THE YALE LAW JOURNAL

VOLUME 65 APRIL, 1956 NUMBER 5

THE CORE OF FREE GOVERNMENT, 1938-40: MR. JUSTICE STONE AND "PREFERRED FREEDOMS"

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LIKE the opposition party that finally wins an election, a Supreme Court Justice faces new difficulties the moment his dissents become the law of the land. Once the balance has shifted, the precedents are no longer decisive. New cases, in fresh areas of controversy, probe for the limits of the Justice's now dominant philosophy, and compel him to give content to the general principles he has declared. So it was with Justice Stone and his colleagues after 1937, when time began to establish the objectives of Mr. Roosevelt's Court reorganization plan. Old issues receded, new ones loomed. The docket bristled with cases that required Stone to round out his doctrine of "judicial self-restraint."

The most puzzling aspect of the new order was that justice now appeared two-faced. The "enlightened Court" bowed in case after case to legislative judgment on the reasonableness of this or that commercial tax or regulation, assailed under the due process clause. At the same time, it warded off legislative encroachments on personal and political liberties. Where official action trenched on those individual rights which history has proved to be the indispensable conditions of a free society, the Court explicitly disclaimed any initial disposition to hold either that the legislature was really seeking its avowed objective or that the means employed were appropriate.[1]

Had not the Justices become ensnared in what Judge Learned Hand has described as a "logical dilemma"? Had they not overlooked the fact that in America "property itself is the matrix, the seed-bed, which must be conserved if other values are to flourish"?[2] "Even before Justice Stone became Chief Justice," Judge Hand noted in 1946, "it began to seem as though, when 'personal rights' were in issue, something strangely akin to the discredited attitude towards the Bill of Rights of the old apostles of the institution of property, was regaining recognition. Just why property itself was not a 'personal right' nobody took the time to explain; and perhaps the inquiry would have been regarded as captious and invidious anyway; but the fact remained that in the

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1. Lusky, *Minority Rights and the Public Interest*, 52 YALE L.J. 1, 11 (1942). See also Hamilton & Braden, *The Special Competence of the Supreme Court*, 50 YALE L.J. 1319, 1349-57 (1941).

2. FREUND, ON UNDERSTANDING THE CONSTITUTION 14 (1949).

name of the Bill of Rights the courts were upsetting statutes which were plainly compromises between conflicting interests, each of which had more than a merely plausible support in reason. That looked a good deal as though more specific directions could be found in the lapidary counsels of the Amendments than the successful school had been able to discover, so long as the dispute turned on property."[3]

Imputing his own ideas to Stone, Judge Hand declared that the core of Stone's constitutional jurisprudence was acceptance of the presumptive constitutionality of legislation, whether it affected economic activities or specific guarantees of personal freedom. He believed, Judge Hand contends, in "even-handed application" of the due process clause, "since only by not intervening could they [judges] hope to preserve that independence which was the condition of any successful discharge of their duties."[4]

It is difficult to square Judge Hand's interpretation with Stone's record, or with that of the Court itself.[5] At the very moment the Justices abandoned guardianship of economic interests, they seemed ready to shoulder a special responsibility for speech, thought and religion. Having surrendered the heavy responsibility of passing on the wisdom of social and economic policy, they were soon faced with the question whether judicial "self-restraint" was equally applicable to the review of legislation infringing those freedoms that had come to be thought of as "implicit in the concept of ordered liberty."[6] Before long Justice Stone began to spell out his ideas.

"It is the paradox of the period, if paradox it be," Herbert Wechsler has written, "that new areas of constitutional protection were emerging even as the power to govern was being sustained. Justice Stone's part in this branch of the development was . . . commanding."[7] Just as he had led the battle for judicial self-restraint in cases involving social and economic legislation, so it was he who, with the "casualness of a footnote"[8] (to use Justice Frankfurter's somewhat derogatory language) suggested a formulation that ultimately flowered into the so-called doctrine of "preferred freedoms."

THE FAMOUS FOOTNOTE FOUR

In the otherwise obscure case of *United States v. Carolene Products Co.*,[9] decided in 1938, Stone wrote these lines into the body of his opinion for the Court:

3. Hand, *Chief Justice Stone's Conception of the Judicial Function*, 46 COLUM. L. REV. 696, 698 (1946). For an elaboration of Judge Hand's own ideas, see *The Contribution of an Independent Judiciary to Civilization*, in HAND, THE SPIRIT OF LIBERTY 172 (Dilliard ed. 1952).

4. Hand, *Chief Justice Stone's Conception of the Judicial Function*, 46 COLUM. L. REV. 696, 698 (1946).

5. Lusky, *supra* note 1, at 19 n.51.

6. Palko v. Connecticut, 302 U.S. 319, 325 (1937).

7. Wechsler, *Stone and the Constitution*, 46 COLUM. L. REV. 764, 793 (1946).

8. Dennis v. United States, 341 U.S. 494, 526 (1951).

9. 304 U.S. 144 (1938)—upholding an Act of Congress prohibiting shipment in inter-

> "[R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators."

He would not go so far as to say that no economic legislation would ever violate constitutional restraints, but he did suggest confining the Court's role strictly. Attached to this proposition was the famous footnote four:

> "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.
>
> "It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . .
>
> "Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious . . . or national . . . or racial minorities . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."[10]

The first draft of the second and third paragraphs of this historic note was written by Stone's law clerk, Louis Lusky. "He [Stone] adopted it almost as drafted," Lusky recalls, "simply toning down a couple of over-emphatic words."[11] The opinion was then circulated. Chief Justice Hughes was "some-

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state commerce of skimmed milk compounded with any fat, other than butter. Stone, speaking for the Court, held that Congress is free to exclude from interstate commerce articles whose use in the states for which they are destined it may reasonably conceive to be injurious to the public health, morals or welfare, or which contravenes the policy of the state of their destination.

10. United States v. Carolene Products Co., 304 U.S. 144, 152-54 n.4 (1938).

11. Letter from Louis Lusky to ATM, July 28, 1952.

It was not unusual for Stone to allow his law clerks to use footnotes as trial balloons for meritorious ideas. "I have always been very proud of these contributions," Lusky writes. "They are my contributions only in a limited sense. The ideas originated with me, but they became important only because the Justice adopted them as his own. It would be a great mistake indeed to suppose that any law clerk ever got anything into the Justice's opinions which he didn't want there himself. He could not be pushed or persuaded against his own judgment." *Ibid.*

Eugene Nickerson tells of another incident illustrating Stone's relation with his law clerks:

In the fall of 1945 one Gibson, a conscientious objector, petitioned for certiorari from the affirmance of his conviction for violating the Selective Training and Service Act by unlawfully deserting camp. At the end of the conference, in going over with the clerks what had happened, it appeared that Gibson's petition had been denied. At that point

what disturbed" by Lusky's language. "Different considerations may apply," the law clerk's draft of the first paragraph said, "and one attacking the constitutionality of a statute may be thought to bear a lighter burden, when the legislation aims at restricting the corrective political processes, which can ordinarily be expected to bring about repeal of undesirable legislation."

"Are the 'considerations' different, or does the difference lie not in the *test* but in the nature of the right invoked"? Hughes asked.[12]

"You are quite right," Stone replied somewhat ambiguously. "I wish to avoid the possibility of having what I have written in the body of the opinion about the presumption of constitutionality in the ordinary run of due process cases applied as a matter of course to these other more exceptional cases. For that reason it seemed to me desirable to file a caveat in the note—without, however, committing the Court to any proposition contained in it. The notion that the Court should be more alert to protect constitutional rights in those cases where there is danger that the ordinary political processes for the correction of undesirable legislation may not operate has been announced for the Court by many judges, notably Chief Justice Marshall in *McCulloch v. Maryland* [4 Wheat. 316, at 435-436] with reference to taxation of governmental instrumentalities."[13] As it later developed, the difference in Stone's mind lay in both the "test" and the nature of the right involved.

This embattled footnote[14] of three paragraphs contains a corresponding number of ideas. The first, by Hughes, suggests that when legislation, on its face, contravenes the specific constitutional negatives set out in the Bill of

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Nickerson asked Stone why it had been denied since it seemed that the rule was pretty well settled in Gibson's favor under the prior decisions. The Justice then launched into an explanation of why Gibson's case was different from the prior decisions but agreed that perhaps the matter ought to be held over for consideration by the Court again. The following week certiorari was granted. Gibson v. United States, 326 U.S. 708 (1945). In December of 1946 (after Stone had died) the decision came down reversing Gibson's conviction. *Id.*, 329 U.S. 338 (1946).

"I don't believe," Nickerson observes, "that this can be cited for any particular bearing on Stone's attitude with respect to conscientious objectors, but it did show the interest he had with respect to a 'law point' which he hadn't fully appreciated." Letter from Eugene Nickerson to ATM, June 6, 1952.

12. Letter from Charles Evans Hughes to HFS, April 19, 1938.

13. Letter from HFS to Charles Evans Hughes, April 19, 1938.

14. Through the years various Supreme Court Justices, notably Rutledge (see especially Thomas v. Collins, 323 U.S. 516 (1945)), Murphy, Black and Douglas, building on Stone's footnote, fashioned the doctrine that the freedoms mentioned in the First Amendment enjoy a priority, a "preferred position" in the hierarchy of constitutional values. Therefore the court should subject their infringement to "more searching judicial inquiry." By 1950 the list of cases in which this idea had been fostered had grown to considerable length. For a listing of relevant cases, see Bernard, *Avoidance of Constitutional Issues in the United States Supreme Court: Liberties of the First Amendment*, 50 MICH. L. REV. 261, 267 n.37, 269 n.40 (1951).

In 1949, Justice Frankfurter flatly denied the propriety of the phrase "preferred position" and deplored use of a footnote as the "way of announcing a new constitutional doctrine." "This is a phrase," he said somewhat contemptuously, "that has uncritically

Rights, the usual presumption of constitutionality may be curtailed or even waived. The second paragraph indicates that the judiciary has a special responsibility as defender of those liberties prerequisite to the purity of political processes. The Court thus becomes the ultimate guardian against abuses that would poison the primary check on government—the ballot box. It must protect those liberties on which the democratic effectiveness of political action depends. The third paragraph suggests a special role for the Court as protector of minorities, and of unpopular groups peculiarly helpless at the polls in the face of discriminatory or repressive assault.[15]

The footnote clearly manifests Stone's growing concern for civil liberties, and his conviction that the Court is under particular responsibility to protect them. "I have been deeply concerned," he wrote Judge Irving Lehman the next day after the *Carolene Products* decision came down, "about the increasing racial and religious intolerance which seems to bedevil the world, and which I greatly fear may be augmented in this country. For that reason I was greatly disturbed by the attacks on the Court and the Constitution last year, for one consequence of the program of 'judicial reform' might well result in breaking down the guaranties of individual liberty."[16]

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crept into some recent opinions of this Court. I deem it a mischievous phrase, if it carries the thought, which it may subtly imply, that any law touching communication is infected with presumptive invalidity . . . . I say the phrase is mischievous because it radiates a constitutional doctrine without avowing it. Clarity and candor in these matters, so as to avoid gliding unwittingly into error, makes it appropriate to trace the history of the phrase 'preferred position.'" Kovacs v. Cooper, 336 U.S. 77, 90 (1949).

