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CONSTITUTIONAL LAW - DUE PROCESS - FREEDOM OF RELIGION AND CONSCIENCE - COMPULSORY FLAG SALUTE

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CONSTITUTIONAL LAW — DUE PROCESS — FREEDOM OF RELIGION AND CONSCIENCE — COMPULSORY FLAG SALUTE — The minor plaintiffs, aged twelve and thirteen, had been excluded from the public school because of repeated refusal to salute the national flag and recite the pledge of allegiance in accordance with an authorized order of the school board. They sought an injunction in the federal district court against such prohibition, alleging that the order violated the Fourteenth Amendment as an infringement on the free exercise of religion in that their beliefs forbade the revering of anything but God. The injunction was granted [1] and the decree was affirmed by the circuit court of appeals.[2] A writ of certiorari was granted by the Supreme Court. *Held*, that it was within the power of the state to promote the national unity as symbolized by the flag, and that reasonable means chosen to achieve this end would not be considered a violation of the freedom of religion and conscience which is protected against state action by the Fourteenth Amendment. Justice Stone dissented on the ground that since other methods consistent with individual liberty were available for promoting patriotism and national unity, the Court should invalidate the requirement of a flag salute as an unjustifiable infringement upon freedom of conscience. *Minersville School District v. Gobitis*, (U. S. 1940) 60 S. Ct. 1010.

The rising tide of nationalism during the past few years has resulted in much legislation, not the least of which has been the extremely controversial flag

[1] Gobitis v. Minersville School District, (D. C. Pa. 1937) 21 F. Supp. 581.
[2] Minersville School District v. Gobitis, (C. C. A. 3d, 1939) 108 F. (2d) 683.

salute measures.[3] Jehovah's Witnesses, a small sect, have tested the validity of these measures at every opportunity, since their literal interpretation of the Bible has resulted in the religious belief that the practice of saluting the flag contravenes the law of God in that it constitutes a bowing down to a graven image.[4] Most of the state courts faced with this question have dismissed it lightly on the assumption that saluting the flag could have no religious connotation and necessarily could not collide with any constitutional guarantee of religious freedom.[5] In the principal case the Supreme Court recognized that freedom of conscience and of individual religious beliefs are included among the fundamental liberties

[3] They have evoked considerable comment: 34 MICH. L. REV. 1237 (1936); 36 MICH. L. REV. 485 (1938); 51 HARV. L. REV. 1418 (1938); 23 MINN. L. REV. 247 (1939); 27 GEO. L. J. 231 (1938); 18 ORE. L. REV. 122 (1938); 23 IOWA L. REV. 424 (1938); 2 UNIV. PITT. L. REV. 206 (1936); 4 UNIV. PITT. L. REV. 243 (1938); 86 UNIV. PA. L. REV. 431 (1938); 12 TEMPLE L. Q. 513 (1938); 23 CORN. L. Q. 582 (1938); Gardner and Post, "The Constitutional Questions Raised by the Flag Salute and Teachers' Oath Acts in Massachusetts," 16 BOST. UNIV. L. REV. 802 (1936); Clark, "The Limits of Free Expression," 73 U. S. L. REV. 392 (1939); 6 KAN. CITY L. REV. 217 (1938); 14 NOTRE DAME LAWY. 115 (1938); 8 GEO. WASH. L. REV. 1094 (1940); 24 MASS. L. Q., Nos. 2, 3, 4 (1939). These comments are in great part critical of the positions taken by the state courts in upholding the legislation.

[4] Book of Exodus, chapter 20, verses 3-5: "Thou shalt have no other gods before me. Thou shalt not make unto thee any graven image, or any likeness of any thing that is in heaven above, or that is in the earth beneath, or that is in the water under the earth. Thou shalt not bow down thyself to them, nor serve them, for I the Lord thy God am a jealous God."

