

## LIBERTY UNDER THE FOURTEENTH AMENDMENT: 1942-1943

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A year ago an attempt was made to survey the status of the fundamental rights guaranteed by the Bill of Rights with respect to their protection against State abridgment.<sup>1</sup> It was observed that the struggle to obtain for these liberties constitutional protection against State abridgment, as well as against Federal abridgment, had been almost continuous since the adoption of the Constitution; that Madison had sought—unsuccessfully—to provide in the Bill of Rights such guaranties for freedom of speech and of the press, for religious freedom, and for the right of trial by jury in criminal cases;<sup>2</sup> that notwithstanding this failure the explosive force of the concept that these fundamental rights and liberties must somehow be safeguarded by the Bill of Rights against State denial was so great as to keep the question almost constantly before the Supreme Court from 1833 to 1913; that with the adoption of the Fourteenth Amendment in 1868 firmer pegs were found on which to hang the claim to constitutional protection, the contention being made—again unsuccessfully, on the whole—for some fifty years that these liberties were “privileges or immunities,” protected by that clause of the Amendment; and that eventually, in 1925, *Gitlow v. New York*<sup>3</sup> established the protection for freedom of speech and of the press, as integral parts of the “liberty” which the due process clause safeguards against State deprivation.<sup>4</sup>

The inclusion in liberty, in 1937, of the right of peaceable assembly,<sup>5</sup> also guaranteed by the First Amendment, and the

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1. Green, *Liberty Under the Fourteenth Amendment* (1942) 27 WASHINGTON U. LAW QUARTERLY 497.

2. For an admirable discussion of this, see Warren, *The New “Liberty” under the Fourteenth Amendment* (1926) 39 Harv. L. Rev. 431, 433-435.

3. (1925) 268 U. S. 652.

4. Originally “liberty” had meant simply freedom from physical restraint. The expansion to include these freedoms resulted from the earlier expansion to include liberty of contract. See Green, *supra* note 1, at 505-514.

5. *DeJonge v. Oregon* (1937) 299 U. S. 353. See also *Herndon v. Lowry* (1937) 301 U. S. 242; and *Hague v. C. I. O.* (1939) 307 U. S. 496. With respect to protection of the right to petition for a redress of grievances,

Court's oddly slow progress toward the same result with respect to religious freedom, which ultimately obtained protection in 1940,<sup>6</sup> were discussed, as was also the incomplete development of protection of the fundamental rights which the Bill of Rights guarantees to the accused in a criminal prosecution, notably the privilege against self-incrimination, guaranteed by the Fifth Amendment, and the right to the aid of counsel, guaranteed by the Sixth.<sup>7</sup>

The Court at its 1942 term, just closed, decided several cases in this field which are not without interest, and one which is of the highest importance. With regard to the effects of the new liberty, it was observed a year ago that, since abridgment of freedom of expression and of religious freedom was attempted much more often by the States (including their municipalities, counties, school boards, and courts) than by the Federal Government, protection of these freedoms against State denial had immediately vitalized the First Amendment into a safeguard of great practical importance, giving it effect where it was needed rather than where it was seldom required.<sup>8</sup> The decisions of the 1942-1943 term confirm this conclusion. In the seventeen years between 1925 and 1942 the Court had had presented to it no less than thirty-two times the claim that State action had denied a right guaranteed by the First Amendment, whereas in the same period a similar claim appeared to have been made only three

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exercised independently of any assembly, see *Bridges v. California* (1941) 314 U. S. 252, 277.

6. *Cantwell v. Connecticut* (1940) 310 U. S. 296.

7. See Green, *supra* note 1, at 529-535.

8. Green, *supra* note 1, at 535-536.

9. In only one of these three cases did the Court find a possible Federal abridgment: *National Labor Relations Board v. Virginia Electric & Power Co.* (1941) 314 U. S. 469. There an order of the National Labor Relations Board was held to abridge the employer's freedom of speech with his employees, unless it was supported by evidence of related coercion. When this case again reached the Court at the 1942 term, the Court held that the Board's new findings and conclusions were "not subject to the infirmities of the original ones," and that the employer's bulletin and speeches had been "considered not in isolation but as part of a pattern of events adding up to the conclusion of domination and interference." *Virginia Electric & Power Co. v. National Labor Relations Board* (1943) 63 S. Ct. 832. The Court's earlier decision appears to have caused the Board to modify its practice in this matter. See *In re Essex Rubber Co.* (1943) NLRB Case No. C-3526, 11 U. S. Law Week 1199, 2887. A similar question may be considered by the Court at its 1943 term. *Trojan Powder Co. v. National Labor Relations Board* (1943) 135 F. (2d) 337 (certiorari applied for July 27, 1943).

times<sup>9</sup> with respect to Federal action. The Court's opinions at the term just closed deal with nine claims of State denial of these liberties, but with only two claims of Federal denial.<sup>10</sup> The 1925-1943 totals are therefore forty-one claims of State abridgment, and five of Federal.<sup>11</sup>

#### FREEDOM OF SPEECH AND OF THE PRESS

The development of freedom of speech and of the press, following their inclusion in liberty in 1925, had been so rapid that in 1941 it was possible for Mr. Justice Frankfurter to say that "in a series of opinions as uncompromising as any in its history, this Court has settled that the fullest opportunities for free discussion are 'implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment,' protected against attempted invasion by the States."<sup>12</sup> The earlier cases had dealt with utterances of an essentially political nature, but the Court, quickly moving beyond these limits, had made it clear that the

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10. The cases of State abridgment are the following: *Largent v. Texas* (1943) 63 S. Ct. 667; *Jamison v. Texas* (1943) 63 S. Ct. 669; *Murdock v. Pennsylvania* (1943) 63 S. Ct. 870; *Douglas v. Jeannette* (1943) 63 S. Ct. 877; *Martin v. Struthers* (1943) 63 S. Ct. 862; *West Virginia State Board of Education v. Barnette* (1943) 63 S. Ct. 1178; and *Taylor v. Mississippi* (1943) 63 S. Ct. 1200 (embracing three independent cases). All of these are discussed in the text. Cf. *Tileston v. Ullman* (1943) 63 S. Ct. 493, where a physician claimed that a Connecticut statute prohibiting the giving of professional advice concerning contraceptives violated the Fourteenth Amendment, not because it deprived him of freedom of speech, but because it endangered the lives of his patients.