In the course of his detailed exploration, Justice Frankfurter himself appears to have glided "unwittingly into error" in stating that the preferred freedoms doctrine (erroneously equated with presumption of unconstitutionality of legislation which touches the First Amendment freedoms) "has never commended itself to a majority of this Court." *Id.* at 95. "I think my brother Frankfurter," Justice Rutledge wrote in dissent, "demonstrates the conclusion opposite to that which he draws, namely, that the First Amendment guaranties of the freedoms of speech, press, assembly and religion occupy preferred position not only in the Bill of Rights but also in the repeated decisions of this Court." *Id.* at 106.

In Dennis v. United States, 341 U.S. 494 (1951), Justice Frankfurter confessed his error: "In reviewing statutes which restrict freedoms protected by the First Amendment, we have emphasized the close relation which those freedoms bear to maintenance of a free society . . . . Some members of the Court—and at times a majority—have done more. They have suggested that our function in reviewing statutes restricting freedom of expression differs sharply from our normal duty in sitting in judgment on legislation." *Id.* at 526 (concurring opinion).

15. In his article *Minority Rights and the Public Interest, supra* note 1, at 20, Lusky omits paragraph one completely from his discussion. Lusky's former law partner, George D. Braden, reasoning both from the contradictory nature of the ideas and Lusky's omission, surmised that Hughes wrote the paragraph. "My guess is," Braden observes, "that Chief Justice Hughes added the paragraph to protect some theory he had which he thought the citations to his opinions demonstrated." Braden, *The Search for Objectivity in Constitutional Law*, 57 YALE L.J. 571, 580 n.28 (1948).

For a brilliant treatment of this subject in a broader context, see Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193 (1952).

16. Letter from HFS to Irving Lehman, April 26, 1938.

Here, obviously, was a fertile field for creative judicial statesmanship. In his *Gerhardt*[17] and *Barnwell*[18] opinions, Stone had previously adumbrated the doctrine of political restraints.[19] The *Carolene Products* footnote seemed but a logical corollary. If the political processes cannot be depended upon to provide protection against legislation restricting, say, the right to vote, freedom of speech, religion and assembly, or statutes directed against discrete and insular minorities, the courts are under special obligation to scrutinize the infringements. Stone's basic thought was this:

> "I am first of all a man of reason. I believe in reason and its power in the market place of discourse. I am also a democrat. I believe that our governments are to be run by the governed. Therefore I shall use my great power as a Supreme Court justice sparingly, but I shall use it when it is necessary to preserve the democratic process or to protect those injured by unreason under circumstances where political processes cannot be relied on to protect them."[20]

Stone was quick to disavow his own pioneering in this field. The groundwork had been laid in the earlier opinions of Holmes,[21] Brandeis,[22] and Hughes,[23] the real pathbreakers being Cardozo and Holmes. Stone mentioned certain of the latter's opinions as indicating that "he thought that the judge should not be too rigidly bound to the tenet of judicial self-restraint in cases involving civil liberties."[24] Even after the *Carolene Products* footnote had

17. Helvering v. Gerhardt, 304 U.S. 405 (1938).

18. South Carolina Highway Dep't v. Barnwell Bros., Inc., 303 U.S. 177 (1938).

19. See, in this connection, Stone's equally significant footnote in South Carolina Highway Dep't v. Barnwell Bros., Inc., *supra* note 18, at 184-85 n.2; Helvering v. Gerhardt, 304 U.S. 405, 416 (1938). For an exposition of the underlying theory of the footnote, see Lusky, *supra* note 1, at 20-21. See also Braden, *supra* note 15.

20. Braden, *supra* note 15, at 580-81. Braden suggests that Stone was "addressing himself to a problem arising out of the use of the presumption of constitutionality as a means of forestalling Due Process Clause attacks on economic legislation. His problem was to make the presumption stick in economic cases without being plagued by it in civil liberties and similar cases. Accordingly, he suggested by typical judicial indirection that legislation restricting political processes and legislation directed at 'discrete and insular' minorities should not have a favorable presumption of constitutionality to protect the legislation against attack. His expressed reason for the latter half of this was that political processes 'can ordinarily be expected to bring about repeal of undesirable legislation,' but that minorities such as racial and religious groups are subject to prejudice 'which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities.' " *Id.* at 579-80.

21. Professor Frankfurter contended that Holmes "attributed very different legal significance to those liberties of the individual which history has attested as the indispensable conditions of a free society" and "was far more ready to find legislative invasion in this field than in the area of debatable economic reform." FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT 51 (1938).

22. See, especially, Whitney v. California, 274 U.S. 357, 375-77 (1927) (concurring opinion).

23. See Stromberg v. California, 283 U.S. 359 (1931); Near v. Minnesota, 283 U.S. 697 (1931).

24. Letter from HFS to Clinton L. Rossiter, April 12, 1941.

been formulated, Stone tried to reassure a worried champion of civil liberty by citing Justice Cardozo's opinion in *Palko v. Connecticut*[25] as illustrating "what the Court had been doing in recent years to iron out difficulties in the way of effective protection of freedom."[26]

Cardozo had spoken of the "social and moral values" of freedom of thought and speech as existing on a "different plane" from the other rights set out in the first eight amendments. "Of that freedom," Cardozo observed, "one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom." These rights are, he said, "the very essence of a scheme of ordered liberty."[27] With reference to Cardozo's formulation, Stone commented: "I am not sure but that it [the application of special constitutional safeguards necessary for protecting individual freedoms] will be worked out about as well now as if a new amendment were drafted."[28]

Further evidence of the Court's opportunity for creative endeavor was forthcoming that same year, when the Justices honored the CIO's challenge of Mayor Hague's power to close Jersey City's public parks and streets to public meetings on the mere opinion of the Director of Public Safety that his refusal would prevent "riots, disturbances and disorderly assemblage." Speaking for the Court, Justice Roberts asserted the right of citizens of the United States to discuss union organization under the Wagner Act.[29] This, he held, is a "privilege and immunity" of citizens of the United States. Stone took a broader view. Freedom of speech and assembly is more than a privilege or immunity peculiar to United States citizenship which is secured to citizens of the United States by the privileges and immunities clause of the Fourteenth Amendment. It is a right "secured to all persons" by the due process clause of the Fourteenth Amendment. Justice Roberts' construction was too narrow, as well as unnecessary. "It has been explicitly and repeatedly affirmed by this Court, without a dissenting voice," Stone wrote, "that freedom of speech and of assembly for any lawful purpose are rights of personal liberty secured to all persons, without regard to citizenship, by the due process clause of the Fourteenth Amendment."[30]

Following the authoritative lead of Justice Samuel F. Miller,[31] he spoke out strongly against all attempts to revive this "privileges and immunities" clause

25. 302 U.S. 319 (1937).

26. Letter from HFS to Raymond L. Wise, June 1, 1939.

27. Palko v. Connecticut, 302 U.S. 319, 325-27 & *passim* (1937).

28. Letter from HFS to Raymond L. Wise, June 1, 1939.

29. Hague v. CIO, 307 U.S. 496, 502 (1939). Hughes approved Roberts' position on the merits, and agreed with Stone as to the state of the record. McReynolds and Butler wrote separate dissents.

30. *Id.* at 519 (concurring opinion).

31. Slaughter House Cases, 83 U.S. (16 Wall.) 36 (1873). Writing an Amherst classmate, Wallace H. Keep, October 7, 1939, Stone said: "I regard Samuel Miller as one of the greatest judges who ever sat on our Court. His influence on the decisions of the Court is still very powerful."

from constitutional limbo.[32] Having just overcome judicial censorship of state economic legislation via the due process clause, the Justice was understandably reluctant to permit the same issue to arise anew under privileges and immunities. "I should have no difficulty," he told Irving Brant, "in agreeing that public discussion of the Wagner Act was a privilege of United States citizenship protected by the privileges and immunities clause if the record had supported our decree on that theory. But it did not, and I am not willing to relinquish any protection to personal liberty afforded by a clause [due process] of the 14th Amendment in the hope that some other clause may be made to serve. The more so when that can be accomplished only by enlarging the privileges of U.S. citizenship (including privileges of property) at State expense."[33]

In his *Hague* opinion, as in the *Carolene Products* footnote, Stone made two points crystal clear: the safeguards for freedom embodied in the First Amendment are firmly anchored in the due process clause of the Fourteenth Amendment; and the Court henceforth would subject legislation restrictive of personal freedom to "more exacting judicial scrutiny."[34] He was beginning to claim for the Court a special responsibility for safeguarding the political processes. For unless it stepped in, interferences with this primary mechanism for obliging government to control itself might render free government a sham.

Antecedents of the Justice's Views on Civil Liberty

Stone's special concern for civil liberties may not have registered with some observers because in earlier years, circumstances had conspired on several occasions to misrepresent his views to the public. And until 1940, *Hague v. CIO* and *Carolene Products* were the only cases in which he had spoken out on civil liberties during his fourteen years on the bench. Privately, however, he had thrown his weight on freedom's side as occasion demanded. The yellow journals screamed the day after his forthright law clerk, Walter Gellhorn, having witnessed high-handed police "protection" against "radical" demonstrations around the Japanese Embassy, testified for the defendants. Not quite

32. Stone's reluctance to ground the decision in "privileges and immunities" may be traced to his dissent in Colgate v. Harvey, 296 U.S. 404, 436 (1935). In a footnote to his opinion in the *Hague* case, Stone said: "If its restraint upon state action were to be extended more than is needful to protect relationships between the citizen and the national government, and if it were deemed to extend to those fundamental rights of person and property attached to citizenship by the common law and enactments of the states when the Amendment was adopted . . . it would enlarge Congressional and judicial control of the state action and multiply restrictions upon it whose nature, though difficult to anticipate with precision, would be of sufficient gravity to cause serious apprehension for the rightful independence of local government. That was the issue fought out in the *Slaughter-House Cases*, with the decision against enlargement." Hague v. CIO, 307 U.S. 496, 520-21 n.1 (1939).

