A. EVANGELISM

Many religions are "evangelistic," especially in their early generations of vitality and zeal. "Evangelism" is used here in its classic sense: *eu* (good) + *angelia* (message) = good news = glad tidings = gospel. *Euangelion* is the regular Greek word for "Gospel" in the New Testament, but that is just a special case of a more general reality: every religion has its "gospel," its teaching of Ultimate Meaning, which "makes sense" of an otherwise perplexing and problematic existence. Those adherents who have been seized by this Glorious Explanation can hardly wait to share it with others, not so much (at first) to gain converts but to bring to others the same joy and new confidence that they discovered for themselves. That is the original and basic meaning of "evangelism"—sharing the good message with others.

Sharing good news is a natural and universal human impulse, wholly apart from religion. But when the good news concerns the most urgent and ultimate of human problems—the purpose and destiny of life itself—it is not surprising that such outpourings of messages of reassurance and affirmation should be characteristic of most, if not all, world religions. It is indeed an act at the very center of religious behavior, and it is entitled to the fullest protection afforded by legal guarantees of the free exercise of religion. Efforts to control, constrain or prevent it are among the clearest violations of religious liberty.

In various times and places, conversion from the established faith has been an offense punishable by death. Procuring such conversions has been subject to even more unpleasant sanctions. Even today, in a more effete era, conversion to an "alien" faith can result in the convert's being disowned and considered dead by his or her family. Some religious groups are especially hostile to attempts to convert their members. In a country like the United States that has no official true faith, people are (legally) free to change their religion at will so they can serve their Creator as they see fit, though they may suffer various non-legal sanctions for doing so. Until recently, there was relatively little law on the subject. As a result, church affiliation in America was a fluid concept, particularly given the constant emergence of new faith-impulses, some of which eventually crystallized into institutional forms we know as denominations (Disciples of Christ; Church of Christ, Scientist; Mormons; Pentecostals, etc.).

The Universal Declaration of Human Rights recognizes as an ideal that "everyone has the right to freedom of thought, conscience and religion; this right includes freedom to *change* his religion or belief...." Does it also include freedom to *persuade others* to change their religion? In some countries it doesn't, and it isn't much

welcomed in others. But it is as much a part of religious behavior as praying or preaching and as much entitled to legal protection.

The evangelizational activities of small, new, vigorous religious movements have had a significant impact upon the law of church and state in the United States. At least a dozen important decisions of the U.S. Supreme Court have dealt with this phenomenon, as well as many more lower court decisions, and to them is owed the broadening of the Free Exercise rights of everyone, including those who most vehemently opposed such activities. The next section will discuss those decisions after a brief interlude on "noise."

1. A Direct Mode of Outreach: Noise

Religious organizations have resorted to various means of making their message known to the environing world. Impressive architecture;[1] free tracts and other literature;[2] concerts and other performances offered to the general public; social welfare programs; signs, symbols, posters and placards announcing location and activities of the religious body; and all the other stratagems of advertising have been pressed into service as instruments of evangelism. But one of the simplest has made its mark from time to time: noise. Whether church chimes pealing round the clock or gospel singers blaring forth on loudspeakers, even the most melodious sounds have inspired in some people not enthusiasm but resentment, and litigation has sometimes followed, "sounding in nuisance," as the lawyers put it, referring not to the decibels but to the area of law invoked. A pentecostal church has been restrained from use of electronic amplification of its services, despite a plea of the right to evangelize, and a similar restraint resulted in mass demonstrations of protest in Puerto Rico in the early 1970s, led by the Evangelical Council of Puerto Rico.[3]

One case will stand for many of this genre: *Wilkes-Barre v. Garabed*, decided by Pennsylvania Superior Court in 1899. One Joseph Garabed, an ensign in the Salvation Army, was brought before the mayor's court for the offense of beating a drum on the public streets without a permit from the mayor, was found guilty and fined $6.00 and costs. He appealed to the Court of Common Pleas, contending that the ordinance forbidding any person to "appear in any of the public streets or places to...beat upon a drum, or blow a horn or trumpet" infringed upon the religious rights of the Salvation Army, but the court disagreed, quoting some selected Scriptures in parting admonition:

---

1. See section on "Landmarking" at IA14, for an unwanted result of building impressive architecture.

2. Such as the magazine *Plain Truth* disseminated free by the Worldwide Church of God, discussed at IE1a, or the magazines *Awake* and *Watchtower* distributed by Jehovah's Witnesses, discussed in the next section.

3. Author's files, which include 12" x 18" glossy photographs of thousands of people marching in protest.

> In the Epistle of Paul to Titus, Chap. 3, we find this command: "Put them in mind to be subject to principalities and powers, to obey magistrates, to be ready to every good work."
>
> In the First Epistle General of Peter, Chap. 1, verses 13 and 14: "Submit yourselves to every ordinance of man for the Lord's sake, whether it be to the king as supreme, or unto governors as unto them that are sent by him for the punishment of evil doers, and for the praise of them that do well."[4]

Despite this scriptural injunction, the defendant appealed to the Superior Court; indeed, he had been sent to Wilkes-Barre by the Salvation Army precisely to test this particular ordinance, which had previously been enforced against two other Salvation Army officers. It was indeed tested before seven judges of the Superior Court, who heard argument on behalf of the Salvation Army by A. Ricketts. He noted that similar statutes had been struck down in other states[5] and that the claim of religious liberty was based on the state constitutions, not the federal.

> The learned judge of the court below does not seem to regard the drum as an instrument of salvation. If he should become familiar with some of the experiences of the Salvation Army, he might change his mind. For instance, they could tell him of a man who through dissipation had come to desperation, and concluding to end his disgust and distress, placed a pistol to his head and attempted to fire a bullet into his brain, but the cartridge failed to explode, as he was preparing to repeat the experiment, the Salvation Army drum attracted his attention, and going to see what it meant, he was awakened to a proper realization of his folly, and became a converted man and a useful citizen. It would doubtless be interesting as well as useful to the learned judge, and to anyone who is not familiar with it, to investigate and learn how important a part the drum in some form, has played in sacred service.... It was generally played by women; when Moses and the children of Israel sang of thanksgiving for their wondrous deliverance at the Red Sea, recorded in the fifteenth chapter of Exodus, Miriam, the sister of Moses, led the women responding with timbrels and dances; when David returned with Saul after the slaying of Goliath, they were likewise met by bands of women with timbrels....[6]

The city responded that it was not seeking to prevent the playing of the drum but merely to regulate it so as to conform to the necessities of public order (what would later be called restrictions of "time, place and manner"):

---

4. *City of Wilkes-Barre v. Jos. Garabed*, 11 Pa. Super. 355 (1899). In more recent times, courts are less apt to quote scripture in deciding religion cases. But see *Girard Trust v. Commissioner*, 122 F. 2d 108 (CA3 1941), discussed at § E4f below.

5. *State v. Dering*, 84 Wis. 585; *In re Frazer*, 63 Mich. 396; *Chicago v. Trotter*, 136 Ill. 430; *Anderson v. Wellington*, 40 Kan. 173.

6. *City of Wilkes-Barre, supra*, argument for appellant.

> The going into the public streets with horns and drums...has a tendency to attract crowds, obstruct the streets, frighten horses and impede travel, and a regulation of the character prescribed in the ordinance before the court is a proper exercise of the police powers vested in the city.

The Superior Court delivered an opinion by Orlady, J., for five of the seven justices.

> As to the first claim—that the ordinance is void because it interferes with man's natural and indefeasible right to worship God according to the dictates of his own conscience—it cannot be sustained. Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions they may with practices.... While there is no legal authority to constrain belief, no one can lawfully stretch his own liberty of action so as to interfere with that of his neighbors, or violate peace and good order....[7]
>
> * * *
>
> The fact that the defendant represents a religious association has nothing to do with the case, nor is it pertinent to inquire into the purposes of the association, the propriety of its practices, or its judgment as to the use of drums as a regulation part of their service.... The state has authority to make regulations as to the time, mode, and circumstances under which parties shall assert, enjoy, or exercise their rights without coming in conflict with any of those constitutional principles which are established for the protection of private rights and private property.
>
> * * *
>
> The ordinance applies to all of the public streets or places in the city; it is not directed against the defendant or the organization he represents, or any other person or body of men. Its manifest purpose is to regulate the use on the streets of the instruments named therein, so as to prevent what the defendant endeavors to effect in seeking the permit,—the calling together and holding a crowd,—and it is asserted to thwart that particular evil, and for no other purpose. It is universally known that the effect of street meetings, which are frequently held in the same locality, in addition to obstructing the highway, is to induce loitering, to provoke strife and collisions, and to cause a common nuisance, and they are a serious grievance to the residents of the neighborhood. The most desirable places for such meetings are the thronged thoroughfares in the populous parts of the city, where the injury to the people at large is the greatest, and the experience of municipalities is in exact accord with that of the defendant and his associates, viz. "The drum is an effective instrument to call together and hold a crowd."
>
> * * *

---

7. The Supreme Court had made this distinction between belief and action in *Reynolds v. U.S.*, 98 U.S. 145 (1878), but modified it in *Cantwell v. Connecticut*, 310 U.S. 296 (1940), forty-one years after *Garabed*. See discussion at § c below.

> The case stated shows that military, political, religious, social organizations, fire companies and private enterprises have been permitted, for the purpose of display and advertisement, to have parades and occupy the streets with bands composed of players on drums, etc. These were each and all moving bodies of persons along the streets. The offense of the defendants was "having held a religious service in the streets and beating drums thereat," which was a stationery and fixed gathering of persons—remaining together—on the thoroughfares.
>
> * * *
>
> The judgment is affirmed.[8]

Justice Beeber dissented, joined by Justice Porter.

> It appears clear to me that the ordinance in question in this case offends not only against the fourteenth amendment to the constitution of the United States, but also against the rule that ordinances must be fair, impartial, general, not oppressive, and consistent with the laws or policy of the state. It is evident that it does not intend to prohibit all playing on musical instruments or beating upon drums in the public streets, for it provides a permit to do it, which clearly shows that the city council did not intend to declare against it, under any and all circumstances, as a nuisance. Nor does it prescribe regulations for the use of musical instruments or drums upon the streets with which all desiring to use them can comply. It divides all persons who desire to make music upon the streets into two classes by an arbitrary line, upon one side of which are those who are permitted to play upon instruments or beat upon drums by the mere will and pleasure of the mayor, and upon the other side are those who are not permitted...by the mere will and pleasure of the mayor. Both classes are alike in this, that they enjoy or are denied a permissible line of conduct at the mere will of the mayor, and this without any regard whatever as to the character of the individuals or the circumstances under which they desire to do this allowable act.[9]
>
> * * *
>
> My examination and consideration of [other state] cases has satisfied me that the preponderance of the authorities of this country and the general policy of our own state laws sustain the conclusion at which I have arrived.
>
> * * *
>
> I would reverse the judgment in this case and direct the prisoner to be discharged.[10]

---

8. *City of Wilkes-Barre, supra,* majority opinion.

9. This point about individual freedoms being subjected to executive discretion was to occupy the Supreme Court decades later in free-speech and free-press cases. See *Lovell v. Griffin*; 303 U.S. 444 (1938), *Schneider v. Irvington*, 308 U.S. 147 (1939); and *Cantwell v. Connecticut, supra,* discussed at §§ b(1), b(2), and c below.

10. *City of Wilkes-Barre, supra*, dissent.

At each stage in this litigation there was extensive discussion whether it was governed by the pioneer civil-rights case, *Yick Wo v. Hopkins*,[11] in which an ordinance investing extensive discretion in municipal officials to determine whether wooden laundries would be permitted to operate, though neutral on its face, was struck down because it was applied mainly to exclude Chinese from the laundry business. The majority thought it did not govern, the minority that it did. But *Yick Wo* and its parallels helped pave the way for the invalidation of sweeping municipal "public nuisance" ordinances and for the Jehovah's Witnesses' Free Exercise decisions of the Supreme Court, which follow.

2. The Jehovah's Witnesses Cases

In the 1930s the evangelistic activities of a little band of zealots generally known as Jehovah's Witnesses came increasingly to national attention. Their movement was begun in the 1870s by Charles Taze Russell, for whom they were often called "Russellites." At his death, his place was taken in 1916 by "Judge" Joseph F. Rutherford, who was president until his death in 1942. The movement was headquartered at the Watch Tower Bible and Tract Society in Brooklyn, from whence streamed a flood of literature, such as the periodicals *Watchtower* and *Awake!*. The chief activity of Witnesses was to distribute this material door-to-door or on public streets to all who would receive it, sometimes accepting donations for it, but giving it away free if recipients were unable or unwilling to pay.