The two cases in which the claim of Federal abridgment was made were *National Broadcasting Co. v. United States* (1943) 63 S. Ct. 997 (Federal Communications Commission's network broadcasting regulations held not to abridge freedom of speech) and *Busey v. District of Columbia* (1943) 63 S. Ct. 1277, remanding the conviction of Jehovah's Witnesses for selling religious magazines without paying the license tax required by a District of Columbia statute. This case, although a Federal abridgment, involved what was essentially a municipal ordinance.

In all computations memoranda cases have been excluded.

All of the cases of State abridgment during the term were the result of challenges of statutes or ordinances by Jehovah's Witnesses. This mass production of litigation by a single sect may tend to distort the statistics, but the wide geographical distribution of these cases should not be overlooked. There was no such predominance of Jehovah's Witnesses prior to the 1942 term, although in recent years where had been an increasing percentage of cases involving their activities.

11. In thirty-one of the forty-one State cases, which commence with *Gitlow v. New York* (1925) 268 U. S. 652, the Court sustained the claim, and one of the remaining ten has since been overruled. In two of the five Federal cases the claim was sustained, but see notes 9 and 10, supra, as to these.

12. *Bridges v. California* (1941) 314 U. S. 252, 281-282.

scope of the constitutional guaranty was general, and in no way dependent upon the subject of the utterance.<sup>13</sup> It seemed, until 1942, that consideration of the status of these freedoms might well be confined to the clear and present danger test.

However, in *Valentine v. Chrestensen*,<sup>14</sup> in 1942, a unanimous court, through Mr. Justice Roberts, holding that a New York ordinance prohibiting the distribution of advertising matter on the streets was valid, said that, while the streets were "proper places for the exercise of the freedom of communicating information and disseminating opinion," and this privilege might not be unduly burdened or prescribed, the Court was "equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising." The ordinance may very well have been valid, but it is another thing to say that "commercial advertising" is (presumably because tainted by the profit motive of the advertiser) wholly outside the protection of the First Amendment. After all, these freedoms are the right of the listener as well as of the speaker, of the reader as well as of the publisher; and there are other fundamental reasons why the proposition cannot be maintained.<sup>15</sup>

The Court's four references,<sup>16</sup> at its 1942 term, to this decision are hardly enlightening, although they show at least an avoidance of the suggestion that commercial advertising is not within the shield of the First Amendment. In addition, Mr. Justice Jackson remarked in *Murdock v. Pennsylvania*<sup>17</sup> that in his view "the First Amendment assures the broadest tolerable exercise of free speech, free press, and free assembly, not merely for religious purposes, but for political, economic, scientific, news or informational ends as well." Although this is (unfortunately, I think) phrased in terms of areas, the areas are broad enough to make the exclusion of commercial advertising at least difficult.

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13. See *Near v. Minnesota* (1931) 283 U. S. 697; *Grosjean v. American Press Co.* (1936) 297 U. S. 233; *Lovell v. Griffin* (1938) 303 U. S. 444; *Schneider v. Irvington* (1939) 308 U. S. 147.

14. (1942) 316 U. S. 52, 54.

15. See Green, *supra* note 1, at 558-559. The opinion may have been influenced by loose language used in some of the picketing cases, commencing with *Thornhill v. Alabama* (1940) 310 U. S. 88, 102, regarding an "area of free discussion that is guaranteed by the Constitution."

16. By Mr. Justice Black in *Jamison v. Texas* (1943) 63 S. Ct. 669, 87 L. ed. 629; by Mr. Justice Douglas in *Murdock v. Pennsylvania* (1943) 63 S. Ct. 870, 87 L. ed. 827; by Mr. Justice Jackson in *Murdock v. Pennsylvania* (1943) 63 S. Ct. 882; and by Mr. Justice Black in *Martin v. Struthers* (1943) 63 S. Ct. 862, 87 L. ed. 861.

17. (1943) 63 S. Ct. 882, 888.

With one exception, all of the Jehovah's Witnesses cases at the 1942 term involved religious freedom as well as freedom of expression. While some of these may be of equal importance to both freedoms, they are considered below under freedom of religion. The exception is *Taylor v. Mississippi*,<sup>18</sup> where the Court, through Mr. Justice Roberts, held that freedom of speech and of the press were abridged by a Mississippi statute which prohibited, amongst other things, the dissemination, orally, by phonograph, or by the distribution of literature, of teaching "designed and calculated" to encourage disloyalty, and also action or speech which "reasonably tends to create an attitude of stubborn refusal to salute, honor or respect the flag." Convictions for advocating refusal to salute the flag were reversed because, the Court said, if the Fourteenth Amendment bans enforcement of the school regulation,<sup>19</sup> a fortiori it prohibits punishment for advocating non-compliance on religious grounds; while the convictions for utterance calculated to encourage disloyalty failed to meet the clear and present danger test.

#### THE FREE EXERCISE OF RELIGION

In *Largent v. Texas*<sup>20</sup> the Court, through Mr. Justice Reed, reversed the conviction of one of Jehovah's Witnesses, under a municipal ordinance which required a permit, issuable in the Mayor's discretion, for the sale of books in the residential portion of the city. The Court said that this was "administrative censorship in an extreme form," and abridged alike "the freedom of religion, of the press and of speech guaranteed by the Fourteenth Amendment." On the same day, in *Jamison v. Texas*,<sup>21</sup> the Court, through Mr. Justice Black, held that a Dallas ordinance prohibiting the distribution of handbills on the streets was, when applied to one of Jehovah's Witnesses, a denial of freedom of the press and of religious freedom. There was no dissent in either case.<sup>22</sup> With these decisions, *Cantwell v. Connecticut*<sup>23</sup>

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18. (1943) 63 S. Ct. 1200.

19. *W. Va. Board of Educ. v. Barnette* (1943) 63 S. Ct. 1173, 87 L. Ed. 1171, discussed below.

20. (1943) 63 S. Ct. 667, 87 L. ed. 627.

21. (1943) 63 S. Ct. 669, 87 L. ed. 629.

22. Both decisions were rested on the earlier cases: *Lovell v. Griffin* (1938) 303 U. S. 444; *Schneider v. Irvington* (1939) 308 U. S. 147; and *Cantwell v. Connecticut* (1940) 310 U. S. 296. See Green, *supra* note 1, at 518-519, for discussion of these.

ceased to be the only instance in which the Court had protected religious freedom.