33. Letter from HFS to Irving Brant, Aug. 11, 1939.

34. Hague v. CIO, 307 U.S. 496, 518 (1939).

sure what his Chief's reaction would be, Gellhorn reported the incident to the Justice with misgiving. But Stone shrugged it off calmly.[35] In the middle thirties the Justice ridiculed movements then current to require loyalty oaths of teachers. Logical consistency, he blurted out to a Senator's devoutly patriotic wife, demanded that each teacher renew her pledge daily before undertaking classroom duties. He considered this movement "so silly that it will fall of its own weight, unless too much is made of it by the university people."[36] A few years later he was much less certain.

"Well, I see," he wrote Dean Young B. Smith, "that Mr. Nicholas Murray Butler has discovered that true academic freedom is identical with that of a citizen of the German Reich—the freedom to do what he is told by his Fuehrer and entourage. I hope someone will be found in Columbia University to give the nonsense the excoriation it deserves."[37]

The Gitlow *Case*

On the Court, however, Stone had failed to express individual views even at the risk of appearing inconsistent. At the very outset of his judicial career, he had left the impression that he agreed with the conservative majority in the controversial *Gitlow* case.[38] Benjamin Gitlow circulated Communist literature and was convicted of violating the New York Criminal Anarchy Act of 1902. The argument of his counsel that the New York statute deprived him of liberty without due process of law by unreasonably restricting freedom of press evoked from the Court its first announcement of the proposition that freedom of speech and of the press, protected by the First Amendment from abridgment by Congress, "are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."[39] But the Court, apparently rejecting Holmes' "clear and present danger" test, held that the New York act, as applied to Gitlow, did not unduly restrict freedom of press and was therefore valid. Holmes and Brandeis dissented. Stone, though a member of the Court when the case came down, did not participate. Through an oversight he was nevertheless credited with having joined the majority.

"The *Gitlow* case was argued before I went on the Court," he explained in 1941, "and I had no part in it. The Reporter omitted to state that fact in his report of the case and, due to my inexperience, I neglected to see that he did so. I have always regretted the oversight."[40]

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35. Letter from Walter Gellhorn to Miss Gertrude Jenkins, Jan. 21, 1947.
36. Letter from HFS to Youngsters, Dec. 1935.
37. Letter from HFS to Young B. Smith, Oct. 5, 1940.
38. Gitlow v. New York, 268 U.S. 652 (1925).
39. *Id.* at 666.
40. Letter from HFS to Clinton L. Rossiter, April 12, 1941. That it was an "oversight" appears fully from an examination of the reports of the 1924 Term. The Reporter failed consistently to note cases in which Stone did not participate.

Two years later another opportunity came to put his views on record. Then, Anita Whitney, a member of the Communist Labor Party, was convicted and sentenced under California's Criminal Syndicalism Act, and sought review by the United States Supreme Court. Miss Whitney claimed that the statute violated the Constitution. The Justices, in an opinion by Sanford, rejected her plea and confirmed the state court's sentence.[41] Holmes and Brandeis concurred in the result, the latter taking the occasion to state in memorable words the sanctity of the constitutional protection afforded freedom of speech and press.[42] Stone joined the majority. Dissatisfied with Sanford's first draft, his objections led to revisions. The majority had been content with the statement that freedom of speech is not absolute and might be limited by making it a crime to form or join syndicalist groups.

"You should mention the fact," Stone wrote Sanford, May 13, 1927, "that the legislature declared in enacting the Act that the Act was necessary to the public peace and safety, etc.: that this declaration was not challenged by the defendant and therefore we cannot say that there was not a proper basis for the exercise of the legislative judgment. I would like to leave all reasonable scope for upholding freedom of speech against purely arbitrary legislation aimed at only fanciful evils. I think we can do that by giving the benefit of every presumption to the legislature unless the contrary fact is proven."

This sentiment was embodied in the majority opinion [43] so he went along. Actually, it is hard to ascertain the difference between his stand and that of Brandeis and of Holmes, except on the basis of a suspicion that they were willing to relax a standard he thought it vital to maintain undiluted. Had he been more desirous of "leaving all reasonable scope" for free thought than of preserving doctrinal consistency, he might have joined their concurrence. Perhaps his experience with political agitators as a member of the Board of Inquiry during World War I made him characterize as "real," evils which Holmes and Brandeis cast aside as purely fanciful.

The Naturalization Cases

A few years later the Justice appeared, without explanation, on opposite sides in cases dealing with the right of pacifists to become naturalized Americans, voting in *United States v. Schwimmer* [44] to deny the right, and dissenting with Hughes, Holmes and Brandeis in *United States v. Macintosh* [45] to affirm it. Again Stone had some explaining to do. "My participation in the *Macintosh* case did not indicate any change of view on my part, although here again the record on its face is against me," he later pointed out.[46] Holmes had rained ridicule on the *Schwimmer* majority for ruling that a woman applicant

41. Whitney v. California, 274 U.S. 357 (1927).
42. *Id.* at 372, 375-78.
43. *Id.* at 371.
44. 279 U.S. 644 (1929).
45. 283 U.S. 605, 627 (1931).
46. Letter from HFS to Clinton L. Rossiter, April 12, 1941.

nearly sixty must swear to bear arms in defense of the United States. "So far as the adequacy of her oath is concerned," the dissenter observed, "I hardly can see how that is affected by the statement, inasmuch as she is a woman over fifty years of age, and would not be allowed to bear arms if she wanted to."[47] Stone joined the majority's narrow interpretation because he thought Miss Schwimmer's past "behavior" indicated a disposition to resist wartime acts of government and to encourage others to do so.

Because of the narrowness of Justice Butler's opinion, however, Stone eagerly sought modifications. He was especially anxious to overcome the "impression," created by Holmes' scorching dissent, "that we are assailing mere opinions not likely to result in action." Accordingly he advised Butler to leave out any reference to "feelings of dislike and distrust," as such expressions suggested that "we are actuated by feelings of prejudice." Shift the emphasis, he told Butler, from Rosika Schwimmer's noxious "opinions" to her radical "behavior."[48] The majority's revised opinion said that pacifists "encouraged disobedience in others." This, in itself, evidenced want of "attachment to the principles of the Constitution."[49] Butler incorporated Stone's suggestions side by side with his original inquiry into the propriety of the applicant's opinions and beliefs. "With these changes I should be glad to come along with you," Stone had told Butler.[50] But the resulting combination of ideas was exceedingly awkward, to say the least.

Stone's friends and former colleagues were incredulous. "Was the *United States Daily* correct in not including your name among those dissenting in the Schwimmer Case?" Robert L. Hale inquired, June 1, 1929. "It is hard for me to believe . . . . You certainly do not share his [Butler's] views that persons make dangerous citizens because they have beliefs which differ from yours."

"No, I did not dissent," Stone replied. "I agreed with everything Justice Holmes said, but thought it not quite applicable to the situation created on the record. The situation, as I read it, places an affirmative burden on the applicant to show that his conduct is such as to evidence attachment to the Constitution. On the record presented to us it was fairly inferrable that the petitioner would refuse obedience to the Constitution and laws enacted under it requiring citizens of the United States to support and maintain a war; and would encourage such disobedience in others.[51] That being the case, it seemed

47. United States v. Schwimmer, 279 U.S. 644, 653 (1929).

48. Letter from HFS to Pierce Butler, May 23, 1929.

49. See United States v. Schwimmer, 279 U.S. 644, 652 & *passim* (1929).

50. Letter from HFS to Pierce Butler, May 23, 1929.

51. On the record presented to the Circuit Court of Appeals and thence to the Supreme Court, such inferences could only have been drawn from Madame Schwimmer's expressed opinions about war and pacifism. The appeals were heard on a stipulation of facts which said: "[T]he testimony at the hearing of the petition shows that the petitioner is qualified for citizenship except insofar as the *views* of the applicant set forth in the foregoing agreed statement of facts may show that the applicant is not attached to the principles of the Constitution. . . ." Quoted in Hazard, *Supreme Court Holds Madame Schwimmer, Pacifist, Ineligible to Naturalization*, 23 AM. J. INT'L L. 626, 629 (1929).

to me that the applicant did not show attachment to the principles of the Constitution. . . . The question was not merely, as Justice Holmes seemed to think, that the applicant was a person who believed that the Constitution could be improved. Such persons, if they are willing to obey it until such time as it is changed by the prescribed procedures, may become good citizens and be attached to the principles of the Constitution. When their objections carry them further than that, I think Congress, rightly or wrongly, has prescribed that they should not be admitted."[52]

Ignoring all such refinements, conservative and liberal sources alike lambasted the decision. A writer in the *American Journal of International Law* said that Butler's opinion turned altogether "upon the applicant's views, opinions and beliefs."[53] "The law is the law," the New York Times mused with an air of bewilderment, but "it is a little anomalous that a country which has renounced war should exclude from its citizenship a person whose chief offense is her opposition to war."[54] *The Nation* labeled the decision "Treason to Conscience," adding that it "puts an indelible stain of disloyalty to American precedents, principles and ideals upon the names of William Howard Taft, Justice Butler, and every one of the judges who laid down this doctrine."[55]

These were the reactions of persons and journals whose opinions Stone repected. And it is fair to surmise that doubts may have been raised as to the wisdom of his acquiescence in Butler's opinion even as revised.

The *Schwimmer* opinion spurred immigration officials to even greater efforts to ensure the political orthodoxy of applicants for citizenship. Absurd questions were asked aspirants to citizenship which, being honestly answered, resulted in their rejection because they would not swear in advance to support every war, however unjust. Several cases testing the more rigorous policies were on their way to the Supreme Court when, in October 1930, Stone sent a long handwritten letter to John Bassett Moore asking for comment on the *Schwimmer* decision. "It would be a great help to me," the Justice said, "if I could (because of your wide experience in dealing with questions affecting citizenship and naturalization) know just how much force you would give to the phrase in the statute 'attached to the principles of the Constitution.' "[56]

Judge Moore's reply minced no words. He was quite "unable to accept the views laid down by Mr. Justice Butler" and, apparently, considered these indistinguishable from Stone's.

"I had always regarded freedom of thought and of speech not only as the very cornerstone of our liberties but also as the first condition of progress in religion, in science and in government. I could not forget that our own independence and form of government were founded in revolution, and as regards

52. Letter from HFS to Robert L. Hale, June 3, 1929.

53. Hazard, *supra* note 51, at 629.

54. Quoted in *Madame Schwimmer—'Without a Country,'* Literary Digest, June 8, 1929, p. 9.

55. *Treason to Conscience*, 128 THE NATION 689 (1929).

56. Letter from HFS to John Bassett Moore, Oct. 9, 1930.

our national defense, and the defense of our institutions, I could not help feeling that if this was in a preeminent sense 'the home of the brave,' it was due to the fact that it was also 'the land of the free,' it being as natural to love a government that assures us liberty as it is unnatural to love a government that oppresses us."

