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The Scope Of Constitutional Guaranties Of Religious Freedom

NOTES

THE SCOPE OF CONSTITUTIONAL GUARANTIES OF RELIGIOUS FREEDOM

Americans have long been fortunate in that their basic constitutional rights have not been the subject of any wide-spread or concerted attack. For this reason, they feel secure in the enjoyment of their freedom. Freedom of speech, freedom of the press, freedom of religion, freedom from unlawful searches, and other liberties are taken for granted. Yet the rise of Nazi Germany stands as a lesson for all that the securing of freedom is never a guaranty of its permanence. The hard-won independence of the small countries of Europe vanished in a matter of days or even hours before the onrushing German armies. History has demonstrated again and again that freedom cannot be secured to the world merely by incorporating its principles into a treaty. No more can domestic liberties be made perpetual by the drafting of constitutions and constitutional amendments. Freedom must ever be the subject of constant vigilance or it will be lost. Americans must put aside their sense of security and examine the bases of their own rights, lest constitutional guaranties become mere empty phrases.

No better preface to a review of the present status of our constitutionally guaranteed rights can be found than the pointed observation of the late Mr. Justice Brandeis:

> "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficient. Men born to freedom are naturally alert to repel invasions of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."[1]

A late case before the Virginia courts presents an example of just such an "insidious encroachment" as Justice Brandeis must have had in mind. Two boys were found guilty of throwing stones against a dwelling in the night time. Separate judgments were entered declaring each to be a delinquent. In each judgment seven conditions of probation were imposed, depriving the boy of certain normal privileges and rights for one year. One of these ordered that each boy "attend Sunday school and Church each Sunday hereafter for a period of one year, and present satisfactory evidence of such attendance at the conclusion of each

[1]Olmstead v. United States, 227 U. S. 438, 479, 48 S. Ct. 564, 572, 72 L. ed. 944 (1928).

month to the Probation Officer." Appeals were taken to the Corporation Court of Bristol, where the judgments of the Juvenile and Domestic Relations Court were affirmed. The Supreme Court of Appeals reversed the judgments and dismissed the proceedings against each of the defendants on the ground that the judgments were contrary to the evidence and that the conditions of probation violated the constitutional rights of the defendants in that it required them to attend worship against their will.[2] Although such a decision may seem a rather obvious one in Virginia in the light of the State's Constitution[3] and Statute of Religious Freedom,[4] it nevertheless is fairly representative of the more recent approach to such issues both in other state courts and the Supreme Court of the United States.

The issue of religious freedom has been involved in a far greater number of cases than most Americans probably expect. It would seem that the scope of this liberty is not yet defined, but can still present problems of interpretation. In some of the cases the "religious" aspect is so far-fetched as to make obvious the danger that opponents of varied sorts of restrictive governmental regulations are ready and willing to attack them in the cause of religion.[5] However, the majority of the cases turn on the legitimate point of just how much liberty the courts are willing to accord individuals in the name of religious freedom. Most of these decisions can be grouped into a few rather logical categories.

The right of an individual to worship according to the dictates of his conscience is protected by three separate guaranties: the First

[2]Jones v. Commonwealth, 185 Va. 335, 38 S. E. (2d) 444 (1946).

[3]Va. Const. (1902) Art. I, § 16: "That religion or the duty which we owe to our creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence and, therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience and that it is the mutual duty of all to practice Christian forbearance, love and charity towards each other."

[4]Va. Code Ann. (Michie, 1942) § 34. This statute, written by Thomas Jefferson, was adopted by Virginia in 1785 and has formed a part of the Virginia Code since that date. It has been the model for similar statutes in many other states.