This was the prelude to the issue which, on the last day of the 1941 term, had divided the Court. A 5 to 4 majority had upheld, in *Jones v. Opelika*,<sup>24</sup> the convictions of Jehovah's Witnesses for selling religious literature in violation of three municipal ordinances, all of which imposed flat license fees, and one of which also provided discretionary power to revoke the license. At the 1942 term one of the majority, Mr. Justice Byrnes, resigned, and Mr. Justice Rutledge took his place.<sup>25</sup> Thereafter the Court granted rehearing,<sup>26</sup> the case was reargued, the earlier judgment was vacated, and the convictions reversed.<sup>27</sup> This result was due simply to the substitution of Mr. Justice Rutledge for Mr. Justice Byrnes; no member of the Court changed his mind.

The case was unfortunately neither heard nor decided alone; it was commingled with a number of other cases, and the opinions in this group (ten in all) suffer by reason of this. In the *Opelika* case were already embraced three ordinances, by no means identical in their requirements;<sup>28</sup> now the Court merged with these eight new cases where Jehovah's Witnesses had been convicted of selling religious literature in violation of an ordinance of Jeannette, Pennsylvania (*Murdock v. Pennsylvania*<sup>29</sup>), and by a series of overlapping opinions decided simultaneously *Douglas v. Jeannette*,<sup>30</sup> a suit to enjoin prosecutions under this ordinance, and *Martin v. Struthers*,<sup>31</sup> a conviction under an ordinance of Struthers, Ohio, which made it unlawful "for any person distributing handbills, circulars or other advertisements to ring the doorbell, sound the door knocker or otherwise summon"

23. (1940) 310 U. S. 296.

24. (1942) 316 U. S. 584, discussed in Green, *supra* note 1, at 524-527.

25. Shortly before *Jones v. Opelika*, Mr. Justice Rutledge, then a judge of the United States Court of Appeals for the District of Columbia, had expressed [in a dissenting opinion in *Busey v. District of Columbia* (1942) 129 F. (2d) 24] the view which the *Opelika* minority subsequently had taken.

26. *Jones v. Opelika* (1943) 63 S. Ct. 658, 87 L. ed. 515. See Fuchs, *The Judicial Art of Wiley B. Rutledge*, 28 WASHINGTON U. LAW QUARTERLY (1943) 115, 142-144.

27. (1943) 63 S. Ct. 890, 87 L. ed. 515.

28. See Green, *supra* note 1, at 524 note.

29. (1943) 63 S. Ct. 870, 87 L. ed. 827.

30. (1943) 63 S. Ct. 877, 87 L. ed. 855.

31. (1943) 63 S. Ct. 862, 87 L. ed. 861.

the inmate to the door to receive the circulars. The second *Jones v. Opelika*<sup>82</sup> is a short per curiam memorandum, reversing the convictions for the reasons stated in the dissenting opinions at the previous term, and in the *Murdock* case.

In the *Murdock* case<sup>83</sup> the Court held that the flat license tax imposed by the ordinance was in substance a tax laid specifically on the free exercise of religion and on the exercise of the freedoms of speech and of the press, and hence violated the Fourteenth Amendment. Mr. Justice Douglas (speaking for the four dissenters in the first *Opelika* case, and for Mr. Justice Rutledge) said that "the hand distribution of religious tracts is an age-old form of missionary evangelism . . . It is more than preaching; it is more than a distribution of religious literature. It is a combination of both. . . . It has the same claim to protection as the more orthodox and conventional exercises of religion." The solicitation of funds or the invitation to purchase books which accompanied this did not "transform evangelism into a commercial enterprise. If it did the passing of the collection plate in church would make the church service a commercial project." "It is one thing," he said, "to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon." As Mr. Chief Justice Stone had done in the first *Opelika* case, Mr. Justice Douglas argued that a flat license tax, fixed in amount and unrelated to the scope of the activities or the revenue derived therefrom, restrains in advance "those constitutional liberties of press and religion and inevitably tends to suppress their exercise," having indeed as potent a destructive influence "as the power of censorship which this Court has repeatedly struck down." He disposed of the "non-discriminating" point (so often made in these cases), by remarking that "a license tax certainly does not acquire constitutional validity because it classifies the privileges protected by the First Amendment along with the wares and merchandise of peddlers and treats them all alike . . . Freedom of speech, freedom of press, freedom of religion are in a preferred position." The State has not "given something for which it can ask a return," Mr. Justice Douglas continued, for these

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82. (1943) 63 S. Ct. 890, 87 L. ed. 515.

83. Flat license fees of \$1.50 for one day, \$7.00 for one week, \$12.00 for two weeks, and \$20.00 for three weeks.

rights, guaranteed by the First Amendment, exist "apart from state authority." And the ordinances were not registration ordinances, nor was the fee "a nominal one, imposed as a regulatory measure and calculated to defray the expense of protecting . . . against the abuses of solicitors."

While this opinion followed, in the main, the dissenting opinions in the earlier case, it omitted the point there made that the license fees were, in relation to the revenues derivable from these sales, so heavy as to be prohibitive. In striking down the ordinance, it thus goes further. Justices Reed and Frankfurter, in separate dissenting opinions,<sup>34</sup> emphasized that there was no evidence that the license fees were so excessive as to be prohibitory, and that this point had been expressly disclaimed by counsel, whose contention was "that no tax, no matter how trifling, can constitutionally be laid upon the activity of distributing religious literature, regardless of the actual effect of the tax." This, Mr. Justice Frankfurter said, "is the only question presented to us." Mr. Justice Reed argued that "the rites protected by the First Amendment are in essence spiritual—prayer, mass, sermons, sacrament—not sales of religious goods" (which he considered that this method of distribution amounted to); that the First Amendment was not intended to exempt "the distribution of religious literature" from "non-discriminatory, non-excessive taxation"; and that the possibility that the tax might "be used readily to restrict the dissemination of ideas" did not make it unconstitutional, if it was in fact not so used. Mr. Justice Frankfurter considered that there was "no constitutional difference between a so-called regulatory fee and an imposition for purposes of revenue," and that a tax could not "be invalidated merely because it falls upon activities which constitute an exercise of a constitutional right." Both he and Mr. Justice Reed made the point which Mr. Justice Jackson (in his separate dissent) also made: that the State has a right to make this activity pay its way, to demand an amount not exceeding "the cost to the community of policing this activity."<sup>35</sup>

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34. Justices Roberts, Frankfurter and Jackson joined in Mr. Justice Reed's dissent. Mr. Justice Jackson joined in Mr. Justice Frankfurter's, and also dissented in a separate opinion (joined in by Mr. Justice Frankfurter) which applied to the Jeannette and Struthers cases also. For a sorting out of the opinions, see *The New Leaflet Decisions* (1943) 3 *Lawyers Guild Review* 43; Dilliard, *About Face to Freedom* (1943) 108 *New Republic* 693.

