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Wall of Separation and the Supreme Court

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The fact that the First Amendment to the United States Constitution was an injunction only against the Federal Government prevented the national courts and Government from being involved in the struggle over separation before the Civil War. The adoption of the Fourteenth Amendment did not immediately change this situation, due to the emasculation of the Amendment's privileges and immunities clause by the Supreme Court in the Slaughter-House and succeeding cases. Nevertheless, the federal courts were occasionally called upon to rule on the meaning of the First Amendment religious clause. The most important instance was the question of Mormon polygamy. Since most Mormons were in Utah, which was then a territory under federal jurisdiction, any action against polygamy had to be taken by the federal authorities. Congress precipitated the struggle by passing an act making plural marriage a criminal offense. When Reynolds was convicted under this act, the Supreme Court was forced to rule on its validity under the First Amendment. As far as we are concerned, the major questions involved were (1) was Christianity the law of the land, and did polygamy therefore violate it? and (2) did the First Amendment prohibit the Government from regulating such acts when they were committed as a part of a religious belief?

The first question was sidestepped in Chief Justice Waite's opinion, for obvious reasons. In the first place, the court might have had a hard time upholding the act on the basis that Christianity was the law of the land, since the evidence on the point is conflicting. Secondly, a declaration that polygamy was a violation of Christian principles would be open to attack, for the Mormons were Christians, and as such had as much right to define Christian morality for themselves as did any other sect. Therefore the Court was forced to rule directly upon the constitutionality of the statute. Was the prohibition of polygamy a violation of the religious liberty guaranteed by the First Amendment? In the nineteenth century or even today a court could conveniently come to only one conclusion. The Chief Justice quoted Jefferson to the effect that the civil officers may interfere with religious practices when they "break out into overt

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1. Slaughter-House Cases, 16 Wall. 36 (U.S. 1873).
acts against peace and good order." He went on to indicate that polygamy had always been considered "odious" in most of Europe and was punishable at common law, and that it had always been an offense against society in this country. Furthermore, he continued, marriage is a civil contract and as such may be regulated by the state. On these grounds the anti-polygamy statute and the good order and peace of society were maintained.\(^5\)

Here we see clearly the problem which John Locke\(^4\) failed to recognize: who is to decide the issue when the civil and the religious spheres come into conflict? Locke dismissed the question by saying that it would seldom if ever come up, but the Supreme Court could not get around it so easily. The answer of the court is implicit but obvious: when the interests of the state and those of religion conflict, the state must decide whether the question involves political stability to a great enough degree to prohibit the religious practice. Particularly in questions involving the public morals the state, not the church, is supreme. Obviously the extent of governmental interference under such a doctrine depends not on any constitutional restrictions, but on the sense of restraint and devotion to liberty of those political authorities who make the decision. The value of the separation principle, however, as Locke recognized, is that it reduces the area of conflict between the political and the religious. It cannot eliminate conflict, but it can minimize it. From the viewpoint of the political, such conflicts should be minimized because they may arouse passions which will threaten political stability. There can be no doubt that in the Reynolds case—regardless of the correctness of the Court's view as to the immorality of polygamy—the decision reached was the only one politically possible, in view of the prevailing hostility to plural marriage. The threat to peace and good order came not so much from the practice itself as from the opposition it aroused.\(^5\)

In 1891 the Supreme Court stuck the judicial neck out somewhat farther when, in ruling that a church had the right to import the minister of its choice from abroad (regardless of immigration regulations), the Court, speaking through Justice Brewer, averred not only that "this is a religious nation" but that "this is a Christian nation." He based this conclusion on an analysis of the wording of several of our most conservative state constitutions which,

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5. This fact was explicitly recognized as regards blasphemy by the Delaware court in State v. Chandler, 2 Harr. 553, 573 (Del. 1837).
he said, "speak the voice of the entire people." This seeming victory for the forces of Christianity—for such a declaration could be used to sanction many breaches of the separation rule—was, however, beclouded by two aspects of Justice Brewer's opinion. First, the declaration was in a sense an *obiter dictum*, for the declaration that this is either a religious or a Christian nation was not necessary to the decision. Second, the Court's opinion indicated that Jewish ministers as well as Christian could be freely imported, thus leaving it somewhat in doubt whether it actually meant that this is a Christian nation or merely that this is a religious nation. In any case, this doctrine has not been adopted by succeeding courts although it is often cited by those who would have it so.