[5]State v. Powell, 58 Ohio St. 324, 50 N. E. 900, 41 L. R. A. 854 (1898). A statute prohibiting playing of baseball on Sunday neither requires nor prohibits any religious observance and therefore does not violate the Ohio constitutional guarantee of freedom of conscience in matters of religion. People v. Goldberger, 163 N. Y. S. 663 (1916). A statute making it a penal offense fraudulently to mark meat as "kosher" is not an invasion of religious freedom. People v. Byrne, 99 Misc. 1, 163 N. Y. S. 682 (1917). A penal law making it an offense to sell an article for the prevention of conception is not invalid as infringing inherent right of freedom of conscience.

Amendment to the Constitution of the United States, the individual state constitutional provisions, and the Fourteenth Amendment to the Federal Constitution. The latter, however, has not been recognized as encompassing religious freedom until a relatively recent time.[6] Prior to such recognition, the First Amendment was a guaranty solely against encroachments by acts of Congress. The majority of cases involved regulatory measures of state governmental agencies and so arose under the individual state constitutions. It was believed that the states were in no wise limited in their power to regulate religion except in so far as their individual state constitutions provided restrictions.[7] But as soon as the Fourteenth Amendment's protection against state governmental action was extended to cover those rights guaranteed by the First Amendment, the number of decisions rendered by the United States Supreme Court multiplied.

One group of cases arose in the federal courts in the period prior to the case of *Gitlow v. New York*,[8] the decision of which extended the coverage of the Fourteenth Amendment. These cases arose under the First Amendment in that the constitutionality of certain United States statutes prohibiting polygamy in territory under the exclusive control of the United States was in issue. The Supreme Court consistently denied that such a prohibition violated the constitutional guaranties of religious liberty. Running through these cases is the suggestion that such a statute does in fact restrict religious freedom, but that public policy could not permit the objection to stand.[9] Such cases no longer

[6]As late as 1907, Mr. Justice Holmes stated: "We leave undecided the question whether there is to be found in the 14th Amendment a prohibition similar to that in the 1st." Patterson v. Colorado, 205 U. S. 454, 462, 27 S. Ct. 556, 558, 51 L. ed. 878 (1907). But in 1925 the Supreme Court finally reached the conclusion that the rights guaranteed from abridgment by Congress under the 1st Amendment are among the fundamental rights protected by the due process clause of the 14th Amendment from impairment by the state. See Gitlow v. New York, 268 U. S. 652, 666, 45 S. Ct. 625, 630, 69 L. ed. 1138 (1925). Though this case dealt only with freedom of speech and of the press, it has been assumed that the same principle applies with equal force to freedom of religion and the other liberties guaranteed in the various clauses of the first amendment. See Minersville School District v. Gobitis, 310 U. S. 586, 593, 60 S. Ct. 1010, 1012, 84 L. ed. 1375, 127 A. L. R. 1493, 1495 (1940).

[7]Swafford v. Keaton, 23 Ga. App. 238, 98 S. E. 122 (1919); State v. Mockus, 120 Me. 841, 113 Atl. 39, 14 A. L. R. 871 (1921).

[8]268 U. S. 652, 45 S. Ct. 625, 69 L. ed. 1138 (1925).

[9]Reynolds v. United States, 98 U. S. 145, 167, 25 L. ed. 244 (1878): "To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances." And again in Davis v. Beason, 133 U. S. 333, 10 S. Ct. 299, 300, 33 L. ed. 637 (1889): "It was

arise, and undoubtedly the unanimous stand taken by the courts aided in achieving their disappearance. However, these cases do serve to illustrate one practical limitation to any concept of absolute religious freedom—that religious freedom cannot be asserted as a justification for the commission of the traditional criminal offenses. As one proceeds to cases which involve conduct differing from the normal, but still falling short of such conduct as would tend to produce any real and present threat to public order or morals, it becomes increasingly difficult to define limitations and maintain any continuity of reasoning.