35. This seems inconsistent with another ground of dissent. All three

If the questions here were reduced to two: (1) Was this an "exercise of religion"? (2) If it was, can it be taxed at all?—the answers would not be too difficult. The minority gave a flat "No" to the first of these questions. "Nor do we think it can be said, properly, that these sales of religious books are religious exercises," Mr. Justice Reed observes. The disagreement here seems to result, ultimately, from a differing degree of perception of the compulsion which a religious belief, genuinely held, may place upon the believer. Submission to the evangelistic command has in the past been regarded as an exercise of religion, inexorably compelled by conscience, to an extent sufficient to influence history more profoundly than any other force. These cases show that it is still so regarded by Jehovah's Witnesses, for, as Mr. Justice Douglas says, "the integrity of this conduct or behavior as a religious practice has not been challenged," and there is no "question as to the sincerity of petitioners in their religious beliefs and practices, however misguided they may be thought to be." Unless mankind has greatly changed, this sect will be by no means the last to act under a similar compulsion. Because of their inadequate appreciation of this, the dissenting opinions seem unrealistic.<sup>86</sup>

The second question is, of course, a much more important one. The majority held that this tax on the distribution of religious literature was "a restraint on the free exercise of religion"; and then went further, holding that it was also "an abridgment of freedom of press." The holding might perhaps better have been limited to the exercise of religion, for its extension to freedom of the press lays it open to a devastating attack by Mr. Justice Reed.<sup>87</sup> One who accepts the view that an exercise of religion

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dissenting opinions stress that the literature was sold, implying quite plainly that a flat license tax upon its free distribution would be invalid. "Street hawkers make demands upon municipalities that involve the expenditures of dollars and cents, whether they hawk printed matter or other things," Mr. Justice Frankfurter remarks; but are their demands any the less if the printed matter is given away instead of sold?

86. They seem unrealistic also in failing to take into account the economic necessity which compels a new denomination, if it is to survive, to couple with its evangelistic activities a solicitation of contributions or purchase of literature. As Mr. Justice Douglas observed, the First Amendment freedoms "are available to all, not merely to those who can pay their own way."

87. He cites *Giragi v. Moore* (1937) 301 U. S. 670 and quotes the Court's reservation in *Grosjean v. American Press* (1936) 297 U. S. 233, 250: "It is not intended by anything we have said to suggest that the owners of

may in no wise be taxed may still hesitate to extend equal immunity to the press—perhaps because of the difference in the language of the First Amendment (only “freedom of the press” is protected, not its “exercise”), perhaps because the press is, more often than not, an enterprise undertaken for profit, supported by its “commercial” activities instead of by benevolent contributions, perhaps because, of the two freedoms, religion is at once the frailer and the deeper, and therefore more is gained by giving it tax exemption.<sup>38</sup> The two freedoms have marched side by side, but, when a choice had to be made, the framers of the First Amendment placed religious freedom first. The full implications of the holding with respect to freedom of the press have perhaps not been realized, even by the dissenting justices. Unless promptly limited or qualified, this is an invitation to challenges of the validity of many taxes now levied by the Federal Government as well as by municipalities—for only one example, taxes now levied on motion pictures and admissions to them. To exempt the distribution of religious literature from taxation, because it is religious, is inexpensive to government; but the economic result of exempting the press from all taxation of its circulation activities would be far-reaching.

Even with respect to religious freedom, in *Murdock v. Pennsylvania* the new majority has now gone so far that it is likely at least to pause before going further. But Jehovah’s Witnesses can hardly have made their last appearance in the Court, for it is of record that their beliefs include one (convenient, but still doubtless genuine), that application for any license, even a free one, is forbidden by Jehovah’s commandment.<sup>39</sup> It is therefore not to be supposed that they will regard the *Murdock* decision as any more than an intermediate skirmish in a long campaign. It may be expected that they will challenge, as opportunities arise, even the regulatory system of licensing or registration,

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newspapers are immune from any of the ordinary forms of taxation for support of the Government.”

Mr. Justice Reed might also have quoted, from *Associated Press v. National Labor Relations Board* (1937) 301 U. S. 103, 132-133: “The publisher of a newspaper has no special immunity from the application of general laws . . . Like others, he must pay equitable and non-discriminatory taxes on his business.”

38. This doubtless prompts the reduced rates accorded ministers for many things (sanctioned, in the case of interstate transportation, by the Federal Government).

39. *Lovell v. Griffin* (1938) 303 U. S. 444.

and the nominal fee therefor, which the implications of Mr. Justice Douglas' opinion would allow.

In *Douglas v. Jeannette*<sup>40</sup> a unanimous court, in an opinion by Mr. Chief Justice Stone, refused to enjoin criminal prosecutions under the Jeannette ordinance which the Murdock decision had invalidated, saying the Court could not assume that the City would "not acquiesce in the decision of this Court holding the challenged ordinance unconstitutional as applied to petitioners."<sup>41</sup>

In *Martin v. Struthers*,<sup>42</sup> a 6 to 3 decision, the Court, through Mr. Justice Black, reversed the conviction of one of Jehovah's Witnesses for, in the distribution of their literature, going to the homes of strangers,<sup>43</sup> knocking on doors and ringing doorbells, in violation of an ordinance which prohibited knocking and doorbell ringing in the distribution of "handbills, circulars or other advertisements." Saying that the ordinance substituted the judgment of the community for that of the individual householder, that it punished the distributor "even though the recipient of the literature was in fact glad to receive it," that door to door distribution was a traditional method for the dissemination of ideas, of widespread use, and that its dangers might "easily be controlled by traditional legal methods" (punishment for trespass after being warned by the householder by appropriate indication), as well as by "identification devices" preventing "abuse of the privilege by criminals posing as canvassers," the Court held that the ordinance was an invasion of freedom of speech and of the press. Mr. Justice Murphy, in a concurring opinion joined in by Justices Douglas and Rutledge, regarded it also as an abridgment of the free exercise of religion (and, indeed, it is difficult to see why Mr. Justice Black omitted this). Mr. Justice Frankfurter, remarking that "the greatest leeway must be given to the legislative judgment," nevertheless concurred (in a separate opinion) because the ordinance was capable of being construed as "an invidious discrimination against the distributors of what is politely called literature," and therefore an unjustifiable prohibi-

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40. (1943) 63 S. Ct. 877, 87 L. ed. 855.