While the Supreme Court was thus kept out of the religious field except where federal statutes were involved, the state courts had to bear the burden of deciding whether religious instruction in the public schools was a violation of the state constitutions, whether the state constitution or common law made the state a Christian state, and so on. The decisions are so different in various states that no clear pattern can be derived from their study. But some of them were important because they contained opinions about the separation theory which went beyond the language of pure law and entered the field of political theory.

In the twentieth century the pendulum of constitutional interpretation has swung to the federal courts on the vital questions of religious liberty. The Supreme Court opened the way for this development by evading the *Slaughter-House* holding and not basing its protection of individual rights against state action upon the privileges and immunities clause which the earlier case had made a practical nullity. This development was foreshadowed by two decisions which, without referring to the First Amendment, held that the liberty spoken of in the Fourteenth includes religious liberty. It was not until the so-called "Roosevelt Court" that the First Amendment religious clauses were specifically applied against the states under the wording of the Fourteenth. From then on it was assured that the important religious cases would be appealed to the Supreme Court of the United States. And they came in a flood.

In a case involving religious rights, there are many lines of thought which a court can pursue in reaching its decision. None

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is either easy to apply nor precise in its application. Judicial determination in this field is "case by case;" precedents do not often apply. Which methods of reaching a conclusion are taken in any particular case are largely a result of the philosophy of the Court; and the philosophy of the Court (even in these days of split majorities) is an amalgam of the individual philosophies of the justices. Since 1940, the Court has almost unanimously adopted Madison and Jefferson's theory of separation. There have been wide differences of opinion in each case, however, on just what Jefferson's theory means and how it can be applied to present-day problems. The methods used by various justices in various cases have been as follows:

1. Historical. In several cases the Court has made a determined effort to base its decisions on what the framers of the First Amendment meant to do. There is, as we know, much difference of opinion on this point. But the Court has, in general, adopted Thomas Jefferson's "wall of separation" theory, including (or adding, as some critics claim) the idea that the state is barred from aiding one religion, all religions, or any preference of one over another, as Justice Black said in his famous Everson case opinion.\footnote{People ex rel. McCollum v. Board of Education, 333 U. S. 203 (1948); Everson v. Board of Education, 330 U. S. 1 (1947).} In this case and the later McCollum case, the Court has gone extensively into the business of making, or as Corwin puts it, remaking, history.\footnote{Corwin, The Supreme Court as National School Board, 23 Thought (Fordham University Quarterly) 665 (1948).} It has thoroughly examined the background of the amendment, and has decided that Jefferson's theory was embodied in it. Although I believe this interpretation to be the correct one, it is unprovable and controversial, and on the whole a poor basis for a decision if used exclusively, for several reasons.

First, the brevity of Congressional debate and the lack of writings on the question by the framers make any historical argument inconclusive and open to serious doubt. Second, the amendment was designed to outlaw practices which had existed at the time—but there is no authoritative declaration of the specific practices at which it was aimed. And third, most of the modern cases involving religious freedom turn on issues which were at most academic in 1789, and perhaps did not exist at all. Public education was practically non-existent in 1789, so the question of religious education may not have been foreseen. And the use of loudspeakers in public parks was certainly not in the minds of the framers.\footnote{See Saia v. New York, 334 U. S. 558 (1948).} The result is that
the historical argument can apply to many recent decisions only by implication; the justices, in short, must apply their own opinions of what Madison or Jefferson would think of the present-day problem—a process which is fraught with the possibility of error, and which actually leaves the Court free to decide, as Justice Jackson remarks, under "no law but our own prepossessions."

Another objection which liberals have to the historical method is that in the hands of an illiberal court it may be actually dangerous to religious freedom. It can as well be used—even if one accepts Jefferson's theory of it—to limit freedom as to protect or enlarge it. As one writer on the subject trenchantly remarks,

"The Founding Fathers were novices in the field of religious freedom, for they had come from a background of bigotry and lived in an era of intolerance. . . . It would be a strange commentary on the flexibility of our democratic government, if after 150 years of growth our concepts of freedom were limited to the narrow horizons of our forefathers. The First Amendment, if it is to keep step with the times, must give much wider protection than it did in 1789."