Their unconventional beliefs and behavior often brought them into conflict with neighbors, other religious bodies and the law. They believed that in the present age Satan is in control of the world. Existing governments, as well as all other structures, including other churches, are part of "Satan's organization," and Witnesses were enjoined to avoid them as much as possible. Therefore, they refused to hold office, to vote, or to serve in the armies of earthly nations. They refused to salute the national flag or to bear the slogans of states, as will be seen,[12] since these are like the "graven image" to which Exodus 20:4-5 forbids obeisance. They also refused blood transfusions because the Bible prohibits the "eating of blood," and they considered transfusion to be an ingestion.[13]

Their basic duty on earth was to proclaim—to "*witness*" to—the imminence of God's Judgment: both to *watch* (in the sense that no human efforts can hasten or delay it) and to *testify* to its coming (so that everyone will be aware what is happening—not that they can save themselves, since no one knows who will be saved—or why). Consequently, they went door-to-door or stood on the streets, dispensing their literature, playing their phonographs, and initiating Bible study

11. 118 U.S. 356 (1886).
12. See IVA6.
13. See IVC3..

wherever possible. For some reason, this activity seemed to stir an unreasoning rage in some people, and many efforts were made to halt or suppress it.[14]

a. Does the First Amendment Apply to the States? Before looking at the specific cases, it is necessary to note an important shift in American jurisprudence that was coming about in the second quarter of the twentieth century. When the First Amendment was adopted in 1789, it read "*Congress* shall make no law respecting an establishment of religion or prohibiting the free exercise thereof...." This wording pointed to the assumption of the eighteenth century that the Bill of Rights was a restriction on the powers of the new federal government, not upon the already-existing states.

By the middle of the nineteenth century it became apparent to many that the states were not all always sedulous in safeguarding the rights and liberties of all of their citizens. After the Civil War, the Fourteenth Amendment was adopted to insure that states should not deprive anyone of rights to which they were entitled by virtue of their being citizens of the United States. It read (in pertinent part): "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Just what rights would be protected by or from the States and under what circumstances has been a subject on which learned judges, jurists, historians and political scientists have expended immense amounts of paper and ink. To the naive layman, it may seem obvious that rights appropriate to all human beings should be protected by state and nation equally and alike, but the Supreme Court has not seen it that way. In 1974 "the Court came within one vote of holding that the fourteenth amendment guaranteed that `no state could deprive its citizens of the privileges and protections of the Bill of Rights'... [But] the full incorporation of the Bill of Rights into the fourteenth amendment [has never] commanded a majority of the Court...."[15]

Instead, *specific* rights have been "incorporated" piecemeal into the Fourteenth Amendment over the years and made applicable to the states:

> Thus the due process clause has been held to protect the right to just compensation [1897], the first amendment freedoms of speech [1927], press [1931], assembly [1937], petition [1939], free exercise of religion [1940], and non-establishment of religion....[1947][16]

---

14. For further information about this group, see Kelley, D.M., *supra*, pp. 72-77, and sources cited there.

15. Tribe, Laurence H., *American Constitutional Law* § 11-2, 2d ed. (Mineola, N.Y.: Fndn. Press, 1988), p. 772, citing *Adamson v. California*, 332 U.S. 46, 74-75 (1947).

16. Ibid., § 11-2, pp. 772ff., citing cases from 1897, 1927, 1931, 1937, 1939, 1940 and 1947, respectively. The quoted material is followed by eleven further incorporations of other clauses of the Bill of Rights.

The U.S. Supreme Court dealt with very few religion cases prior to the mid-twentieth century because religion was generally considered to be within the jurisdiction of the states[17] and because in a predominantly Protestant culture there was less religious diversity and fewer interfaith clashes. Only after the religion clauses were "incorporated" into the Due Process Clause of the Fourteenth Amendment (as part of the "liberty" of which no person could be deprived by any state without due process of law) did the Supreme Court recognize jurisdiction over what had previously been largely a state responsibility. Since that shift, the court has decided in less than a half-century almost five times as many church-state cases as in the century-and-a-half preceding.[18] The turning point was provided by one of the Jehovah's Witnesses cases, *Cantwell v. Connecticut*.

b. "Free-Press" Cases. *Cantwell* was preceded, however, by two earlier cases involving the Witnesses that were decided under the protections of freedom of press and speech, which had already been incorporated into the Fourteenth Amendment—*Lovell v. Griffin* (1938) and *Schneider v. Irvington* (1939). Although not resting on the First Amendment guarantees of religious liberty, these cases were forerunners of later decisions that did invoke the Religion Clause. A third Jehovah's Witness' case—*Martin v. Struthers*—decided on the basis of the Speech and Press Clauses came along later but is included here.

(1) *Lovell v. Griffin* (1938). The town of Griffin, Georgia, had adopted an ordinance that prohibited the distribution of handbills, circulars, advertising or literature without written permission from the city manager. Amy Lovell, a Jehovah's Witness, was arrested for distributing tracts without obtaining a permit. The Supreme Court unanimously held that the ordinance violated the First Amendment's guarantees of freedoms of speech and press, since it imposed a form of licensing and potential censorship. The court explained that liberty of the press is not confined to newspapers, magazines and books, but encompasses pamphlets, leaflets and every other type of publication which carries information and opinion. The ordinance gave the city manager no guidelines to direct his judgment of what distributions were permissible, leaving him free to impose an arbitrary prior restraint on the dissemination of publications. The court added that freedom to publish without freedom to circulate what had been published would be of little value.[19]

---

17. See *Permoli v. New Orleans*, 3 How. 589 (1845), discussed at ID1a.

18. Depending on what one counts as a church-state case, and whether one counts cases consolidated in one decision, those decided *per curiam* or by memorandum order, or those vacated, remanded or otherwise dealt with procedurally rather than substantively, the list comes to about 33 decisions prior to 1940 and about 145 thereafter (through 1996). See Appendix A of Volume I for chronology.

19. *Lovell v. Griffin*, 303 U.S. 444 (1938); an earlier Jehovah's Witness case from the same town had been dismissed by the Supreme Court in 1937 for lack of a substantial federal question (*Coleman v. Griffin*, 302 U.S. 636).

(2) *Schneider v. Irvington* (1939). The next year the court struck down a similar ordinance of Irvington, New Jersey, which forbade the distribution of literature on the city streets, ostensibly to prevent littering. The constitutional way to prevent littering, the court said, was not to forbid the circulation of literature but to arrest the litterers. A companion ordinance which prohibited distribution of circulars from door to door without a license from the chief of police was also struck down because it unconstitutionally made liberty to communicate dependent upon the police chief's unguided discretion in issuing permits.[20]

(3) *Martin v. Struthers* (1943). Even after the Free Exercise of Religion Clause had been incorporated in the Fourteenth Amendment and made applicable to the states, the Supreme Court sometimes relied on the free-press and free-speech guarantees to rectify restrictions on religion. Struthers, Ohio, had adopted an ordinance forbidding anyone to knock on the door or ring the doorbell of its residents to deliver a handbill without prior invitation of the occupant. In a case arising against a Jehovah's Witness, the court held the ordinance unconstitutional as a violation of the guarantees of free press and free speech. The court reasoned that a householder who didn't want to receive the literature could simply refuse it, but that the ordinance outlawed a time-honored way of communicating.[21]

c. *Cantwell v. Connecticut* (1940). Newell Cantwell and his two sons, Jesse and Russell, who claimed to be ordained ministers (as do all Jehovah's Witnesses, though some are engaged in ministry full-time and some only part- time), were arrested in New Haven, Connecticut, and convicted of violating an ordinance requiring a permit from the secretary of the public welfare council for any solicitations or sales for "any alleged religious, charitable or philanthropic cause." The Cantwells had no such permit, and claimed that their activities were not covered by the ordinance since they were merely distributing books, pamphlets and periodicals. The state trial court held otherwise, since they were also soliciting donations of money for a religious cause.

Jesse Cantwell was also convicted of the common-law offense of breach of the peace. In a heavily Catholic neighborhood he had approached two men on the street and asked permission to play a recording for them on a portable phonograph which he carried. They consented, and he played a record describing a book which he was selling entitled "Enemies." The recorded message began with a general denunciation of all organized religious institutions as part of "Satan's organization" and then focused on the specific evils of the Roman Catholic Church, "couched in terms which naturally would offend not only persons of that persuasion, but all others who respect the honestly held religious faith of their fellows," as Justice Owen J. Roberts put it in an opinion for a unanimous Supreme Court.[22]

---

20. *Schneider v. Irvington*, 308 U.S. 147 (1939). See further discussion at § C3a below.
21. *Martin v. Struthers*, 319 U.S. 141 (1943). See further reference at § j below.
22. *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

The two men, who were Roman Catholics, were not pleased by this recital. One said he felt like hitting Cantwell, and the other said he was tempted to throw him off the street. Cantwell gathered up his phonograph records and books and departed. The trial court convicted Cantwell, not for assault or other direct disturbance, but for inciting *others* to breach of the peace. The Supreme Court reversed the convictions on both counts.

First, the court took the step that has opened the door to dozens of important decisions—and hundreds of cases in the lower federal courts—by incorporating the (entire) First Amendment in the Fourteenth, thus making it applicable to the states.[23]

> We hold that the statute, as construed and applied to the appellants, deprives them of their liberty without due process of law in contravention of the Fourteenth Amendment. The fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.

This language would seem to encompass both religion clauses, but because *Cantwell* dealt only with Free Exercise, the incorporation of the no-establishment clause remained merely *dictum* until *Everson v. Bd. of Education* in 1947.

The court paid homage to the old belief-action distinction of *Reynolds v. U.S.* (1878),[24] but then—fortunately—went beyond it to set limits on the degree to which the states could regulate religiously motivated action. Prosecutors are fond of quoting the first three sentences below as though they were the gravamen of *Cantwell* without making clear that those words were but the prologue to what followed: the words that provided the main thrust of the decision (italicized below).

> [T]he Amendment embraces two concepts, freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.... *In every case [however,] the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom....* [A] state may not, by statute, wholly deny the right to preach or to disseminate religious views. Plainly such a previous and absolute restraint would violate the terms of the guaranty. It is equally clear that a state may by general and non-discriminatory legislation regulate the times, the places and the manner of soliciting upon its streets, and of holding meetings thereon; and may in other respects safeguard the peace, good

23. The rest of the First Amendment had already been incorporated except for the religion clauses.
24. 98 U.S. 145 (1878), discussed at IVA2a.

> order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment.[25]

The Cantwells contended that having to obtain a permit before soliciting was a "prior restraint" on the exercise of their religion—a term that had arisen in the area of freedom of the press, recalling resentments against the English system of requiring advance permission for publication that had very likely inspired the authors of the First Amendment's guarantee of press freedom.[26] The State of Connecticut disagreed, saying it was only seeking to erect safeguards against frauds disguised as charities. Though that might indeed be the state's intent, said the court, "the question remains whether the method adopted by Connecticut to that end transgresses the liberty safeguarded by the Constitution."

> It will be noted, however, that the Act requires an application to the secretary of the public welfare council of the State.... If he finds that the cause is not that of religion, to solicit for it becomes a crime.... Such a censorship of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment and included in the liberty which is within the protection of the Fourteenth.

The state had urged that if the secretary should act arbitrarily or unjustly, recourse was available to the courts, but the court observed that "the availability of a judicial remedy for abuses in the system still leaves that system one of previous restraint which, in the field of free speech and press, we have held inadmissible." That is, the expression would be suppressed in advance and the suppression would continue until, and unless, lifted by a subsequent court order, which might not ensue for a long time, if ever.

The court added a reassurance for those worried about the possibilities of abuse of such freedom:

> Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public. Certainly penal laws are available to punish such conduct.... Without doubt a state may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent.... But to condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution.

---

25. *Cantwell, supra*, emphasis added.
26. Cf. *Near v. Minnesota*, 283 U.S. 697 (1931).

The court turned to the conviction of Jesse Cantwell for breach of the peace, "a common law concept of the most general and undefined nature":

> The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquillity. It includes not only violent acts but acts and words likely to produce violence in others.... When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the state to prevent or punish is obvious. Equally obvious is it that a state may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions.[27]

Recalling that "Jesse Cantwell, on April 26, 1938, was upon a public street, where he had a right to be, and where he had a right peacefully to impart his views to others," the court noted that "there is no showing that his deportment was noisy, truculent, overbearing or offensive," and that it had not been claimed "that he intended to insult or affront the hearers by playing the record. It is plain that he wished only to interest them in his propaganda." Although the hearers *were* affronted and expressed their outrage verbally, they did not resort to violence, and Cantwell left the scene without provoking them further. The court concluded:

> We find in the instant case no assault or threatening of bodily harm [by Cantwell], no intentional discourtesy, no personal abuse. On the contrary, we find only an effort to persuade a willing listener to buy a book or to contribute money in the interest of what Cantwell, however misguided others may think him, conceived to be true religion.
>
> In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.
>
> The essential character of these liberties is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed. Nowhere is this shield more necessary than in our own country for a people composed of many races and creeds.
>
> * * *
>
> [I]n the absence of a statute narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial

27. Ibid., Note the introduction into the field of religious liberty of the "clear and present danger" test that had originated in the field of freedom of speech, *Schenck v. U.S.*, 249 U.S. 47 (1919).

> interest of the State, the petitioner's communication, considered in the light of the constitutional guaranties, raised no such clear and present menace to public peace and order as to render him liable to conviction of the common law offense in question.

