Supplementary Material

Chapter 8: The New Deal/Great Society Era—Individual Rights/Religion/Free Exercise

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

On April 22, 1938, Newton Cantwell, and his sons, Russell and Jessie, were proselytizing in New Haven, Connecticut. They solicited contributions, attempted to hand out literature on Jehovah Witnesses and played a recording by Joseph Rutherford, the religious leader of that sect. The Rutherford speech contained vituperative criticisms of Catholicism, which did not sit well in predominantly Roman Catholic New Haven. Several residents complained to the police and the Cantwells were arrested for soliciting money for a religious cause without a local license. A local trial jury convicted all three for the failure to have a license and breaching the peace. The Supreme Court of Connecticut sustained the conviction for failure to have a license and Newton Cantwell's conviction for breaching the peace, but reversed the convictions of the younger Cantwells on that count. The Cantwells appealed to the Supreme Court of the United States, claiming that their conviction violated their First and Fourteenth Amendment rights.

The Supreme Court unanimously held that the Cantwells were unconstitutionally convicted. Justice Roberts's opinion first held that due process clause of the Fourteenth Amendment incorporated the free exercise clause of the First Amendment and that Connecticut had violated the Cantwells's free exercise rights. Justice Roberts' opinion was unanimous. At a time when most provisions of the Bill of Rights were not incorporated, no justice maintained that states were constitutionally free to violate free exercise rights. No justice in Cantwell *complained that the Court was substituting their judgment for the local elected legislature or for the jury's facts. Such complaints were frequently heard in other cases when New Deal/Great Society liberals declared laws unconstitutional or incorporated provisions of the Bill of Rights. Why do you think the justices were unanimous in this case? Consider, in particular, why the free exercise of religion was deemed fundamental at a time when most of the procedural rights set out in the first eight amendments to the Constitution were not.*

Cantwell *was the first case Hayden Covington argued before the Supreme Court and his first victory. Covington, the lawyer for Jehovah's Witnesses, became the most successful Supreme Court advocate of the early New Deal period.*

JUSTICE ROBERTS delivered the opinion of the Court.

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We hold that the statute, a 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 constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus, the 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, the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom. No one would contest the proposition that 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 guarantee. . . . It is equally clear that a State may, by general and nondiscriminatory 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 order, and comfort of the community without unconstitutionally invading the liberties protected by the Fourteenth Amendment. The appellants are right in their insistence that the Act in question is not such a regulation. If a certificate is procured, solicitation is permitted without restraint, but, in the absence of a certificate, solicitation is altogether prohibited.. . . .

[T]he Act requires an application to the secretary of the public welfare council of the State; that he is empowered to determine whether the cause is a religious one, and that the issue of a certificate depends upon his affirmative action. If he finds that the cause is not that of religion, to solicit for it becomes a crime. He is not to issue a certificate as a matter of course. His decision to issue or refuse it involves appraisal of facts, the exercise of judgment, and the formation of an opinion. He is authorized to withhold his approval if he determines that the cause is not a religious one. 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.

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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. . . . 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.

We [also] hold that, in the circumstances disclosed, the conviction of Jesse Cantwell [for breach of peace] must be set aside. . . .

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The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts, but acts and words likely to produce violence in others. No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot, or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. 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. Here we have a situation analogous to a conviction under a statute sweeping in a great variety of conduct under a general and indefinite characterization, and leaving to the executive and judicial branches too wide a discretion in its application.

Having these considerations in mind, we note 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. There is no showing that his deportment was noisy, truculent, overbearing or offensive. . . .

The record played by Cantwell embodies a general attack on all organized religious systems as instruments of Satan and injurious to man; it then singles out the Roman Catholic Church for strictures 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. The hearers were, in fact, highly offended. One of them said he felt like hitting Cantwell, and the other that he was tempted to throw Cantwell off the street. The one who testified he felt like hitting Cantwell said, in answer to the question "Did you do anything else or have any other reaction?" "No, sir, because he said he would take the victrola, and he went." The other witness testified that he told Cantwell he had better get off the street before something happened to him, and that was the end of the matter, as Cantwell picked up his books and walked up the street.

We find in the instant case no assault or threatening of bodily harm, no truculent bearing, 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.

. . . Although the contents of the record not unnaturally aroused animosity, we think that, in the absence of a statute narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State, the petitioner's communication, considered in the light of the constitutional guarantees, 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.