

## Constitutional Law--Freedom of Worship--Salute to the Flag (People ex rel. Fish v. Sandstrom, 167 Misc. 436 (1938))

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circulate<sup>23</sup> what he pleases,—subject, however, to the police power of the state.<sup>24</sup> This is the blind spot of the Amendments in question—depending as they do upon arbitrary and changeable concepts woven from the nebulous pattern of police power.<sup>25</sup> It is true that “the right of the press to state public things and discuss them \* \* \* as every other right enjoyed in human society, is subject to the restraints which separate right from wrong-doing,”<sup>26</sup> but we must take care lest this fundamental right be destroyed by an over-zealous imposition of arbitrary restraints.<sup>27</sup>

R. J. M.

CONSTITUTIONAL LAW—FREEDOM OF WORSHIP—SALUTE TO THE FLAG.—Defendants were convicted under Section 627 of the Education Law for failure to send their daughter to the public school or any other suitable school. Defendants and their daughter were members of a religious association called “Jehovah’s Witnesses”. As such they believed that to salute the flag contravened the laws of God, quoting from the Bible, Exodus, Chapter 20, verses 4 and 5: “Thou shalt not make unto thee any graven image \* \* \* thou shalt not bow down thyself to them \* \* \*.” They regard the regulation of the Commissioner of Education, under Section 712<sup>1</sup> of the Education Law, whereby pupils in the public schools were required to salute the United States flag as a violation of their right to religious liberty and freedom of worship. Their defense is the unconstitutionality of such regulation. *Held*, the section does not violate the constitutional rights of the defendants. Saluting the flag is not a religious rite and therefore does not interfere with their right to freedom of worship. The Government was in lawful pursuit of its duty to inculcate patriotism. Laws and regulations enacted for such purposes are to be obeyed by

<sup>23</sup> *People v. Armentrout*, 118 Cal. App. Supp. 761, 1 P. (2d) 556 (1931) (Freedom of speech and press includes liberty of circulating and publishing; to “publish” ordinarily meaning to disclose, reveal, proclaim, circulate or make public. [CALIF. CONST. art. I, §9].) *Ex parte Jackson*, 96 U. S. 727, 733 (1877). Liberty of circulating is as essential to the freedom of the press as liberty of publication; indeed, without the circulation, the publication would be of little value.

<sup>24</sup> See note 7, *supra*.

<sup>25</sup> See notes 12–19, *supra*.

<sup>26</sup> *Toledo Newspaper Co. v. United States*, 247 U. S. 402, 419, 38 Sup. Ct. 560 (1918).

<sup>27</sup> For other viewpoints see *Deutsch, Freedom of the Press and of the Mails* (1938) 36 MICH. L. REV. 703; Notes (1938) 13 ST. JOHN'S L. REV. 81, (1935) UNIV. OF CINC. L. REV. 265; (1935) 21 A. B. A. J. 595.

<sup>1</sup> N. Y. ED. LAW § 712: “It shall be the duty of the commissioner of education to prepare, for the public schools \* \* \* a program providing for the salute to the flag \* \* \*.”

everyone regardless of his religious belief or scruples. *People ex rel. Fish v. Sandstrom*, 167 Misc. 436, 3 N. Y. Supp. (2d) 1006 (1938).<sup>2</sup>

There is no doubt that "freedom of religion" is one of the rights which is protected by the Fourteenth Amendment<sup>3</sup> against abridgment by the states in the same manner as freedom of speech and freedom of the press.<sup>4</sup> The cases on this subject may be divided into four groups: (1) where the prohibition of the United States Constitution to establish a religion was allegedly violated by an act discriminating against another belief, either by giving preference to the tenets of one religion, or by unduly oppressing the other;<sup>5</sup> (2) where the adherents of a religion were enjoined from freely exercising their beliefs;<sup>6</sup> (3) where the members of one religion were compelled to

<sup>2</sup> This decision is in accordance with the judgments rendered in *Nichols v. Mayor*, — Mass. —, 7 N. E. (2d) 577 (1937) (petitioner, a child of eight years, was expelled from public school for refusing to salute the flag for the same reasons; writ of mandamus denied); *Leoles v. Landers*, 184 Ga. 580, 192 S. E. 218 (1937) (plaintiff, a child of twelve years, was expelled from school for the same reasons); *Hering v. State Board of Education*, 117 N. J. L. 455, 189 Atl. 629 (1937) (similar facts, but refusal not based upon religious belief; writ denied).