Cantwell v. Connecticut was a seminal decision, not only in incorporating the religion clauses (at least Free Exercise) in the Fourteenth Amendment, but in initiating a long line of decisions on the limits of state regulation of charitable solicitations[28] and in foreshadowing another long line of Free Exercise cases balancing religious liberty against state interests and seeking the least intrusive means of serving them.[29]

d. *Cox v. New Hampshire* (1941). The Jehovah's Witnesses were not always successful in their appeals to the courts to protect their right to spread the faith. In several subsequent cases, the Supreme Court found against them, though one decision was later overruled by the court itself.[30]

In Manchester, New Hampshire, some ninety Witnesses marched in single file along the sidewalks of several streets, each carrying a placard announcing on one side, "Religion is a Snare and a Racket" and on the other "Serve God and Christ the King." Some handed out leaflets announcing a forthcoming talk by Judge Rutherford. Sixty-eight of the marchers were arrested for violation of a state statute requiring a permit for any "parade or procession upon any public street or way." They had not applied for such a permit, and they claimed in defense that each of the marchers was a minister of the gospel engaged in "disseminating information in the public interest," an activity that was also "one of their ways of worship."

The Supreme Court, in an opinion written by Chief Justice Charles Evans Hughes, observed:

> Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend.... One would not be justified in ignoring the familiar red traffic light because he thought it his religious duty to disobey the municipal command or sought by that means to direct public attention to an announcement of his opinions.[31]

---

28. See below, §§ d-l, and part C.

29. See IVA.

30. *Minersville v. Gobitis*, 310 U.S. 586 (1940), overruled by *West Virginia v. Barnette*, 319 U.S. 624 (1943), discussed at IVA6.

31. *Cox v. New Hampshire*, 312 U.S. 569 (1941).

The court's holding was predicated upon the finding of the Supreme Court of New Hampshire that the scope of the statute was limited to "considerations of time, place and manner" in order "to prevent confusion by overlapping parades or processions," and to give "the public authorities notice in advance so as to afford opportunity for proper policing." The licensing body was held not to have arbitrary discretion in granting or denying licenses, but was required to issue them without discrimination. The court disposed of the defendant's final claim by concluding:

> The argument as to freedom of worship is also beside the point. No interference with religious worship or the practice of religion in any proper sense is shown, but only the exercise of local control over the use of streets for parades and processions.

e. *Chaplinsky v. New Hampshire* (1942). Arising from the same state was a case in which a Witness was convicted of violating a statute forbidding anyone to "address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, or call him by any offensive or derisive names." The Witness was being brought to a police station after citizens complained to a traffic officer of his behavior in distributing his literature, and encountered the city marshal, to whom he said, "You are a God damned racketeer, a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists."

The Witness contended that his arrest violated his freedom of religion, but the Court was not persuaded. It doubted "that cursing a public officer is the exercise of religion in any sense of the term." And even if such actions were religious (perhaps by virtue of the theological language used?), "they would not cloak him with immunity from the legal consequences for concomitant acts committed in violation of a valid criminal statute." The statute was not an invalid violation of freedom of speech, since "resort to epithets or to personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act" was not a constitutional issue. The court invoked the concept of "fighting words" that invite immediate physical reprisal as an exception to the guarantees of freedom of speech.[32]

f. ***Jones v. Opelika (I)* (1942).** Three very similar cases involving Witnesses were consolidated for decision in 1942 and are referred to by the title of one of them, arising in the city of Opelika, Alabama.[33] In each instance the Witness was convicted of selling literature without a license required by law. License fees, which the court characterized as "small, yet substantial" were charged for such permits, but because the *amount* of the fees was not raised as an impediment to the free exercise of religion or freedom of speech, the court did not deal with that aspect, but only with the prior

32. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

33. The other two are *Bowden v. Fort Smith* (Arkansas) and *Tobin v.* (Casa Grande) *Arizona*.

question: "whether a nondiscriminatory license fee, presumably appropriate in amount, may be imposed upon these activities."

In an opinion for the court, Justice Stanley F. Reed expressed some elevated *dicta*:

> There are ethical principles of greater value to mankind than the guarantees of the Constitution, personal liberties which are beyond the power of government to impair. These principles and liberties belong to the mental and spiritual realm where the judgments and decrees of mundane courts are ineffective to direct the course of man. The rights of which our Constitution speaks have a more earthly quality. They are not absolutes to be exercised independently of other cherished privileges, protected by the same organic instrument.... So the mind and spirit of man remain forever free, while his actions rest subject to necessary accommodations to the competing needs of his fellows.
>
> If all expressions of religion or opinion, however, were subject to the discretion of authority, our unfettered dynamic thoughts or moral impulses might be made only colorless and sterile ideas. To give them life and force, the Constitution protects their use.... One man, with views contrary to the rest of his compatriots, is entitled to the privilege of expressing his ideas by speech or broadside to anyone willing to listen or read. Too many settled beliefs have in time been rejected to justify this generation in refusing a hearing to its own dissentients. But that hearing may be limited by action of the proper legislative body to times, places, and methods for the enlightenment of the community which, in view of existing social and economic conditions, are not at odds with the preservation of peace and good order.
>
> This means that the proponents of ideas cannot determine entirely for themselves the time and place and manner for the diffusion of knowledge or for their evangelism, any more than the civil authorities may hamper or suppress the public dissemination of facts and principles by the people. The ordinary requirements of civilized life compel this adjustment of interests.... Believing as this nation has from the first that the freedoms of worship and expression are closely akin to the illimitable privileges of thought itself, any legislation affecting those freedoms is scrutinized to see that the interferences allowed are only those appropriate to the maintenance of a civilized society.[34]

After this encomium for the importance of freedom of expression, especially to that exalted realm beyond the reach of human laws, where "the mind and spirit of man" may indeed "remain forever free," but are also rendered invisible and inaudible, the court turned to the more "earthly" consideration of a licensing fee for evangelism. (The section quoted above is similar to generalized dicta found toward the beginning of many court decisions, what might be called the "anchor-to-windward" prologue, against which the actual finding is to be viewed, which often turns out to be of a

34. *Jones v. Opelika*, 316 U.S. 584 (1942).

rather opposite nature, as in this instance.) The court distinguished between "censorship and complete prohibition, either of subject matter or the individuals participating, upon the one hand, and regulation of the conduct of individuals in the time, manner and place of their activities upon the other," and implied that the licensing fees were of the latter category.

> [W]hen, as in these cases, the practitioners of these noble callings choose to utilize the vending of their religious books and tracts as a source of funds, the financial aspects of their transactions need not be wholly disregarded....
>
> When proponents of religious or social theories use the ordinary commerical sales of articles to raise propaganda funds, it is a natural and proper exercise of the power of the state to charge reasonable fees for the privilege of canvassing. Careful as we may and should be to protect the freedoms safeguarded by the Bill of Rights, it is difficult to see in such enactments a shadow of prohibition of the exercise of religion....

The court added a note that was to echo again decades later in *Harris v. McRae*[35] and *Regan v. Taxation with Representation*:[36] "The First Amendment does not require a subsidy in the form of fiscal exemption." The license fee requirements in all three cases were upheld.

Four justices were not convinced. Chief Justice Harlan Fiske Stone wrote a dissent joined by Justices Hugo Black, William O. Douglas and Frank Murphy, in which he focused on several aspects of the cases: (1) the revocability of the Opelika license at the discretion of a public administrator made the exercise of First Amendment rights "wholly contingent upon his whim"; (2) the failure of the defendants to apply for a license did not disqualify them from challenging the facial unconstitutionality of the statute requiring it; (3) the license "fee" requirement that was clearly and solely a revenue-raising tax and was not aimed or able to regulate the time, place or manner of the activity licensed; (4) the tax's being directed to activities that were not primarily commercial, were wholly nonprofit, and were the means of carrying out activities protected by the First Amendment; (5) the flat tax imposed being more "burdensome and destructive of the activity taxed" than a tax proportionate to the income produced by the activity, as it "requires a sizable out-of-pocket expense by someone who may never succeed in raising a penny by his exercise of the privilege which is taxed." Indeed,

> on its face a flat license tax restrains in advance the freedom taxed and tends inevitably to suppress its exercise. The First Amendment prohibits all laws abridging freedom of press and religion, not merely some laws or all except tax laws.

35. 448 U.S. 297 (1980).
36. 461 U.S. 540 (1983).

For these reasons, the Chief Justice urged that the three ordinances be struck down, concluding:

> [I]f the present taxes, laid in small communities upon peripatetic religious propagandists, are to be sustained, a way has been found for the effective suppression of speech and press and religion despite constitutional guaranties. The very taxes now before us are better adapted to that end than were the stamp taxes which so successfully curtailed the dissemination of ideas by eighteenth century newspapers and pamphleteers, and which were a moving cause of the American Revolution....
>
> Freedom of press and religion, explicitly guaranteed by the Constitution must at least be entitled to the same freedom from burdensome taxation which it has been thought that the more general phraseology of the commerce clause has extended to interstate commerce....
>
> In its potency as a prior restraint on publication the flat license tax falls short only of outright censorship or suppression. The more humble and needy the cause, the more effective is the suppression.[37]

Justice Murphy also wrote a major dissent joined by the Chief Justice, Justices Black and Douglas. The Chief Justice had referred to the freedoms protected by the First Amendment as being in a "preferred position," but Justice Murphy went beyond that in asserting that freedom of religion was even more important.

He noted first that in the case of the Arizona ordinance the effect on religious dissemination was prohibitive, since the population of Casa Grande was only 1,545, and the license fee was $25 per quarter!

> With so few potential purchasers it would take a gifted evangelist, indeed, in view of the antagonism generally encountered by Jehovah's Witnesses, to sell enough tracts at prices ranging from five to twenty-five cents to gross enough to pay the tax.... The petitioners should not be subjected to such tributes.
>
> But whatever the amount, the taxes are in reality taxes upon the dissemination of religious ideas, a dissemination carried on by the distribution of religious literature for religious reasons alone and not for personal profit.... We need not shut our eyes to the possibility that use may...be made of such taxes, either by discrimination in enforcement or otherwise, to suppress the unpalatable view of militant minorities such as Jehovah's Witnesses. As the evidence excluded in [the Opelika trial court] tended to show, no attempt was made there to apply the ordinance to ministers functioning in a more orthodox manner....
>
> Freedom to think is absolute in its own nature; the most tyrannical government is powerless to control the inward workings of the mind. But even an aggressive mind is of no missionary value unless there is freedom

37. *Jones v. Opelika, supra*, Stone dissent.

> of action, freedom to communicate its message to others by speech and writing....
>
> The exercise, without commercial motives, of freedom of speech, freedom of the press, or freedom of worship are not proper sources of taxation for general revenue purposes.

Justice Murphy went on to express a remarkable characterization of freedom of religion:

> Important as free speech and a free press are to a free government and a free citizenry, there is a right even more dear to many individuals—the right to worship their Maker according to their needs and the dictates of their souls and to carry their message or their gospel to every living creature. These ordinances infringe that right....
>
> * * *
>
> While perhaps not so orthodox as the oral sermon, the use of religious books is an old, recognized and effective mode of worship and means of proselytizing. For this petitioners were taxed. The mind rebels at the thought that a minister of any of the old established churches could be made to pay fees to the community before entering the pulpit. These taxes on petitioners' efforts to preach the "news of the Kingdom" should be struck down because they burden petitioners' right to worship the Deity in their own fashion and to spread the gospel as they understand it.
>
> * * *
>
> An arresting parallel exists between the troubles of Jehovah's Witnesses and the struggles of various dissentient groups in the American colonies for religious liberty which culminated in the Virginia Statute for Religious Freedom... and the First Amendment. In most of the colonies there was an established church, and the way of the dissenter was hard.... Many of the non-conforming ministers were itinerants, and measures were adopted to curb their unwanted activities. The books of certain denominations were banned. Virginia and Connecticut had burdensome licensing requirements. Other states required oaths before one could preach which many ministers could not conscientiously take. Research reveals no attempt to control or persecute by the more subtle means of taxing the function of preaching, or even an attempt to tap it as a source of revenue.
>
> By applying these occupational taxes to petitioners' non-commercial activities, respondents now tax sincere efforts to spread religious beliefs, and a heavy burden falls upon a new set of itinerant zealots, the Witnesses. That burden should not be allowed to stand....
>
> * * *
>
> Liberty of conscience is too full of meaning for the individuals in this nation to permit taxation to prohibit or substantially impair the spread of religious ideas, even though they are controversial and run counter to the established notions of a community. If this Court is to err in evaluating claims that freedom of speech, freedom of the press, and freedom of

> religion have been invaded, far better that it err in being overprotective of these precious rights.[38]

These impressive words have been excerpted at length, not only because of their intrinsic merit, but because—with the resignation of Justice James F. Byrnes and the appointment of Wiley B. Rutledge to fill the vacancy—the minority became the majority, and the next year in a similar case, *Murdock v. Pennsylvania*,[39] (in connection with which the *Opelika* case was reargued), a similar tax was declared unconstitutional by a vote of 5 to 4, *Opelika* was vacated in a *per curiam* opinion, and the taxes upheld therein were also struck down.[40] It may be noted that the solicitation of contributions emerges increasingly in these cases as an activity closely linked with evangelism, and indeed they are often one and the same undertaking, suggesting an overlapping between this section and the one on "Solicitations and Fund-Raising."[41]

g. *Jamison v. Texas* (1943). In 1943, the Supreme Court struck down an ordinance in Dallas, Texas, that prohibited the distribution of handbills on city streets, saying that a state "may not prohibit the distribution of handbills in the pursuit of a clearly religious activity merely because the handbills invite the purchase of books for the improved understanding of the religion or because the handbills seek in a lawful fashion to promote the raising of funds for religious purposes."