Coming down to Stone's technical query, the meaning of the phrase "attached to the principles of the Constitution," Moore laid it on without stint. That phrase required the Court to make only a limited inquiry into the morals and character of the applicant. "By what authority," he asked, "can a court assume to set up, under the mere prescription of an oath, an inquisition into beliefs and to censor the thoughts and prescribe the views which persons seeking citizenship must or may not hold?" "Pacificism," this leading authority on international law declared, "has never been considered illegal or *unconstitutional*. It will hardly be pretended that believing in or teaching pacifism either is immoral, or is inconsistent with attachment to the 'principles' of the Constitution or with a good disposition towards the order and happiness of the country." Moore did not subscribe to pacifist doctrine, yet he believed that "its adherents not only are qualified for citizenship in the sense of the Act of 1906, but that they also constitute the great body of those who pay to the cause of peace and its promotion more than an emotional, unthinking shallow lip-service. As such they perform a useful service in counteracting the general tendency to violence which has so ruthlessly held sway during the past fifteen years."[57]

Disinclined to continue discussion of the specific points he had raised, the Justice confessed somewhat contritely: "The only regret that has grown out of my judicial career up to the present is for my failure sometimes to speak out instead of remaining silent. I have so often differed with the Court and said so, that I have felt under some constraint to pass in silence expositions with which I did not agree where only matters of statutory construction were involved."[58]

Moore's letter had apparently shaken the Justice's confidence in his policy of reticence. Once again he regretted not having stated his views. In writing Moore, Stone was not only trying to reassure himself as to the wisdom of his stand in the *Schwimmer* case, but also thinking of a case then on its way toward decision—that of a Yale divinity professor, Clyde Macintosh, who on the ground that he would not swear beforehand to support every future military adventure of the United States, lost his bid for naturalization. Stone prepared, but did not deliver, a dissent. Taking his cue from Moore, he pointed to the identity of the naturalization oath and that prescribed by the Constitution for federal officers: "It comes as a surprise, after the lapse of one hundred and forty years, to learn that Congress, by prescribing the same oath as prerequisite to citizenship, has authorized an inquisition into the beliefs of applicants for

57. Letter from John Bassett Moore to HFS, Oct. 18, 1930.
58. Letter from HFS to John Bassett Moore, Oct. 21, 1930.

citizenship, censored their thoughts, or prescribed for them the views which they, more than persons seeking public office, must or may not hold."

In the *Schwimmer* case, the undelivered opinion said, "the proven conduct of the applicant, quite apart from her opinions and theories, supported the District Court's inference of her want of that attachment to the principles of the Constitution which the Naturalization Law requires. . . . Here, the applicant stands ready to take the statutory oath as it is written."

"The construction of the statute by the opinion of the Court," Stone concluded, "as requiring applicants for citizenship to promise unconditionally to bear arms in some future hypothetical war, and authorizing their exclusion on the basis of their views and opinions, wholly apart from their behavior, seems to be a strained and unnatural one, not consonant with its words or history."[59]

Stone's draft opinion did not go down, however, as Hughes' willingness to distinguish the *Schwimmer* case and treat it as standing on its own "special facts," enabled Stone to join Holmes and Brandeis in the Chief Justice's dissent. "Sensing a possible feeling that the publication of another dissent would not be wholly appreciated," Stone explained, "I withdrew my own."[60] Once more Stone had an excuse for not stating "succinctly" his peculiar stand—that Miss Schwimmer was denied citizenship not for her opinions but for her past behavior.

Moore made his disgust over the *Macintosh* ruling known immediately. "Yesterday," he wrote Stone, May 26, 1931, "I read with real grief the decision in the naturalization case; a decision having, in my opinion, no foundation in law, and involving the exercise of a narrow, tyrannical, inquisitional supervision over personal beliefs. Most fully do I agree with the declaration that it 'is not within the province of the courts to make bargains with those who seek naturalization'; and for the very same reason the courts commit a bald usurpation of power when they go outside the terms and well styled interpretations of old statutes in order to force those who seek naturalization to make extralegal bargains with them."

Why was Justice Stone at such pains to maintain a distinction seemingly so

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59. Unpublished slip opinion prepared by Stone as a dissent in United States v. Macintosh, 283 U.S. 605 (1931). Herein Stone followed Moore closely. "In reading the Schwimmer case," Moore had observed, "one of the first thoughts that occurred to me was a question not mentioned in the dissent, and that was the question whether the Court did not give to the prescription of the oath in the Naturalization Act of 1906 an effect not given to it before and not justified. The form of the oath is not, I believe, new. Is it not in substance the oath that has been administered since the foundation of the government not only to petitioners for citizenship but also to all persons taking office? If this be so, how can a court be justified in using it, after the lapse of one hundred and forty years, for the purpose of conducting an inquisition into beliefs, for the purpose of excluding individuals from citizenship, or citizens from office? . . . By what authority can a court assume to set up, under the mere prescription of the oath, an inquisition into beliefs and to censor the thoughts and prescribe the views which persons seeking citizenship or public office must or may not hold?" Letter from John Bassett Moore to HFS, Oct. 18, 1930.

60. Letter from HFS to John Bassett Moore, May 27, 1931.

tenuous? The reason may have been his instinctive distrust of radicals and agitators. Writing in 1919, he suggested that their "muddle-headed" thinking was produced by a "variety of causes," but listed "false social and political theories" among the "most frequent."[61] Rosika Schwimmer was cut from the same cloth as the proud political zealots Stone had encountered in camp after camp during World War I. Pacifists refused, sometimes on political grounds, to use force on behalf of their government. As a Supreme Court Justice, he could do no more for Miss Schwimmer than he did for political recalcitrants as a member of the Board of Inquiry in 1918. A religious dissenter such as Professor Macintosh, on the other hand, could enlist his support.

As to the effect of Stone's experience in reviewing cases of conscientious objectors, Justice William O. Douglas writes: "I know from what he told me that it was for him a moving experience. Perhaps he learned from the quiet Quakers, or from those who are more impassioned, the full meaning of religious freedom. Perhaps he saw in the deep, burning eyes of some of the 2,000 drafted men whom he interviewed the message that there are some who will die rather than bear false witness to their religion."[62]

These naturalization cases gave Stone a wrench. Invoking technical reasons for not speaking out in the agitators' behalf, he sometimes seemed to grasp at straws. In the case of Marie Bland, another pacifist seeking citizenship, decided with the *Macintosh* case, he argued that because she refused to take the oath exactly as written, the Court could not assist her. A separate concurrence was written along this line, but as no one, including members of Sutherland's majority, thought this fact significant, Stone abandoned it and joined in Hughes' brief dissent.[63] The same pattern reappeared in *Hamilton v. Regents of the University of California* [64] where the Court held that the state might require students attending the state university to take military drill in spite of religious scruples. Justice Butler, speaking for the Court, featured the *Schwimmer* and *Macintosh* cases as supporting precedents. Stone, though wanting to go along with the majority, was discomfited. "I wish very much," he wrote Justice Butler, November 28, 1934, "that I could persuade you to drop from your opinion in No. 55, *Hamilton v. University of California,* the references to the Schwimmer Case and the Macintosh Case. Neither case has very much to do with the question presented to us now, and the present case does not need their support. I do not deny the truth of the quotations from these opinions. My only feeling about them is that they unnecessarily rub salt into the wounds of a great many very worthy people who, I am convinced, dwell on a higher spiritual plane than I do, and I am not at all sure that another generation may not conclude that their views about war are a great deal wiser than my own. The subject with which we are called upon to deal is a delicate one, and I feel

61. Stone, *The Conscientious Objector,* 21 COLUMBIA UNIVERSITY QUARTERLY 253, 254, 269 (1919).

62. DOUGLAS, AN ALMANAC OF LIBERTY 352 (1954).

63. United States v. Bland, 283 U.S. 636, 637 (1931).

64. 293 U.S. 245 (1934).

that we ought to avoid causing any unnecessary irritations so far as is reasonably possible."

Justice Butler refused to budge. "Admittedly the Schwimmer and Macintosh cases as to the points on which they are here cited accurately state the law," he wrote Stone. "I fear failure now to cite them might, because of the difference on other points reflected by the dissenting opinions, be misunderstood to the detriment of the law."[65]

Justice Cardozo also had misgivings and stated them in a six page memorandum. Uncertain as to "whether it is wise to circulate it," he temporized. "All through the land," he wrote Stone, "conscientious and high principled young men—for ethical if not religious reasons—are opposed to military training. I think it oppressive to make them submit to it in these times of peace, though I am satisfied the state has the power to be oppressive if it chooses. The opinion of the Court seems to be quite without sympathy for their attitude. But I suppose it is best to keep one's mouth shut when in doubt."[66]

In the end, however, Cardozo's memorandum went down as a concurring opinion.[67] Stone, along with Brandeis, joined in it. Justice Stone had again missed an opportunity to speak his own mind. As his letter to Justice Butler indicates, the policy of "remaining silent" still seemed the wiser course.

Stone never quite subdued the nagging disquiet caused by parting company with Holmes in the *Schwimmer* case. Yet to his dying day, he maintained that there was a difference between her case and that of Professor Macintosh.[68] Naturalization involves the assumption of obligations as well as the entry upon privileges, he reasoned. Therefore, the authorities, bound by an act of Congress, were justified in ascertaining whether the applicant was frank in claiming to assume those obligations. "He found it almost impossible," Louis Lusky observes, "to admit that he had changed his mind about anything he had said in an opinion, . . . with resulting lack of clarity."[69] To the very end he could admit no more than a regret that he had not made his position clear. "I have always thought that the *Schwimmer* case was correctly decided but not for the reasons stated in the opinion. These cases later attracted attention," he explained in 1941, and "I have naturally regretted that I did not write my own opinions in both of them."[70]

Preferred Freedoms in Eclipse

At intervals over twenty years, Stone had wrestled earnestly with the paradoxes of liberty and authority in the modern state at this most sensitive level. The battle was never fought to a finish. As though he had written prologues

65. Letter from Pierce Butler to HFS, Nov. 30, 1934.
66. Letter from Benjamin N. Cardozo to HFS, Nov. 30, 1934.
67. Hamilton v. Regents of the University of California, 293 U.S. 245, 265 (1934).
68. Girouard v. United States, 328 U.S. 61, 72 n.1 (1946).
69. Letter from Louis Lusky to ATM, May 25, 1955.
70. Letter from HFS to Clinton L. Rossiter, April 12, 1941.

to a series of uncompleted plays, the ghosts of old decisions continued to rise up and rehearse their agonies. Until 1940, he, somewhat like the Court itself, seemed to be keeping open two lines of approach. The showdown came in the spring of that year. Then in flat contradiction to the "preferred position" he and other Justices had indicated for freedom of thought and belief, all his colleagues approved the compulsory flag salute required of Jehovah's Witnesses. It was a notable decision.[71] At long last Stone spoke out—alone.

