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Constitutional Law--Religious Freedom--Flag Salute in Public Schools (Minersville School District v. Gobitis, 310 U.S. 586 (1940))

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to interfere with religious practices.[6] Freedom of speech is, likewise, not absolute but subject to the regulations for the common good. The state may regulate it in the course of exercising its police power,[7] but public power ends where an infringement of the fundamental rights begins.[8] A statute which allows an arbitrary denial and censorship of religion and speech is unconstitutional.[9] Regulation must be in the public interest, and non-discriminatory. In the instant case the right to solicit is made to depend upon the approval or disapproval of a particular religion by an administrative official. Such censorship violates the constitutional guaranties,[10] although a court may overrule the official's judgment. The state has the power to punish subsequent abuses and such power is consistent with the constitutional privileges.[11] Whether one has been denied the liberties guaranteed by the Fourteenth Amendment must appear from the facts of the case.[12] The state cannot abridge the constitutional liberty of one rightfully upon the street to impart information by speaking or distributing pamphlets, but it can lawfully regulate the conduct of those using the streets.[13] Treating the conviction of inciting a breach of the peace as analogous to a conviction under a statute containing the elements of that common law offense we see that the liberty of Cantwell has been unlawfully abridged. He preached his notion of religion and tried to persuade others to believe with him as he had a right to do under the Constitution.

L. S.

CONSTITUTIONAL LAW—RELIGIOUS FREEDOM—FLAG SALUTE IN PUBLIC SCHOOLS.—The Gobitis children, members of the sect known as "Jehovah's Witnesses", were expelled[1] from the Miners-

[6] *Ibid.*

[7] Gitlow v. People, 268 U. S. 652, 45 Sup. Ct. 625 (1925); Near v. Minnesota, 283 U. S. 697, 51 Sup. Ct. 625 (1931); State v. McKee, 73 Conn. 18, 46 Atl. 409 (1900); People v. Most, 171 N. Y. 423, 64 N. E. 175 (1902); N. Y. PEN. LAW §§ 160, 161 (anarchy).

[8] Near v. Minnesota, 283 U. S. 697, 51 Sup. Ct. 625 (1931); Schneider v. State, 308 U. S. 147, 60 Sup. Ct. 146 (1939).

[9] Lowell v. City of Griffin, 303 U. S. 444, 58 Sup. Ct. 666 (1938); Hague v. C.I.O., 307 U. S. 496, 59 Sup. Ct. 954 (1939); Schneider v. State, 308 U. S. 147, 60 Sup. Ct. 146 (1939) ("Conceding that fraudulent appeals may be made in the name of charity and religion, we hold a municipality cannot, for this reason, require all who wish to disseminate ideas to present them first to police authorities for their consideration and approval, with a discretion in the police to say some ideas may, while others may not, be carried to the homes of citizens; some persons may, while others may not, disseminate information from house to house. Frauds may be denounced as offenses and punished by law. Trespasses may similarly be forbidden").

[10] Schneider v. State, 308 U. S. 147, 60 Sup. Ct. 146 (1939).

[11] Near v. Minnesota, 283 U. S. 697, 51 Sup. Ct. 625 (1931).

[12] Schenck v. United States, 249 U. S. 47, 39 Sup. Ct. 247 (1919).

[13] Schneider v. State, 308 U. S. 147, 60 Sup. Ct. 146 (1939).

[1] Action of Superintendent claimed to be pursuant to regulation of Miners-

ville public schools because of their refusal to participate in the daily school exercise of saluting the national flag on the grounds that such a salute is forbidden by command of Scripture.[2] Their father then brought suit to enjoin the action of the school board. On *certiorari* to Supreme Court of the United States from judgment [3] of Circuit Court of Appeals affirming decree [4] of District Court granting injunction and affirming order [5] denying dismissal of complaint, *held,* reversed. The requirement of the Minersville school board that pupils salute the national flag in a daily school exercise as a condition of attendance does not infringe, without due process, the liberty guaranteed by the Fourteenth Amendment. *Minersville School District v. Gobitis,* 310 U. S. 586, 60 Sup. Ct. 1010 (1940).

The prevailing [6] opinion in the present [7] case seems to rest upon the ground that the task of determining what means are appropriate for promoting national unity through education should be left to the legislature or school boards, and not assumed by the courts. This is not denied. But it is respectfully maintained that when a measure, whose appropriateness has been affirmed by the legislature, is challenged on the constitutional ground of freedom of conscience, it is the function of the court to adjudicate the matter on the merits of the particular case. To proceed otherwise is practically to nullify whatever constitutional guaranties may be involved, since the legislative body is an interested party and hardly competent to judge the constitutionality of its own measures. Besides, experience shows that questions of practical importance—the need for immediate action, the apparent efficacy and appropriateness of a particular measure—may sometimes distract the attention of legislators from the constitutional question involved, or interfere, all unconsciously, with the accuracy of their judgment in that regard. Judicial review, therefore, would seem to be imperative.

