CONSTITUTION CLUBS®

MURDOCK
v.
PENNSYLVANIA
SUPREME COURT OF THE UNITED STATES
319 U.S. 105
May 3, 1943
[5 - 4]

OPINION: DOUGLAS...The City of Jeannette, Pennsylvania, has an ordinance, some forty years old, which provides in part:

> 'That all persons canvassing for or soliciting within said Borough, orders for goods, paintings, pictures, wares, or merchandise of any kind, or persons delivering such articles under orders so obtained or solicited, shall be required to procure from the Burgess a license to transact said business and shall pay to the Treasurer of said Borough therefore the following sums according to the time for which said license shall be granted.
>
> 'For one day $1.50, for one week seven dollars ($7.00), for two weeks twelve dollars ($12.00), for three weeks twenty dollars ($20.00), provided that the provisions of this ordinance shall not apply to persons selling by sample to manufacturers or licensed merchants or dealers doing business in said Borough of Jeannette.'

Petitioners are 'Jehovah's Witnesses'. They went about from door to door in the City of Jeannette distributing literature and soliciting people to 'purchase' certain religious books and pamphlets, all published by the Watch Tower Bible & Tract Society. The 'price' of the books was twenty-five cents each, the 'price' of the pamphlets five cents each. In connection with these activities petitioners used a phonograph on which they played a record expounding certain of

their views on religion. None of them obtained a license under the ordinance. Before they were arrested each had made 'sales' of books. There was evidence that it was their practice in making these solicitations to request a 'contribution' of twenty-five cents each for the books and five cents each for the pamphlets but to accept lesser sums or even to donate the volumes in case an interested person was without funds. In the present case some donations of pamphlets were made when books were purchased. Petitioners were convicted and fined for violation of the ordinance...**The cases are here on petitions for writs of certiorari which we granted along with the petitions for rehearing of Jones v. Opelika[1] and its companion cases**.

So, Jones v. Opelika was vacated --- effectively, overruled.

The First Amendment, which the Fourteenth makes applicable to the states, declares that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press * * *.' **It could hardly be denied that a tax laid specifically on the exercise of those freedoms would be unconstitutional. Yet the license tax imposed by this ordinance is in substance just that.**

Petitioners spread their interpretations of the Bible and their religious beliefs largely through the hand distribution of literature by full or part time workers. They claim to follow the example of Paul, teaching 'publicly, and from house to house.' Acts 20:20. They take literally the mandate of the Scriptures, 'Go ye into all the world, and preach the gospel to every creature.' Mark 16:15. In doing so they believe that they are obeying a commandment of God.

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.

The integrity of this conduct or behavior as a religious practice has not been challenged. Nor do we have presented any question as to the sincerity of petitioners in their religious beliefs and practices, however misguided they may be thought to be. Moreover, we do not intimate or suggest in respecting their sincerity that any conduct can be made a religious rite and by the zeal of the practitioners swept into the First Amendment. Reynolds v. United States[2]...denied any such claim to the practice of polygamy and bigamy. Other claims may well arise which deserve the same fate. We only hold that spreading one's religious beliefs or preaching the Gospel through distribution of religious literature and through personal visitations is an age-old type of

[1] Case 1A-R-014 on this website.
[2] Case 1A-R-001 on this website.

evangelism with as high a claim to constitutional protection as the more orthodox types. The manner in which it is practiced at times gives rise to special problems with which the police power of the states is competent to deal. But that merely illustrates that the rights with which we are dealing are not absolutes. We are concerned, however, in these cases merely with one narrow issue. There is presented for decision no question whatsoever concerning punishment for any alleged unlawful acts during the solicitation. Nor is there involved here any question as to the validity of a registration system for colporteurs and other solicitors. **The cases present a single issue—the constitutionality of an ordinance which as construed and applied requires religious colporteurs to pay a license tax as a condition to the pursuit of their activities.**

The alleged justification for the exaction of this license tax is the fact that the religious literature is distributed with a solicitation of funds. Thus it was stated in Jones v. Opelika that when a religious sect uses 'ordinary commercial methods of sales of articles to raise propaganda funds', it is proper for the state to charge 'reasonable fees for the privilege of canvassing'. Situations will arise where it will be difficult to determine whether a particular activity is religious or purely commercial. The distinction at times is vital. As we stated only the other day in Jamison v. Texas[3], 'The state can prohibit the use of the street for the distribution of purely commercial leaflets, even though such leaflets may have 'a civil appeal, or a moral platitude' appended. They 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. **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. The right to use the press for expressing one's views is not to be measured by the protection afforded commercial handbills. It should be remembered that the pamphlets of Thomas Paine were not distributed free of charge.** It is plain that a religious organization needs funds to remain a going concern. But an 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.** As we have said, the problem of drawing the line between a purely commercial activity and a religious one will at times be difficult. On this record it plainly cannot be said that petitioners were engaged in a commercial rather than a religious venture. It is a distortion of the facts of record to describe their activities as the occupation of selling books and pamphlets. And the Pennsylvania court did not rest the judgments of conviction on that basis, though it did find that petitioners 'sold' the literature. [These selling activities are 'merely incidental and collateral' to their 'main object which was to preach and publicize the doctrines of their order.']