[5] Hering v. State Board of Education, 117 N. J. L. 455, 189 A. 629 (1937), affd. per curiam, 118 N. J. L. 566, 194 A. 177 (1938), appeal dismissed per curiam 303 U. S. 624, 58 S. Ct. 752 (1938); Leoles v. Landers, 184 Ga. 580, 192 S. E. 218 (1937), appeal dismissed per curiam, 302 U. S. 656, 58 S. Ct. 364 (1937); Nicholls v. Mayor, 297 Mass. 65, 7 N. E. (2d) 577 (1937); State ex rel. Bleich v. Board of Public Instruction, 139 Fla. 43, 190 So. 815 (1939); Johnson v. Town of Deerfield, (D. C. Mass. 1939) 25 F. Supp. 918, affd. per curiam, 306 U. S. 621, 59 S. Ct. 791 (1939); People v. Sandstrom, 279 N. Y. 523, 18 N. E. (2d) 840 (1939); Gabrielli v. Knickerbocker, 12 Cal. (2d) 85, 82 P. (2d) 391 (1938), appeal dismissed and certiorari denied, 306 U. S. 621, 59 S. Ct. 786 (1939). These decisions were based on two misconceptions, first, that a person's religion and its obligations should be determined objectively, and second, that the decision of the Supreme Court in Hamilton v. Regents of University of California, 293 U. S. 245, 55 S. Ct. 197 (1936), was authority for their position. On this second point, see 24 MASS. L. Q., Nos. 2, 3, 4, (1939), indicating that it is one thing to condition entrance to college upon an act violating religious freedom and still another to so condition attendance at free public schools (with possible criminal liability of the parent and reform school for the child). On the first point, freedom to choose one's own religion, one's relations to his Maker and the obligations thereof, is basic to religious freedom. To allow a public officer to determine whether those convictions are religious is to sound the death knell of religious liberty. Prior decisions of the Court have recognized the subjective element of religious convictions. See Watson v. Jones, 13 Wall. (80 U. S.) 679 (1871); Reynolds v. United States, 98 U. S. 145 (1878); Davis v. Beason, 133 U. S. 333, 10 S. Ct. 299 (1890); Cantwell v. Connecticut, 310 U. S. 296, 60 S. Ct. 900 (1940).

protected by the due process clause. Earlier it had been held that the freedom of religion expressly secured against federal aggression by the First Amendment was not by implication included in the Fourteenth Amendment as a limitation on state action,[6] but a line of decisions culminating in *Cantwell v. Connecticut*[7] reversed that view.[8] Freedom of religion has been defined by the Court as absolute freedom of belief and thought and freedom of exercise of those beliefs and thoughts subject to regulation for the protection of society.[9] In the name of protection of society, legislation has been upheld prohibiting affirmative religious acts and practices that affected mental and physical health,[10] or that offended public ethics and morals.[11] Nor has it been doubted that politically organized society in furnishing a program of self-defense may disregard the scruples of a conscientious objector.[12] In the principal case the development of sentiment in favor of national cohesion and unity was considered to be sufficient to override the claim to freedom of conscience. But is it desirable to allow the liberties, usually considered to be basic in our political system, to be brushed aside so easily? [13] It is true that in questioning the means used by the legislature to reach an admittedly legitimate end the court must necessarily weigh factors of policy and formulate an opinion on matters extralegal in nature, i.e., matters which the members of the court are presumably no more competent to pass upon than other intelligent persons.[14] It is precisely on this issue, the scope of judicial

[6] Brunswick-Balke-Collander Co. v. Evans, (D. C. Ore. 1916) 228 F. 991; People ex rel. v. Board of Education, 245 Ill. 334, 92 N. E. 251 (1910).

[7] 310 U. S. 296, 60 S. Ct. 900 (1940).

[8] Meyer v. Nebraska, 262 U. S. 390, 43 S. Ct. 625 (1923); Pierce v. Society of Sisters, 268 U. S. 510, 45 S. Ct. 571 (1925); Stromberg v. California, 283 U. S. 359, 51 S. Ct. 532 (1931); Hamilton v. Regents of University of California, 293 U. S. 245, 55 S. Ct. 197 (1936); Cantwell v. Connecticut, 310 U. S. 296, 60 S. Ct. 900 (1940).