41. Also, as a result of the Murdock and Opelika decisions, the Court remanded *Busey v. District of Columbia* (1943) 63 S. Ct. 87 L. ed. 1199 (see note 25, supra).

42. (1943) 63 S. Ct. 862, 87 L. ed. 861.

43. The ordinance was not so narrowly drawn. It would in terms have applied to ringing the doorbell (for this purpose) at the home of a friend or relative.

tion of freedom of utterance. Mr. Justice Reed, considering that the ordinance was not discriminatory, dissented, Justices Roberts and Jackson joining in his dissent. Mr. Justice Jackson, in a separate dissenting opinion of great vigor, dealt with this whole group of cases, analysing "the broad plan of campaign" of Jehovah's Witnesses, the national structure of the sect, and the intolerant and offensive character of its literature,<sup>44</sup> as well as the activities disclosed by the records. "Such is the activity," he said, "which it is claimed no public authority can either regulate or tax. This claim is substantially, if not quite, sustained today." The Struthers ordinance, he continued, left the distributor "free to make the distribution if he left the householder undisturbed, to take it in his own time," but "the Court says that the City has not even this much leeway in ordering its affairs, however complicated they may be as the result of round-the-clock industrial activity." He then said: "This Court is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added. So it was with liberty of contract, which was discredited by being overdone. The Court is adding a new privilege to override the rights of others to what has before been regarded as religious liberty."

The warning is not to be ignored, but it seems inapplicable here. The case, indeed, seems one which should not have given the Court much trouble, for the existence of a non-abridging means of protecting the householder should be sufficient to invalidate an abridging means.<sup>45</sup> If the non-abridging methods, to which Mr. Justice Black referred, are not too burdensome to the householder, that should be sufficient to justify the decision, even aside from the "discriminatory" point. The growth of Jehovah's Witnesses, notwithstanding their odd doctrines, has been accomplished chiefly by use of these methods of proselyting. Their success proves that there are persons who are receptive to these beliefs, however surprising that may be. It should not be necessary for the Court to say that these freedoms extend to all, not simply to the intelligent or the inoffensive.

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44. For a history of the sect and description of its beliefs, see Heller, *A Turning Point for Religious Liberty* (1943) 29 Va. L. Rev. 440; Mulder and Comisky, *Jehovah's Witnesses Mold Constitutional Law* (1942) 2 Bill of Rights Review 262.

45. Cf. *Schneider v. Irvington* (1939) 308 U. S. 147, 162, 164.

## THE FLAG SALUTE DECISION

In 1940 the Court held in *Minersville School District v. Gobitis*<sup>46</sup> that a school board regulation requiring all children to participate in saluting the flag and in reciting a pledge of allegiance, was not a deprivation of religious liberty, in the case of children (belonging to Jehovah's Witnesses) who, as the Court said, refused to participate, in the conscientious belief that this was forbidden by command of scripture. The solitary dissenter from this holding was the present Chief Justice. Seldom has any decision of the Court been so generally and so sharply criticized.<sup>47</sup> There was little to balance against abridgment of the freedom, for it seemed evident that, while there are many ways to teach loyalty and patriotism, compelling children to violate their consciences by engaging in a salute and a pledge of allegiance is hardly one of them. In spite of the fact that eight members of the Court had concurred in the holding, this consideration made it seem probable, from the beginning, that the dissent of Mr. Chief Justice Stone must eventually prevail.

At the 1941 term, Justices Black, Douglas and Murphy, dissenting in *Jones v. Opelika*,<sup>48</sup> said that "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." Four months later, in *Barnette v. State Board of Education*,<sup>49</sup> a three-judge court in the Southern District of West Virginia, remarked, through Circuit Judge Parker, that "the developments with respect to the *Gobitis* case . . . are such that we do not feel that it is incumbent upon us to accept it as binding authority,"<sup>50</sup> and enjoined the State Board of Education from

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46. (1940) 310 U. S. 586, discussed in Green, *supra* note 1, at 519-523.

47. The brief filed by the Bill of Rights Committee of the American Bar Association in the *Barnette* case, *infra*, collected twenty-five discussions of the decision in legal periodicals, of which twenty were critical, two supported it, and three took no position. An admirable treatment is that of Mr. Thomas Reed Powell, *Conscience and The Constitution*, in (1941) *Hutchinson, Democracy and National Unity*, 18-31. For discerning comment, reluctantly approving the reasoning, but disliking the result, see Lerner, *The Mind and Faith of Justice Holmes* (1943) 319-320.

48. (1942) 316 U. S. 584, 623-624.

49. (1942) 47 F. Supp. 251. For comment, see (1943) 43 *Col. L. Rev.* 184; (1943) 27 *Minn. L. Rev.* 471.

50. The court said that of the seven justices still members of the Supreme Court who had participated in that decision, four had now "given public expression to the view that it is unsound." (Mr. Chief Justice Hughes and Mr. Justice McReynolds had retired in 1941.)

enforcing, against children having conscientious scruples,<sup>51</sup> a regulation requiring a flag salute and a pledge of allegiance, holding that such enforcement was "violative of religious liberty." The court said that this freedom, "like the right of free speech," could not be abridged "unless its exercise presents a clear and present danger to the community."<sup>52</sup>

In *West Virginia State Board of Education v. Barnette*,<sup>53</sup> a decision of the highest importance, the Court affirmed this decree on appeal.<sup>54</sup> Mr. Justice Jackson, for the majority of six,<sup>55</sup> after remarking that the freedom asserted brought no collision with rights asserted by any other individual, "the sole conflict" being "between authority and rights of the individual," observed that "the compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind," and that "It is now a commonplace that censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish. He suggested that "involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence."<sup>56</sup> The *Gobitis* decision, he continued, "assumed, as did the argument in that case and this, that power exists in the State to impose the flag salute discipline upon school children in general. The Court only examined and

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51. The suit was brought by members of Jehovah's Witnesses.

52. It cited *Herndon v. Lowry* (1937) 301 U. S. 242, as authority. It added that "if speech tending to the overthrow of the Government but not constituting a clear and present danger may not be forbidden because of the guaranty of free speech, it is difficult to see how it can be held that conscientious scruples against giving a flag salute must give way to an educational policy having only indirect relation, at most, to the public safety."