The so-called "flag-salute" cases aroused much interest and comment during the war period. These cases arose because of the refusal of a religious sect known as Jehovah's Witnesses to salute the flag, on the ground that such a ceremony violates the scriptural prohibitions against the serving of false gods. Five cases in all reached the Supreme Court prior to 1940, but the most widely heralded of these was *Minersville School District v. Gobitis,* decided in that year.[10] Eight members of the Court decided that a requirement of a local board of education in Pennsylvania that pupils salute the American flag in daily school exercises did not violate the due process clause as applied to children who sought to avoid the exercises as an encroachment on their religious beliefs. The Court recognized that extensive leeway should be given religious beliefs but that this license could not be carried to the extent of excusing a citizen from the discharge of political responsibilities. Mr. Justice Stone was the sole member dissenting from this opinion.

Assuming that absolute religious freedom is intolerable and that limitations must be placed somewhere, this decision might well be regarded as the logical demarcation of religious and political spheres—a rendering unto Caesar the things that are Caesar's. Even the Jehovah's Witnesses, taking a literal interpretation of the Bible, admit the necessity of some forms of political conformity such as the payment of certain types of taxes. But on closer inspection it becomes apparent that the decision might open the door to a possible reconsideration on the question of exemption from military service because of conscientious objection.

This decision was not destined long to remain the law of the land.

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never intended or supposed that the Amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order, and morals of society."

[10]310 U.S. 586, 60 S. Ct. 1010, 84 L. ed. 1375, 127 A. L. R. 1493 (1940).

Following in its wake came a host of state statutes requiring compulsory flag salute exercises in the public schools. Jehovah's Witnesses are not easily discouraged, and although they denounce all government as an instrumentality of Satan, they are not hesitant about looking to the courts of that government for possible relief. They fought each case which arose against them with the result that within two years, three members of the Supreme Court announced that they had been in error in the *Gobitis* case.[11] As was to be expected after such a change of heart, the Supreme Court granted certiorari in the case of *West Virginia State Board of Education v. Barnette*,[12] which arose the following year. In reversing the previous holding of the *Gobitis* case, Mr. Justice Jackson pointed out that the decision had *assumed* that power exists in the State to impose the flag salute discipline upon school children in general. The Court had merely examined and rejected a claim of an immunity from the unquestioned general rule, an immunity based on religious beliefs. The very core of the *Gobitis* decision is the reasoning that "national unity is the basis of national security" and that the authorities have "the right to select appropriate means for its attainment." In the *Barnette* case, Mr. Justice Jackson questioned the existence of this alleged power of the State to compel outward manifestations of the desired inward inclinations, and concluded that such power does not in fact exist, and that such exercise of authority transcends the constitutional limitations which are designed to protect the intellect and spirit from official control.

Mr. Justice Frankfurter was not dissuaded from the position he assumed when he delivered the majority opinion in the *Gobitis* case. In a very lengthy dissent he advanced the belief that the *Barnette* decision was more far-reaching than the majority ever intended; that the Court was in fact passing judgment on the political power of each of

[11]This change of opinion occurred in conjunction with the case of Jones v. Opelika, 316 U. S. 584, 62 S. Ct. 1231, 86 L. ed. 1691 (1942). The majority of the Court in this case held that a non-discriminatory license fee required of all people distributing pamphlets on the city streets was not an infringement of the constitutionally guaranteed freedom of religion. In a dissenting opinion, Justices Murphy, Douglas, and Black stated: "The opinion of the Court sanctions a device which in our opinion suppresses or tends to suppress the free exercise of a religion practiced by a minority group. This is but another step in the direction which Minersville School District v. Gobitis... 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 this is an appropriate occasion to state that we now believe that it was also wrongly decided." 316 U. S. 584, 633, 62 S. Ct. 1231, 1251 (1942).