In 1936 the Gobitis children, aged twelve and ten, had refused to join other pupils in the flag salute, as ordained by the Minersville, Pennsylvania, School Board. This did not mean that they were unpatriotic, or that they did not love their country. It simply meant that, as they read the Scriptures, the flag salute violated the Biblical injunction against bowing down to a graven image. Expelled from the town's grammar school, their father's suit to obtain readmittance reached the Supreme Court just as the Second World War threatened. The nation was already in the throes of hectic preparation. Moved, one suspects, by considerations of "time and circumstances,"[72] eight Justices, speaking through Justice Frankfurter, found the School Board's prescribed ceremony rationally related to the purpose of fostering national unity—"the basis of national security," and "an interest inferior to none in the hierarchy of legal values."[73]

The basic issue was not new for either Stone or Frankfurter. In his memorandum of September 18, 1918 to Secretary of War Newton Baker, Frankfurter had said that "conscientious objectors, whether sectarian or individualistic . . . who stand in uncompromising opposition [whether to combatant or noncombatant service] should be convicted and confined." "I suggest," Frankfurter wrote, that "these absolutists be turned over to the Fort Leavenworth authorities for treatment." Stone, on the other hand, held that: "All human experience teaches us that a moral issue cannot be suppressed or settled by making its supporters martyrs."[74] Justice Stone adhered to this belief in the Jehovah's Witnesses cases. Earlier in the 1939-40 Term, Chief Justice Hughes' hint from the Bench during argument[75] that Jehovah's Witnesses could not invoke the free-speech protection because what they said was offensive to Catholics, had stirred him profoundly. "I suppose," he wrote John Bassett Moore while the *Gobitis* case was under consideration, "there are limits beyond which personally offensive free speech cannot be pressed, but there would not

71. Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940).

72. "It seems to me," Frankfurter wrote Stone in explanation of his stand in the *Gobitis* case, "that we do not trench on an undebatable territory of libertarian immunity to permit the school authorities a judgment as to the effect of this exemption in the particular setting of our time and circumstances." Letter from Felix Frankfurter to HFS, May 27, 1940.

73. Minersville School Dist. v. Gobitis, 310 U.S. 586, 595 (1940).

74. Stone, *The Conscientious Objector*, 21 COLUMBIA UNIVERSITY QUARTERLY 253, 270 (1919).

75. In Cantwell v. Connecticut, 310 U.S. 296 (1940).

be much necessity for free speech protection if it extended only to those things we like to hear."[76] At conference, however, he reserved his vote.

By the time the *Gobitis* case reached the Justices, April 21, 1940, this issue had been before them three times. In each instance, they disposed of the matter by per curiam opinion, for want of a substantial federal question. As late as April 17, 1939, Justice Stone joined his colleagues in denying appeal from the Supreme Court of California, upholding the flag salute.[77] When, less than a year later, it became evident that Stone would dissent in the *Gobitis* case, Justice Frankfurter was astonished and dismayed. In a five-page letter he elaborated the consideration he had given this "tragic issue," all the more delicate for him in that it involved a "clash of rights, not the clash of wrongs." "For resolving such clash we have no calculus," Frankfurter commented. "We are not exercising an independent judgment; we are sitting in judgment upon the judgment of the legislature."

"Nothing has weighed as much on my conscience, since I have come on this Court, as has this case," the Court's spokesman wrote. "All my bias and predisposition are in favor of giving the fullest elbow room to every variety of religious, political and economic view." Frankfurter's stand was the more soul-wrenching in that it entered "a domain where constitutional power is on one side and my private notions of liberty and toleration and good sense are on the other. . . . I want to avoid the mistake comparable to that made by those whom we criticized when dealing with the control of property. . . . My intention . . . was to use this opinion as a vehicle for preaching the true democratic faith of not relying on the Court for the impossible task of assuring a vigorous, mature, self-protecting and tolerant democracy by bringing the responsibility for a com-

76. Letter from HFS to John Bassett Moore, May 22, 1940.

77. Gabrielli v. Knickerbocker, 306 U.S. 621 (1939). The earlier cases suffering a similar fate are Hering v. State Bd. of Education, 303 U.S. 624 (1938), and Leoles v. Landers, 302 U.S. 656 (1937).

Whether Justice Stone joined in voting *against* the appeal in the *Leoles* and *Hering* cases is uncertain. Justice Frankfurter, basing his opinion on Johnson v. Deerfield, 306 U.S. 621 (1939), contends that he did. "Johnson v. Deerfield was," Frankfurter explains, "an adjudication. The judgment below was affirmed, and it is a matter of common practice not to join such an affirmance if one dissents from it. Stone did not dissent from that affirmance. It was rested on three prior dispositions, two of which [are] Leoles v. Landers, 302 U.S. 656; Hering v. State Bd. of Education, 303 U.S. 624. . . ." Letter from Justice Felix Frankfurter to ATM, Oct. 29, 1955.

Louis Lusky, Stone's law clerk at the time the *Leoles* and *Hering* cases were disposed of, rejects Frankfurter's contention. Lusky writes: "It was the Justice's practice to tabulate in his red leather-bound docket book the votes at the conference, marking a '1' in the appropriate box opposite each Justice's name as the vote was cast. When he returned from the conference I would, with his knowledge and permission, look over the votes—partly as a matter of curiosity, to see how closely he had followed the recommendations which I would make in each case as to whether jurisdiction should be taken. I took particular note of the *Leoles* and *Hering* cases because I was interested in the subject matter and had discussed the cases with the Justice prior to the conference. I was, of course, disappointed with the rulings of the Court, but was gratified to find that in each case the Justice had voted against dismissing the appeal." Letter from Louis Lusky to ATM, July 15, 1955.

bination of firmness and toleration directly home where it belongs—to the people and their representatives themselves." In all this, Frankfurter thought he was but following Stone's pointed admonitions about judicial self-restraint. "I have tried in this opinion really to act on what will, as a matter of history, be a lodestar for due regard between legislative and judicial powers, to wit, your dissent in the Butler case."

Nor was this the only case in which Stone had stated the guiding rule Frankfurter thought he was following: "I am aware of the important distinction which you so skillfully adumbrated in your footnote 4 (particularly the second paragraph of it) in the *Carolene Products Co.* case. I agree with that distinction; I regard it as basic. I have taken over that distinction in its central aspect in the present opinion . . . by insisting on the importance of keeping open all those channels of free expression by which undesirable legislation may be removed, and keeping unobstructed all forms of protest against what one deems invasions of conscience, however much the invasion may be justified on the score of the deepest interests of national wellbeing."

"We are not," Frankfurter emphasized, "the primary resolver of the clash." The Court's spokesman was concerned lest we "exercise our judicial power unduly, and as though we ourselves were legislators by holding with too tight a rein the organs of popular government."[78]

It was most embarrassing to be confronted by an antagonist who, as Stone said, quotes "my favorite author against me." But, he retorted, any "vulgar intrusion of law in the domain of conscience," as in this case, imposes on the Court a larger responsibility than in legislation dealing with the control of property. "I am truly sorry not to go along with you. The case is peculiarly one of the relative weight of imponderables and I cannot overcome the feeling that the Constitution tips the scales in favor of religion."[79]

For Justice Frankfurter the great lesson of the controversy over the Supreme Court in 1937 was that judges may not interpose personal valuations in any sphere of judicial competence. "The precise issue," in the *Gobitis* case, was "whether the legislatures of the various states and the authorities in a thousand counties and school districts of this country are barred from determining the appropriateness of various means to evoke that unifying sentiment without which there can ultimately be no liberties, civil or religious." The Court must defer to local authority, Frankfurter insisted. "To stigmatize legislative judgment in providing for this universal gesture of respect for the symbol of our national life in the setting of the common school as a lawless inroad on that freedom of conscience which the Constitution protects, would amount to no less than the pronouncement of pedagogical and psychological dogma in a field where courts possess no marked and certainly no controlling competence."[80] The essence of Stone's *Carolene Products* footnote was that

78. Letter from Felix Frankfurter to HFS, May 27, 1950, reprinted in full in MASON, SECURITY THROUGH FREEDOM 217-20 (1955). See, in this connection, *Can the Supreme Court Guarantee Toleration?* in FRANKFURTER, LAW AND POLITICS 195-97 (1939).

79. For this pencil-written, undated note, I am indebted to Mr. Justice Frankfurter.

80. Minersville School Dist. v. Gobitis, 310 U.S. 586, 597-98 (1940).

> "Except where the transgression of constitutional liberty is too plain for argument, personal freedom is best maintained—so long as the remedial channels of the democratic process remain open and unobstructed—when it is ingrained in a people's habits and not enforced against popular policy by the coercion of adjudicated law."[81]

At the end Frankfurter threw down the very caveat Stone had hurled at his colleagues in 1936. "[T]o the legislature no less than to courts is committed the guardianship of deeply-cherished liberties."[82]

Stone's first thought was to follow his usual pattern in cases of this sort—merely note dissent without supporting reasons. "Partly out of urging on my part and partly becaue he felt rather strongly," his law clerk, Allison Dunham, recalls, "he finally decided to write his dissent."[83] "One cannot be too sure he is right in such matters," Stone wrote of his opinion later, "but at least he must be true to the faith that is in him."[84] But he delayed so long that his dissent circulated only after most of the Justices had signified adherence to Frankfurter's opinion.[85]

On the day the *Gobitis* case was to come down, his law clerk told him that Frankfurter planned to read his opinion in full.[86] "He began to think of

81. *Id.* at 599.

82. *Id.* at 600.

83. Letter from Allison Dunham to ATM, Oct. 2, 1951. "Dunham had fierce feelings on the subject," Justice Frankfurter commented in an interview, April 7, 1953. "Stone took weeks to decide." But Dunham rejects any implication that he had "any effect" on Stone's initial decision to vote against the majority. The former law clerk is inclined to think that "the law clerk was not important in the decision-making process which Stone went through in making up his mind." "My recollection," he observes, "is that when I talked to him before the conference he had even then made up his mind to vote as he did. . . . My influence, if any, in the *Gobitis* case was in inducing Stone to write a dissent as distinguished from noting his dissent." Letter from Allison Dunham to ATM, June 26, 1952.

84. Letter from HFS to Norman Meyer, June 5, 1940.

85. Letter from Allison Dunham to ATM, Oct. 2, 1950.

86. Stone, along with Brandeis, had been instrumental in fixing the custom of reading a brief summary in each case, rather than giving the opinion at length from the bench.

"I have omitted to tell you about the change which has gradually taken place in our practice of oral delivery of opinions," Stone wrote Frankfurter, March 17, 1938.

