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FREEDOM OF RELIGIOUS WORSHIP

THOMAS H. SKEMP

THE First Amendment to the Constitution provides that "Congress shall make no law respecting an establishment of religion or prohibit the free exercise thereof." The Fourteenth Amendment to the Constitution provides "Nor shall any state deprive any person of life, liberty, or property, without due process of law." In the construction of the Fourteenth Amendment, courts have uniformly held that the word "liberty" embodied in that amendment embraces the liberties guaranteed by the First Amendment, so that, in effect, the Fourteenth Amendment provides that no state legislature or local unit of government has the power to make any law respecting an establishment of religion or prohibiting the free exercise thereof. The language of this prohibition appears so plain that one does not wonder at the fact that the Supreme Court of the United States had no occasion to pass upon the same until almost 100 years after adoption.

Not until 1925, in what is commonly known as the Oregon School Law case, *Pierce v. The Society of Sisters*,¹ did the prohibition against states and local units of government against the enactment of laws involving the question of religious freedom as imposed by the Fourteenth Amendment come before our United States Supreme Court. The State of Oregon had enacted a statute which required that all children between the ages of 8 and 16 years were required to attend the public schools of that state. The effect of that statute was to destroy all parochial and private schools engaged in the instruction of children within the ages prescribed by the law.

The main contentions before the court—which are of interest in the subject we are considering—were two, the natural right of parental control over children and the limitations on the police power of the state. In disposing of those issues the United State Supreme Court used the following language. "As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state. The fundamental theory of legislation upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

¹ 268 U.S. 510, 45 Sup. Ct. 571, 69 L.Ed. 1070 (1925).

In the last October term of our United States Supreme Court two important and far reaching opinions were handed down effecting religious freedom under the Fourteenth Amendment. In a single year the court passed upon issues, which, prior to that, it had occasion to pass on only twice before in a period of 153 years.

On May 29, 1940, the so-called Jehovah Witness case, *Cantwell v. State of Connecticut*,² was decided. A statute of the State of Connecticut was enacted prohibiting persons from making solicitations for any religious cause unless the cause had the approval of the Secretary of Public Welfare. To obtain a certificate of approval an application had to be made to the Secretary of Public Welfare who had the power to determine whether or not the cause was a religious one or a *bona fide* object of charity or philanthropy. Violation of the statute was punishable by fine or imprisonment. The appellants were members of a religious sect known as Jehovah's Witnesses. In expounding their doctrine they made a house to house canvass in the city of New Haven, Connecticut, without first securing a license. They were equipped with books, pamphlets, and a portable phonograph and a set of records. The persons called on were asked for permission to play one of the records. If the permission was granted the person was then solicited for the purchase of a book and on refusal was solicited for a contribution. One of the records entitled "Enemies" included an attack on the Catholic religion. The Supreme Court of the State of Connecticut, in sustaining a conviction of the members of the sect, held that the state law did not amount to an improper restraint on the exercise of their religion within the meaning of the Constitution but merely was a safeguard against the perpetuating of fraud under the cloak of religion. The United States Supreme Court in an opinion by Justice Roberts reversed the ruling of the Supreme Court of the State of Connecticut and held that the particular vice of the statute in question was found to lie in its provisions which permitted a previous restraint on the free exercise of religion in that it required a prior application to the Secretary of Public Welfare and empowered such Secretary to determine whether the cause in question was a religious one. The court said: "Such a censorship of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment and included in the liberty which is within the protection of the Fourteenth." In disposing of the argument that the act of the officer was subject to the restraint of judicial correction the court said: "A statute authorizing previous restraint upon the exercise of the guaranteed freedom by judicial decision after trial is as obnoxious to the Constitution as one providing for like restraint by administrative action."

² 309 U.S. 626, 60 Sup. Ct. 589, 84 L.Ed. 987 (1940).

In its opinion the court again took occasion to discuss the distinction between the "freedom to believe" and a "freedom to act" as had been previously applied in the case of *Reynolds v. United States*.³ The court said: "Thus the amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute, but in the nature of things the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection."

On June 3, 1940 the so-called Flag Salute case was decided by the United States Supreme Court.

Briefly the facts in that case are as follows: Two children of a family affiliated with a religious sect known as Jehovah's Witnesses refused to join in a ceremony required by the law of Pennsylvania to be performed by teachers and pupils of its free public schools. The ritual consisted of a salute to the flag and a pledge of allegiance to the republic for which it stands. On the grounds of religious belief these children refused to participate in the ceremony, and were expelled from school. The parents of the children sought to enjoin the school authorities from exacting participation in the flag salute ceremony and were given relief in the courts of Pennsylvania. On appeal to the Supreme Court of the United States the Pennsylvania courts were reversed and it was held that the state statute requiring children to salute the flag does not offend against the Fourteenth Amendment of the Federal Constitution which guarantees religious freedom. The majority opinion of the court was written by Mr. Justice Frankfurter. Mr. Justice Stone wrote an opinion in which he vigorously dissented from the majority rule.

The chief contentions in the case were: first, the right of a state legislature and local units of government to compel certain rituals or public affirmation in the promotion of national unity or nationalism even though such acts conflict with religious belief, and second, the right of judicial review.

As to the first of these issues the majority of the court held: (1) That it was in the province of state legislatures and local boards to determine the appropriate means (such as the salute of the flag) to instill in the minds of children in public schools "a cohesive sentiment"—in other words for the promotion of nationalism; (2) where there is a conflict of religious convictions and the political concern of society, the citizen is not relieved from the discharge of his political responsibilities.

On the other hand as to this issue, Justice Stone, in his minority opinion, takes the position that the Constitution is an absolute restraint

³ 98 U.S. 145 (1878).

on the authority of the legislature or a local unit of government to either compel belief or the expression of it where it violates religious conviction.

As to the second issue before the court, the right of judicial review, the majority of the court held: (1) that the court room is not the arena for debating educational systems; (2) that in promoting educational policy, such as nationalism the legislature and school boards have the power to determine the appropriate means to further the legitimate end; (3) that the legislature as well as the courts are committed to the duty of protecting liberty; and (4) it is not for the courts to decide the wisdom of the use of legislative authority.

Justice Stone in his dissenting opinion vigorously attacked the view of the majority as to this issue and contended that the right of judicial review must be maintained as a means of protection of small minorities. He contended that until this decision by the court that the right of judicial review had always been maintained and that it should not be deserted even where political policy was affected.⁴

Justice Frankfurter in the opening paragraph of his opinion acknowledges the importance of the matter at issue before the court. It is further noteworthy that the American Bar Association Committee on Bill of Rights and the American Civil Liberties Union filed briefs as friends of the court. The decision has provoked considerable editorial comment and in some quarters has been vigorously attacked as being a shift from the Oregon School Law decision.

Certain queries are prompted by the flag salute decision. First: Are we entering a period of political history where the development of a spirit of nationalism—or the so-called totalitarian philosophy of a powerful state—requires that the constitutional right of freedom of religion and the rights of people against their government be infringed so that our former concept of liberty must give way to the furtherance of the idea of political "cohesive sentiment"? Second: Is the court's new statement on the doctrine of judicial review a relinquishment of our previous concept of that doctrine which was looked to as a safeguard against majority tyranny and the protection of the right of helpless minorities?

⁴ *Minersville School District v. Gobitis*, 310 U.S. 586, 60 Sup. Ct. 1010, 84 L.Ed. 1375 (1940).