[12]319 U. S. 624, 63 S. Ct. 1178, 87 L. ed. 1628 (1943).

the forty-eight states.[13] Furthermore, he refused to accept the distinction drawn between this situation and that involved in *Hamilton v. Regents*[14] in which the Court had unanimously held that a student attending a state-maintained university cannot refuse to attend required courses in military training because of religious scruples. The majority distinguished the cases on the ground that attendance at a university is purely voluntary, whereas public school attendance is compulsory. Frankfurter took issue with the majority's assertion that attendance in the public schools is compulsory, pointing out that under an earlier rule handed down by the Supreme Court, West Virginia cannot compel children to attend its public schools.[15] He believed that just as the right of California was recognized in *Hamilton v. Regents*[16] to provide for future soldiers through compulsory military training in the state university, so West Virginia should be accorded the right to develop future citizens by requiring flag saluting exercises in its public schools.

In concurring opinions, Justices Black and Douglas "substantially" agreed with the majority as represented by Mr. Justice Jackson, but they stressed the point that this decision should not be interpreted as a blanket withdrawal of all restrictions and limitations on the exercise of religious freedom.[17]

In a separate concurring opinion, Mr. Justice Murphy expressed a belief that religious freedom should be upheld to "its farthest

[13]"When Mr. Justice Holmes, speaking for this court, wrote that 'it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts,' he went to the very essence of our constitutional system and the democratic conception of our society. He did not mean that for only some phases of civil government this Court was not to supplant legislatures and sit in judgment upon the right or wrong of a challenged measure. He was stating the comprehensive judicial duty and role of this Court in our constitutional scheme...."

"....Judges should be very diffident in setting their judgment against that of a state in determining what is and what is not a major concern, what means are appropriate to proper ends, and what is the total social cost in striking a balance of imponderables." West Virginia State Board of Education v. Barnette, 319 U. S. 624, 649, 652, 63 S. Ct. 1178, 1190, 1192, 87 L. ed. 1628 (1943).

[14]293 U. S. 245, 55 S. Ct. 197, 79 L. ed. 343 (1934).

[15]Pierce v. Society of Sisters, 268 U. S. 510, 45 S. Ct. 571, 69 L. ed. 1070, 39 A. L. R. 468 (1925). An oregon statute requiring all children to attend public schools was held to violate Fourteenth Amendment rights (1) of parents and children to select their own schools, and (2) of private schools not to have the value of their property destroyed without due process of law.

[16]293 U. S. 245, 55 S. Ct. 197, 79 L. ed. 343 (1934).

[17]"No well-ordered society can leave to the individuals an absolute right to make final decisions, unassailable by the State, as to everything they will or will

reaches."[18] This latter is the opinion of but one man; however, as can be seen from this and other recent cases, it marks the trend of thought of the present Supreme Court.

Closely paralleling the "flag-salute" cases has been another group of cases in which these same Jehovah's Witnesses have challenged the constitutionality of certain municipally-imposed vendor's taxes, licenses, and permits as constituting an infringement of their freedom of religion. Beginning in 1938, with *Lovell v. City of Griffin*,[19] the question of the validity of such ordinances has been repeatedly before the Supreme Court. There was considerable variation in the subject matter and wording of the ordinances involved in each of these cases, but up until 1940, when the flag-salute rule was upheld in the *Gobitis* case, the Supreme Court uniformly held such restrictive measures to be unconstitutional.[20] The temper of the Court of 1940 was evidenced in another case, *Cox v. New Hampshire*,[21] where a statute which required a permit to be secured before a parade could be staged was upheld. Seemingly inconsistent holdings which had been made prior to that time were distinguished on the ground that this statute did not give the city an arbitrary right to refuse permits for a parade. The previous cases had been held by the Supreme Court to involve arbitrary censorship. This was the first of the line of cases which might be regarded as a backward step from the direction of absolute religious freedom.

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not do. The First Amendment does not go so far. Religious faiths, honestly held, do not free individuals from responsibility to conduct themselves obediently to laws which are either imperatively necessary to protect society as a whole from grave and pressingly imminent dangers or which, without any general prohibition, merely regulate time, place or manner of religious activity." West Virginia State Board of Education v. Barnette, 319 U. S. 624, 643, 63 S. Ct. 1178, 1188, 87 L. ed. 1628 (1943).

