunt. Public opinion reached the point of hysteria and launched a campaign of violence and persecution too extensive and deplorable to describe adequately here.[46] Rather than "vindicating the con-

[46] For further details see, Recent Limitations Upon Religious Liberty (American Political Science Review, December, 1942), by Victor W. Rotnem, based on thousands of complaints and affidavits filed with the Federal Department of Justice, Civil Liberties Unit (headed by Mr. Rotnem); 1 Bill of Rights Rev. 267; 1 Bill of Rights Rev. No. 1 (Supplement); 6 Missouri

fidence of a free people" the dispute emphasized the lengths to which bigotry can go when the judiciary shirks its responsibility as custodian of the Bill of Rights. It was not the "forum of public opinion" but the judiciary finally asserting itself that corrected the denial of constitutional right.

To tell an unpopular minority that it can protect unorthodox views by having the laws amended through political process is simply to abandon it to the arbitrary will of the majority without any effective remedy. It is not a sufficient answer to say that the people may change the government by electing a new parliament. Elections are not held frequently enough. Moreover, it is usually minorities whose rights are denied, while it is majorities who win the elections. The very purpose of the Bill of Rights is to protect minorities — not relegate them to the polls — so that a government cannot through step-by-step encroachments destroy the liberties of all its citizens. Regardless of what government is in power, some rights should remain as inviolable possessions of the people. Said Thomas Jefferson, advocate of freedom:

> A Bill of Rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse or rest on inference.

The *Gobitis* decision in 1940, which upheld the compulsory flag ceremony, began to lose some of its force in 1942. Justices Black, Douglas, and Murphy, who had concurred in the decision, publicly declared that in their opinion it was wrongly decided. This remarkable and unprecedented move was made in their special dissent appended to the main dissents in *Jones* v. *Opelika*.[47] Here the justices said:

> This is but another step in the direction which *Minersville School District* v. *Gobitis*, 310 U.S. 586, took against the same religious minority and is a logical extension of the principles upon which that decision rested. Since we joined in the opinion in the *Gobitis* case, we think it is an appropriate occasion to state that we now believe that it was also wrongly decided.

This about-face meant that only three of the original majority in the *Gobitis* case were still on the court and holding the same views. They were Justices Roberts, Reed and Frankfurter. The lonely dissent of Mr. Justice Stone had been joined by the special dissent of Black, Douglas and Murphy. The most recent appoint-

Law Rev. 106; Fennell, The Reconstructed Court and Religious Freedom: The Gobitis case in Restrospect (1941), 19 New York University Law Quarterly Review 31.

[47] (1942), 316 U.S. 584, at pp. 623-624.

ments to the court, Jackson and Rutledge, had not expressed themselves on the subject.

Immediately following the statement of Justices Black, Douglas and Murphy, retracting their previous views on the flag issue, an action was instituted by Jehovah's witnesses in the State of West Virginia to challenge the validity of another statute making it compulsory for school children to participate in the flag-saluting ceremonies. Although the state relied upon the decision of the Supreme Court in the *Gobitis* case, the federal district court declared that the decision of the Supreme Court had become so impaired that it need not be followed. This case, *Barnette* v. *West Virginia State Board of Education*,[48] is one of the rare instances in the history of the federal judiciary that a lower court refused to follow a standing precedent of a higher court.[49]

The Attorney General of West Virginia appealed the decision directly to the Supreme Court of the United States. On Flag Day in June 1943, the Supreme Court overruled the *Gobitis* decision. For the court, Mr. Justice Jackson delivered a carefully-reasoned opinion. On behalf of the majority of 6 to 3 he pointed out that Jehovah's witnesses interfered in no way with those who wanted to have, and desired to participate in, the flag-salute ceremony. He clearly demonstrated the invalidity of the statute. Justices Roberts, Reed and Frankfurter adhered to the views expressed in the *Gobitis* case, the latter expanding what he had stated for the majority in the previous judgment.

Speaking for the court in the *Barnette* case,[50] Mr. Justice Jackson stated:

> This case calls upon us to reconsider a precedent decision, as the Court throughout its history often has been required to do. . . .
>
> . . . But the refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so. Nor is there any question in this case that their behavior is peaceable and orderly. The sole conflict is between authority and rights of the individual. . . .
>
> . . . Here, however, we are dealing with a compulsion of students to declare a belief. They are not merely made acquainted with the flag salute so that they may be informed as to what it is or even what it means. . . .
>
> It is also to be noted that the compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind. . . . To sustain the compulsory flag salute we are required to say that a Bill of Rights

[48] (1942), 47 F. Supp. 251 (D.C.W. Va.).

