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CONSTITUTIONAL LAW - FREEDOM OF RELIGION - COMPULSORY FLAG SALUTE

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RECENT DECISIONS

This section is divided into two parts: notes and abstracts. The abstracts consist merely of summaries of the facts and holdings of recent cases and are distinguished from the notes by the absence of discussion.

NOTES

CONSTITUTIONAL LAW — FREEDOM OF RELIGION — COMPULSORY FLAG SALUTE — The state of West Virginia enacted an amendment to its statutes in 1941 [1] requiring all schools to conduct courses in history and civics for the purpose of fostering "the ideals, principles and spirit of Americanism," and pursuant thereto the Board of Education adopted a resolution ordering that the flag salute and declaration of allegiance should be a regular part of the program of activities in the public schools. Expulsion from school was provided for nonconformity—and until compliance the child was considered unlawfully absent from school and the parents were liable to fine and imprisonment for causing child delinquency. Appellees were members of Jehovah's Witnesses, and brought suit to secure an injunction restraining the West Virginia Board of Education from enforcing the above regulation against them on the ground that it was contrary to their religious principles,[2] and hence a violation of freedom of religion and speech and due process and equal protection of the laws guaranteed by the Constitution. *Held,* the injunction should be granted. That national unity may be fostered "by persuasion" is not questioned; but to hold that conformity may be achieved by compulsion strikes at the heart of our form of government. Our government exists "by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent." The Court stated that the purpose of the Bill of Rights was to withdraw religious rights from the usual scope of legislative enactments and to remove them from the vicissitudes of political controversy. Such rights are susceptible of legislative restriction only to prevent grave and immediate danger to interests which the state may lawfully protect—and mere silence during a flag salute ceremony is not such a danger. *West Virginia State Board of Education v. Barnette,* (U.S. 1943) 63 S. Ct. 1178.

This is the sixth occasion on which a "flag salute" statute has been before the United States Supreme Court,[3] and on each previous occasion the Court has upheld the power of the state to impose such a regulation upon the activities program of its schools. Justice Stone in his dissent in the *Gobitis* case was the first justice to declare an objection to the exercise of such power by the state. The

[1] W. Va. Code (1941 Supp.), § 1734(9).

[2] The Jehovah's Witnesses considered that the flag is an "image" and that to salute it would be a violation of Exodus, Chapter 20, Verses 4 and 5—"Thou shalt not make unto thee any graven image. . . ."

[3] The previous occasions were: Leoles v. Landers, 302 U.S. 656, 58 S. Ct. 364 (1937); Hering v. State Board of Education, 303 U.S. 624, 58 S. Ct. 752 (1937); Gabrielli v. Knickerbocker, 306 U.S. 621, 59 S. Ct. 786 (1938); Johnson v. Deerfield, 306 U.S. 621, 59 S. Ct. 791 (1938); and Minersville School District v. Gobitis, 310 U.S. 586, 60 S. Ct. 1010 (1939) (Justice Stone dissenting).

force of the wisdom of this dissenting voice was soon manifested when three justices who had joined in the majority *Gobitis* opinion declared that they felt the case had been wrongly decided.[4] It was this shift of position which caused the Court to again review the problem. In the present case the majority of the Court interprets the "flag salute" statute as compelling the declaration of a belief and an attitude of mind, contrary to the precepts of the Bill of Rights. The Court would only sustain a statute compelling such a compliance on a showing that "remaining passive during a flag salute ritual creates a clear and present danger." [5] The main point of disagreement between the theory of the majority opinion and that of Justice Frankfurter's very forceful dissent is with respect to the position which the United States Supreme Court should take in determining the constitutionality of legislative enactments affecting civil rights. The opinion of the majority does not accord to civil rights statutes the presumption of constitutionality which is given to statutes dealing with economic rights.[6] Justice Frankfurter, on the other hand, objects to establishing the Supreme Court as a "super-legislature" with respect to civil rights.[7] Although the Court may strike down legislation the effect of which is either to promote or discourage some religious creed, "it by no means follows that legislative power is wanting whenever

[4] Justices Black, Douglas and Murphy expressed their disapproval of their previous position in the Gobitis case by stating in their dissent to Jones v. Opelika, 316 U.S. 584 at 623-624, 62 S. Ct. 1231 (1941): "Since we joined in the opinion in the Gobitis case, we think this is an appropriate occasion to state that we now believe that it also was wrongly decided."