[18]"There is before us the right of freedom to believe, freedom to worship one's Maker according to the dictates of one's conscience, a right which the Constitution specifically shelters. Reflection has convinced me that as a judge I have no loftier duty or responsibility than to uphold that spiritual freedom to its farthest reaches." West Virginia State Board of Education v. Barnette, 319 U. S. 624, 645, 63 S. Ct. 1178, 1188, 87 L. ed. 1628 (1943).

[19]303 U. S. 444, 58 S. Ct. 666, 82 L. ed. 949 (1938).

[20]Lovell v. City of Griffin, 303 U. S. 44, 58 S. Ct. 666, 82 L. ed. 949 (1938). A statute required written permission from the city manager to sell or distribute without cost literature of any kind. This was held unconstitutional in that it subjected such distribution to license and censorship. Schneider v. New Jersey, 308 U. S. 147, 60 S. Ct. 146, 84 L. ed. 155 (1939). Four cases were tried together. Three involved statutes prohibiting absolutely the distribution of pamphlets. One prohibited throwing papers on the streets. The Court held that it was unconstitutional to prohibit such distribution and that although the city had the power to prevent the littering of its streets, such power could only be invoked against those who actually threw

The next important case was that of *Jones v. Opelika,* decided in June, 1942,[22] which involved an ordinance requiring a license to sell pamphlets on the streets. The Court considered only the question of whether or not the license was discriminatory, and finding it not to be discriminatory, held it valid. Chief Justice Stone dissented and was joined by Justices Black, Murphy, and Douglas. It was here that the last three justices took the opportunity to express the opinion that the *Gobitis* case had been erroneously decided. Like the *Gobitis* case, this decision stood only a very short time. In May, 1943, the Court handed down thirteen decisions involving the Jehovah's Witnesses. One of these, *Murdock v. Pennsylvania,*[23] presented the same factual situation as *Jones v. Opelika,* and the Court decided that the tax was unconstitutional, overruling the *Jones* case. It was reasoned that the power to tax the exercise of a privilege is the power to control or suppress it.

The Court did not stop here. In *Follett v. Town of McCormick,*[24] a distributor of Jehovah's Witnesses' literature was held to be immune from an occupational license fee, admittedly non-discriminatory, even though his livelihood was derived entirely from such sales. Again, in *Marsh v. State of Alabama,*[25] the Court exceeded previous bounds and held it unconstitutional for an industrial town, owned entirely by a corporation, to attempt to exact a license fee for the distribution of religious tracts. The reasoning is summed up in the observation that "When we balance the Constitutional rights of owners of property against those of people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position."[26]

A minority of the Court, Mr. Justice Reed in particular, expressed alarm over the trend of these more recent cases. The majority decisions are interpreted as conferring an almost absolute immunity from tax-

papers on the streets and could not be invoked against those who merely provided the wherewithal. Cantwell v. Connecticut, 310 U. S. 296, 60 S. Ct. 900, 84 L. ed. 987 (1940). A statute required an official to pass upon the question of whether a given cause was religious in purpose as a condition to the issuance of a certificate of approval to solicit for a religious cause. The Court held that it violated the consituation in that it imposed censorship upon religious activity.

[21]312 U. S. 569, 61 S. Ct. 762, 85 L. ed. 1049 (1940).

[22]316 U. S. 584, 62 S. Ct. 1231, 86 L. ed. 1691 (1942).

[23]319 U. S. 105, 63 S. Ct. 870, 87 L. ed. 1292 (1943).

[24]321 U. S. 573, 64 S. Ct. 717, 88 L. ed. 938 (1944).

[25]326 U. S. 501, 66 S. Ct. 276, 90 L. ed. 237 (1946).

[26]326 U. S. 501, 66 S. Ct. 276, 280, 90 L. ed. 237 (1946).

ation on the Jehovah's Witnesses. Minority justices are unable to see how the same immunity can be denied to newspapers and radio stations on the ground that such taxation constitutes an infringement of the freedom of speech and of the press. Furthermore, they regard these cases as rendering property owners almost powerless to prevent unwanted trespassers from plaguing them in the name of religious freedom. Whether or not the fears of this minority are well founded remains to be seen.