"At the outset, I should say that I have long felt that the elaborate oral delivery of opinions was a great waste of time, without any compensating advantage to the Court, and that the practice was especially bad when, as in the case of some notable dissents, the dissent delivered had no relationship to the written dissent which had previously been circulated among the members of the Court. There has, I think, always been a feeling on the part of some members of the Court that the business of delivering opinions orally was overdone, but there have always been some members who have been strongly opposed to any serious restriction of the practice.

"Some time ago a number of us adopted the practice of merely announcing the name of the case, the way in which it came to us (certiorari, appeal, certificate, etc.), the precise question presented, and the decision. This takes about two minutes. We have gradually gained recruits. Those who preferred the old method became somewhat conspicuous if they indulged in long oral discourse, and have gradually curtailed their own performance.

reading his opinion also," Dunham recalls. "During the course of the morning it became clear that he was getting more and more worked up. At Court time, when the opinions were read, Frankfurter, to our surprise, did not read his but merely announced the result."[87] By this time Stone was so agitated he could not change his plans. When his turn came, he sat forward in his seat and, in a manner rare for him, read with fervor and emotion.

"History teaches us," he said, "that there have been but few infringements of personal liberty by the state which have not been justified, as they are here, in the name of righteousness and the public good, and few which have not been directed, as they are now, at politically helpless minorities."[88] The Pennsylvania law did more than prohibit the free exercise of religion. In the name of national unity, it sought to coerce the Gobitis children to express a sentiment they did not entertain, in violation of their deepest spiritual convictions. The flag salute requirement could not stand, even though it be thought to enhance the interest of national unity.

> "[W]here there are competing demands of the interests of government and of liberty under the Constitution, and where the performance of governmental functions is brought into conflict with specific constitutional restrictions, there must, when that is possible, be reasonable accommodation between them so as to preserve the essentials of both . . . it is the function of courts to determine whether such accommodation is reasonably possible."

Granted that national cohesion is a desirable social end,

> "there are other ways to teach loyalty and patriotism which are the sources of national unity, than by compelling the pupil to affirm that which he does not believe and by commanding a form of affirmance which violates his religious convictions. Without recourse to such compulsion the state is free to compel attendance at school and require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guaranties of civil liberty which tend to inspire patriotism and love of country. I cannot say that government here is deprived of any interest or function which it is entitled to maintain at the expense of the protection of civil liberties by requiring it to resort to the alternatives which do not coerce an affirmation of belief."[89]

Loyalty is a beautiful idea, the dissenter said in effect, but you cannot create it by compulsion and force.[90]

The result has been that on the last few opinion days following recesses, delivery of opinions has occupied only a brief time, twenty minutes or so. One day the docket broke down because the Clerk did not realize that most of the day would not be consumed with the delivery of opinions.

"Thus, by force of example, there has come about a reform which it seemed impossible to establish by any formal action."

87. Letter from Allison Dunham to ATM, Oct. 2, 1950.

88. Minersville School Dist. v. Gobitis, 310 U.S. 586, 604 (1940).

89. *Id.* at 603-04.

90. CHAFEE, FREE SPEECH IN THE UNITED STATES 565 (2d ed. 1941).

Stone did not, of course, insist on religious freedom as an absolute. "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."[91] A pacifist could be made to fight, though a wise state might attempt accommodation to his scruples. A man could be forbidden to do many things dictated by his private conscience. But great care must be exercised in adjusting the necessary functions of government to the legitimate demands of freedom, so as to "preserve the essentials of both." There was no occasion for weighing the regulation to see if it could be valid under any conceivable state of facts. The Minersville School Board had struck at the vitals of liberty; its patent destruction of religious freedom could not survive judicial inquiry, and no niceties of judicial self-restraint should keep the Court from saying so:

> "The guaranties of civil liberty are but guaranties of freedom of the human mind and spirit and of reasonable freedom and opportunity to express them. They presuppose the right of the individual to hold such opinions as he will and to give them reasonably free expression, and his freedom, and that of the state as well, to teach and persuade others by the communication of ideas. The very essence of the liberty which they guaranty is the freedom of the individual from compulsion as to what he shall think and what he shall say, at least where the compulsion is to bear false witness to his religion. If these guaranties are to have any meaning they must, I think, be deemed to withhold from the state any authority to compel belief or the expression of it where that expression violates religious convictions, whatever may be the legislative view of the desirability of such compulsion."[92]

Far from being free to wash its hands of such questions by deferring to legislative judgment, or by applying the usual presumption of constitutionality, the Supreme Court had a positive duty, enjoined by the Constitution itself. Though America's fundamental law may embody no particular economic theory, it does contain explicit protections for personal liberty. These the Court is bound to enforce. No legislative evaluation of national unity could override safeguards the Constitution places around religious freedom. "The framers were not unaware," Stone said, "that under the system which they created most governmental curtailments of personal liberty would have the support of a legislative judgment that the public interest would be better served by its curtailment than by its constitutional protection." The positive terms of the Bill of Rights made it inconceivable that "they intended or rightly could have left any latitude for a legislative judgment that the compulsory expression of belief which violates religious convictions would better serve the public interest than their protection."[93] "The very terms of the Bill of Rights preclude . . . any reconciliation of such compulsions with the constitutional guarantees by a legislative

91. Minersville School Dist. v. Gobitis, 310 U.S. 586, 602 (1940).
92. *Id.* at 604.
93. *Id.* at 604-05.

declaration that they are more important to the public welfare than the Bill of Rights."[94]

Nor could judges avoid expressing an independent judgment on the wisdom of legislative policy in conflict with the Bill of Rights, even if the political process remained unimpaired. "Where all the effective means of inducing political changes are left free from interference," Frankfurter had argued, "education in the abandonment of foolish legislation is itself a training in liberty. To fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies rather than to transfer such a contest to the judicial arena, serves to vindicate the self-confidence of a free people."[95]

"I am not persuaded," Stone replied, "that we should refrain from passing upon the legislative judgment 'as long as the remedial channels of the democratic process remain open and unobstructed.' This seems to me no less than the surrender of the constitutional protection of the liberty of small minorities to the popular will."[96]

Jehovah's Witnesses were an unpopular religious minority, subject to prejudice which tended to curtail the operation of corrective political processes. Under the rule suggested by the third paragraph of the *Carolene Products* footnote, the Court is the ultimate "resolver of the clash." If the Justices stood aloof, as the majority opinion held, numerically inconsequential groups might find themselves helpless victims of overpowering prejudice. Such minorities have a claim to be heard, a claim honored in the Constitution. All acts infringing their rights must be subjected to "searching judicial scrutiny."

Nor was tolerance a luxury to be enjoyed only in untroubled times; it is "needed most, and most urgently, . . . in times . . . when the nation is subject to extraordinary stress."[97] Answering Frankfurter's argument that liberty is best maintained when it is ingrained in a people's habits, and not enforced against popular policy by adjudicated law, Stone wrote:

> "The Constitution expresses more than the conviction of the people that democratic processes must be preserved at all costs. It is also an expression of faith and a command that freedom of mind and spirit must be preserved, which government must obey, if it is to adhere to that justice and moderation without which no free government can exist."[98]

Stone's emotions rose to heights he seldom exhibited. Later in the day he became somewhat ashamed, and rather regretted having read his dissent at length. But he had made a profound impression. "Not only sensible, but courageous," Thurman Arnold wrote the dissenter. "When a liberal judge holds out alone against his liberal brethren," Benjamin V. Cohen remarked, "I

94. *Id.* at 605-06.
95. *Id.* at 600.
96. *Id.* at 605-06.
97. BARTH, THE LOYALTY OF FREE MEN 238 (1951).
98. Minersville School Dist. v. Gobitis, 310 U.S. 586, 606-07 (1940).

think he ought to know when he has spoken not for himself alone, but has superbly articulated the thoughts of his contemporaries who believe with him in an effective but tolerant democracy." A former law clerk, who had toiled over the American Bar Association's amicus brief in behalf of the Gobitis children, wrote him: "It certainly took me down a peg to see with how much more insight and skill you were able to expound the same position after working only a few days at the most." For this erstwhile co-worker, Stone's opinion combined "the grace of Holmes, the solidity of Brandeis and a certain hard hitting subtlety and economy of language which you have made your own. And beyond that, it must have required some courage to print such an opinion in times like these."[99]

The dissenting Justice also drew praise from some who had never screwed up enough courage to congratulate a judge. "My admiration for one who could not be swayed by the passions of the time from a proper evaluation of the worth of human freedom got the best of me," a timorous correspondent commented. In Massachusetts, where the issue had not yet been settled, citizens were urged to ponder Stone's dissent "before making any more religious martyrs out of children."[100] Clergymen from a variety of denominations saw "grave error" in the majority stand. John Haynes Holmes, chairman of the American Civil Liberties Union, said Stone's dissent would "rank as one of the great dissenting opinions in American history."[101]

Press comment was highly favorable. One hundred and seventy-one leading newspapers promptly condemned the decision; only a handful approved it.[102] The St. Louis Post-Dispatch called it a "terrible decision." "We think this decision of the United States Supreme Court is dead wrong," the Post-Dispatch editorialized. "We think its decision is a violation of American principle. We think it is a surrender to popular hysteria. If patriotism depends upon such things as this—upon violation of a fundamental right of religious freedom, then it becomes not a noble emotion of love for country, but something to be rammed down our throats by the law."[103] "The Court," the Miami Herald asserted, "cannot stop these people from believing in their strange doctrine."[104]

99. Letter from Louis Lusky to HFS, Aug. 16, 1940.

100. Letter from Frank Grinnell to Editor, Boston Herald, June 5, 1940, p. 22, col. 3.

101. Letter from John Haynes Holmes to HFS, June 14, 1940.

102. See Heller, *A Turning Point for Religious Liberty*, 29 VA. L. REV. 440 (1943).

103. St. Louis Post-Dispatch, June 4, 1940.

104. *The Flag Salute Decision*, Miami Herald, June 5, 1940. For other editorials unfavorable to the majority opinion, see *School Boards May But Need Not Be Intolerant*, Baltimore Sun, June 4, 1940; *An Illiberal Court*, Chicago Tribune, June 9, 1940; *Can Patriotism Be Compelled?* Christian Science Monitor, June 5, 1940; *Distorting the Constitution*, New York Evening Post, June 6, 1940; *A Surprising Decision*, Norfolk Virginian-Pilot, June 4, 1940; *No Patriotic Victory*, Record (Columbia, S.C.), June 5, 1940; *Lawful, But Still Silly*, San Francisco Chronicle, June 4, 1940; *Patriotism by Fiat*, Trenton (N.J.) Gazette, June 7, 1940; Birmingham Age-Herald, June 17, 1940. For comments in legal periodicals, see list in Note, 52 YALE L.J. 168, 175 (1942).