> [O]ne who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion. This right extends to the communication of ideas by handbills and literature as well as by the spoken word.[42]

h. *Largent v. Texas* (1943). In a companion action, the court decided an appeal from a county court in Texas of the conviction of a member of Jehovah's Witnesses for violation of an ordinance of the town of Paris requiring the obtaining of a permit to solicit orders or to sell books. The permit was issuable at the discretion of the mayor. She was fined $100. Since Texas law did not provide for an appeal from a county court fine of that amount, the Supreme Court of the United States took the case directly and reversed the conviction on the ground that the ordinance reposed unguided discretion in the mayor in deciding whether to issue the required permit. "Dissemination of ideas depends upon the approval of the distributor by the official.

---

38. Ibid., Murphy dissent. This line of thinking—unfortunately—has not fared well in more recent times; see *Texas Monthly v. Bullock*, 489 U.S. 1 (1989), and *Jimmy Swaggart Ministries v. California*, 493 U.S. 378 (1990), discussed at VC6b.

39. 319 U.S. 105 (1943), see below, § g.

40. 319 U.S. 103 (1943).

41. See § C below.

42. *Jamison v. Texas*, 318 U.S. 413 (1943).

This is administrative censorship in an extreme form. It abridges the freedom of religion, of the press and of speech...." said Justice Reed. No one from Texas put in an appearance to defend the ordinance.[43]

i. *Murdock v. Pennsylvania* (1943). The city of Jeannette, Pennsylvania, had a license-tax ordinance similar to that (originally) upheld in *Opelika*. Several Witnesses were arrested for "sale" of books without paying the tax and obtaining a permit. Justice Douglas wrote the opinion for the majority of the court, striking down the ordinance and overruling the *Opelika* decision. He expressed most clearly the evangelistic significance of the Witnesses' activity:

> The hand distribution of religious tracts is an age-old form of missionary evangelism—as old as the history of printing presses. It has been a potent force in various religious movements down through the years. This form of evangelism is utilized today on a large scale by various religious sects whose colporteurs carry the Gospel to thousands upon thousands of homes and seek through personal visitations to win adherents to their faith. It is more than preaching; it is more than distribution of religious literature. It is a combination of both. Its purpose is as evangelical as the revival meeting. This form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits. It has the same claim to protection as the more orthodox and conventional exercises of religion. It also has the same claim as the others to the guarantees of freedom of speech and freedom of the press.[44]

The sole issue before the court, wrote Douglas, was "the constitutionality of an ordinance which...requires religious colporteurs to pay a license tax as a condition to the pursuit of their activities." That question had been answered affirmatively in *Jones v. Opelika* because payment was solicited and accepted for the religious literature offered.

> But the mere fact that the religious literature is "sold" by itinerant preachers rather than "donated" does not transform evangelism into a commercial enterprise. If it did, then the passing of the collection plate in church would make the church service a commercial project. The constitutional rights of those spreading their religious beliefs through the spoken and printed word are not to be gauged by standards governing retailers or wholesalers of books.... [A]n itinerant evangelist[,] however misguided or intolerant he may be, does not become a mere book agent by selling the Bible or religious tracts to help defray his expenses or to sustain him. Freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way.

43. *Largent v. Texas*, 318 U.S. 418, 422 (1943).
44. *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

Justice Douglas then sought to explain what, with reference to religion, could be taxed and what could not—a distinction he did not make altogether plain in *Murdock*, and it has not become much plainer since. That case has been cited to contradictory purposes, and the court itself repudiated some of them in a 1989 decision, *Texas Monthly v. Bullock*, q.v.[45]

> We do not mean to say that religious groups and the press are free from all financial burdens of government. We have here something quite different, for example, from a tax on the income of one who engages in religious activities or a tax on property used or employed in connection with those activities. It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon.... The power to tax the exercise of a privilege is the power to control or suppress its enjoyment. Those who can tax the exercise of this religious practice can make its exercise so costly as to deprive it of the resources necessary for its maintenance.... Spreading religious beliefs in this ancient and honorable manner would thus be denied the needy. Those who can deprive religious groups of their colporteurs can take from them a part of the vital power of the press which has survived from the Reformation.... A state may not impose a charge for the enjoyment of a right granted by the federal constitution.

He then reiterated the objections of the four minority justices in *Opelika* to the flat tax and quoted the Supreme Court of Illinois, which had said of a similar tax on similar activities of Witnesses, "a person cannot be compelled `to purchase, through a license fee or a license tax, the privilege freely granted by the Constitution,' *Blue Island v. Kazul*."

> This tax is not a charge for the enjoyment of a privilege or benefit bestowed by the state. The privilege in question exists apart from state authority. It is guaranteed the people by the Federal constitution.

Justice Douglas also used the "preferred rights" language of the minority in *Opelika*:

> The fact that the ordinance is "non-discriminatory" is immaterial. The protection afforded by the First Amendment is not so restricted. A license tax certainly does not acquire constitutional validity because it classifies the privileges protected by the First Amendment along with the wares and merchandise of hucksters and peddlers and treats them all alike. Such equality of treatment does not save the ordinance. Freedom of press, freedom of speech and freedom of religion are in a preferred position.

The four justices remaining of the *Opelika* majority not surprisingly dissented from the new majority's views and expressed even stronger divergence than had been

45. 488 U.S. 1 (1989), discussed at VC6b(4).

apparent in the earlier opinions. Justice Reed began by insisting that the transactions engaged in by the Witnesses were indeed "sales" subject to the ordinances invoked. He considered that "the real contention of the Witnesses is that there can be no taxation of the occupation of selling books and pamphlets...." But then he traced the development of federal and state protections of religion and found therein no reference to taxation or exemption of religious activities or entities, pro or con: "Neither in the state or the federal constitutions was general taxation of church or press interdicted." He referred to an important decision on freedom of the press striking down a tax on papers with a circulation of more than 20,000 copies per week because it was designed to limit circulation, but which included a caveat: "It is not intended...to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government."[46]

Justice Reed took issue with the contention that the power to tax might be used to suppress the sale of religious or other materials, arguing that "the possibility of misuse does not make a tax unconstitutional." On the contrary, "If the tax is used oppressively, the law will protect the victims of such action."

> The decision forces a tax subsidy notwithstanding our accepted belief in the separation of church and state. Instead of all bearing equally the burdens of government, this Court now fastens upon the communities the entire cost of policing the sales of religious literature.... The distributors of religious literature, possibly of all information publications, become today privileged to carry on their occupations without contributing their share to the support of the government, which provides the opportunity for the exercise of their liberties.

He challenged Justice Douglas' principal contribution to the case, the paean of praise for colporteuring as a venerable religious practice.

> Nor do we think it can be said, properly, that these sales of religious books are religious exercises.... Certainly...selling religious books is an age-old practice...that...is evangelism in the sense that the distributors hope the readers will be spiritually benefited. That does not carry us to the conviction, however, that when distribution of religious books is made at a price, the itinerant colporteur is performing a religious rite, is worshipping his Creator in his way.... And even if the distribution of religious books was a religious practice protected from regulation by the First Amendment, certainly the affixation of a price for the articles would destroy the sacred character of the transaction. The evangelist becomes also a book agent.

46. *Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

> The rites which are protected by the First Amendment are in essence spiritual—prayer, mass, sermons, sacrament—not sales of religious goods.[47]

Justice Reed's dissent was joined by Justices Owen Roberts, Robert Jackson and Felix Frankfurter, all of whom apparently shared the somewhat restricted theological assumption that the religious activities ("rites") protected by the First Amendment are of ritual or sacerdotal character ("in essence spiritual—prayer, mass, sermons, sacrament") unsullied by commerical taint. But religious activities have generally involved financial remunerations and contributions of various kinds, and in some religious traditions voluntary poverty and begging for alms are viewed as the height of holiness. (Justice Jackson also dissented separately to all three cases decided that day—*Murdock*, *Martin v. Struthers*[48] and *Douglas v. Jeannette*,[49] as will be noted in due course below.)

j. *Martin v. Struthers* (1943). This case was referred to briefly in an earlier section[50] as being decided on the basis of the free speech and press clauses. Justice Black, writing for the majority, focused on the right of people to go from door to door ringing doorbells to tell their views to householders. (The ordinance did not forbid the distribution of handbills or advertising from house to house but merely the summoning of the resident to the door to receive it.)

> For centuries it has been a common practice in this and other countries for persons not specifically invited to go from home to home and knock on doors or ring doorbells to communicate ideas to the occupants or to invite them to political, religious, or other kinds of public meetings. Whether such visiting shall be permitted has in general been deemed to depend upon the will of the individual master of each household, and not upon the determination of the community. In the instant case, the City of Struthers, Ohio, has attempted to make this decision for all its inhabitants. The question to be decided is whether the city, consistently with the federal constitution's guarantee of free speech and press, possesses this power.
>
> The right of freedom of speech and press has broad scope. The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance. This freedom embraces the right to distribute literature, *Lovell v. Griffin*..., and necessarily protects the right to receive it. The privilege may not be withdrawn even if it creates the minor nuisance for a community of cleaning litter from its streets. *Schneider v. State*.... Yet the peace, good order, and comfort of the community may imperatively

47. *Murdock, supra*, Reed dissent.
48. 319 U.S. 141 (1943), mentioned at § b(3) above.
49. 319 U.S. 157 (1943).
50. See § A2b(3) above.

> require regulation of the time, place and manner of distribution. *Cantwell v. Connecticut*.... No one supposes, for example, that a city need permit a man with a communicable disease to distribute leaflets on the street or to homes, or that the First Amendment prohibits a state from preventing the distribution of leaflets in a church against the will of the church authorities.[51]

(The final clause of this excerpt is the essence of *dicta*, since it poses a hypothetical having little connection with the actual facts in this case or the judgment upon them, but it alludes to an important and often neglected aspect of the law of church and state—the right of religious bodies to call upon the government to protect them from disturbance.[52])

Justice Black considered whether the community could interpose its criminal law between a canvasser with a message to communicate and the individual householder, who may wish to receive that message. The ordinance "submits the distributor to criminal punishment for annoying the person on whom he calls, even though the recipient of the literature is in fact glad to receive it." Justice Black conceded that in the instant case the record showed that "the householder to whom the appellant gave the leaflet which led to her arrest was more irritated than pleased with her visitor," and that there might be some justification for her irritation:

> The city...is an industrial community most of whose residents are engaged in the iron and steel industry, [and]...its inhabitants frequently work on swing shifts, working nights and sleeping days so that casual bell pushers might seriously interfere with the hours of sleep although they call at high noon.

However, he pointed out that there were more appropriate ways to deal with that problem.

> Traditionally the American law punishes persons who enter onto the property of another after having been warned by the owner to keep off.... [A model statute has been proposed] which would make it an offense for any person to ring the bell of a householder who has appropriately indicated that he is unwilling to be disturbed. This or any similar regulation leaves the decision as to whether distributors of literature may lawfully call at a home where it belongs—with the homeowner himself.

Thus, presumably, a "Do Not Disturb" or "No Solicitations" sign hung on the door should suffice to protect the householder from intrusion by unwanted canvassers. Since the privacy interests of residents could thus be protected by less restrictive means (that is, by methods that achieved the public interest while

51. *Martin v. Struthers, supra.*
52. See VC1.

interfering less with the protected right of speech, press or religion), the court struck down the Struthers ordinance as a violation of freedom of speech and press.

The distribution of literature to individual homes, Justice Black noted in passing, is a method that "[m]any of our most widely established religious organizations have used...[for] disseminating their doctrines, and laboring groups have used it in recruiting their members.... Door to door distribution of circulars is essential to the poorly financed causes of little people."

Justice Murphy concurred in a separate opinion in which he reiterated his view that religious freedom is a value to be protected above all others, in which concurrence he was joined by Justices Douglas and Rutledge.

> I believe that nothing enjoys a higher estate in our society than the right...to practice and proclaim one's religious convictions.... The right extends to the aggressive and disputatious as well as to the meek and acquiescent. The lesson of experience is that—with the passage of time and the interchange of ideas— organizations, once turbulent, perfervid and intolerant in their origin, mellow into tolerance and acceptance by the community or else sink into oblivion.[53]

This comment may have been a response to Justice Jackson's distress about the tactics of the Jehovah's Witnesses, expressed in his dissent attached to *Douglas v. Jeannette*[54] and intimated Justice Murphy's awareness of the process of relaxation or maturation of religious bodies described thirty years later by this author in *Why Conservative Churches Are Growing*.[55] Justice Murphy continued:

> There can be no question but that appellant was engaged in a religious activity when she was going from house to house in the city of Struthers distributing circulars advertising a meeting of those of her belief.... [I]f a householder does not desire visits from religious canvassers, he can make his wishes known in a suitable fashion.... [I]f the city can prohibit canvassing for the purpose of distributing religious pamphlets, it can also outlaw the door to door solicitations of religious charities, or the activities of the holy mendicant who begs alms from house to house to serve the material wants of his fellowmen and thus obtain spiritual comfort for his own soul.... Freedom of religion has a higher dignity under the Constitution than municipal or personal convenience. In these days, free men have no loftier responsibility than the preservation of that freedom. A nation dedicated to that ideal will not suffer but will prosper in its observance.[56]

---

53. *Martin v. Struthers, supra*, Murphy concurrence.
54. See § k below.
55. Kelley, *supra*, ch. VII.
56. *Martin v. Struthers*, *supra*, Murphy concurrence.