A fourth group of cases is closely related to the "flag-salute" decisions in that they also involve the issue of religious freedom in the public schools. These cases, however, have been confined exclusively to the state courts. They involve the issue of whether the reading of the Bible in the public schools constitutes a violation of the individual state constitutional guaranties of religious freedom. The states are not in accord on this point. In at least five cases, the courts have held that such exercises did not violate the constitution.[27] Other jurisdictions take the opposite view, that such exercises violate their respective constitutional prohibitions against the establishment of a state religion and compulsory worship.[28] With the exception of the Wisconsin decision, these two groups can be reconciled on their facts: those cases holding such exercises to violate the constitutions all involved statutes which made no provision for the exemption of the children whose parents made objections; but those cases holding it permissible to read the Bible in the public schools, providing the teacher refrained from making comment, all involved non-compulsory type statutes. How-

[27]People ex rel. Vollman v. Stanley, 81 Colo. 276, 255 Pac. 610 (1927) (Bible reading is valid where the children whose parents object do not have to attend); Wilkerson et al. v. City of Rome, 152 Ga. 762, 110 S. E. 895 (1922) (Bible reading in schools valid where attendance is not compulsory); Moore v. Monroe and another, 64 Iowa 367, 20 N. W. 475 (1884) (Code section 1764 providing that "the Bible shall not be excluded from any school or institution in the state, nor shall any pupil be required to read it contrary to wishes of his parent or guardian," held not in violation of the constitution); Pfeiffer v. Board of Education of City of Detroit, 118 Mich. 560, 77 N. W. 250 (1898) (Distinguished Weiss case on difference in constitutional construction); Kaplan v. Independent School District of Virginia, 171 Minn. 142, 214 N. W. 18 (1927) (Requirement that the Bible be read in public schools valid where the children are excused if their parents object).

[28]People ex rel. Ring v. Board of Education of District 24, 245 Ill. 334, 92 N. E. 251 (1910) (Reading of the King James Version of the Bible held to be a discrimination against Catholics); Herold v. Parish Board of School Directors et al., 136 La. 1034, 68 So. 116 (1915) (Reading of the New Testament held to be a discrimination against Jewish pupils); State ex rel. Freeman v. Scheve, 65 Neb. 853, 91 N. W. 846 (1902); State ex rel. Weiss v. District Board of School District No. 8, 76 Wis. 177, 44 N. W. 967 (1890).

ever, in a case involving a statute which did not require attendance, the Wisconsin Supreme Court held the law unconstitutional on the reasoning that each religious sect bases its doctrine on some portion of the Bible and the reading of that portion would tend to inculcate that doctrine. Moreover, the withdrawal of a portion of the students at such time as the Bible was being read would tend to destroy the equality and uniformity of treatment of pupils sought to be established and protected by the constitution.[29]

It is interesting to speculate whether the United States Supreme Court would also strike down such statutes, in the light of its more recent decisions extending the protection of religious freedom. An answer to this question may eventually be presented in a test case which began in the state courts of Illinois in the summer of 1945.[30] A petition was filed by the wife of a member of the faculty at the University of Illinois, asking for a writ of mandamus to compel the local board of education to cease its present practice of requiring the reading of parts of the Bible in public school exercises. Though the children of objecting parents were specifically excused from the classes, plaintiff alleged that such practice constitutes an infringment of the constitutional rights of her child. The writ was denied in the Sixth Circuit Court at Champaign, Illinois, and appeal was taken to the Supreme Court of Illinois, which has not yet rendered a decision.† The results may prove significant in that plaintiff has declared her intention of appealing to the United States Supreme Court should she receive an adverse ruling in the highest court of Illinois.