All such press support demonstrated to Justice Stone that "there are many who set high value on civil liberties and are deeply concerned by our decision."[105] Few shared the Boston Herald's conviction that "a strong declaration [by the Supreme Court] as to the importance of national cohesiveness is timely."[106] Even the Catholic journal *America*, voice of the Jehovah's Witnesses' principal target, took exception to the idea that "patriotism can be taught by an enforced flag salute."[107] Professing liberals far and wide, including some with whom Frankfurter worked shoulder to shoulder before coming to the Court, deplored his "judicial self-restraint," regretted his misguided attempt to fortify national unity at the cost of freedom. "First and foremost," Harold Laski wrote Stone from London, "I want to tell you how right I think you are in that educational case from Pennsylvania and, to my deep regret, how wrong I think Felix is. That was a noble decision, nobly written."[108] Both *The Nation* and *The New Republic* applauded Justice Stone's "conclusive dissent."[109] The Court itself is verging on hysteria, *The New Republic* commented, when it "says in effect that we must imperil religious liberty in the interest of the American state, which is worth preserving because it guarantees religious liberty. . . ."[110] "The spirit now shown toward 'communists,'" John Bassett Moore observed, "is of a piece with that which is requiring children in the schools daily to salute the flag. I am sorry to see Frankfurter acting as the mouthpiece of such measures, which are likely to create disloyalty more than to promote loyalty."[111]

Certain correspondents marveled at the "staunchness" of Stone's associates in withstanding the force of his reasoning.[112] But the Justice himself felt somewhat crushed by his failure to wean anyone from the majority. To a federal circuit court judge who was "a good deal moved," he replied: "One of the difficulties with the opinion is that it is not moving enough."[113] "I am sorry," he told a law clerk, "that the opinion in the *Flag Salute* case did not draw at least one 'just' man to its support. However, as you know, I do not mind standing alone if I must."[114]

In certain quarters Stone's temerity stimulated ugly reaction. A Boston veterans' organization called for his resignation. "In dissenting on that decision," its resolution read, "you simply gave a bad example and encouraged

105. Letter from HFS to Norman Meyer, Oct. 13, 1940.
106. Boston Herald, June 5, 1940.
107. Blakely, *Omnipotent Schoolboards*, America, June 22, 1940, p. 286.
108. Letter from Harold J. Laski to HFS, July 10, 1940.
109. *We Don't Like Disagreeing With Felix*, 150 THE NATION 723 (1940).
110. *Frankfurter v. Stone*, 102 THE NEW REPUBLIC 843-44 (1940). See also *A Surprising Decision*, Norfolk Virginian-Pilot, June 4, 1940.
111. Letter from J. B. Moore to HFS, July 19, 1940.
112. Letter from Leon Green to HFS, July 2, 1940.
113. Letters from Henry Edgerton to HFS, June 4, 1940; HFS to Henry Edgerton, June 5, 1940.
114. Letter from HFS to Francis X. Downey, June 5, 1940.

more pupils to refuse to salute the flag. One might gather also from your action that you are either a radicle [sic] or a disciple of that so-called religion."[115]

In the wake of the Court's well-nigh unanimous stamp of approval of the compulsory flag salute, religious bigotry and fanatical, unthinking patriotism became rampant. Jehovah's Witnesses, it was said, "don't believe in Religion; to them Religion is a Racket of making money by selling Judge Rutherford's volumes."[116] Vigilante committees took it upon themselves to enforce respect for the flag by violent means. Between June 12 and June 20, 1940, hundreds of attacks on the Witnesses were reported to the Justice Department for possible action by the Federal Bureau of Investigation. At Kennebunkport, Maine, Kingdom Hall was burned. At Rockville, Maryland, within twenty miles of the majestic Supreme Court building, police joined a mob attack on a Bible meeting. At Litchfield, Illinois a crowd of 1,000 townsfolk milled around sixty canvassing Witnesses, burning their tracts, overturning their cars. At Connersville, Indiana the Witnesses' attorney was beaten and driven out of town. At Jackson, Mississippi a veterans' organization, led by a self-styled major, banished the Witnesses and their trailer houses from the city.[117] Similar incidents occurred in Texas, California, Arkansas and Wyoming. The Department of Justice traced this wave of violence directly to the Court's decision in the first flag-salute case.[118]

The Court itself thus became a weapon in the struggle for men's minds. By its approbation, "foolish" laws become somewhat less so; novel restraint, lodged in the structure of government, had become "constitutional." With the blessing of an authoritative Supreme Court judgment, the country's local school officials tightened up on the flag salute requirement.[119] In several states the lower courts treated recalcitrant Witnesses' children as delinquents and confined them to state reform schools. After the Supreme Court's decision, trial court rulings were speedily reversed in Stone's own native New Hampshire.[120]

"It would be a mistake," the St. Louis Post-Dispatch commented soberly, "to attribute these outbreaks of violence against religious minorities solely to the United States Supreme Court's opinion upholding the compulsory flag salute in public schools . . . . Yet there can be little doubt that most unfortunate decision will be an encouragement for self-appointed guardians of patriotism and the national moralists to take the law into their own hands."[121]

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115. Letter from Italian American World War Veterans of the United States, East Boston Post No. 6, to HFS, June 7, 1940.

116. Letter from Reverend R. E. McDonald to HFS, Feb. 26, 1943.

117. Rotnem & Folsom, *Recent Restrictions upon Religious Liberty*, 36 AM. POL. SCI. REV. 1053, 1061 (1942).

118. CARR, FEDERAL PROTECTION OF CIVIL RIGHTS 16 (1947).

119. See Justice Jackson's remarks, West Virginia State Bd. of Education v. Barnette, 319 U.S. 624, 626 (1943).

120. State v. Lefebvre, 91 N.H. 382, 20 A.2d 185 (1941).

121. St. Louis Post-Dispatch, June 10, 1940.

EPILOGUE: THE CLOUDS LIFT

Although no "just" man could be weaned from the majority to support Stone's *Gobitis* dissent, it soon became apparent that the majority was not as cohesive as the vote—and Justice Frankfurter's opinion—seemed to indicate. The dissent had drawn no votes, but, perhaps assisted by public reaction to the decision, it prompted reflection and reappraisal by certain members of the majority.

Two years after the decision in the *Gobitis* case, the ubiquitous Witnesses came again to the Supreme Court in *Jones v. City of Opelika*[122] and two companion cases. In the interim Justice Stone had become Chief Justice, following the retirement of Hughes, and Associate Justices Byrnes and Jackson had filled the vacancies left by Stone and McReynolds.[123] These cases, it was said, represented but a "logical extension" of the principles on which the decision in the *Gobitis* case had been based.[124] All three concerned the validity of municipal ordinances imposing a license tax on the privilege of selling books and pamphlets on the streets or from house to house. The municipalities argued that the Witnesses' sales of tracts and pamphlets could be taxed like any other commercial activity. In opposition, representatives of the sect claimed protection under the First Amendment, made applicable to the states by the Fourteenth, and urged that the ordinances were a forbidden interference with fundamental religious freedoms.

In an opinion by Justice Reed, the Court ruled that these sales partook "more of commercial than religious or educational transactions."[125] When "proponents of religious . . . theories use the ordinary commercial methods of sales of articles to raise propaganda funds," Justice Reed observed, "it is a natural and proper exercise of the power of the State to charge reasonable fees for the privilege of canvassing."[126] Chief Justice Stone again dissented, urging that the Witnesses were "peripatetic religious propagandists" engaged in the noncommercial, nonprofit activity of disseminating religious ideas.[127]

The *Opelika* case is of interest for more than the Chief Justice's dissent. His views were now shared by Justices Black, Douglas and Murphy, who took the unusual step of explaining that their votes reflected a more complete reversal of views than the case required. Since they had joined in the majority opinion in the *Gobitis* case and now had misgivings, they thought the occasion appropriate to state their belief that it had been "wrongly decided." "The First Amendment," they wrote, "does not put the right freely to exercise religion in a subordinate position. We fear, however, that the opinions in these and in the *Gobitis* case do exactly that."[128]

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122. 316 U.S. 584 (1941).

123. Stone was commissioned July 3, 1941; Byrnes, June 25, 1941; and Jackson, July 11, 1941. See 62 Sup. Ct. V (1942).

124. Jones v. City of Opelika, 316 U.S. 584, 623 (1941) (dissenting opinion).

125. *Id.* at 598.

126. *Id.* at 597.

127. *Id.* at 608, 610.

128. *Id.* at 624.

Several months before the *Opelika* decision came down in June of 1942, the West Virginia State Board of Education adopted a resolution requiring the flag salute of pupils and teachers alike.[129] Refusal to comply was made an act of "insubordination," and insubordination meant expulsion.[130] Under the compulsory school attendance law, an expelled child became automatically a delinquent, and both he and his parents were subject to prosecution.[131]

Given hope, perhaps, by the *Opelika* decision, one Walter Barnette and several other Witnesses brought suit in the summer of 1942 to enjoin enforcement of the regulation, claiming that it denied them and their children the free exercise of religion guaranteed by the Fourteenth Amendment. With rare prescience, a three-judge district court disregarded precedent and granted the injunction. "Ordinarily we would feel constrained to follow an unreversed decision of the Supreme Court . . . whether we agreed with it or not," Circuit Judge Parker commented. "The developments with respect to the Gobitis case, however, are such that we do not feel that it is . . . binding authority . . . [citing Jones v. City of Opelika]."[132] Under such circumstances, the judges believed, "we would be recreant to our duty as judges, if . . . we should deny protection to rights which we regard as among the most sacred of those protected by constitutional guarantees."[133]

As the *Barnette* case proceeded to the Supreme Court for review, the district court's estimate of the situation was further reinforced. Justice Byrnes, a member of the majority in the *Opelika* case, resigned in October, and Justice Rutledge was appointed to succeed him in February.[134] Four days after the new Justice took his seat, the Supreme Court granted certiorari in *Murdock v. Pennsylvania*,[135] another case involving a license tax on Witnesses' missionary activities, and ordered reargument in *Jones v. City of Opelika* and two companion cases.[136] In May the four dissenters and Justice Rutledge reversed the former decision in *Opelika*, and decided all four cases in favor of the Witnesses.[137] "Freedom of press, freedom of speech, freedom of religion are in a preferred position," Justice Douglas declared for the majority in the *Murdock* case.[138] Justice Frankfurter and the three other Justices dissented.[139] The

129. See West Virginia State Bd. of Education v. Barnette, 319 U.S. 624, 626 (1943).
130. *Id.* at 629.
131. *Ibid.*
132. Barnette v. West Virginia State Bd. of Education, 47 F. Supp. 251, 252-53 (S.D. W. Va. 1942).
133. *Ibid.*
134. See 63 Sup. Ct. V (1943).
135. 318 U.S. 748 (1943).
136. Jones v. City of Opelika, 318 U.S. 796 (1943).
137. Murdock v. Pennsylvania, 319 U.S. 105 (1943); Jones v. City of Opelika, 319 U.S. 103 (1943).
138. Murdock v. Pennsylvania, *supra* note 137, at 115.
139. Jones v. City of Opelika, 319 U.S. 103, 134 (1943) (Frankfurter, J.); *id.* at 117 (Reed and Roberts, JJ., *inter alia*); Douglas v. City of Jeannette, 319 U.S. 157, 166 (1943) (Jackson, J.).

public at large assuredly did not yet know it, but the compulsory flag salute was already doomed.