Apparently Justice Murphy and his two concurrers wanted to strike the ordinance for violation of free exercise of religion as well as of freedom of speech and press, though they did not explicitly say so, but could not muster a majority for that view, so—as often happens—they simply added that contention to the court's opinion as being not inconsistent with it in the hope that some day it might commend itself to a future majority confronting similar questions—as perhaps it did in *Sherbert v. Verner*[57] and *Wisconsin v. Yoder*,[58] which, though not solicitation cases and making no reference to *Martin v. Struthers* or Justice Murphy's views, did exalt religious freedom to perhaps its high-water mark.

Justice Frankfurter filed an opinion which was either a concurrence or a dissent, depending upon whether his view of the holding was accepted:

> The Court's opinion leaves one in doubt whether prohibition of all bell-ringing and door-knocking would be deemed an infringement of the constitutional protection of speech. It would be fantastic to suggest that a city has power, in the circumstances of modern life, to forbid house-to-house canvassing generally, but that the Constitution prohibits the inclusion in such prohibition of door-to-door vending of phylacteries or rosaries or of any printed matter. If the scope of the Court's opinion, apart from some of its general observations, is that this ordinance is an invidious discrimination against distributors of what is politely called literature, and therefore is deemed an unjustifiable prohibition of freedom of utterance.... I would not be disposed to disagree with such a construction of the ordinance.[59]

Although Justice Frankfurter professed uncertainty as to the "scope" of the court's opinion, it seems a model of clarity and forthrightness compared to his convoluted comment. Since he joined Justice Jackson's dissent to *Murdock* and *Martin*, the majority apparently did not accept his "construction of the ordinance," and the "running head" above his opinion characterizes it as "Frankfurter, J., dissenting,"[60] although he did not so characterize it himself: it begins simply "Mr. Justice Frankfurter:"—unlike the remaining opinion, which begins more forthrightly, "Mr. Justice Reed, *dissenting*."

In his dissent, Justice Reed minced no words:

> [I]t is impossible for me to discover in this town police regulation a violation of the First Amendment. No ideas are being suppressed. No censorship is involved. The freedom to teach or preach by word or book is unabridged, save only the right to call a householder to the door of his house to receive the summoner's message....

57. 374 U.S. 398 (1963), discussed at IVA7c.
58. 406 U.S. 205 (1972), discussed at IIIB2.
59. *Martin v. Struthers*, *supra*, Frankfurter opinion.
60. Supplied by the editor of *United States Reports*, vol 319.

> The antiquity and prevalence of colportage are relied on to support the Court's decision. But the practice has persisted because the householder was acquiescent. It can hardly be thought, however, that long indulgence of a practice which many or all citizens have welcomed or tolerated creates a constitutional right to its continuance....
>
> The First Amendment does not compel a pedestrian to pause on the street to listen to the argument supporting another's view of religion or politics. Once the door is opened, the visitor may not insert a foot and insist on a hearing. He certainly may not enter the home. To knock or ring, however, comes close to such invasions. To prohibit such a call leaves open distribution of the notice on the street or at the home without signal to announce its deposit. Such assurance of privacy falls far short of an abridgment of freedom of the press. The ordinance seems a fair adjustment of the privilege of distributors and the rights of householders.[61]

Justices Roberts and Jackson joined this dissent, and Justice Jackson filed an additional dissent appended to *Douglas v. City of Jeannette*.

k. *Douglas v. City of Jeannette* (1943). This was a companion case to *Murdock v. Pennsylvania*, decided the same day and involving the same city and the same statute, but reaching the Supreme Court through the federal, rather than the state, court system. The court, in an opinion by Chief Justice Stone, held that the case was not properly in the federal courts, and the ordinance in question had been dealt with in *Murdock*, which had taken the federal route.

Justice Jackson added a sixteen-page opinion concurring in the result in *Jeannette* and dissenting vehemently in *Murdock* and *Martin*. He reviewed the record in *Jeannette* to show the pattern of activity of Jehovah's Witnesses that was not as visible in *Murdock*: "This record shows us something of the strings as well as the marionettes. It reveals the problems of those in local authority when the right to proselyte comes in contact with what many people have an idea is their right to be let alone."[62] Justice Jackson thought it of possibly constitutional significance that the Jehovah's Witnesses deliberately decided to institute a saturation campaign in Jeannette with more Witnesses than the local police could handle. And indeed on Palm Sunday morning in 1939 over 100 Witnesses descended upon the little town of Jeannette, causing the police department to be so swamped with complaints that the fire department had to be called upon for assistance! Twenty-one Witnesses were arrested and eighteen convicted for selling or offering for sale their literature without a permit. Particular umbrage seems to have been taken at the tactic of making their calls on Sunday morning.

Justice Jackson expressed concern about the organization behind this campaign, headed by the Watch Tower Bible and Tract Society in Brooklyn, which published the materials distributed by the Witnesses.

---

61. *Martin v. Struthers*, *supra*, Reed dissent.
62. *Douglas v. Jeannette, supra*, Jackson opinion, at 166.

> Its output is large and its revenues must be considerable. Little is revealed of its affairs. One of its "zone servants" testified that its correspondence is signed only with the name of the corporation and anonymity as to its personnel is its policy. The assumption that it is a "non-profit charitable" corporation may be true, but it is without support beyond mere assertion. In none of these cases has the assertion been supported by such usual evidence as a balance sheet or an income statement.

Justice Jackson quoted at some length from Witness literature distributed on Palm Sunday to homes, many of them inhabited by Roman Catholics, which denounced the Roman Catholic Church as a "harlot," a "whore," a "racket," a work of the devil.

> Such is the activity which it is claimed no public authority can either regulate or tax....
>
> As individuals many of us would not find this activity seriously objectionable.... [W]e work in offices affording ample shelter from such importunities and live in homes where we do not personally answer such calls and bear the burden of turning away the unwelcome. But these observations do not hold true for all.... [T]he Court's many decisions in this field are at odds with the realities of life in those communities where the householder himself drops whatever he may be doing to answer the summons to the door and is apt to have positive religious convictions of his own.

He thought the right to distribute literature was not infringed by the regulation in *Martin v. Struthers* that forbade such interruptions.

> The city of Struthers decided merely that one with no more business at a home than the delivery of advertising matter should not obtrude himself farther by announcing the fact of delivery. He was free to make the distribution if he left the householder undisturbed, to take it in his own time.... If the local authorities must draw closer aim at evils than they did in these cases, I doubt that they ever can hit them.

In *Murdock*, he noted, the activities of itinerant evangelists and colporteurs were equated with such constitutionally protected activities as worship in churches and preaching from pulpits. But how, he asked, "can we dispose of the questions in this case merely by citing the unquestioned right to minister to congregations voluntarily attending services?"

Justice Jackson was especially troubled by what he saw as a tendency to elevate religious rights over other First Amendment rights—a recurring perplexity in the court.

> These Witnesses, in common with all others, have extensive rights to proselyte and propagandize.... The real question is where their rights end and the rights of others begin....

In my view the First Amendment assures the broadest tolerable exercise of free speech, free press, and free assembly, not merely for religious purposes, but for political, economic, scientific, news, or informational ends as well. When limits are reached which such communications must observe, can one go farther under the cloak of religious evangelism? Does what is obscene, or commercial, or abusive, or inciting become less so if employed to promote a religious ideology? I had not supposed that the rights of secular and non-religious communications were more narrow or in any way inferior to those of avowed religious groups.

It may be asked why then does the First Amendment separately mention free exercise of religion? The history of religious persecution gives the answer. Religion needed specific protection because it was subject to attack from a separate quarter. It was often claimed that one was an heretic and guilty of blasphemy because he failed to conform in mere belief or in support of prevailing institutions and theology. It was to assure religious teaching as much freedom as secular discussion, rather than to assure it greater license, that led to its separate statement.

The First Amendment grew out of an experience which taught that society cannot trust the conscience of a majority to keep its religious zeal within the limits that a free society can tolerate. I do not think it any more intended to leave the conscience of a minority to fix its limits. Civil government cannot let any group ride rough-shod over others simply because their "consciences" tell them to do so.

A common-sense test as to whether the Court has struck a proper balance of these rights is to ask what the effect would be if the right given to these Witnesses should be exercised by all sects and denominations. If each competing sect in the United States went after the householder by the same methods, I should think it intolerable.... Can we give to one sect a privilege that we could not give to all, merely in the hope that most of them will not resort to it?

* * *

We have held that a Jehovah's Witness may not call a public officer a "God damned racketeer" and a ""damned Fascist," because that is to use "fighting words," and such are not privileged. *Chaplinsky v. New Hampshire*.... How then can the Court today hold it a "high constitutional privilege" to go to homes, including those of devout Catholics on Palm Sunday morning, and thrust upon them literature calling their church a "whore" and their faith a "racket"?

Nor am I convinced that we can have freedom of religion only by denying the American's deep-seated conviction that his home is a refuge from the pulling and hauling of the marketplace and the street. For a stranger to corner a man in his home, summon him to the door and put him in the position either of arguing his religion or of ordering one of unknown disposition to leave is a questionable use of religious freedom....

* * *

> I doubt if only the slothfully ignorant wish repose in their homes, or that the forefathers intended to open the door to such forced "enlightenment" as we have here....
>
> * * *
>
> I should think that the singular persistence of the turmoil about Jehovah's Witnesses, one which seems to result from the work of no other sect, would suggest to this Court a thorough examination of their methods to see if they impinge unduly on the rights of others....
>
> This Court is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added.... The Court is adding a new privilege to override the rights of others to what has before been regarded as religious liberty. In so doing it needlessly creates a risk of discrediting a wise provision of our constitution which protects all—those in the peaceful, orderly practice of the religion of their choice but which gives no right to force it upon others.[63]

Thus Justice Robert Jackson, who just one year later was to deliver another trenchant dissent—in *U.S. v. Ballard*—contending that even the most preposterous religious representations should not be put on trial with respect, not just to the truth or falsity of their doctrinal representations, but their very sincerity in advancing them, even to induce financial contributions!

It is interesting that Justice Jackson viewed colportage and solicitation—the outreach activities of a religion—as "forcing" that religion upon others, as though they were unable to say No, while neglecting what is probably the greatest justification in the modern urban (or suburban) setting for the kind of ordinance struck down in *Martin v. Struthers*, i.e., the often-justifiable reluctance felt by *women* alone in the home to open the door to unidentified strangers. Justice Jackson was distressed that a *man* should have to choose between "arguing his religion or...ordering one of unknown disposition to leave." How much more troubling that choice may be to a *woman* or an *elderly person of either sex alone in the house*. And the prior decision—whether to go to the door at all—may be equally perplexing if one is expecting a needed delivery or a visiting friend but may find on the threshold instead a high-pressure salesman or a persistent missionary.

It would be edifying to know how many of the communities that were outraged by the court's striking down their Struthers-type ordinances proceeded to enact new ones of the kind the court implied were permissible, i.e., the National Institute of Municipal Law Officers' model ordinance making it an offense "for any person to ring the bell of a householder who has appropriately indicated that he is unwilling to be disturbed."[64] Such a measure would seem to be quite adequate to mollify Justice

63. Ibid., Jackson opinion.

64. *Martin v. Struthers*, *supra*, at 148; the wording is the court's, not necessarily the Institute's.

Jackson's concerns while still preserving the freedom of canvassers to call on those willing to be visited.

l. *Prince v. Massachusetts* (1944). In Brockton, Massachusetts, Sarah Prince was convicted of violating the child labor laws by permitting her nine-year-old ward, Betty Simmons, to sell magazines on the street. Mrs. Prince and Betty were both Witnesses, and the "magazine" they were "selling" was the *Watchtower*, though they made no "sales" on the evening in question. They were about twenty feet apart when the school attendance officer, a Mr. Perkins, who had warned her on earlier occasions about such activity, accosted them and advised Mrs. Prince to get Betty off the street, which she did. Nevertheless, she was charged with furnishing a minor with material to sell and with permitting the minor to work, and her conviction was upheld by the Supreme Judicial Court of the Commonwealth.

Justice Rutledge wrote the opinion of the U.S. Supreme Court, beginning, "The case brings for review another episode in the conflict between Jehovah's Witnesses and state authority.... The story told by the evidence has become familiar. It hardly needs repeating, except to give setting to the variations introduced through the part played by a child of tender years." (After only a couple of years on the high court bench, Justice Rutledge showed signs of already becoming somewhat jaded by the Witnesses' adventures with the law. Nevertheless, he gave a vivid account of the events summarized above.)

> [T]wo claimed liberties are at stake. One is the parent's, to bring up the child in the way he should go, which for appellant means to teach him the tenets and the practices of their faith. The other freedom is the child's, to observe these; and among them is "to preach the gospel...by public distribution" of "Watchtower" and "Consolation," in conformity with the scripture: "A little child shall lead them."

Justice Rutledge noted that "Appellant does not stand on freedom of the press," but solely on freedom of religion.