2. Political process. In one case the Court has taken the view that it will not strike down state legislation, except in flagrant cases, as long as the remedial processes of government leave open the possibility of agitation for repeal. Justice Frankfurter strongly urged this view in his *Gobitis* case opinion, in which he said:

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

Frankfurter reiterated this view in his dissent in the *Barnette* case, in which the Court reversed itself and over-ruled the *Gobitis* decision. As to the merits of the argument, there is a good deal of truth and wisdom in Frankfurter's approval of the Holmesian dictum that experimentation should be permitted in the "insulated compartments" of the states. But Holmes was referring to economic experi-

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13. *Summers, The Sources and Limits of Religious Freedom*, 16 Ill. L. Rev. 57 (1946). The analysis of the historical method here given is taken largely from this article.
ment, not to civil liberties. In any case, the constitutional principle in civil liberties questions is clear: the state is barred from "experimenting" with the liberties which the Constitution guarantees. In addition, while Frankfurter's faith in the democratic process is touching, his theory is dangerously close to one of pure majority rule. In this connection, he cited Madison and Jefferson as knowing "that minorities may disrupt society," yet Jefferson and Madison both also realized that majorities can disrupt society by trampling on minority rights. This was, in fact, the main (and only) reason for the inclusion of the Bill of Rights in the Constitution. It was intended as a constitutional protection against the tyranny of a majority which might disregard the fact that unalienable rights belong to minorities as well as majorities. To apply Frankfurter's theory might well be to make the Bill of Rights a nullity—an eventuality which Frankfurter would dislike as deeply as anyone on the Court.

3. Minority protection. It was this conviction that led Justice Stone to make his lonely dissent to the Gobitis decision, a dissent which was to become the majority opinion in the Barnette case. Stone's thesis was that there are certain fundamental rights which are constitutionally protected from state violation, and that the Court is duty-bound to enforce these rights, even if it does mean a limitation on government action. He objected to Frankfurter's idea, because, he said, it meant "the surrender of the constitutional protection of the liberty of small minorities to the popular will," and advanced a contrary theory that the constitutional provisions do—and were meant to—limit governmental action.

"The very fact that we have constitutional guaranties of civil liberties and the specificity of their command where freedom of speech and of religion are concerned require some accommodation of the powers which government normally exercises, when no question of civil liberty is involved, to the constitutional demand that those liberties be protected against the action of government itself."  

16. Id. at 653 (dissenting opinion).
18. Frankfurter had feared that government's freedom of action would be unduly restricted if the Court were to strike down "reasonable" legislation. In his Barnette dissent he called such court action "a denial of the exercise of legislation." West Virginia Board of Education v. Barnette, 319 U. S. 624, 654 (1943) (dissenting opinion).
His view was, in short, that national unity is a legitimate object of governmental action, but that such action cannot abrogate constitutional limitations.

Stone's argument seems philosophically more tenable than Frankfurter's, but it does not really solve the question in any particular case, since it gives no clue as to where civil liberty ends and legitimate governmental action begins. There is no doubt, for instance, that in the *Reynolds* Mormon case, religious liberty was denied and legislation approved, yet who doubts the correctness of the decision? Stone's rule is no touchstone; in each case the Court must still decide which interest is paramount: that of political and social aims, or that of civil liberty. It is this enduring necessity which makes liberty perpetually a thing which must be fought for, a thing which must be continually reasserted as one of the predominant values in the competition for supremacy. Liberty must compete with other values; and as far as the courts are concerned, the outcome of the competition depends not on a constitutional principle but on the philosophical theories of the judges.