<sup>3</sup> The second sentence of the Fourteenth Amendment of the U. S. Constitution reads as follows: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny any person within its jurisdiction the equal protection of the laws."

<sup>4</sup> *Stromberg v. California*, 283 U. S. 359, 51 Sup. Ct. 532 (1930). Since the "freedom of religion" is also protected by the First Amendment, it would appear that it too would be protected by the Fourteenth Amendment from abridgement by the states.

<sup>5</sup> *People ex rel. Ring v. Board of Education*, 245 Ill. 334, 92 N. E. 251 (1910): "All sects, religions and even anti-religions stand on equal footing. They have the same rights of citizenship without discrimination." *Shreveport v. Levy*, 26 La. Ann. 671, quoted in *Herold v. Parish Board*, 136 La. 1034, 68 So. 116 (1915): "Before the Constitution Jews and Gentiles are equal; by the law they must be treated alike; and the ordinance \* \* \* which gives to one sect a privilege which it denies to another violates both the Constitution and the law, and is therefore null and void." But cf. *Pirkey Bros. v. Commonwealth*, 134 Va. 713, 114 S. E. 764, 765 (1922): "From the creation of the State until the present time, this State has been recognized as a Christian State." See *Frolicstein v. Mayor of Mobile*, 40 Ala. 725 ( ) cited by 2 COOLEY, CONSTITUTIONAL LIMITATIONS (8th ed. 1927) 983n. (statute not unconstitutional which prohibited a Jew who did not work on Saturday from selling goods on Sunday. *Contra*: *Johns v. State*, 78 Ind. 332, 334 (1881): "It was not the purpose of the law makers to compel any class of conscientious persons to abstain from labor upon two days in every week." Here the court sustained the constitutionality of a statute which exempted the observers of the seventh day of the week from abstaining work on Sunday.

<sup>6</sup> *Reynolds v. United States*, 98 U. S. 145 (1879) (bigamy sanctioned by defendant's religion not a good defense); *People v. Pierson*, 176 N. Y. 201, 211, 68 N. E. 243, 248 (1903) (religious belief no excuse where statute requires parents to provide medical attendance for their children when ill); *State v. White*, 64 N. H. 48, 5 Atl. 828 (1886) and *Commonwealth v. Plaisted*, 148 Mass. 375, 19 N. E. 224 (1889) (religious belief not a good defense to charge of disturbing the public peace by beating drums and playing cornets in the streets).

take part in the worship of another religion;<sup>7</sup> (4) where an individual was compelled to do an act which was contrary to his serious belief.<sup>8</sup> Under the Constitution no one can be prevented from believing, acting and worshiping God according to the principles of his religion. But this freedom ends when it comes in conflict with the law of the land.<sup>9</sup> The most important application of the rule in the fourth group is the provision to be found in many state constitutions relieving the conscientious objector from the obligation to bear arms. However, it must be noted that this privilege ends where the war power begins.<sup>10</sup> When we apply these principles to the instant case, we have to concede that saluting the flag is in no wise an act of worship within the meaning of the Constitution. Saluting the flag does not mean adoring God. It is a gesture of patriotism, signifying the respect for the American Government and its institutions and ideals, similar to rising to a standing position upon hearing the National Anthem. Consequently defendants' daughter, in the instant case, was not compelled against her consent and the wishes of her parents to perform an act of worship or to join therein.

Far more difficult is the question as to whether she was compelled to do an act which was contrary to her serious belief. All the cases which relate to this question are based upon the decision rendered by the Supreme Court in the case of *Hamilton v. Regents*.<sup>11</sup>

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<sup>7</sup> In *Herold v. Parish Board*, 136 La. 1034, 68 So. 116 (1915), cited *supra* note 5, the Supreme Court of Louisiana held that the reading of the Bible is religious instruction. In *People ex rel. Ring v. Board of Education*, 245 Ill. 334, 92 N. E. 251 (1910), cited *supra* note 5, the Supreme Court of Illinois held that listening to the sermon, reading the Holy Scriptures or having them read, constitute worship, and that the character of such exercises is not changed by the place of their performance. *Contra: Spiller v. Inhabitants of Woburn*, 12 Allen 127 (Mass. 1866), where the court held that reading from the Bible and saying a prayer by the teacher does not amount to a religious rite or ceremony.