53. (1943) 63 S. Ct. 1178, 87 L. ed. 1171. For an excellent analysis, see Powell, *The Flag Salute Case* (1943) 109 *New Republic* 16.

54. Briefs in support of the decree were filed by the Bill of Rights Committee of the American Bar Association, and the American Civil Liberties Union, as amici curiae. In the oral argument, counsel for appellees stated that the result of the *Gobitis* decision had been "civil war against Jehovah's Witnesses," including beatings, wholesale expulsions, and other forms of persecution. More than 20,000 children, he said, had been expelled from school in the less than three years since the decision. See 11 U. S. Law Week 3279.

55. He and Mr. Justice Rutledge were the only justices who had not participated in the *Gobitis* decision.

56. For consideration of the "liberty of silence" in *Prudential Insurance Co. v. Cheek* (1922) 259 U. S. 530 (involving the Missouri service letter statute, now R. S. Mo. 1939 §5064), and in the *Gobitis* case, see Green, *supra* note 1, at 512 n. and at 522.

rejected a claim based on religious beliefs of immunity from an unquestioned general rule." But the question now examined is "whether such a ceremony so touching matters of opinion and political attitude may be imposed upon the individual by official authority." "Freedom of speech and of press, of assembly, and of worship," Mr. Justice Jackson said, may not be infringed simply because a legislature has a "rational basis" for infringing them; "they are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect." But here the refusal to salute was relatively "harmless to others or to the State." "No official," he added, can "force citizens to confess by word or act their faith" in matters of opinion. Overruling the *Gobitis* decision, the Court held that the regulation was wholly void. As in the religious literature cases discussed above, the Court now goes further than the earlier dissent.

Justices Black and Douglas, concurring "substantially," confined themselves to the ground of religious freedom; but Mr. Justice Murphy, in his separate concurrence, added to this the "freedom of silence" which is the basis of Mr. Justice Jackson's opinion. Justices Roberts and Reed adhered "to the views expressed by the Court" in the *Gobitis* case, without amplifying this.

Mr. Justice Frankfurter, dissenting separately, reduces the issues to the ultimate one, and carries Mr. Justice Holmes' philosophy of judicial *laissez faire*<sup>57</sup> to its farthest point. The opinion is a broader and perhaps a more profound statement of the doctrine than any ever made by Mr. Justice Holmes; and it is much more than a restatement of the position which Mr. Justice Frankfurter took in the *Gobitis* case. Quoting the present Chief Justice's admonition regarding judicial self-restraint,<sup>58</sup> he said that "The Constitution does not give us greater veto power when dealing with one phase of 'liberty' than with another," and argued that "so far as the scope of judicial power is concerned," the right not to have property taken without just compensation has an equal claim with the First Amendment freedoms; for "all the provisions of the first ten Amendments are

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57. I am indebted for this term to Lerner, *op. cit. supra*, note 47, at 127-128.

58. In *United States v. Butler* (1936) 297 U. S. 1, 79: "The only check upon our own exercise of power is our own sense of self-restraint."

'specific prohibitions,'” and each “in so far as embraced within the Fourteenth Amendment, must be equally respected.” Even though legislation relates to civil liberties, “our duty of deference” to the legislature “is not less relevant or less exacting.” He considered that the Court’s “only and very narrow function” in dealing with legislation, “is to determine whether, within the broad grant of authority vested in legislatures, they have exercised a judgment for which reasonable justification can be offered.” Even this much prevents “the free play of the democratic process.” He thought the essence of the religious freedom guaranteed by the Constitution to be simply: “no religion shall either receive the state’s support or incur its hostility”; the individual conscience “cannot restrict community action . . . in matters of community concern, so long as the action is not asserted in a discriminatory way . . .” The flag salute requirement he regarded as an attempt to reach a “legitimate legislative end, . . . the promotion of good citizenship”; and he could not “deny that reasonable legislators” could have enacted it. Therefore he thought that it must be sustained.<sup>59</sup>

The case does indeed reach “ultimate questions of judicial power and its relation to our scheme of government,” as Mr. Justice Frankfurter says. It is unfortunate that there is so little direct clash in the judicial debate; as Mr. Justice Jackson’s opinion was pointed largely to the majority opinion in the *Gobitis* case, so Mr. Justice Frankfurter was replying to the dissent there. In the meantime both sides have advanced their positions. There can be no doubt that Mr. Justice Holmes’ “judi-

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59. The doctrine becomes with him one of “reasonable doubt”: “We may deem it a foolish measure, but the point is that this Court is not the organ of government to resolve doubts as to whether it will fulfil its purpose. Only if there be no doubt that any reasonable mind could entertain can we deny to the states the right to resolve doubts their way and not ours.”

While this was the chief, it was not the only, ground of dissent. A year ago it was suggested that if the *Gobitis* decision was to be supported at all, this might better be done upon the ground that, since under *Pierce v. Society of Sisters* (1925) 268 U. S. 510, attendance at public schools could not be compelled, children might avoid the flag salute requirement by going elsewhere; although this was, of course, open to the answer that it was not possible in actual fact for them to obtain equivalent education elsewhere (Green, *supra* note 1, at 522). Mr. Justice Jackson having incautiously said that “in the present case attendance is not optional,” Mr. Justice Frankfurter replied that West Virginia does not compel attendance at its public schools because it cannot. He rightly rejected the distinction (which the majority opinion attempted to make on this ground) between this case and *Hamilton v. University of California* (1934) 293 U. S. 245.

cial tolerance" and "judicial restraint" with respect to State legislation<sup>60</sup> have profoundly influenced every member of the Court.<sup>61</sup> But most of them have realized that these principles had a limited field of application. So, indeed, they had with Mr. Justice Holmes. He developed them (chiefly though not entirely) in dissents from decisions which struck down social legislation as violative of liberty of contract<sup>62</sup>—that ironic liberty which from the first he sought to limit. The Fourteenth Amendment did not embody "our economic or moral beliefs," nor should it be used "beyond the absolute compulsion of its words" to prevent the making of social or economic experiments by the States, he said over and over again. The legislation to which the precept is here applied is not experimental, but counter-experimental: it is Jehovah's Witnesses who are departing from the established order, not West Virginia. And, while "the Fourteenth Amendment does not enact Mr. Herbert Spencer's 'Social Statics,'" it does enact freedom of speech and the free exercise of religion.<sup>63</sup> There is a difference between permitting the legislature to experiment despite the farthest reaches of a highly imaginative liberty of contract, and allowing it to deny the fundamental rights explicitly guaranteed by the First Amendment. For Mr. Justice Holmes, judicial laissez faire had its limits, even narrower than need here be considered, for he struck down (without a hint of deference to the legislature) as a deprivation of property rights, a Pennsylvania statute which I think the present Court, if they considered it on first impression, might sustain as desirable social legislation.<sup>64</sup>

It has also had its limits for the present Court, including Mr.