[49] See 56 Harv. L. Rev. 652–654; 43 Colum. L. Rev. 134–135; 31 Georgetown L. J. 85–88; 11 Geo. Wash. L. Rev. 112–114; 22 Oreg. L. Rev. 198–202; 17 Tul. L. Rev. 497–500.

[50] (1943), 319 U.S. 624.

which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind. . . .

Government of limited power need not be anemic government. Assurance that rights are secure tends to diminish fear and jealousy of strong government, and by making us feel safe to live under it makes for its better support. Without promise of a limiting Bill of Rights it is doubtful if our Constitution could have mustered enough strength to enable its ratification. To enforce those rights today is not to choose weak government over strong government. It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end. . . .

The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures — Boards of Education not excepted. . . .

Such Boards are numerous and their territorial jurisdiction often small. But small and local authority may feel less sense of responsibility to the Constitution, and agencies of publicity may be less vigilant in calling it to account. . . . There are village tyrants as well as village Hampdens, but none who acts under color of law is beyond reach of the Constitution. . . .

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections. . . .

Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever increasing severity. As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.

It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. There is no mysticism in the American concept of the

> State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority. . . .
>
> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.
>
> We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.[51]

Mississippi had gone even further than making flag-saluting compulsory for school children by declaring it a crime punishable by ten years imprisonment to distribute literature which "reasonably tends to create an attitude of stubborn refusal to salute, honour or respect the flag".

On the day of the famous flag-salute reversal the court also rendered decisions in three Mississippi sedition cases brought against Jehovah's witnesses. Taylor, Benoit and Cummings had been convicted under a special war-time sedition statute.[52] The basis of their conviction was that the message they distributed about God's Kingdom as the only hope of the world would likely result in dissaffection against the war effort and the peace and dignity of the state. The explanation the accused had made to show why they did not salute the flag was held to be in contravention of the statutory provision above quoted.

The Supreme Court held that the literature and speech of Jehovah's witnesses could not be made the basis of a conviction consistent with the constitutional guarantees of freedom of speech, press and worship. The prison sentences of ten years imposed against the defendants were set aside and the prosecutions ordered dismissed. The three cases are cited as *Taylor* v. *Mississippi*.[53] These decisions concluded litigation of the flag-salute controversy; vindicated the position of Jehovah's witnesses; and once more demonstrated the potency of the Bill of Rights in protecting the liberty of the subject.

[51] *Idem.*, at pp. 630, 631, 633, 634, 636, 637-638, 640-641, 642. See also *Donald* v. *Hamilton Board of Education*, [1945] O.R. 518, where the Ontario Court of Appeal was confronted with the question of a compulsory flag salute. The provincial statute provided that no child should be obliged to join in "any exercise of devotion or religion objected to by the parent or guardian". Adopting the reasoning of the Supreme Court in the *Barnette* case, the Ontario Court held the flag salute to be an "exercise of devotion or religion" from which the pupils should be excused.

[52] Gen. Laws of Miss. (1942), c. 178.

[53] (1943), 319 U.S. 583.

V

Eternal Vigilance Still the Price of Liberty

Even with the strong guarantee in the Bill of Rights and the concomitant doctrine of judicial supremacy, civil liberties are not absolutely secure in the United States. Even the mountain of precedent that the Supreme Court has built up to give vitality to constitutional guarantees does not entirely remove grave, present and clear dangers. Mr. Justice Murphy, consistently the outstanding champion of civil liberties on the high federal bench, warned the American people in his powerful dissent in *Prince* v. *Massachusetts*:[54]

> No chapter in human history has been so largely written in terms of persecution and intolerance as the one dealing with religious freedom. From ancient times to the present day, the ingenuity of man has known no limits in its ability to forge weapons of oppression for use against those who dare to express or practice unorthodox religious beliefs. And the Jehovah's witnesses are living proof of the fact that even in this nation, conceived as it was in the ideals of freedom, the right to practice religion in unconventional ways is still far from secure. Theirs is a militant and unpopular faith, pursued with a fanatical zeal. They have suffered brutal beatings; their property has been destroyed; they have been harassed at every turn by the resurrection and enforcement of little used ordinances and statutes. See Mulder and Comisky, 'Jehovah's Witnesses Mold Constitutional Law,' 2 Bill of Rights Review, No. 4, p. 262. To them, along with other present-day religious minorities, befalls the burden of testing our devotion to the ideals and constitutional guarantees of religious freedom. We should therefore hesitate before approving the application of a statute that might be used as another instrument of oppression. Religious freedom is too sacred a right to be restricted or prohibited in any degree without convincing proof that a legitimate interest of the state is in grave danger.