4. Preferred rights. Another rule which has been enunciated by the Court, and which is also opposed to the Frankfurter theory, is that which holds that some rights have a preferred status and should be invariably protected by the courts. Frankfurter had maintained that legislation should be upheld if it could be considered reasonable, placing, apparently, the burden of proof on the aggrieved party. But Justice Murphy took up the cudgels against this doctrine. Religious liberty, he thought, was so sacred a privilege that the shoe should be put on the other foot. That is, in a case involving religious rights, the state should be required to prove that its action—as regards the restriction of liberty—is reasonable. It will not do to prove its reasonableness as general legislation; it must be reasonable in its application to religious liberty. The presumption of the court, said Murphy, should be that any violation of First Amendment rights is "prima facie invalid."

"Religious freedom is too sacred a right to be restricted or prohibited in any degree without convincing proof that a legitimate interest of the state is in grave danger."20

This preferential treatment of First Amendment freedoms is common if largely implicit with the Court in religious cases.21

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In matters where there is no specific constitutional prohibition, the usual court rule—often ignored—is that there is a presumption of constitutionality, and that if the law is considered by the Court to be a reasonable exercise of some legitimate governmental power such as the police power, the law should be sustained. There is grave doubt, however, that such should be the case where there is a clause in the Constitution which prohibits governmental action, especially when the prohibition is couched in such absolute terms as those of the First Amendment. There is thus some value in Justice Murphy's contention that when such prohibitions are involved, a law should be considered invalid unless "convincing proof" of its necessity be offered. Some, like Frankfurter, would fear that legitimate state action would be made impossible by such an interpretation; this need not be the case, however. For even with a presumption of unconstitutionality it is still necessary for the Court to decide whether or not convincing proof has been presented. It is, in other words, the Court which must be convinced. A court made up of Frankfurter would doubtless be easier to convince than one made up of Murphys. The shift in emphasis, in other words, would not be as important as the makeup of the Court. Again, then, it is the judges, rather than the rule of interpretation, which are of fundamental importance.

5. General applicability. The Court has sometimes held that a law of general applicability is valid even though it interferes incidentally with religious liberties. This view is diametrically opposed to that of Murphy discussed above, and the Court in each case has to decide which of the two it prefers. The result generally depends on the Court's view of the importance of the legislation and the degree to which it impinges upon liberty. The rule of general applicability was stated forcefully by Justice Frankfurter in the Gobitis case.

"The religious liberty which the Constitution protects does not exclude legislation of general scope not directed against doctrinal loyalties of particular sects." 22

"The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities." 23

It is doubtful, however, if most judges would go as far as Frankfurter on this interpretation. The validity of the argument, provided it is properly qualified, is undeniable. Its application in a compulsory vaccination law case was undoubtedly wise. 24 But as

23. Id. at 594-595.
applied in a flag-salute case or a street-littering ordinance case, it is of doubtful wisdom.  

The fact that Frankfurter gives no weight to the importance, as distinct from the relevance, of the "concerns of a political society," is cause for comment. It is probable that he does not actually mean that any relevant concern, expressed in a general law, would be sufficient to uphold the law, regardless of how minor the subject matter of the law may be. There is a vast difference in the importance of laws regulating the holding of public meetings in parks, and laws prohibiting plural marriage. Frankfurter's doctrine gives no weight to such differences, however; it is enough that both types of law are of "relevant concern" to society.

That Frankfurter himself does not completely agree with his doctrine seems to be indicated by his Everson case dissent. No one would deny that safe transportation to school is a relevant concern of society; yet Justice Frankfurter agreed with his dissenting colleagues that such transportation could not be constitutionally provided to parochial school children.Obviously, more than mere "relevance" must be considered. All things that are of relevant concern are not thereby constitutional; if they were our Bill of Rights would be deprived of much of its utility in protecting us from governmental interferences with our liberties.

Neither is the general scope of legislation a complete criterion of its constitutionality in religious cases. It is obvious that laws of general scope on their face, may be used to discriminate against particular groups. Southern evasions of the Constitution's suffrage requirements are an obvious case in point, and the courts have latterly been very cautious in approving such evasions. The application of the law, and not merely its scope, are of concern; and if a law of general scope does in practice work against "the doctrinal loyalties of particular sects," that is one factor which should be taken into consideration by the courts. Scope, relevance, and importance and effect, are all part of the complicated picture which the courts should consider before making decisions.