> If by this position appellant seeks for freedom of conscience a broader protection than for freedom of the mind, it may be doubted that any of the great liberties insured by the First Article can be given higher place than the others. All have preferred position in our scheme. All are interwoven there together.[65]

Referring to precedents (*West Virginia State Board of Education v. Barnette*,[66] *Pierce v. Society of Sisters*,[67] and *Meyer v. Nebraska*,[68]), Justice Rutledge reaffirmed that "It is cardinal with us that the custody, care and nurture of the child reside first

65. *Prince v. Massachusetts*, 321 U.S. 158 (1944).
66. 391 U.S. 624 (1943), discussed at IVA6b.
67. 268 U.S. 510 (1925), discussed at IIIB1b.
68. 262 U.S. 390 (1923), discussed at IIIB1a.

in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. It is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter." Nevertheless, "neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways."

> The case reduces itself therefore to the question whether the presence of the child's guardian puts a limit to the state's power. That fact may lessen the likelihood that some evils the legislation seeks to avert will occur. But it cannot forestall all of them. The zealous though lawful exercise of the right to engage in propagandizing the community, whether in religious, political or other matters, may and at times does create situations difficult enough for adults to cope with and wholly inappropriate for children, especially of tender years, to face. Other harmful possibilities could be stated, of emotional excitement and psychological or physical injury. Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.[69]

The judgment of the state court was thus affirmed.

Two other opinions were filed. Justice Murphy contended that the state court should have been reversed, since the state had not met the burden of showing that its regulation of the religious activity at issue was necessary.

> In dealing with the validity of statutes which directly or indirectly infringe religious freedom and the right of parents to encourage their children in the practice of a religious belief, we are not aided by any strong presumption of the constitutionality of such legislation. On the contrary, the human freedoms enunciated in the First Amendment and carried over into the Fourteenth Amendment are presumed to be invulnerable and any attempt to sweep away those freedoms is prima facie invalid. It follows that any restriction or prohibition must be justified by those who deny that the freedoms have been unlawfully invaded....
>
> The burden is not met...by vague references to the reasonableness underlying child labor legislation in general.... If the right of a child to practice its religion in that manner be forbidden by constitutional means, there must be convincing proof that such a practice constitutes a grave and immediate danger to the state or to the health, morals or welfare of the child.

69. *Prince, supra.*

> The state, in my opinion, has completely failed to sustain its burden of proving the existence of any grave or immediate danger to any interest which it may lawfully protect.
>
> * * *
>
> [T]he bare possibility that such harms might emanate from distribution of religious literature is not, standing alone, sufficient justification for restricting freedom of conscience and religion. Nor can parents or guardians be subjected to criminal liability because of vague possibilities that their religious teachings might cause injury to the child. The evils must be grave, immediate, substantial.... Indeed, if probabilities are to be indulged in, the likelihood is that children engaged in serious religious endeavor are immune from such influences. Gambling, truancy, irregular eating and sleeping habits and the more serious vices are not consistent with the high moral character ordinarily displayed by children fulfilling religious obligations. Moreover, Jehovah's Witness children invariably make their distribution in groups subject at all times to adult or parental control, as was done in this case. The dangers are thus exceedingly remote, to say the least.[70]

Justice Murphy thus would have shifted the burden from the Witnesses, where the majority had placed it—to show that they had a right to use the public thoroughfares for religious purposes—to the state, to show why they should *not* be entitled to do so, and made it a heavy burden to meet. He concluded with a striking characterization of the struggles of minority religions for the religious liberty to which they were entitled:

> No chapter in human history has been so largely written in terms of persecution and intolerance as the one dealing with religious freedom. From ancient times to the present day, the ingenuity of man has known no limits in its ability to forge weapons of oppression for use against those who dare to express or practice unorthodox beliefs. And the Jehovah's Witnesses are living proof of the fact that even in this nation, conceived as it was in the ideals of freedom, the right to practice religion in unconventional ways is far from secure. Theirs is a militant and unpopular faith, pursued with a fanatical zeal. They have suffered brutal beatings; their property has been destroyed; they have been harassed at every turn by the resurrection and enforcement of little used ordinances and statutes. To them, along with other present-day religious minorities, befalls the burden of testing our devotion to the ideals and constitutional guarantees of religious freedom. We should therefore hesitate before approving the application of a statute that might be used as another instrument of oppression. Religious freedom is too sacred a right to be restricted or

70. Ibid., Murphy dissent, citing *Jamison v. Texas*, 318 U.S. 413 (1943), discussed at § g above, for the following holding: "One who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion."

> prohibited in any degree without convincing proof that a legitimate interest of the state is in grave danger.[71]

No other member of the court joined Justice Murphy in this dissent, a forerunner of the "compelling state interest" test of Free Exercise advanced by the court in *Sherbert v. Verner* in 1963.[72]

The other opinion, written by Justice Jackson and joined by Justices Roberts and Frankfurter, might be viewed as the demurrer of those still smarting from the defeat of their views in *Murdock-Opelika II*.

> It is difficult for me to believe that going upon the streets to accost the public is the same thing for application of public law as withdrawing to a private structure for religious worship. But if worship in the churches and the activity of Jehovah's Witnesses on the streets "occupy the same high estate" and have the "same claim to protection" it would seem that child labor laws may be applied to both if to either. If the *Murdock* doctrine stands along with today's decision, a foundation is laid for any state intervention in the indoctrination and participation of children in religion, provided it is done in the name of their health and welfare.
>
> This case brings to the surface the real basis of disagreement among members of this Court in previous Jehovah's Witness cases. Our basic difference seems to be as to the method of establishing limitations which of necessity bound religious freedom.
>
> My own view can be shortly put: I think the limits begin to operate whenever activities begin to affect or collide with liberties of others or of the public. Religious activities which concern only members of the faith are and ought to be free—as nearly absolutely free as anything can be. But beyond these, many religious denominations or sects engage in collateral and secular activities intended to obtain means from unbelievers to sustain the worshippers and their leaders. They raise money, not merely by passing the plate to those who voluntarily attend services or by contributions by their own people, but by solicitations and drives addressed to the public, by holding public dinners and entertainments, by various kinds of sales and Bingo games and lotteries. All such money-raising activities on a public scale are, I think, Caesar's affairs and may be regulated by the state so long as it does not discriminate against one because he is doing them for a religious purpose, and the regulation is not arbitrary and capricious, in violation of other provisions of the Constitution.
>
> The Court in the *Murdock* case rejected this principle of separating immune religious activities from secular ones.... Instead, the Court now draws a line based on age that cuts across both true exercise of religion and auxiliary secular activities.... I think this is not a correct principle for defining activities immune from regulation on grounds of religion, and

71. Ibid., Murphy dissent.
72. 374 U.S. 398 (1963), discussed at IVA7c.

> *Murdock* overrules the grounds on which I think affirmance should rest. I have no alternative but to dissent from the grounds of affirmance of a judgment which I think was rightly decided, and upon right grounds, by the Supreme Judicial Court of Massachusetts.[73]

This case is worth more attention than has usually been given it because the three opinions represent three important schools of thought on the subject of legal protection of the outreach activities of religious bodies. (1) The majority of the court (Rutledge, Stone, Black, Douglas, Reed) accepted the view that had prevailed in *Murdock* (reversing *Opelika*), that the work of colporteurs on public streets was to be treated as *more religious than commercial* with respect to the assessment of a flat license tax (primarily designed to gain revenue from street peddlers). But they viewed the state's right to regulate or prohibit such activities with respect to *children* (not adults) as permissible because of the *parens patriae* role of the state.

(2) Justice Jackson, who later in the same term wrote a vigorous dissent in *U.S. v. Ballard*,[74] fully as laudable in its way as Murphy's in *Opelika* or *Prince*, drew the line between the *internal* activities of religious bodies and their *outreach* activities. When they reach out to the public, he contended, their activities are matters of public concern to a degree that "internal" activities are not, and when they seek and obtain money thereby, they become commercial as well as religious, and the state is then entitled to regulate the *commercial* aspects irrespective of their motivation, with the consequence of significant strictures upon the *religious* aspects. The effect of this approach (shared by Jackson, Roberts and Frankfurter), whether intended or not, was to subordinate the religious quality of the activities to their imputed "commerical" character, and to draw them under the state's regulations imposed upon (and designed to control supposed abuses in) commercial enterprises.

(3) Justice Murphy, on the other hand, took the view that such activities were *primarily religious*, even though taking place on the public street and addressed to the public. Their religious character was not lost or lessened because contributions were sought or received, even if these transactions were viewed as "sales," since the motive was not profit-making but evangelistic. And the religious motivation gave them such priority in the public arena, in his view, that the state must bear a heavy burden in justifying any interference with them, even as to enforcement of restrictions that applied across-the-board to others not religiously motivated. Though not prevailing in these cases, something very like the Murphy view became in time—and for a while—the prevailing Free Exercise test in such cases as *Sherbert v. Verner*[75] and *Wisconsin v. Yoder*.[76]

---

73. Ibid., Jackson dissent.
74. 322 U.S. 78 (1944), quoted with approval below at § B6a.
75. 374 U.S. 398 (1963), discussed at IVA7c.
76. 406 U.S. 205 (1972), discussed at IIIB2.

Mention should be made of other cases involving Jehovah's Witnesses in this period, the names of which—with those already described—comprise a litany familiar to students of the growing recognition of religious liberty in the American legal record. Two of the most important, *Minersville School District v. Gobitis*[77] and *West Virginia State Board of Education v. Barnette*,[78] the flag-salute cases, represented a turnabout within the Court even more striking than the *Opelika-Murdock* shift.[79] Three other Supreme Court cases involved the resistance of Jehovah's Witnesses to Selective Service: *Sicurella v. U.S.*[80], *Simmons v. U.S.*[81] and *Gonzales v. U.S.*[82] Several cases arose from the refusal of Jehovah's Witnesses to accept blood transfusions, one of which found its way to the Supreme Court: *Jehovah's Witnesses of Washington State v. King County Hospital*.[83]

m. *Follett v. McCormick* (1944). This case extended the teaching of *Murdock*—that a flat license tax designed to gain revenue from commercial canvassers may not be levied upon nonprofit itinerant colporteurs distributing religious literature as an act of faith—to a Jehovah's Witness who resided permanently in the town of McCormick and made his livelihood from the full-time selling of religious literature. The court noted that preachers of the more conventional religious bodies reside more or less permanently in the community and are not deemed to be engaged in commercial enterprises merely because they depend upon their calling for their livelihood, so there was no constitutional justification for treating the full-time religious ministrants of less orthodox sects any differently.[84]

n. *Marsh v. Alabama* (1946). A law of Alabama made it a crime to enter or remain on private premises after the owner had denied permission to do so, and that law was applied to Jehovah's Witnesses who were distributing their literature despite a notice posted in store windows announcing "This is Private Property, and Without Written Permission, No Street or House Vendor, Agent or Solicitation of Any Kind Will Be Permitted." The distinctive feature of *Marsh v. Alabama* was that the entire town of Chickasaw, a suburb of Mobile, was owned by the Gulf Shipbuilding Company—stores, houses, streets and sidewalks. It was a "company town," and the company did not grant permission to the Witnesses to come upon its "premises."

The Supreme Court, per Justice Black, held that its decisions forbidding a state to prohibit the dissemination of religious literature on a publicly owned street of the normal city applied with equal force to the streets of a privately owned town, since these were functionally equivalent for the population living there to the public space

77. 310 U.S. 586 (1940).
78. 319 U.S. 624 (1943).
79. See IVA6.
80. 348 U.S. 385 (1955), discussed at IVA5g.
81. 348 U.S. 397 (1955), discussed at IVA5m(4).
82. 348 U.S. 407 (1955), discussed at IVA5m(5).
83. 390 U.S. 598 (1968) *per curiam*, discussed at IVC3f and g.
84. *Follett v. McCormick*, 321 U.S. 573 (1944).

of any urban aggregation, and the fact that they were privately owned did not render them any less "public" as a place for freedom of speech, press and religion of, by or toward the population. Justice Reed, joined by Chief Justice Stone and Justice Harold Burton, dissented on the ground that the majority had impaired the right of the owner to control the use of his private property.[85]

o. *Tucker v. Texas* (1946). A companion case to the preceding, also announced by Justice Black, differed only in that the property in question was wholly owned by the United States, which had erected a village in Medina County, Texas, for housing workers employed in national defense production at the Hondo Navigation works. A member of Jehovah's Witnesses was calling from door to door disseminating religious literature in the village when the federal manager of the village told him to leave. When he refused, he was arrested and charged with trespass. The Texas courts upheld his conviction, but the Supreme Court reversed, holding that the governmental landowner could no more abridge the freedom of press and of religion on a residential street than could a private landowner. Chief Justice Stone and Justices Reed and Burton again dissented on the same grounds as in the preceding case, viz., that the premises in question had not been shown to have been dedicated by the owner to general use by the public.[86] These were forerunners of the decisions of the 1980s and 1990s parsing the gradations of the "public forum" theory.

p. *Saia v. New York* (1948). Two years later the court reviewed the conviction of a Jehovah's Witness for violating an ordinance of Lockport, New York, forbidding use of sound amplification equipment without permission from the chief of police. The opinion of the court was prepared by Justice Douglas but announced by Justice Black. It found the ordinance to be a prior restraint on free speech in violation of the First Amendment.