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

[3] Case 1A-R-015 on this website.

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 tax imposed by the City of Jeannette is a flat license tax, the payment of which is a condition of the exercise of these constitutional privileges. 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. Those who can tax the privilege of engaging in this form of missionary evangelism can close its doors to all those who do not have a full purse. 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.

It is contended, however, that the fact that the license tax can suppress or control this activity is unimportant if it does not do so. But that is to disregard the nature of this tax. It is a license tax—a flat tax imposed on the exercise of a privilege granted by the Bill of Rights. **A state may not impose a charge for the enjoyment of a right granted by the federal constitution.** Thus, it may not exact a license tax for the privilege of carrying on interstate commerce, although it may tax the property used in, or the income derived from, that commerce, so long as those taxes are not discriminatory. A license tax applied to activities guaranteed by the First Amendment would have the same destructive effect. It is true that the First Amendment, like the commerce clause, draws no distinction between license taxes, fixed sum taxes, and other kinds of taxes. But that is no reason why we should shut our eyes to the nature of the tax and its destructive influence. The power to impose a license tax on the exercise of these freedoms is indeed as potent as the power of censorship which this Court has repeatedly struck down. Lovell v. Griffin[4]; Schneider v. State[5]; Cantwell v. Connecticut[6]; Largent v. Texas[7]; Jamison v. Texas[8]. It was for that reason that the dissenting opinions in Jones v. Opelika stressed the nature of this type of tax. In that case, as in the present ones, we have something very different from a registration system under which those going from house to house are required to give their names, addresses and other marks of identification to the authorities. **In all of these cases the issuance of the permit or license is dependent on the payment of a license tax. And the license tax is fixed in amount and unrelated to the scope of the activities of petitioners or to their realized revenues.** It is not a nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question. It is in no way apportioned. It is a flat license tax levied and collected as a condition to the pursuit of activities whose enjoyment is guaranteed by the First Amendment. Accordingly, it restrains in advance those constitutional liberties of press and religion and inevitably tends to suppress their exercise. That is almost uniformly recognized as the inherent vice and evil of this flat license tax. As stated by the Supreme Court of Illinois in a case involving this same sect and an ordinance similar to the present one, a person cannot be compelled 'to purchase, through a license fee or a license tax, the privilege freely granted by the constitution.' So it may not be said

[4] Case 1A-R-009 on this website.
[5] Case 1A-R-010 on this website.
[6] Case 1A-R-011 on this website.
[7] Case 1A-R-016 on this website.
[8] Case 1A-R-015 on this website.

that proof is lacking that these license taxes either separately or cumulatively have restricted or are likely to restrict petitioners' religious activities. On their face they are a restriction of the free exercise of those freedoms which are protected by the First Amendment.

The taxes imposed by this ordinance can hardly help but be as severe and telling in their impact on the freedom of the press and religion as the 'taxes on knowledge' at which the First Amendment was partly aimed. They may indeed operate even more subtly. Itinerant evangelists moving throughout a state or from state to state would feel immediately the cumulative effect of such ordinances as they become fashionable. The way of the religious dissenter has long been hard. But if the formula of this type of ordinance is approved, a new device for the suppression of religious minorities will have been found. This method of disseminating religious beliefs can be crushed and closed out by the sheer weight of the toll or tribute which is exacted town by town, village by village. The spread of religious ideas through personal visitations by the literature ministry of numerous religious groups would be stopped.

The fact that the ordinance is 'nondiscriminatory' 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 in treatment does not save the ordinance. Freedom of press, freedom of speech, freedom of religion are in a preferred position.

It is claimed, however, that the ultimate question in determining the constitutionality of this license tax is whether the state has given something for which it can ask a return. That principle has wide applicability. But it is quite irrelevant here. 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.

Considerable emphasis is placed on the kind of literature which petitioners were distributing—its provocative, abusive, and ill-mannered character and the assault which it makes on our established churches and the cherished faiths of many of us. But those considerations are no justification for the license tax which the ordinance imposes. **Plainly a community may not suppress, or the state tax, the dissemination of views because they are unpopular, annoying or distasteful. If that device were ever sanctioned, there would have been forged a ready instrument for the suppression of the faith which any minority cherishes but which does not happen to be in favor. That would be a complete repudiation of the philosophy of the Bill of Rights.**

Jehovah's Witnesses are not 'above the law'. But the present ordinance is not directed to the problems with which the police power of the state is free to deal. It does not cover, and petitioners are not charged with, breaches of the peace. They are pursuing their solicitations peacefully and quietly. Petitioners, moreover, are not charged with or prosecuted for the use of language which is obscene, abusive, or which incites retaliation. Nor do we have here, as we did in...Chaplinsky v. New Hampshire[9], state regulation of the streets to protect and insure the safety, comfort, or convenience of the public. **Furthermore, the present ordinance is not narrowly**

[9] Case 1A-S-8 on this website.

drawn to safeguard the people of the community in their homes against the evils of solicitations. Cantwell v. Connecticut. As we have said, it is not merely a registration ordinance calling for an identification of the solicitors so as to give the authorities some basis for investigating strangers coming into the community. And the fee is not a nominal one, imposed as a regulatory measure and calculated to defray the expense of protecting those on the streets and at home against the abuses of solicitors. Nor can the present ordinance survive if we assume that it has been construed to apply only to solicitation from house to house. **The ordinance is not narrowly drawn to prevent or control abuses or evils arising from that activity.** Rather, it sets aside the residential areas as a prohibited zone, entry of which is denied petitioners unless the tax is paid. That restraint and one which is city wide in scope (Jones v. Opelika) are different only in degree. Each is an abridgment of freedom of press and a restraint on the free exercise of religion. They stand or fall together.