[5] Instant case, 63 S. Ct. at 1183. The Supreme Court has continually used the "clear and present danger" standard for determining the constitutionality of federal and state legislation affecting civil rights under the First and Fourteenth Amendments, respectively. Schenck v. United States, 249 U.S. 47, 39 S. Ct. 247 (1918); Abrams v. United States, 250 U.S. 616, 40 S. Ct. 17 (1919); dissent of Holmes, J., in Gitlow v. New York, 268 U.S. 652, 45 S. Ct. 625 (1924); Schneider v. New Jersey, 308 U.S. 147, 60 U.S. 146 (1939); Thornhill v. Alabama, 310 U.S. 88, 60 S. Ct. 736 (1939); Cantwell v. Connecticut, 310 U.S. 296, 60 S. Ct. 900 (1939).

A proper application of this doctrine to the present facts would seem to indicate that mere silence during a flag salute ceremony does not create a clear and present danger to the existence of national unity.

[6] Schneider v. New Jersey, 308 U.S. 147 at 161, 60 S. Ct. 146(1939): "In every case therefore, where legislative abridgment of the rights [of freedom of speech and press] 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."

With respect to state legislation affecting economic policy, the Court has said, "the legislature is primarily the judge of the necessity of such an enactment . . . every possible presumption is in favor of its validity, and . . . though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power." Nebbia v. New York, 291 U.S. 502 at 537-538, 54 S. Ct. 505 (1933). See also McGoldrick v. Berwind-White Coal Co. 309 U.S. 33, 60 S. Ct. 388 (1939); West Coast Hotel Co. v. Parrish, 300 U.S. 379, 57 S. Ct. 578 (1936).

[7] Instant case, 63 S. Ct. at 1190.

a general non-discriminatory civil regulation in fact touches conscientious scruples or religious beliefs of an individual or group." [8] The decision in the *Gobitis* case was predicated upon the ground that the legislature, as well as the courts, were intended by the framers of the Constitution to be the guardians of our freedoms, and that it was constitutionally appropriate to "fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies rather than to transfer the contest to the judicial arena. . . ." [9] The position of the majority of the present Court is directly opposed to such an interpretation of the Constitution.[10] Probably no decision of the Supreme Court in recent years has been subjected to such violent criticism from all sides as was the *Gobitis* opinion.[11] Many persons attributed the attitude of the Court to the imminence of a second world war, requiring action to unify national sympathies and emotions. Perhaps the present successful trend of the war has allayed our first fears and we are now in a better position to view with a proper perspective the importance of the preservation of our civil liberties. In any event, the decision in the principal case is unanimously acclaimed as restoring our "freedoms" to the carefully guarded niche of constitutional interpretation which we have heretofore set aside for them.[12]

[8] Instant case, 63 S. Ct. at 1191. At page 1198 Justice Frankfurter urges that so long as there is a "rational justification" for the legislation it may not be declared unconstitutional; and in support of his position contends that such an enactment cannot be considered unreasonable in view of the fact that on past considerations of this problem thirteen justices of the Court have found such legislation constitutional.

In the opinion which he wrote for the majority in the Gobitis case Justice Frankfurter said, "the effective means for its [national unity] attainment are still so uncertain and so unauthenticated by science as to preclude us from putting the widely prevalent belief in flag-saluting beyond the pale of legislative power." 310 U.S. 586 at 598.

The majority opinion in the present case, however, insists upon examining the propriety of the statute, and finds that an attempt to coerce national unity would in all probability fan the flames of disunity and swell the ranks of the dissenters, and as a means to national unity would defeat its own purposes.

[9] 310 U.S. 586 at 600, 60 S. Ct. 1010 (1939).

[10] It is stated, 63 S. Ct. at 1185, "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy . . ."

[11] See Heller, "A Turning Point for Religious Liberty," 29 VA. L. REV. 440 at 450-452 (1943).

[12] See also citations in abstract of principal case, 42 MICH. L. REV. 187 (1943).