6. Interference with liberty of others. A sixth test that has been proposed is the degree to which an action impelled by religious conviction impinges upon the freedom of others. This test involves a balancing of freedoms. Justice Jackson proposed its use in his dissent in the Prince case, in which he averred that limitations on religious liberty should begin only when the actions affect those

outside the religious group which condones or sanctions them.\textsuperscript{27} This argument has gained prominence recently largely because of the Supreme Court's refusal to use it in the \textit{McCollum} case. It requires an analysis of both freedom \textit{for} and freedom \textit{from}, as is well brought out in the controversy over that case. The Court holds that freedom \textit{from} any element of coercion in religious matters is an important factor. But others believe that their freedom \textit{for} religious instruction is more important than the freedom \textit{from} it of a few "atheists."

A leading constitutional authority has advanced this opinion:

"Have the parents of children who must for financial or other reasons attend the public schools no right to guide the education of their children, and hence no right to demand that the education available through the public schools shall not be purely secular? It would seem that the decision in the \textit{McCollum} case amounts to a law prohibiting the "free exercise" of religion—a type of law which is in definite words banned by Amendment I.\textsuperscript{28}

And a prominent Catholic writer seconds it:

"This case was different. It was a matter of one child and its parent against all the other children in the community. It was decided in favor of the one child, but in this kind of case, what, it can be asked, becomes of the freedom of religion of all the others? Before, it was always the power of the state that was restricted. Here, it is the freedom of other individual citizens that is denied."\textsuperscript{29}

Laying aside the question of whether or not coercion did exist, and assuming with the court that it did, it appears that the major question in the \textit{McCollum} case was whether the freedom from coercion of the McCollum boy (and, possibly, others in like position) or the freedom of others to attend religious classes in public schools on school time, is the most valuable. Since, given the will on the part of parents, children, and church, religious education can be secured outside the public schools, it would seem—again assuming that coercion existed—that the first freedom was actually the one which most needed protection. At least the Supreme Court thought so, by an (in these days unusual) overwhelming majority.\textsuperscript{30}

\textsuperscript{28} Corwin, \textit{supra} note 10, at 680.
\textsuperscript{29} Parsons, \textit{The First Freedom} 178 (1948).
\textsuperscript{30} The significance of \textit{Zorach v. Clauson}, 343 U. S. 306 (1952), is difficult to estimate. It is probable that it does not affect the argument here, since the majority assumed there was no coercion involved in the New York "dismissed-time" system.
Whatever the decision in a particular case, it is, I believe, obvious that the balancing of freedoms is a tricky thing, and a job which courts of law are not well qualified to handle. Yet under the American constitutional system such questions inevitably present themselves to the courts. It is the judges' own value hierarchy which determines their answer, not a legal or constitutional principle.

7. Clear and present danger. The Court has at times attempted to apply the Holmes-Brandeis "clear and present danger" rule to religious liberty cases. Since such cases in this country seldom if ever pose an actual threat to any government, the question resolves itself into, not clear and present danger to the state, but instead, to some paramount interest which the state feels bound to protect. Obviously, once again this means the weighing of values, not the application of principles of law. Justice Murphy used this concept, as well as that of preferred rights, in his Prince case dissent. The state, he said, had completely failed to prove the "existence of any grave or immediate danger to any interest which it may lawfully protect."31 The majority disagreed. The same principle may have been present in the minds of the justices in many of the other cases which have been heard by the Court.32 It must be said that the difficulties in the way of applying the clear and present danger test to subversive activities are multiplied when it is applied to religious liberty cases. For at least there is no doubt that the state may legally and morally protect itself against acts of subversion. But may it protect itself against disunity, or irreligious tendencies, or street-littering, or invasion of the privacy of the home, or unauthorized parades, when these are relevant to the First Amendment? Here enters the question, not only of whether the state can prevent such activities at all, but also of whether the value of religious liberty is not higher than the other value concerned. In the Cox case, the Court was not merely concerned with "maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses."33 The real question was whether the holding of unauthorized parades constitutes such an excess, especially when

the parade in question may be viewed as a religious exercise. The Court in that case decided it was an excess; but obviously, given a slightly different hierarchy of values on the part of several justices, another conclusion might have been reached which would sound just as logical when embalmed in judicial phraseology.