In *West Virginia State Board of Education v. Barnette*,[140] the Court voted six to three that the Board's regulation was an unconstitutional invasion of the religious rights of a minority. Drawing heavily on Stone's *Gobitis* dissent, Justice Jackson endorsed "preferred freedoms" for the Court in the strongest terms:

> "Much of the vagueness of the due process clause disappears when the specific prohibitions of the First [Amendment] become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect."[141]

Thus succeeded one of the most effective "appeals to the brooding spirit of the law"[142] in American judicial history. Thus did the doctrine of "preferred freedoms," pre-eminently the contribution of Justice Stone, for a time achieve majority acceptance.

CONCLUSION

Commentators disagree as to the role Stone assigned the judiciary in the rarefied area of civil rights. One writer gives him special credit for "developing a rationale justifying a larger scope of judicial intervention in those cases in which alleged impairment of basic civil liberties was involved."[143] Judge Learned Hand denies that Stone made any such distinction. "It needed little acquaintance with the robust and loyal character of the Chief Justice," Judge Hand wrote in 1946, "to foretell that he would not be content with what to him was an opportunistic reversion at the expense of his conviction as to the powers of a court." Judge Hand is certain that Stone never meant to insist that the courts have a wider latitude for enforcing their own predilections when concerned with "personal rights" than when concerned with property itself.[144]

Stone's own words refute this view: "The First Amendment is not confined to safeguarding freedom of speech and freedom of religion against discrimi-

140. 319 U.S. 624 (1943).

141. West Virginia State Bd. of Education v. Barnette, 319 U.S. 624, 639 (1943).

142. A dissenting opinion is "an appeal to the brooding spirit of the law, to the intelligence of a future day." HUGHES, THE SUPREME COURT OF THE UNITED STATES 68 (1928). Further on the function of dissents, see Powell, *And Repent at Leisure*, 58 HARV. L. REV. 930, 943 (1945).

143. Hendel, *Chief Justice Stone and Judicial Review*, 6 LAW. GUILD REV. 529, 530 (1946).

144. Hand, *Chief Justice Stone's Conception of the Judicial Function*, 46 COLUM. L. REV. 696, 698 (1946).

natory attempts to wipe them out. On the contrary, the Constitution, by virtue of the First and the Fourteenth Amendments, has put those freedoms in a preferred position. Their commands are not restricted to cases where the protected privilege is sought out for attack. They extend at least to every form of taxation which, because it is a condition of the exercise of the privilege, is capable of being used to control or suppress it."[145]

Stone had now rounded out notable contributions. Dedicated to free men, he was also mindful of the necessity for effective government. Power is necessary for the survival of organized society. By leveling the judicially created barriers for property and by repudiating the notion that the "reserved" powers of the states constitute an independent limitation on the powers of Congress, he had won judicial approval of the power to govern. And just as these views gained the ascendancy, he played a commanding role in laying the foundations for new areas of constitutional protection for civil rights.[146] In the *Carolene Products* footnote, as in subsequent decisions, he construed government regulation of economic interests quite differently from legislation curtailing thought, speech and religion. In economic matters the Court should not "sit in judgment on the wisdom of legislative action";[147] it should allow "wide latitude . . . for the legislative appraisal of conditions and for the legislative choice of methods."[148] In judging government interference with civil liberties, however, he was "prepared to weigh the legislative restriction in the light of possible alternatives and to substitute the Court's view of what is necessary or appropriate in the given circumstances for that of the legislature."[149] The Justice not only gave these views blanket endorsement, but also called Holmes to their defense. "Justice Holmes' opinions," he told an inquiring student in 1941, "indicate that he thought that the judge should not be too rigidly bound to the tenet of judicial self-restraint in cases involving civil liberties, although so far as I know he never formulated the distinction. You will find my formulation of it in a footnote in *United States v. Carolene Products Company*."[150]

In 1938 the Bill of Rights, especially the guarantee of freedom to the human mind and spirit, loomed large in Stone's constitutional jurisprudence. The "preferred position" of the freedoms guaranteed against infringement by the First Amendment derived not only from the specific constitutional injunction

145. Jones v. City of Opelika, 316 U.S. 584, 608 (1942) (dissenting opinion).

146. See Wechsler, *Stone and the Constitution*, 46 COLUM. L. REV. 764, 793-800 (1946).

147. United States v. Butler, 297 U.S. 1, 87 (1936) (dissenting opinion).

148. KONEFSKY, CHIEF JUSTICE STONE AND THE SUPREME COURT 263 (1945).

149. *Id.* at 270.

150. Letter from HFS to Clinton L. Rossiter, April 12, 1941.

In setting aside a Texas statute preventing labor organizers from soliciting union membership without first obtaining an organizer's card, Justice Rutledge, building on Stone's *Carolene Products* footnote, said: "The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in

against their infringement but also from their elevated rank in the hierarchy of values. Presumption of constitutionality—a practical rule of government holding that the people and their representatives should be allowed to correct their own mistakes wherever possible—simply does not apply in a situation where, for one reason or another, the legislature cannot be expected to correct its mistakes. In such a case the court must, under the philosophy embodied in the second and third paragraphs of the *Carolene Products* footnote, assume responsibility for the result. Guardianship of corrective political processes was a special function of his Court. It must be alert to legislative intrusions that prevent the effective operation of free government; it must extend its benefits to the novel, the unpopular, the unorthodox. "If only popular causes are entitled to enjoy the benefit of the constitutional guaranties," he observed, "they serve no purpose and could as well not have been written."[151]

"There must be reasonable accommodation between the competing demands of freedom of speech and religion on the one hand, and other interests of society which have some claims upon legislative protection," Stone wrote in an unpublished opinion. "To maintain the balance between them is essential to the well-ordered functioning of government under a constitution. Neither is absolute, and neither can constitutionally be made the implement for the destruction of the other." And, as he never tired of reminding his brethren: "That is where the judicial function comes in."[152]

Today, the "preferred freedoms" doctrine of *Carolene Products* and the *Gobitis* dissent has fallen into a sort of constitutional limbo. Not explicitly approved in recent years by any majority opinion of the Court, it has been explicitly disapproved only by Justice Frankfurter.[153] At least some substance

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our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. . . . That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice." Thomas v. Collins, 323 U.S. 516, 529-30 (1945).

A statute which Stone considered "invalid on its face" was at issue in Lovell v. City of Griffin, 303 U.S. 444, 451 (1938). Here a unanimous Court held invalid the requirement of a license for the distribution of pamphlets to be issued at the sole discretion of a municipal officer. Also a state statute which forbade peaceful picketing for the purpose of notifying the public of the facts regarding a labor dispute is "invalid on its face." Thornhill v. Alabama, 310 U.S. 88, 101 (1940).

Writing Justice Murphy in connection with his opinion in the *Thornhill* case, Justice Stone observed: "The question which troubles me is whether you should treat the statute as void on its face or void only as applied to this particular petitioner. . . . Perhaps it comes down to a matter of use of words, but as I understand it when a statute is void on its face we mean that it can never be applied to anyone under any circumstances." Letter from HFS to Murphy, April 14, 1940.

151. From Stone's draft of an undelivered dissenting opinion in Martin v. City of Struthers, 319 U.S. 141 (1943). This opinion later became, in substance, Justice Black's opinion for the majority.

152. Letter from HFS to Wiley Rutledge, Jan. 23, 1944, apropos Prince v. Massachusetts, 321 U.S. 158 (1944).

153. Dennis v. United States, 341 U.S. 494, 540-41, 544 (1951) (concurring opinion). However, for an ominous recent note, see Ullman v. United States, 24 U.S.L. WEEK 4147

of the doctrine remains. Thus the "clear and present danger" test, in the altered form of *Dennis v. United States*,[154] is still applied in First Amendment cases.[155] Even where the Court has appeared to sanction the "reasonableness" approach to First Amendment freedoms, it has cautioned that freedoms of speech and press must weigh heavily in the scales.[156] In short, the preferred freedoms doctrine, one of Chief Justice Stone's richest legacies to the democratic concept of judicial review, may still be revived. There is hope "that in calmer times, when present pressures, passions and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society."[157]

(U.S. March 26, 1956), upholding the constitutionality of the Immunity Act of 1954. The opinion of the Court, by Justice Frankfurter, contains the dictum, "As no constitutional guarantee enjoys preference so none should suffer subordination or deletion." *Id.* at 4149. In context, the primary purpose of the statement was clearly to emphasize that the Fifth Amendment privilege against self-incrimination was not to be considered an inferior or unimportant right. The statement might well be deemed, therefore, to have no long-range implications. And since *Ullman* was a civil liberties case, the statement might equally be interpreted to mean that all "preferred freedoms" are equally preferred. However, Justice Reed thought it necessary to file a separate opinion on this point alone, concurring in the judgment but taking exception to "the statement that no constitutional guarantee enjoys preference. *Murdock v. Pennsylvania*, 319 U.S. 105, 115; *Thomas v. Collins*, 323 U.S. 516, 530; *cf. Kovacs v. Cooper*, 336 U.S. 77, 88." See Ullman v. United States, 24 U.S.L. WEEK 4147, 4152 (U.S. March 26, 1956). Justices Black and Douglas dissented. *Id.* at 4152.

154. 341 U.S. 494 (1951).

155. For the different standard applied in substantive due process cases, see, *e.g.*, Wieman v. Updegraff, 344 U.S. 183 (1952); American Communications Ass'n v. Douds, 339 U.S. 382, 391-92 (1950).

156. *Id.* at 399-400. *Cf.* Communist Party v. Subversive Activities Control Bd., 223 F.2d 531, 544-46, 554-57 (D.C. Cir. 1954), *cert. granted*, 349 U.S. 943 (1955).

157. Justice Black dissenting in Dennis v. United States, 341 U.S. 494, 581 (1951).

THE YALE LAW JOURNAL

VOLUME 65 APRIL, 1956 NUMBER 5

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