[9] Cantwell v. Connecticut, 310 U. S. 296, 60 S. Ct. 900 (1940).

[10] People v. Pierson, 176 N. Y. 201, 68 N. E. 243 (1903); State v. Verbon, 167 Wash. 140, 8 P. (2d) 1083 (1932); Vonnegut v. Baum, 206 Ind. 172, 188 N. E. 677 (1934); Knowles v. United States, (C. C. A. 8th, 1909) 170 F. 409; Delk v. Commonwealth, 166 Ky. 39, 178 S. W. 1129 (1915); New v. United States, (C. C. A. 9th, 1917) 245 F. 710.

[11] Reynolds v. United States, 98 U. S. 145 (1878); Davis v. Beason, 133 U. S. 333, 10 S. Ct. 299 (1890); Updegraph v. Commonwealth, 11 S. & R. (Pa.) 394 (1824).

[12] United States v. Mackintosh, 283 U. S. 605, 51 S. Ct. 570 (1931); Hamilton v. Regents of University of California, 293 U. S. 245, 55 S. Ct. 197 (1936). A good many problems here were avoided by exempting conscientious objectors from the draft laws.

[13] It has been suggested that since this nation has long been free from religious persecution it has perhaps become uninterested in the rights of minorities. 18 ORE. L. REV. 122 at 128 (1938).

[14] They must determine whether the end justifies the use of the particular means —simply a matter of individual opinion based on the sum total of a person's experience colored by his basic philosophy of living. See Biklé, "Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action," 38 HARV. L. REV. 6 (1924).

review, that the present Court split, the majority being of the opinion that in questionable cases personal freedom could best be maintained by the democratic process as long as the remedial channels of that process functioned.[15] Justice Stone thought that such an approach would result in a complete surrender of constitutional protection of minorities to the popular will. The required flag salute would seem to be of little efficacy when applied to persons sincerely believing it to be a sinful act,[16] and it is extremely doubtful whether it is desirable even when applied to children having no such beliefs.[17] It is premature to conclude that the Court has succumbed to a spirit of superpatriotism.[18] If individual liberties are something more than the by-product of a democratic process,[19] if in fact they have an intrinsic value worthy of protection, it is difficult to justify a decision which subordinates a fundamental liberty to a legislative program of questionable worth.[20]

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[15] Thereby distinguishing liberty of exercise of religion from liberty of speech, press and assemblage in that the latter are indispensable to the remedial channels of the democratic process. Compare Hague v. Committee for Industrial Organization, 307 U. S. 496, 59 S. Ct. 954 (1939); Schneider v. State, 308 U. S. 147, 60 S. Ct. 146 (1939); Thornhill v. Alabama, (U. S. 1940) 60 S. Ct. 736.

[16] See Shinn v. Barrow, (Tex. Civ. App. 1938) 121 S. W. (2d) 450. Judge Clark, Minersville School District v. Gobitis, (C. C. A. 3rd, 1939) 108 F. (2d) 683 at 691, quoting from Hensley, "The Constitutional Aspects of Compulsory Pledges of Allegiance and Salutes to the American Flag," THE LAWYER, November, 1939, p. 5 at 10, stated: "There is a psychological futility in compelling a child to salute the flag when that impinges on his or her religious tenets; such compulsion generates resentment, and is calculated to produce a precisely antithetical result to that which was planned by the authors of the flag-saluting ceremony." See also Judge Lehman's concurring opinion in People v. Sandstrom, 279 N. Y. 523 at 533, 18 N. E. (2d) 840 (1939), where it is suggested that the flag is soiled and dishonored by such compulsion when against the dictates of conscience.

[17] Minersville School District v. Gobitis, (C. C. A. 3rd, 1939) 108 F. (2d) 683 at 692.

[18] As was suggested in 35 TIME, No. 24, p. 22 (June 10, 1940).

[19] See note 15, supra.

[20] See the dissenting opinion of Chief Justice Hughes in United States v. Mackintosh, 283 U. S. 605, 51 S. Ct. 570 (1931).