There are two other cases which involve the issue of religious exercises in schools, but they differ from the above in that one arose in a state university and the other in a privately owned military school. In *North v. Trustees of University of Illinois*,[31] it was alleged that plaintiff's son was expelled because of his refusal to attend compulsory chapel exercises. Mandamus was sought to compel the school authorities to readmit the boy. In holding that mandamus would not lie, the court held that this regulation did not infringe the Illinois constitu-

[29]State ex rel. Weiss v. District Board of School District No. 8, 76 Wis. 177, 44 N. W. 967 (1890).

[30]McCollum v. Board of Education (see Newsweek Magazine, July 2, 1945, p. 76, and Sept. 24, 1945, p. 85; Time Magazine, Sept. 24, 1945, p. 66).

†On 22 Jan. 1947, the Illinois Supreme Court affirmed the lower court's decision, ruling that such voluntary classes, not part of the public school program nor supported by public money, do not encroach upon religious liberty. People ex rel. McCollum v. Board of Education of School District No. 71, 15 U.S. Law Week 2431.

[31]137 Ill. 296, 27 N. E. 54 (1891).

tion.[32] The court based its decision in part on the voluntary nature of enrollment in the university, and distinguished the Wisconsin case previously noted in that it related to the public schools. This is the same argument advanced by the United States Supreme Court in *Hamilton v. Regents* previously noted, but that this line of reasoning is not universally accepted is demonstrated by Mr. Justice Frankfurter's dissent in the *Barnette* case.[33]

The second case, *Miami Military Institute v. Leff*,[34] arose over an attempt on the part of the school to collect certain tuition fees from the defendant. He had admittedly contracted to pay these fees, but his son withdrew from school because he was being forced to go to church each Sunday even though there was no church of his faith for him to attend. The court held in part[35] that such a requirement violated the student's constitutional rights in that it compelled him to attend and support a place of worship contrary to his desires.

The only obvious conclusion that can be reached from a study of these cases is that the final word on the allowable limitations to religious freedom remains to be spoken. It is apparent that the trend of the recent cases toward greater freedom has been so rapid that a minority of the Supreme Court have come to believe that the proper constitutional limits have already been exceeded. The Supreme Court might conceivably continue on its present course until it reaches an ultimate conclusion that any form of restraint on absolute religious freedom violates the Constitution. On the other hand, the recent appointment of a new Chief Justice may conceivably upset the balance on the Court and result in a retreat from the present position. Inasmuch as the problem of religious liberty necessarily involves concepts and intangible standards, it would seem that the decisions must inevitably continue to be influenced to a considerable extent by the personal beliefs of the judges. The only key to such personal ideas lies in the statements made by the various men who have faced this problem in the past and at least part of whom may be called upon to decide similar issues in the future. By a comparison of these quotations, some conclusion might be reached as to whether the past and present justices of the Supreme Court believe religious freedom to be subject to any limitations, and if so, what are the proper limits.

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[32]Ill. Const., Art. 2, § 3: "No person shall be required to attend or support any ministry or place of worship against his consent."

[33]See text at footnote 15.

[34]129 N. Y. Misc. 481, 220 N. Y. Supp. 799 (1926).

[35]The school argued that such a regulation was part of their contract with the parent. The court found that it was not in fact a term of that contract, but would

Up until the time of the decision in *Jones v. Opelika* in 1942, there seems to have been no question in the minds of any of the justices then on the Supreme Court but that religious freedom was subject to some limitations. This is illustrated by the following portion of Mr. Justice Murphy's dissent to that case:

> "Freedom of speech, freedom of the press, and freedom of religion all have a double aspect—freedom of thought and freedom of action. Freedom to think is absolute of its own nature; .... But even an aggressive mind is of no missionary value unless there is freedom of action .... Since in any form of action there is a possibility of collision with the rights of others, there can de no doubt that this freedom to act is not absolute but qualified, being subject to regulation in the public interest which does not unduly infringe the right."[36]