> The right to be heard is placed in the uncontrolled discretion of the Chief of Police. He stands athwart the channels of communication as an obstruction which can be removed only after criminal trial and conviction and lengthy appeal. A more effective previous restraint is difficult to imagine....
>
> Loud-speakers are today indispensable instruments of effective public speech. The sound truck has become an accepted method of political campaigning. It is the way people are reached. Must a candidate for governor or the Congress depend on the whim or caprice of the Chief of Police in order to use his sound truck for campaigning? Must he prove to the satisfaction of that official that his noise will not be annoying to people?
>
> The present ordinance would be a dangerous weapon if it were to get a hold on our public life. Noise can be regulated by regulating decibels. The hours and place of public discussion can be controlled.... Any abuses

85. *Marsh v. Alabama*, 326 U.S. 501 (1946).
86. *Tucker v. Texas*, 326 U.S. 517 (1946).

> which loud-speakers create can be controlled by narrowly drawn statutes.... Annoyance at ideas can be cloaked in annoyance at sound. The power of censorship inherent in this type of ordinance reveals its vice.[87]

This case was decided solely on the Free Speech Clause, not on Free Exercise. Justice Frankfurter dissented, joined by Justices Reed and Burton.

> The native power of human speech can interfere little with the self-protection of those who do not wish to listen. They may easily move beyond earshot.... But modern devices for amplifying the range and volume of the voice...afford easy, too easy, opportunities for aural aggression. If uncontrolled, the result is intrusion on cherished privacy.... Surely there is not a constitutional right to force unwilling people to listen.... And so I cannot agree that we must deny the right of a State to control these broadcasting devices so as to safeguard the rights of others not to be assailed by intrusive noise but to be free to put their freedom of mind and attention to uses of their own choice.
>
> * * *
>
> The men whose labors brought forth the Constitution of the United States had the street outside Independence Hall covered with earth so that their deliberations might not be disturbed by passing traffic.... [I]t would startle them to learn that the manner and extent of the control of the blare of the sound trucks by the States of the Union, when such control is not arbitrarily and discriminatorily exercised, must satisfy what this Court thinks is the desirable scope and manner of exercising such control.[88]

Justice Jackson was even more spirited in his dissent.

> The appellant, one of Jehovah's Witnesses, contends, and the Court holds, that without the permission required by city ordinance he may set up a sound truck so as to flood this [park] area with amplified lectures on religious subjects. It must be remembered that he demands even more than the right to speak and hold a meeting in this area that is reserved for other and quite inconsistent purposes [—the people's recreation]. He located his car, on which loud-speakers were mounted, either in the park itself, not open to vehicles, or in the street close by. The microphone for the speaker was located some little distance from the car and in the park, and electric wires were strung...apparently across the sidewalk, from the one to the other.... It was for setting up this system of microphone, wires and sound truck without a permit, that this appellant was convicted—it was not for speaking.
>
> It is astonishing news to me if the Constitution prohibits a municipality from policing, controlling or forbidding erection of such equipment by a private party in a public park.... To my mind this is not a free speech issue. Lockport has in no way denied or restricted the free use, even in its park,

87. *Saia v. New York*, 334 U.S. 558 (1948).
88. *Saia, supra*, Frankfurter dissent.

> of all of the facilities for speech with which nature has endowed the appellant.... But can it be that society has no control of apparatus which, when put to unregulated proselyting, propaganda and commercial uses, can render life unbearable? It is intimated that the City can control the decibels; if so, why may it not prescribe zero decibels as appropriate to some places?... If it is to be treated as a case merely of religious teaching, I still could not agree with the decision. Only a few weeks ago we held that the Constitution prohibits a state or municipality from using tax-supported property "to aid religious groups to spread their faith."[89] Today we say it compels them to let it be used for that purpose.... I cannot see how we can read the Constitution one day to forbid and the next day to compel use of public tax-supported property to help a religious sect spread its faith.[90]

(Perhaps it was to avoid this anomaly that the majority refrained from mentioning the religious aspect of the challenged conduct.)

q. ***Niemotko v. Maryland*** **(1951)**. The city of Havre de Grace, Maryland, had a city park in which it permitted various meetings (including those of religious groups) upon issuance of a permit. When representatives of Jehovah's Witnesses requested a permit, the city council grilled them about their views on service in the armed forces, refusal to salute the flag, the Roman Catholic Church and other matters not visibly relevant to use of the park. Apparently not pleased with their replies, the city council denied the permit, but the Witnesses went ahead with their meeting as planned, and two of them were arrested for disturbing the peace when they got up to speak.

The Supreme Court reversed their conviction because of the arbitrary censorship exercised by the city council. The right to freedom of speech and religion cannot be subject to the whims or personal opinions of a local governing body.[91]

r. ***Fowler v. Rhode Island*** **(1953).** A further point was made in a similar case from Rhode Island, where a Jehovah's Witness was arrested for giving a sermon in a public park as part of a religious assembly. A Pawtucket ordinance forbade "addresses" to political or religious meetings, but made an exception for "any political or religous club or society" that visited the park in a body, provided no "public address" was made under its auspices.

The case turned, not on whether making a speech without a permit could be punished, but on whether the offending act was protected by the exception for religious services. The Supreme Court held, in an opinion written by Justice Douglas, that an admission at oral argument that a religious meeting was involved triggered the exception.

---

89. *McCollum v. Bd. of Ed.*, 333 U.S. 203, discussed at IIIC1a.

90. *Saia, supra*, Jackson dissent.

91. *Niemotko v. Maryland*, 340 U.S. 268 (1951).

> On oral argument before the Court the Assistant Attorney General...conceded that the ordinance...did not prohibit church services in the park. Catholics could hold mass in Slater Park and Protestants could conduct their services without violating the ordinance. Church services normally entail not only singing, prayer, and other devotionals but preaching as well. Even so, those services would not be barred by the ordinance. That broad concession...is fatal to Rhode Island's case. For it plainly shows that a religious service of Jehovah's Witnesses is treated differently than a religious service of other sects. That amounts to the state preferring some religious groups over this one....
>
> Appellant's sect has conventions that are different from the practices of other religious groups. Its religious service is less ritualistic, more unorthodox, less formal than some. But apart from narrow exceptions not relevant here[92] it is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment. Nor is it in the competence of courts under our constitutional scheme to approve, disapprove, classify, regulate, or in any manner control sermons delivered at religious meeting. Sermons are as much a part of a religious service as prayers. They cover a wide range and have as great a diversity as the Bible or other Holy Book from which they commonly take their texts. To call the words which one minister speaks to his congregation a sermon, immune from regulation, and the words of another minister an address, subject to regulation, is merely an indirect way of preferring one religion over another. That would be precisely the effect here if we affirmed this conviction in the face of the concession made during oral argument. Baptist, Methodist, Presbyterian or Episcopal ministers, Catholic priests, Moslem mullahs, Buddhist monks could all preach to their congregations in Pawtucket's parks with impunity. But the hand of the law would be laid on the shoulder of a minister of this unpopular group for performing the same function.[93]

The judgment of the Supreme Court of Rhode Island upholding the conviction was therefore reversed. Justice Frankfurter concurred in the result, but would have predicated it upon the Equal-Protection-of-the-Laws Clause of the Fourteenth Amendment rather than on the First Amendment. Justice Jackson concurred in the result.

s. *Poulos v. New Hampshire* (1953). The last case in this series is perhaps the most tedious and opaque. For twenty turgid pages Justice Reed wrestled with the particulars of a dispute from New Hampshire over religious services conducted in a public park in Portsmouth without the requisite permit. The ordinance requiring the

92. Citing *Reynolds v. U.S.*, 98 U.S.145 (1878) and *Davis v. Beason*, 133 U.S. 333 (1890), (discussed at IVA2a and b), presumably referring to the practice of polygamy outlawed there.

93. *Fowler v. Rhode Island*, 345 U.S. 67 (1953).

permit had been held valid in *Cox v. New Hampshire* (1941),[94] and the state superior court had ruled in the instant case that the denial of the permit was "arbitrary and unreasonable," but the sole recourse under state law was to seek a writ of *certiorari* or *mandamus* to compel the city officials to issue the permit, which could take time and expense. But Justice Reed wrote for the majority that there was no justification for acting extralegally when a remedy was available at law.

> The principles of the First Amendment are not to be treated as a promise that everyone with opinions or beliefs to express may gather around him at any public place and at any time a group for discussion or instruction.... It must be admitted that judicial correction of arbitrary refusal by administrators to perform judicial duties under valid laws is exulcerating[95] and costly. But to allow applicants to proceed without the required permits...is apt to cause breaches of the peace or to create public dangers. The valid requirements of licenses are for the good of the applicants and the public.... Delay is unfortunate, but the expense and annoyance of litigation is a price citizens must pay for life in an orderly society where the rights of the First Amendment have a real and abiding meaning.[96]

Justice Frankfurter, ever the Harvard law professor he had been before appointment to the court, devoted seven pages to chiding Justice Reed for exploring the issue of whether New Hampshire could require a permit for open-air meetings in its parks, since that had been settled in *Cox* and was not raised by the parties and therefore not before the court. He concurred in the holding that the proper remedy for denial of a permit was in the courts rather than proceeding without a permit.

Justice Black issued a one-page dissent.

> I do not challenge the Court's argument that New Hampshire could prosecute a man who refused to procure a license to "run businesses".... But the First Amendment affords freedom of speech a special protection; I believe it prohibits a state from convicting a man of crime whose only offense is that he makes an orderly religious appeal after he has been illegally, "arbitrarily and unreasonably" denied a "license" to talk. This to me is a subtle use of a creeping censorship loose in the land.

Justice Douglas, no slouch at using pen and ink, dissented for five pages, joined by Justice Black.

> [W]hen a legislature undertakes to proscribe the exercise of a citizen's constitutional right to free speech, it acts lawlessly; and the citizen can take matters in his own hands and proceed on the basis that such a law is no law at all.[97]

---

94. 312 U.S. 569 (1941), discussed at § A2d above.

95. Ulcer-causing (*Archaic*) — Webster.

96. *Poulos v. New Hampshire*, 345 U.S. 395, 405, 409 (1953).

97. Citing *DeJonge v. Oregon*, 290 U.S. 353, 365.

> The reason is the preferred position granted freedom of speech, freedom of press, freedom of assembly, and freedom of religion by the First Amendment. The command of the First Amendment...is that there shall be *no* law which abridges those civil rights. The matter is beyond the power of the legislature to regulate, control or condition.... No matter what the legislature may say, a man has the right to make his speech, print his handbill, compose his newspaper, and deliver his sermon without asking anyone's permission.... The vice of a statute, which exacts a license for the right to make a speech, is that it adds a burden to the right. The burden is the same when the officials administering the licensing system withhold the license and require the applicant to spend months or years in the courts in order to win a right which the Constitution says no government shall deny.[98]

This case was decided mainly on the basis of freedom of speech, although the speech in question was religious. Perhaps the reason for that emphasis was the struggle over McCarthyism then going on in the country, and some members of the court were beating McCarthy over the back of Poulos, or at any rate asserting the broadest scope for freedom of speech against efforts being made—even on the court—to curtail it.[99] That may explain why so much energy was expended by various members of the court on what might otherwise have been a rather obscure and technical dispute.

In the cases just described, the Supreme Court—after considerable internal struggle—carved out an important clearing in the wilderness for the free exercise of religion, for which everyone owes a vast debt of gratitude to the then much despised Jehovah's Witnesses and to their counsel, Hayden Covington, who envisioned the strategy of constitutional litigation and represented most of the plaintiffs and appellants in the cases discussed above.

The Witnesses have since become almost respectable, but their place as the current pariahs of religion has been taken by more recently emerging religious movements: the "Moonies," the "Hare Krishnas," the Scientologists and many others, who now suffer the obloquy heaped on the Witnesses, and before them, on the Mormons, and before them (in England), on the Wesleyans, and before them (both in England and the North American colonies), on the Quakers—and so on back to the beginning. Every new religion arriving on the scene seems to inherit the same tired accusations and atrocity tales[100] used to discredit its predecessors, and must endure the same

---

98. *Poulos, supra*, Douglas dissent.

99. Justice Douglas cited *Beauharnais v. Illinois*, 343 U.S. 250; *Dennis v. U.S.*, 341 U.S. 494; *Feiner v. New York*, 340 U.S. 315, as examples of a theory that "grants a power reasonably to regulate free speech... a doctrine that has been slowly creeping into our constitutional law. It has no place there."