<sup>8</sup> Enumerated by 2 COOLEY, *op. cit. supra* note 5, at 984, n. 1 and Cardozo, J., in the minority opinion in the case of *Hamilton v. Regents*, 293 U. S. 245, 55 Sup. Ct. 197 (1934).

<sup>9</sup> See note 6, *supra*.

<sup>10</sup> In *United States v. Mackintosh*, 283 U. S. 605, 51 Sup. Ct. 570 (1930) the Supreme Court held that this privilege comes from the acts of Congress and may be revoked by the latter. "No other conclusion is compatible with the well nigh limitless extent of the war powers which include the power, in the last extremity, to compel the armed service of any citizen in the land without regard to his objections or his views in respect of the justice or morality of the particular war or of war in general."

<sup>11</sup> 293 U. S. 245, 55 Sup. Ct. 197 (1934). Appellants, students of the university, were suspended upon their refusal to take the prescribed courses in military training because of their religious objections as adherents of the Methodist Episcopal Church. The court, denying relief, said: "California has not drafted or called them to attend the university. They are seeking education offered by the State and at the same time insisting that they are excluded from the prescribed course solely upon grounds of their religious beliefs. Appellants' contention amounts to no more than an assertion that the due process clause of the Fourteenth Amendment confers upon them the right to be students in the State University free from the obligation to take military training. Viewed in

Relying on the reasoning of that case the court in *Hering v. State Board of Education*<sup>12</sup> came to the conclusion that since the salute to the flag was required in public schools only and since children are not required to attend a public school, the prosecutor's children might "seek their schooling elsewhere". But where there is no school, other than the public school in the district where the children reside, or where the parents are unable to pay for other schooling, the advice "they can seek their schooling elsewhere" is impracticable. The instant case is clearly distinguishable from the *Hamilton* case. The defendants here were under a duty to send their child to school while in the *Hamilton* case, the students were not compelled to attend the university. It would seem that this case is decided on principles more vital and fundamental than were necessary to decide the *Hamilton* case.

P. S.

CONSTITUTIONAL LAW—REGULATION OF INTERSTATE COMMERCE IN FOOD—FILLED MILK ACT.—Defendant was indicted for violation of the Filled Milk Act<sup>1</sup> which prohibits the shipment in interstate commerce of skimmed milk compounded with any oil or fat other than milk fat so as to resemble milk or cream. On appeal by the United States from a judgment sustaining a demurrer to the indictment, *held*, reversed. The statute is not unconstitutional on its face. It is a valid regulation of interstate commerce and is not violative of the due process clause of the Fifth Amendment.<sup>2</sup> *United States v. Carolene Food Products Co.*, — U. S. —, 58 Sup. Ct. 778 (1938).

Congress may regulate interstate commerce to prevent its use in the promotion of immoral or dishonest projects.<sup>3</sup> Its channels may be closed to those articles which are injurious to the public health.<sup>4</sup> Such regulation is not invalid as invading the rights reserved to the states merely because it has the qualities of police regulation usually exer-

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the light of our decisions that proposition must at once be put aside as untenable."

<sup>12</sup> 117 N. J. L. 455, 189 Atl. 629 (1937).

<sup>1</sup> 42 STAT. 1486 (1923), 1 U. S. C. § 61 (1934).

<sup>2</sup> Cf. *Hebe Co. v. Shaw*, 248 U. S. 297, 39 Sup. Ct. 125 (1918) (wherein it was held that a state law forbidding the manufacture and sale of skim milk compounded with cocoanut oil was not invalid under the Fourteenth Amendment).

<sup>3</sup> *Reid v. Colorado*, 187 U. S. 137, 23 Sup. Ct. 92 (1902); *Lottery Case*, *Champion v. Ames*, 188 U. S. 321, 23 Sup. Ct. 321 (1902); *Hipolite Egg Co. v. United States*, 220 U. S. 45, 31 Sup. Ct. 364 (1910); *Hoke v. United States*, 227 U. S. 308, 33 Sup. Ct. 281 (1912); *United States v. Hill*, 248 U. S. 420, 39 Sup. Ct. 143 (1918); *Brooks v. United States*, 267 U. S. 432, 45 Sup. Ct. 435 (1924).

<sup>4</sup> See note 3, *supra*.