No statement by any other justice has been found up until that time which would indicate a contrary opinion concerning the existence of proper limitations upon religious freedom, but the following year in a concurring opinion to the *Barnette* case, Mr. Justice Murphy seems to have undergone a change of mind:

> "But there is before us the right of freedom to believe, freedom to worship one's Maker according to the dictates of one's conscience, a right which the Constitution specifically shelters. Reflection has convinced me that as a judge I have no loftier duty or responsibility than to uphold that spiritual freedom to its farthest reaches."[37]

Whether or not Mr. Justice Murphy intended this statement to be construed as advocating a blanket withdrawal of all restraint it is not possible to say; however, it is the only statement to be found in any recent case which might possibly be conceived of as embodying such an idea.

The other justices who have written majority, concurring, or dissenting opinions in connection with the cases included in the scope of this review all have asserted that there are definite limits beyond which actions cannot be justified in the name of religious liberty. They have all indicated in some manner what they believe those proper limitations to be. These comments are herein set forth without any effort to classify or group them as to possible interpretation:

1. Justices Black and Douglas, concurring: "No well ordered

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be void, even if included, as an infringement of constitutionally guaranteed freedom of religion.

[36] 316 U. S. 584, 618, 62 S. Ct. 1231, 1249, 86 L. ed. 1691 (1942).

[37] 319 U. S. 624, 645, 63 S. Ct. 1178, 1188, 87 L. Ed. 1628 (1943).

society can leave to the individuals an absolute right to make final decisions, unassailable by the State, as to everything they will or will not do. The First Amendment does not go so far. Religious faiths, honestly held, do not free individuals from responsibility to conduct themselves obediently to laws which are either imperatively necessary to protect society as a whole from grave and pressing dangers or which, without any general prohibition, merely regulate time, place or manner of religious activity."[38]

2. Mr. Justice Roberts: "There are limits to the exercise of these liberties. The danger in these times from the coercive activities of those who in the delusion of racial or religious conceit would incite violence and breaches of the peace in order to deprive others of their equal right to the exercise of their liberties, is emphasized by events familiar to all. These and other transgressions of those limits the states appropriately may punish."[39]

3. Mr. Justice Reed: "Believing as this nation has from the first that the freedoms of worship and expression are closely akin to the illimitable privileges of thought itself, any legislation affecting those freedoms is scrutinized to see that the interferences allowed are only those appropriate to the maintenance of a civilized society."[40]

4. Mr. Justice Jackson: "Religious freedom in the long run does not come from this kind of license to each sect to fix its own limits, but comes of hard-headed fixing of those limits by neutral authority with an eye to the widest freedom to proselyte compatible with the freedom of those subject to proselyting pressures."[41]

5. Chief Justice Stone: "Concededly the constitutional guarantees of personal liberty are not always absolutes. Government has a right to survive and powers conferred upon it are not necessarily set at naught by the express prohibitions of the Bill of Rights. It may make war and raise armies. To that end it may compel citizens to give military service .... and subject them to military training despite their religious objections .... It may suppress religious practices dangerous to morals, and presumable those also which are inimical to public safety, health and good order...."[42]

6. Mr. Justice Frankfurter: "The constitutional protection of

[38]West Virginia State Board of Education v. Barnette, 319 U. S. 624, 643, 63 S. Ct. 1178, 1188, 87 L. ed. 1628 (1943).

[39]Cantwell v. State of Connecticut, 310 U. S. 296, 310, 60 S. Ct. 900, 906, 84 L. ed. 987 (1940).

[40]Jones v. Opelika, 316 U. S. 584, 595, 62 S. Ct. 1231, 1238, 86 L. ed. 1691. (1942).

[41]Douglas v. City of Jeannette, 319 U. S. 157, 180, 63 S. Ct. 882, 888, 87 L. ed. 1330 (1943).

[42]Minersville School District v. Gobitis, 310 U. S. 586, 602, 60 S. Ct. 1010, 1016, 84 L. ed. 1375 (1940).