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60. See Lerner, *op. cit. supra*, note 47, at 127-129.

61. Justices Black and Douglas, and Justice Murphy, say in their concurring opinions here that reluctance to strike down State regulation of "conduct thought inimical to the public welfare" was the controlling influence which moved them to consent to the *Gobitis* decision. But the first two add: "Long reflection has convinced us that although the principle is sound, its application in the particular case was wrong."

62. See Lerner, *op. cit. supra* note 47, at 143 et seq. for the dissents and a brilliant consideration of them.

63. As Mr. Justice Jackson said in this case, "Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard." It may be noted also that the prohibitions included in the Fourteenth Amendment by virtue of the First are, unlike the prohibitions of the Fourteenth, in terms against legislative abridgment ("Congress shall make no law . . ."). It was from the legislature that the framers most feared the danger, not from the executive or the courts.

64. *Pennsylvania Coal Co. v. Mahon* (1922) 260 U. S. 393.

Justice Frankfurter. The Court has recognized—even in decisions which did not rely on the clear and present danger rule—that, when an abridgment of freedom of speech or press is claimed, not only is there no “deference” to be paid to the legislative judgment, but that the Court “should be astute to examine the effect of the challenged legislation.” “Mere legislative preference or beliefs,” it has said often, may be insufficient to justify abridgment of these rights, though ample to justify restriction of others.<sup>65</sup> In the *Gobitis* case, Mr. Justice Frankfurter urged that this was valid only in the case of legislation cutting off appropriate means through which “the processes of popular rule may effectively function.”<sup>66</sup> But six weeks before that decision, in *Thornhill v. Alabama*,<sup>67</sup> and *Carlson v. California*,<sup>68</sup> he concurred in decisions making short work of legislation limiting labor picketing. There was no deference to the legislatures there, nor even the grace of apologetic reference to the earlier decisions of the Court on which they must have relied.<sup>69</sup> Is it seriously suggested that picketing is to be protected because it specially influences legislation—or is it protected because, even though it is more than utterance, it is still utterance?

#### CLEAR AND PRESENT DANGER

In any event, a rigid bar to any theory of deference to the legislature (and much more to the “reasonable doubt” doctrine announced by Mr. Justice Frankfurter here<sup>69a</sup>) is erected by the clear and present danger test (for which Mr. Justice Holmes was responsible), in the fields to which that applies.<sup>70</sup> Mr. Justice Frankfurter’s minimizing of the test in 1941,<sup>71</sup> as well as his

65. *Schneider v. Irvington* (1939) 308 U. S. 147, 161, quoted in many later cases. See Hamilton and Braden, *The Special Competence of the Supreme Court* (1941) 50 *Yale L. J.* 1319, 1349-1357; Lusky, *Minority Rights and the Public Interest* (1942) 52 *Yale L. J.* 1, 11; Green, *supra* note 1, 560-561, for this and for Mr. Chief Justice Stone’s much broader suggestion in *United States v. Carolene Products Co.* (1938) 304 U. S. 144, 152 n. 4. In the *Gobitis* case Mr. Justice Frankfurter distinguishes the *Schneider v. Irvington* statement because of the “totally different order of problem” with which the legislature was dealing.

66. *Minersville School District v. Gobitis* (1940) 310 U. S. 586, 599 n. Mr. Chief Justice Stone answered him (at 605-607).

67. (1940) 310 U. S. 88.

68. (1940) 310 U. S. 106.

69. E.g. *Truax v. Corrigan* (1921) 257 U.S. 312, 340. See Teller, *Picketing and Free Speech* (1942) 56 *Harv. L. Rev.* 180-181.

69a. See note 59, *supra*.

70. See Green, *supra* note 1, at 539 et seq.

71. In *Bridges v. California* (1941) 314 U. S. 252, 295-296.

continued silence as to it earlier, was doubtless influenced by this. The conflict between the two concepts in the *Barnette* case is almost as sharp as it was eighteen years earlier in *Gitlow v. New York*.<sup>71</sup> Mr. Justice Frankfurter now urges that the clear and present danger test is one of very limited application. It is true that, while Justices Holmes and Brandeis said that it applied "in every case," all of the cases in which they spoke of clear and present danger were cases of political utterances (by socialists, communists, synodicalists or pro-Germans). But, commencing in 1940, the Court applied the rule, successively, to picketing,<sup>72</sup> to religious utterances<sup>73</sup> and to utterances punished as contempt of court.<sup>74</sup> The delay of the Court in extending it to religious freedom was mentioned a year ago.<sup>75</sup> The District Court made that extension in the *Barnette* case;<sup>76</sup> and Mr. Justice Jackson, while striking down the flag salute as an invasion of the freedom of silence rather than of religious freedom, nevertheless included "freedom of worship" as one of the rights which might be restricted "only to prevent grave and immediate danger to interests which the State may lawfully protect." While neither concurring opinion mentions the rule—omissions which can hardly be inadvertent<sup>77</sup>—still three justices at least appear to have supported Mr. Justice Jackson's dictum. Even as a minority dictum, this is of great importance.

Aside from this, there was no development of the rule during the term.<sup>78</sup> There was no effort to apply it to any of the ordinances relating to handbills or circulars, mentioned above; and in *Taylor v. Mississippi*,<sup>79</sup> the application was to the classic case

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71a. (1925) 268 U. S. 652.

72. *Thornhill v. Alabama* (1940) 310 U. S. 88 and later cases.

73. *Cantwell v. Connecticut* (1940) 310 U. S. 296.

74. *Bridges v. California* (1941) 314 U. S. 252.

75. *Green*, supra note 1, at 523, 560.

76. See note 52, supra.

77. Clear and present danger was not mentioned in the brief of the Bill of Rights Committee of the American Bar Association; but it was urged by counsel for appellees, who, in the oral argument, said that the only clear and present danger resulting from refusal to salute the flag was the clear and present danger that the person so refusing would be mauled or killed. 11 U. S. Law Week 3279.

78. Perhaps there should be mentioned the Court's surprising resort to clear and present danger, in construing the naturalization statute of 1906, in *Schneiderman v. United States* (1943) 63 S. Ct. 1333, 87 L. ed. 1249.