At Chicago, Illinois, Mr. Justice Douglas of the United States Supreme Court delivered an address on the occasion of the 100th anniversary of the birth of John Peter Altgeld, once Governor of Illinois. In the course of a review of Altgeld's career, Justice Douglas noted that when he became Governor four of the men found guilty in the Haymarket riots had been hanged. Three were still in prison. Altgeld reviewed the cases and found that there were sufficient grounds for a pardon. Those who feel that civil liberties are perfectly safe without legal protection and that the public conscience can be trusted to see that there is always fair play, should consider the following quotation from Mr. Justice Douglas's speech:

> The reaction was violent, as Altgeld knew it would be. He at once experienced what many before and after him experienced — that

[54] (1944), 321 U.S. 158, at pp. 175–176.

he who calls for the application of the Bill of Rights to unpopular minorities, as well as to the other groups of the community, often becomes himself suspect.

Mr. Justice Douglas pointed out some of the practical problems that had confronted Altgeld's effort to see that justice and fair play were given accused persons. He showed also how the same difficulties exist even today for anyone trying to defend an unpopular minority:

> Moreover, it is not in the courts alone that the strength of our civil liberties is to be ascertained. The executive and legislative branches of government also have responsibilities for enforcement of the Bill of Rights. The administration of the voting booths, the habits of the police in law enforcement, the nature of the city's ordinances — these all are indices of the vitality of the Bill of Rights in the life of the community. So is the attitude of the community. For an indifferent community, like a misguided one, will surely breed disrespect for the standards embodied in the Bill of Rights. . . .
>
> The creation of a healthy community attitude is not the exclusive task of any one group. The task starts in the homes, in the schools and in the churches. But city and state officials, editors, lawyers and other groups of citizens have an important share of the responsibility. I remember recent instances where tyrannical judges sitting in local courts rode roughshod over the civil liberties of defendants charged with crime. In one case it was a doctor, in another an editor, who thundered personal disapproval and started campaigns to rid their cities of those oppressive practices. They were indeed the ones that alerted the local bar associations and caused civil-liberties committees to be formed to patrol the local scene.
>
> These are not always easy steps to take. When Altgeld insisted that even anarchists were entitled to due process of law, he himself was labeled a subversive influence. That will often be said today when one insists that the safeguards of the Bill of Rights be extended to all groups, including any minority group in our midst that may be at the whipping post or the subjects of temporary hysteria.
>
> Yes, it takes courage to stand between an unpopular minority and the community, insisting that our Bill of Rights was designed for the protection of all people, whatever their race, creed or political faith. The lawyer may feel uneasy when it seems that important clients may slip away because of his attitude. The editor may be tempted to stand mute by reason of the views of important advertisers. Even the clergyman may be under pressure to hold his tongue because of the influence of some of his parishioners.
>
> But those who are devoted to the democratic ideal expressed in our Bill of Rights will take the direct and daring course. Once they are sure of their facts and know they are doing right they will, like Altgeld, espouse the cause of the victims of ignorance, prejudice or passion. They, too, may be pilloried or cursed. But institutions become great by the greatness of the men who champion them, by the greatness of the advocacy that defends them.

A people indifferent to their civil liberties do not deserve to keep them and in this revolutionary age may not be expected to keep them long. A people who proclaim their civil liberties but extend them only to preferred groups start down the path to totalitarianism. They emulate either the dictatorship of the Right or the dictatorship of the Left. In doing this they erase a basic distinction between our system of government and totalitarianism.

To allow that to happen is to lose by default. Far better to lose pleading the cause of decency and of justice. Then we win greatness even in defeat, and leave behind a rich heritage for those who later rebuild on the ashes of our lost hopes.

But there will be no failure if we adhere steadfastly to our faith. For the goal of people of all races is toward a system which respects their dignity, frees their minds and allows them to worship their God in their own way. None has yet designed an article of political faith more suited to those ends than our own Bill of Rights.

VI

Conclusion

In some countries such as Canada and Great Britain, where the courts are less able to protect the citizen against legislative or executive denial of his rights, criticism is heard of the constant boiling of litigation under the Bill of Rights in the United States. Opponents of the American system contend that it is a bad thing to allow litigants to challenge in the courts acts or decrees of the government; that such power results in the disintegration of the liberties themselves.

The answer to the contention that civil rights are just as secure in such countries can be found in the facts. Compare the security available to the people in the courts of the United States with the insecurity of those in countries without a Bill of Rights. This insecurity lies entirely in the inability of the courts to perform the same protective function over personal freedoms as do the courts of the United States. It is in the realm of civil liberties, at least, that the sovereignty of the legislatures should not be absolute. In this field the courts should enter and remain. Then, and only then, will there be security.