A consideration of this case on its merits leads to the conclusion that national unity does not demand the infringement of religious liberty by the compulsory flag salute. In the first place, since patriotism

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ville Board of Education (Nov. 6, 1935) as authorized by legislature, prescribing instruction in "Civics and loyalty to the State and National Government." PURDON'S PENNSYLVANIA STATUTES, tit. 24, § 1551.

[2] Reliance is placed on the following verses from chapter 20 of *Exodus:*

"3 Thou shalt have no other gods before me.
4 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:
5 Thou shalt not bow down thyself to them, nor serve them:
* * *"

[3] 108 F. (2d) 683 (C. C. A. 3d, 1939).

[4] 24 F. Supp. 271 (E. D. Pa. 1939).

[5] 21 F. Supp. 581 (E. D. Pa. 1937).

[6] Mr. Justice Stone dissenting.

[7] For other cases involving flag salute see Leoles v. Landers, 302 U. S. 656, 58 Sup. Ct. 364 (1937); Hering v. State Board of Education, 303 U. S. 624, 58 Sup. Ct. 752 (1938); Gabrielli v. Knickerbocker, 306 U. S. 621, 59 Sup. Ct. 786 (1939); Johnson v. Deerfield, 306 U. S. 621, 59 Sup. Ct. 791 (1939);

and loyalty cannot be brought about by legislative compulsion, the chief value of the voluntary flag salute is lost when its performance becomes mandatory. The flag may be honored by the use of the police power in protecting it from desecration,[8] but it is "dishonored by a salute by a child in reluctant and terrified obedience to a command of secular authority which clashes with the dictates of conscience." [9]

It is conceded that there may be times when the government may lawfully demand a public and external manifestation of the loyalty of its citizens. But it has no right, in the face of religious protests, to demand that that manifestation assume a particular, arbitrary form, when some other and religiously unobjectionable form would serve its purpose equally well. If national unity may be attained and freedom of conscience left uninfringed by the use of means other than the flag salute, those means should be used.[10] Our national history bears eloquent testimony that there are such means. Patriotism and loyalty were not born in this country with the enactment of the first flag salute statute [11] and the educational system which cannot foster them without infringing liberty of conscience is on the verge of pedagogical bankruptcy.

To be sure, national unity, freedom and security are fostered by external marks of respect for the flag which symbolizes them. But they are, nevertheless, independent of these acts. To forget this fact is to risk falling into a dangerous formalism; it is to confuse the symbol with the thing symbolized; the shadow with the reality; flag waving with patriotism. The patriotism of the Gobitis children is not on trial. The lower courts found that there was no question of their substantial loyalty.[12] And when we have the substance of loyalty we can well afford to overlook the children's refusal to externalize it by some accidental and arbitrary form to which they objected on religious grounds. The greater danger lies in false professions of loyalty; the undetected enemy saluting the flag he plans to destroy. There seems to be no valid reason, then, for the denial to the Gobitis children of their freedom of conscience and the compulsory flag salute would appear to be an unjustified and unconstitutional use of the police power.

J. T. T., C.M.

Nicholls v. Mayor and School Committee of Lynn, 297 Mass. 65, 7 N. E. (2d) 577 (1937); People v. Sandstrom, 279 N. Y. 523, 18 N. E. (2d) 840 (1939).

[8] Halter v. Nebraska, 205 U. S. 34, 27 Sup. Ct. 419 (1907).

[9] People v. Sandstrom, 279 N. Y. 523, 539, 18 N. E. (2d) 840, 847 (1939).

[10] A parallel may be seen in the requirement in New York State that witnesses be examined under oath. The mode of swearing witnesses is prescribed by C. P. A. § 360. But religious objections thereto are respected by the provision of alternative forms. N. Y. CIV. PRAC. ACT §§ 361, 363, 364. Where religious scruples forbid the taking an oath of any kind, an affirmation may be substituted. N. Y. CIV. PRAC. ACT § 362.

[11] See 108 F. (2d) 683, 684 (C. C. A. 3d, 1939) (first flag salute statute, Kansas, 1907).

[12] 24 F. Supp. 271, 273 (E. D. Pa. 1939).