100. See Bromley, David G., Anson Shupe, Jr., and Joseph C. Ventimiglia, "Atrocity Tales, The Unification Church and the Social Construction of Evil," *Journal of Communication*, 29:42-53 (1979).

contempt, rejection and outright persecution. It is a tribute to the basic faith in freedom that (still?) actuates the upper echelons of the American judiciary that the claims of such groups to free exercise of religion are eventually, more often than not, vindicated. The Witnesses did not win all of their cases, and neither do the more recent religious movements, but they win enough of them to keep alive the hope that religious freedom in the United States is an expanding rather than a contracting category, despite such lamentable setbacks as *Oregon v. Smith*.[101]

Justice Murphy's words continue to be as true today as they were in 1944:

> No chapter in human history has been so largely written in terms of persecution and intolerance as the one dealing with religious freedom. From ancient times to the present day, the ingenuity of man has known no limits in its ability to forge weapons of oppression for use against those who dare to express or practice unorthodox beliefs. And the [Moonies? Hare Krishnas?] are living proof of the fact that even in this nation, conceived as it was in the ideals of freedom, the right to practice religion in unconventional ways is far from secure.... Theirs is a militant and unpopular faith, pursued with a fanatic zeal.... To them, along with other present-day religious minorities, befalls the burden of testing our devotion to the ideals and constitutional guarantees of religious freedom.[102]

3. Other Cases Involving Evangelism

Not all exercises of evangelism scrutinized by the courts were those of Jehovah's Witnesses. Others were active in efforts to spread their gospels abroad.

a. *Kunz v. New York* (1951). A Baptist minister was fined for speaking at Columbus Circle in New York City without a permit. He had obtained a permit two years before, but it was revoked before the year for which it was issued had elapsed. The police commissioner revoked it on evidence presented at a hearing to the effect that he had ridiculed and denounced other religious beliefs in his meetings. When he applied for a permit the next year, it was denied, and the same the year after, so he went ahead without a permit. His conviction was upheld by New York courts, and the U.S. Supreme Court heard an appeal. In an opinion by Chief Justice Fred M. Vinson the decision below was reversed.

> The court below has mistakenly derived support for its conclusion from the evidence produced at the trial that appellant's religious meetings had, in the past, caused some disorder. There are appropriate public remedies to protect the peace and order of the community if appellant's speeches result in disorder or violence.... We do not express any opinion on the propriety of punitive remedies which the New York authorities may

101 . 494 U.S. 872, (1990), discussed at IVD2e.

102 . *Prince v. Massachusetts*, 321 U.S. 158 (1944), Murphy dissent. For the original reference to Jehovah's Witnesses has been substituted the names of some more recent religious minorities.

> utilize. We are here concerned with suppression—not punishment. It is sufficient to say that New York cannot vest restraining control over the right to speak on religious subjects in an administrative official where there are no appropriate standards to guide his action.[103]

Justice Robert Jackson issued one of his trenchant dissents in this case.

> Essential freedoms are today threatened from without and within. It may be difficult to preserve here what a large part of the world has lost—the right to speak, even temperately, on matters vital to spirit and body. In such a setting, to blanket hateful and hate-stirring attacks on races and faiths under the protections for freedom of speech may be a noble innovation. On the other hand, it may be a quixotic tilt at windmills which belittles great principles of liberty. Only time can tell. But I incline to the latter view and cannot assent to the decision....

After receiving reports that Kunz was engaging in scurrilous attacks on Catholics and Jews, he was given a hearing at which eighteen complainants appeared. As a result, his permit to speak on the street was revoked. Occasionally fisticuffs had occurred at his meetings, and he testified that when an officer was present there were no such outbreaks. He also asserted that he intended to go on preaching as he had done in the past.

> The speeches which Kunz has made and which he asserts he has a *right* to make in the future were properly held by the courts below to be out of bounds for a street meeting and not constitutionally protected. This Court, without discussion, makes a contrary assumption which is basic to its whole opinion....
>
> New York has placed no limitation upon any speech Kunz may choose to make on private property, but it does require a permit to hold religious meetings on its streets.... There is a world of difference. The street preacher takes advantage of people's presence on the streets to impose his message upon what is, in a sense, a captive audience. A meeting on private property is made up of an audience that has volunteered to listen. The question, therefore, is not whether New York could, if it tried, silence Kunz, but whether it must place its streets at his service to hurl insults at the passer-by.

Justice Jackson recalled that the court, "in one of its few unanimous decisions in recent years," had held that the First Amendment did not protect certain narrow classes of speech—libel, obscenity and "fighting words"—"those which by their very utterance inflict injury or tend to incite an immediate breach of the peace..."[104]

---

103 . *Kunz v. New York*, 340 U.S. 290, 294-295 (1951).

104 . Ibid., Jackson dissent, quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572, discussed at § e above.

Equally inciting and more clearly "fighting words," when thrown at Christians and Jews who are rightfully on the streets of New York, are statements that "The Pope is the anti-Christ" and the Jews are "Christ-killers." These terse epithets come down to our generation weighted with hatreds accumulated through centuries of bloodshed. They are recognized words of art in the profession of defamation. They are not the kind of insult that men bandy and laugh off when the spirits are high and the flagons are low.... They are always, and in every context, insults which do not spring from reason and can be answered by none.

* * *

In this case the Court does not justify, excuse, or deny the inciting and provocative character of the language, and it does not, and on this record could not, deny that when Kunz speaks he poses a "clear and present" danger to peace and order. Why, then, does New York have to put up with it?

It is well to be vigiliant to protect the right of Kunz to speak, but is he to be sole judge as to how far he will carry verbal attacks in the public streets? Is official action the only source of interference with religious freedom? Does the Jew, for example, have the benefit of these freedoms when, lawfully going about, he and his children are pointed out as "Christ-killers" to gatherings on public property by a religious sectarian sponsored by a police bodyguard?

* * *

This Court, however, refuses to take into consideration Kunz's "past" conduct or that his meetings have "caused some disorder." Nor does it deny that disorders will probably occur again. It comes close to rendering an advisory opinion when it strikes down this ordinance without evaluating the factual situation which has caused it to come under judicial scrutiny. If it were not for these characteristics of the speeches of Kunz, this ordinance would not be before us, yet it is said that we can hold it invalid without taking into consideration either what he has done or what he asserts a right to do.

* * *

The question remains whether the Constitution prohibits a city from control of its streets by a permit system which takes into account dangers to public peace and order. I am persuaded that it does not do so, provided, of course, that the city does not so discriminate as to deny equal protection of the law or undertake a censorship of utterances that are not so defamatory, insulting, inciting, or provocative as to be reasonably likely to cause disorder and violence.... Cities throughout the country have adopted permit requirements to control private activities on public streets and for other purposes.... Is everybody out of step but this Court?

* * *

If the Court is deciding that the permit system for street meetings is so unreasonable as to deny due process of law, it would seem appropriate to point out respects in which it is unreasonable. This I am unable to learn,

> from this or any former decision. The Court holds, however, that Kunz must not be required to get permission, the City must sit by until some incident, perhaps a sanguinary one, occurs and then there are unspecified "appropriate public remedies."
>
> * * *
>
> The purpose of the Court is to enable those who feel a call to proselytize to do so by street meetings. The means is to set up a private right to speak in the city streets without asking permission. Of course, if Kunz may speak without permit, so may anyone else. If he may speak whenever and wherever he may elect, I know of no way in which the City can silence the heckler, the interrupter, the dissenter, the rivals with missionary fervor, who have an equal right at the same time and place to lift their voices. And, of course, if the City may not stop Kunz from uttering insulting and "fighting" words, neither can it stop his adversaries, and the discussion degenerates to a name-calling contest without social value and, human nature being what it is, to a fight or perhaps a riot. The end of the Court's method is chaos.
>
> * * *
>
> The "consecrated hatreds of sect" account for more than a few of the world's bloody disorders. These are the explosives which the Court says Kunz may play with in the public streets, and the community must not only tolerate but aid him. I find no such doctrine in the Constitution.[105]

Justice Jackson painted a portentous picture of the perils of non-permit-regulated speech in the crowded and superpluralistic warrens of New York City, but the damage that befalls there in more recent times seems not mainly to stem from unregulated preachers so much as from drug gangs shooting it out with assault rifles. But even if the subject is confined to speech, one wonders if Justice Jackson has exhausted the alternatives of interaction in his scenario of name-calling, fight and riot. Those are certainly likely possibilities—"human nature being what it is"—but are they the only possibilities? No one was forced to stand around Columbus Circle and listen to Kunz if they didn't like what he said. But if they thought his offenses required an answer, they might resort to various nonviolent counteractives. The remedy for offenses of speech is not suppression but more speech.

If eighteen people could make the trip to the hearing to demand that Kunz not be allowed verbally to attack Jews and Catholics, perhaps—after the Supreme Court's decision had put him back on the street again—they could gird themselves to "take back the streets" from this insult-monger. They could answer him back, as Justice Jackson envisioned, but not with counterinsults. If only half of them showed up *en masse*, they could make a strong showing at drowning out the epithets of Kunz, perhaps by praying for him orally, by lustily singing "Faith of Our Fathers" or by reading loudly in unison from some of the imprecatory Psalms. In other words, it

105 . *Kunz v. New York, supra*, Jackson dissent.

should not be conceded that "human nature" is exhausted by the two alternatives of regulation or riot. There is at least a third option: counterevangelism.

b. *Airport Commissioners v. Jews for Jesus* (1987). In 1987 the Supreme Court of the United States accepted for hearing a case involving restrictions on evangelistic activity, this time at an airport (and not involving Jehovah's Witnesses). In a sense it seems related to a series of Circuit Court decisions upholding the rights of devotees of new religious groups to solicit charitable contributions at airports, but since there was no charitable solicitation in this instance it does not follow in that train of case law, and the court did not refer to them.[106] In this instance the Board of Airport Commissioners of Los Angeles had adopted a resolution in 1983 that stated in part: "NOW, THEREFORE, BE IT RESOLVED...that the Central Terminal Area at Los Angeles International Airport is not open for First Amendment activities by any individual or entity...."[107]

The resolution authorized the city attorney to take action against anyone violating this rule. On July 6, 1984, one Alan Howard Snyder, a minister of the gospel for Jews for Jesus, a nonprofit religious corporation, was distributing free religious literature on a pedestrian walkway at Los Angeles International Airport (referred to in the court's opinion by its air traffic code, LAX). A peace officer of the Department of Airports informed him that his activity was prohibited and that legal action would be taken against him if he persisted. Snyder left the airport terminal forthwith and subsequently filed suit in federal district court challenging the constitutionality of the Board of Airport Commissioners' action. The district court found the resolution unconstitutional, and the Ninth Circuit Court of Appeals affirmed, holding that the airport complex was a traditional public forum.[108]

The U.S. Supreme Court granted *certiorari*, and its decision was announced June 15, 1987, by Justice Sandra Day O'Connor for a unanimous court.

> The [Airport Commissioners] contend that LAX is neither a traditional public forum nor a public forum by government designation, and accordingly argue that the latter standard governing access to a nonpublic forum is appropriate. [Jews for Jesus], in turn, argue that LAX is a public forum subject only to reasonable time, place or manner restrictions. Moreover, at least one commentator contends that *Perry*[109] does not control a case such as this in which the [would-be communicators] already have

106. *Wolin v. Port of New York Authority*, 392 F.2d 83 (CA2, 1968), cert. denied, 393 U.S. 940 (1968); *Kuszynski v. City of Oakland*, 479 F.2d 1130 (CA9, 1973); *ISKCON v. Rockford*, 585 F.2d 263 (CA7, 1978); *ISKCON v. Eaves*, 601 F.2d 809 (CA5, 1979); *ISKCON v. Port of New York Authority*, 425 F.Supp. 681 (S.D.N.Y., 1977); *Fernandes v. Limmer*, 663 F.2d 619 (CA5, 1981).

107. *Board of Airport Commissioners of the City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, (1987).

108. Relying on *Kuszynski v. City of Oakland*, *supra*.

109. The reference is to *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37 (1983), which defined a "traditional public forum" or a "public forum by governmental designation" as one in which "the government may not prohibit all communicative activity."

> access to the airport, and therefore concludes that this case is analogous to *Tinker v. Des Moines School District*.[110] Because we conclude that the resolution is facially unconstitutional under the First Amendment overbreadth doctrine regardless of the proper standard, we need not decide whether LAX is indeed a public forum, or whether the *Perry* standard is applicable when access to a nonpublic forum is not restricted.
>
> * * *
>
> On its face, the resolution at issue in this case reaches the universe of expressive activity, and, by prohibiting *all* protected expression, purports to create a virtual "First Amendment Free Zone" at LAX. The resolution does not merely regulate expressive activity in the Central Terminal Area that might create problems such as congestion or the disruption of the activities of those who use LAX. Instead, the resolution expansively states that LAX "is not open for First Amendment activities by any individual and/or entity...." The resolution therefore does not merely reach the activity of [colporteurs] at LAX; it prohibits even talking or reading, or the wearing of campaign buttons or symbolic clothing. Under such a sweeping ban, virtually every individual who enters LAX may be found to violate the resolution by engaging in some "First Amendment activit[y]." We think it obvious that such a ban cannot be justified even if LAX were a nonpublic forum because no conceivable governmental interest would justify such an absolute prohibition of speech.

So ended the Los Angeles Airport Commissioners' bold attempt to create an evangelism-free zone where travelers would be safe from the importunings of various religious and secular missionaries. Earlier decisions by lower courts had rejected less sweeping prohibitions as unconstitutional limitations on solicitations, mainly because of the speech content of such activities. Los Angeles decided simply to outlaw all forms of speech itself but did not succeed. However, New York partially succeeded where Los Angeles had failed, in two cases that reached the U.S. Supreme Court in 1992—*ISKCON v. Lee* and *Lee v. ISKCON*.[111]

---

110. 393 U.S. 503 (1969), discussed at IIIE1. The commentator cited was Laycock, D., "Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers," 81 *Nw.U.L.Rev.* 1, 48 (1986).

111. See § C5e below.