The argument against an unfettered legislature is succinctly put by Thomas Jefferson:

All the powers of government — legislative, executive, and judiciary — result in the legislative body. The concentrating of these in the same hands is precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands, and not by a single one. . . . An elective despotism was not the government we fought for, but one which should not only be founded on free principles, but in which the powers of government be so divided

and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others.[55]

The late Mr. Justice Cardozo of the Supreme Court of the United States, one of the most brilliant of legal minds, pointed out the immense advantage that judicial review gives to the administration of justice:

> The utility of an external [judicial] power restraining the legislative judgment is not to be measured by counting the occasions of its exercise. The great ideals of liberty and equality are preserved against the assaults of opportunism, the expediency of the passing hour, the erosion of small encroachments, the scorn and derision of those who have no patience with general principles, by enshrining them in constitutions, and consecrating to the task of their protection a body of defenders. By conscious or subconscious influence, the presence of this restraining power, aloof in the background, but none the less always in reserve, tends to stabilize and rationalize the legislative judgment, to infuse it with the glow of principle, to hold the standard aloft and visible for those who must run the race and keep the faith.
>
> Great maxims, if they may be violated with impunity, are honored often with lip-service, which passes easily into irreverence. The restraining power of the judiciary does not manifest its chief worth in the few cases in which the legislature has gone beyond the lines that mark the limits of discretion. Rather shall we find its chief worth in making vocal and audible the ideals that might otherwise be silenced, in giving them continuity of life and of expression, in guiding and directing choice within the limits where choice ranges. This function should preserve to the courts the power that now belongs to them.[56]

The doctrine of judicial review discussed by Mr. Justice Cardozo is not of American origin. Its first important advocate was the great common-law judge, Lord Chief Justice Coke, who told King James that, though the King was "under no man, he was under God and the law". The principle was best stated in *Bonham's* case:[57]

> And it appears in our books, that in many cases, the common law will control acts of parliament, and sometimes adjudge them to be utterly void: For when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such act to be void.

Legislatures and executives are frequently subjected to the pressures of politics. They are sensitive to arguments of expediency. They respond readily to pseudo-patriotic arguments. All these dangers make it exceedingly difficult for the individual, especially of an unpopular minority, to protect himself. By the

[55] Jefferson's Works, Vol. 3, page 223.

[56] Cardozo, The Nature of the Judicial Process (New Haven, 1921), pp. 93–94.

[57] (1610), 8 Co. 118.

very nature of their appointment, members of the legislature are representatives of the majority. At times it is politically dangerous even to express the views of minorities on unpopular issues. Thus decisions are often reached in legislative chambers without all sides of the case being stated.

No such inhibitions need interfere with the calm impartiality of the courtroom. The duty of the court when faced with an unpopular issue has been well stated by Mr. Justice Chapman of the Florida Court of Appeals in *Wilson* v. *Russell.*[58] The arguments of expediency and patriotism advanced by the respondent are weighty, said Mr. Justice Chapman, and

> if presented to a legislative body could not only be influential but convincing, or if made on the hustings, would be approved and applauded by the people, but a court in the discharge of duty under our system is required to be oblivious to public clamor, partisan demands, notoriety, or personal popularity and to interpret the law fearlessly and impartially so as to promote justice, inspire confidence and serve the public welfare

A tribunal deciding controversial issues under these conditions is much more able to reach conclusions consonant with justice than a body that is obliged to keep one eye on the press and the other on the ballot box.

In the final analysis, the dynamic power of the American Bill of Rights springs not only from the terms of the Amendments themselves, but also from the power of the courts to apply them. A very high valuation is placed thereby on the dignity of the individual. Mr. Justice Jackson of the Supreme Court expressed the American concept of citizenship in *Edwards* v. *California*:

> The power of citizenship as a shield against oppression was widely known from the example of Paul's Roman citizenship which sent the centurion scurrying to his higher-ups with the message: 'Take heed what thou doest; for this man is a Roman'. I suppose none of us doubts that the hope of imparting to American citizenship some of this vitality was the purpose of . . . the Fourteenth Amendment.[59]

Citizenship or domicile in the United States of America affords the individual more protection for his personal freedoms against the encroachment of governments, whether state or federal, than that available in any other of the United Nations. When a person appeals to the Bill of Rights, invoked through the aid of judicial review, any exercise of power, whether by the executive or legislature, will be scrutinized by the judiciary and weighed on the scales of freedom. Certainly the right of an individual in every one of the United Nations should be made as legally secure as it is in the United States.

[58] (1941), 146 Fla. 539; 1 So. 2d 569.
[59] (1942), 314 U.S. 160, at p. 182.