79. (1943) 63 S. Ct. 1200, 87 L. ed. 1195. The authorities cited by Mr. Justice Roberts here were *DeJonge v. Oregon* (1937) 299 U. S. 353 and *Herndon v. Lowry* (1937) 301 U. S. 242. The persistence of old standards was shown by the fact that Mississippi enacted a "reasonable tendency" statute—in 1942!

of political utterances. The silence of Mr. Chief Justice Stone with respect to clear and present danger remained unbroken.

#### RIGHTS OF THE ACCUSED IN CRIMINAL PROSECUTIONS

At the 1941 term the Court, after six years of developing the rule that the State's use of confessions made by an accused under certain conditions<sup>80</sup> violated the due process clause, had brought this to a point where it seemed not far removed from the privilege against self-incrimination which the Fifth Amendment guarantees.<sup>81</sup> The rule appears to be in no degree qualified by the "fair trial rule" mentioned below. At the term just closed the Court dealt with no cases involving this rule; it mentioned it in *McNabb v. United States*,<sup>82</sup> but in restricted terms.

In *Betts v. Brady*,<sup>83</sup> toward the end of the 1941 term, the Court (a 6 to 3 majority) affirmed the conviction by a Maryland court of an uneducated and penniless farm hand. Accused of robbery, he had asked the trial court to appoint counsel for him. The court refusing, he defended himself as best he could, was (not surprisingly) convicted, and was sentenced to eight years in prison. Ten years earlier, in *Powell v. Alabama*,<sup>84</sup> the Court, influenced by the inclusion of freedom of speech and press in the liberty guaranteed by the Fourteenth Amendment, had held that the right to the aid of counsel, guaranteed by the Sixth Amendment, was likewise within the protection of the due process clause,<sup>85</sup> and had reversed the convictions of the Scottsboro negroes for rape. But the Court now held that the due process clause did not protect the right to the appointment of counsel

80. For the latest and broadest catalog of these conditions, see *Ward v. Texas* (1942) 316 U. S. 547.

81. Cf. Mr. Justice Roberts in *Lisenba v. California* (1941) 62 S. Ct. 280, 290: "The concept of due process would void a trial in which, by threat or promises . . . a defendant was induced to testify against himself." See Green, *supra* note 1, at 530-531.

82. (1943) 87 L. ed. 579, 584. For a case (remanded because habeas corpus was available) in the related field of convictions based upon perjured testimony, see *Pyle v. Kansas* (1942) 63 S. Ct. 177, 87 L. ed. 154.

83. (1942) 316 U. S. 455.

84. (1932) 287 U. S. 45.

85. There was qualifying language in the opinion, but the Court itself regarded this as the holding. In *Grosjean v. American Press Co.* (1936) 297 U. S. 233, 243, the Court said: " \* \* \* in *Powell v. Alabama* . . . we concluded that certain fundamental rights, safeguarded by the first eight amendments against federal action, were also safeguarded against state action by the due process of law clause of the Fourteenth Amendment, and among them the fundamental right of the accused to the aid of counsel in a criminal prosecution." See also *Palko v. Connecticut* (1937) 302 U. S. 319, 324, where the Court referred to "the right of one accused of crime to the benefit of counsel" as "implicit in the concept of ordered liberty."

except when, in a particular case, a fair trial could not be had without it, that this right was not "a fundamental right, essential to a fair trial."<sup>86</sup>

The "fair trial rule" was not only valid but necessary in the cases to which the Court had first applied it—that is, to a trial which though superficially conforming to due process, was simply a "mask" for a conviction due to mob influence, to public passion, or to perjured testimony.<sup>87</sup> The rule was used to add something to the Bill of Rights, to ensure that the rights there guaranteed were accorded in fact, not simply in form. But at the 1941 term the rule, with its concomitant "independent examination of the record," had been so far extended that it seemed to have become most dangerous.<sup>88</sup> Its use in *Betts v. Brady* to sabotage a "fundamental" right which the Court had already declared to be within the shelter of the Fourteenth Amendment was a perversion of its original spirit which seems dangerous in the extreme, for this may well be only the first instance of such use to prevent inclusion in the Fourteenth Amendment of the precise and inflexible rights guaranteed by the Bill of Rights.<sup>89</sup>

In contrast with the previous year, at the 1942 term the Court dealt with the fair trial rule only once. In *Buchalter v. New York*<sup>90</sup> Mr. Justice Roberts stated it in general terms, but found no circumstances to which it applied.<sup>91</sup> No case approaching the ultimate issue in *Betts v. Brady* was decided.<sup>92</sup> That remains the unfinished business of the Court.

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86. See Green, *supra* note 1, at 530.

87. See *Moore v. Dempsey* (1923) 261 U. S. 86. For an earlier application of the rule, see Mr. Justice Holmes' dissenting opinion in *Frank v. Mangum* (1915) 237 U. S. 309, 345.

88. See Green, *supra* note 1, at 534 n.

89. For other criticism of *Betts v. Brady*, see Lusky, *supra* note 65, at 28-30; Griswold and Cohen (1942) N. Y. Times, Aug. 2, 1942, p. E6, col. 5; Note (1942) 21 Chicago-Kent L. Rev. 107; Note (1942) 42 Col. L. Rev. 1205; Note (1943) 11 Geo. Wash. L. Rev. 254; Note (1942) 31 Ill. Bar J. 189; Note (1942) 27 Marquette L. Rev. 34; Note (1934) 16 So. Cal. L. Rev. 55; Note (1942) 91 U. of Pa. L. Rev. 78; Note (1943) Wisc. L. Rev. 118, 123. For a more favorable view, see Haight, "Betts v. Brady" (1943) 29 Am. Bar Assn. Journal 61.

90. (1943) 63 S. Ct. 429, 87 L. ed. 1088.

91. Mr. Justice Black, who wrote the dissenting opinion in *Betts v. Brady*, agreed only "substantially," making no mention of the rule.

92. A brief reference to the decision appears in Mr. Justice Frankfurter's opinion in *Adams v. United States ex rel. McCann* (1943) 63 S. Ct. 236, 87 L. ed. 209. More enlightening is *Mitchell v. Youell* (1942) 130 F. (2d) 880, where the Circuit Court of Appeals for the 4th Circuit, in a careful opinion by Circuit Judge Parker, held that the refusal to appoint counsel in a Virginia prosecution for burglary deprived the accused of a fair trial, reversing the conviction notwithstanding *Betts v. Brady*.



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