8. **Unavoidability of clash.** In Justice Murphy's hands, the clear and present danger rule was easily turned into a doctrine that "a basic liberty can be limited only to the extent that the clash between its free exercise and the prevention of immediate substantive evil is unavoidable."84 The use of such a doctrine would clearly have led to a different decision in the *Cox* and *Prince* cases.85 It is in actuality only an extension of the clear and present danger rule, by the addition of the test of inevitability of effect—a test which in some cases (though not in all) is no easier to apply. In the *Jacobson* compulsory vaccination case, for instance, to have based the decision on whether the lack of vaccination would have led "unavoidably" to a smallpox epidemic (which is what the authorities were upheld in their power to prevent), would have been literally impossible.86 But in some cases, as the *Cantwell* case, the test can seemingly be applied easily by merely looking at what happened. The state claimed that the actions of the Jehovah's Witnesses threatened the peace. But the Court overruled this contention because no actual breach of the peace had occurred. A clash was obviously not unavoidable if it had been avoided.87 However, there is a difficulty in this; for if the state were forced to wait until violations had occurred before it could act, its job of preventing such violations or breaches of the peace would be impossible to carry out. Preventive action is, in many cases, not only legitimate but necessary, a fact which the unavoidability test fails to recognize. It has the value, however, of recognizing that proper watchfulness by the civil authorities, by providing police protection or other means, might often prevent any real threat of disorder, thus rendering unnecessary the prohibition or breaking up of the meeting. American police authorities could learn a real lesson from the London police in this connection.

This survey of the means by which a court can arrive at tenable decisions in cases involving religious liberty emphasizes the fact

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84. *Summers*, supra note 13, at 73.
85. See also *Chaplinsky v. New Hampshire*, 315 U. S. 568 (1942), in which Murphy himself upheld the state's dignity against the religious freedom to curse its officials!
that no hard and fast rule of law can be applied. In spite of the fulminations of critics, it is clear that the Court can only proceed, in Justice Frankfurter's words, "from case to case." It is for this reason that the study of judicial decisions on religious liberty becomes in reality not a study of law (even of "constitutional" law) but an excursion into political philosophy. From study of the Court's philosophy it appears that the present justices almost unanimously share the doctrines of Jefferson and Madison; and that, with these as a basis, they add their own modern corollaries to fit present-day needs, in accordance with their interpretations of the libertarian spirit of those doctrines. Good grounds exist for the belief that the Court in so acting is proceeding along the high road of liberty which was blazed by Roger Williams and followed by the Revolutionary statesmen. Whatever one's opinion on that, however, it cannot be gainsaid that, for better or worse, the Court has made a significant addition to the theory of separation. It has set up the standard that no American government may "pass laws which aid one religion, aid all religions, or prefer one religion over another." The "all religions" phrase has aroused a ferment among some sincerely religious people; it apparently results from the Court's fear that any aid, even ostensibly to "all religions," would inevitably in fact aid one religion, or prefer one religion over another. It is another step in the long road toward state neutrality, and it is made necessary partly by the existence of a huge group of citizens—probably at least 45%—who are not religious, and some of whom are irreligious. Such people have the same civil rights as the religious, and to tax or coerce them even for the aid of "all" religions would be as unfair as to tax Presbyterians for the support of Methodism.

40. The Christian majority in America may also make the Court particularly conscious of the rights of small minorities and of their need for special protection.
41. Another grave and extremely interesting problem which has confronted the Court is the question of how much credence is to be given to the protestations of sincerity made by the practitioners of strange and unusual religious beliefs, such as, perhaps, snake tests. The Supreme Court met this exceedingly difficult problem head-on in United States v. Ballard, 322 U. S. 78 (1944), which involved a case of what the Court felt was the old confidence game in a new guise, practiced by the leader of the "I am" cult. The majority was inclined, for obvious reasons, to evade the issue of the sincerity of the defendant's religious beliefs. Justice Jackson wrote a particularly perspicacious dissent, maintaining that a man's beliefs cannot be called insincere merely because they differ from the prevailing ones. A court, said he, was in no position to judge the truth or falsity of any religious belief; obviously it could not, therefore, pin the label of insincerity on a belief which could not be proven false!