The judgment in Jones v. Opelika has this day been vacated. Freed from that controlling precedent, we can restore to their high, constitutional position the liberties of itinerant evangelists who disseminate their religious beliefs and the tenets of their faith through distribution of literature. The judgments are reversed...

And the convictions are vacated.

DISSENT: REED/ROBERTS/FRANKFURTER/JACKSON...These cases present for solution the problem of the constitutionality of certain municipal ordinances levying a tax for the production of revenue on the sale of books and pamphlets in the streets or from door to door. Decisions sustaining the particular ordinances were entered in the three cases first listed at the last term of this Court. In that opinion the ordinances were set out and the facts and issues stated. Jones v. Opelika. A rehearing has been granted...By a per curiam opinion of this day, the Court affirms its acceptance of the arguments presented by the dissent of last term in Jones v. Opelika...

The real contention of the witnesses is that there can be no taxation of the occupation of selling books and pamphlets because to do so would be contrary to the due process clause of the Fourteenth Amendment, which now is held to have drawn the contents of the First Amendment into the category of individual rights protected from state deprivation. Since the publications teach a religion which conforms to our standards of legality, it is urged that these ordinances prohibit the free exercise of religion and abridge the freedom of speech and of the press.

The First Amendment reads as follows: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.'

It was one of twelve proposed on September 25, 1789, to the States by the First Congress after the adoption of the Constitution. Ten were ratified. They were intended to be and have become our Bill of Rights. By their terms our people have a guarantee that so long as law as we know it shall prevail, they shall live protected from the tyranny of the despot or the mob. None of the provisions of our Constitution is more venerated by the people or respected by legislatures and the courts than those which proclaim for our country the freedom of religion and expression. While the interpreters of the Constitution find the purpose was to allow the widest practical scope for the exercise of religion and the

dissemination of information, no jurist has ever conceived that the prohibition of interference is absolute. Is subjection to nondiscriminatory, nonexcessive taxation in the distribution of religious literature, a prohibition of the exercise of religion or an abridgment of the freedom of the press?

Nothing has been brought to our attention which would lead to the conclusion that the contemporary advocates of the adoption of a Bill of Rights intended such an exemption. The words of the Amendment do not support such a construction. 'Free' cannot be held to be without cost but rather its meaning must accord with the freedom guaranteed. 'Free' means a privilege to print or pray without permission and without accounting to authority for one's actions. In the Constitutional Convention the proposal for a Bill of Rights of any kind received scant attention. In the course of the ratification of the Constitution, however, the absence of a Bill a Rights was used vigorously by the opponents of the new government. A number of the states suggested amendments. Where these suggestions have any bearing at all upon religion or free speech, they indicate nothing as to any feeling concerning taxation either of religious bodies or their evangelism. This was not because freedom of religion or free speech was not understood. It was because the subjects were looked upon from standpoints entirely distinct from taxation.

The available evidence of Congressional action shows clearly that the draftsmen of the amendments had in mind the practice of religion and the right to be heard, rather than any abridgment or interference with either by taxation in any form. The amendments were proposed by Mr. Madison. He was careful to explain to the Congress the meaning of the amendment on religion. The draft was commented upon by Mr. Madison when it read: 'No religion shall be established by law, nor shall the equal rights of conscience be infringed.'

He said that he apprehended the meaning of the words on religion to be that Congress should not establish a religion and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience. No such specific interpretation of the amendment on freedom of expression has been found in the debates. The clearest is probably from Mr. Benson who said that 'The committee who framed this report proceeded on the principle that these rights belonged to the people; they conceived them to be inherent; and all that they meant to provide against was their being infringed by the Government.'...

It is only in recent years that the freedoms of the First Amendment have been recognized as among the fundamental personal rights protected by the Fourteenth Amendment from impairment by the states. Until then these liberties were not deemed to be guarded from state action by the Federal Constitution. The states placed restraints upon themselves in their own constitutions in order to protect their people in the exercise of the freedoms of speech and of religion. Pennsylvania may be taken as a fair example. Its constitution reads: 'All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience and no preference shall ever be given by law to any religious establishments or modes of worship.'

'**No person who acknowledges the being of a God, and a future state of rewards and punishments shall, on account of his religious sentiments, be disqualified to hold any office or place of trust or profit under this Commonwealth.**'

'The printing press shall be free to every person who may undertake to examine the proceedings of the Legislature or any branch of government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty. * * *'

It will be observed that there is no suggestion of freedom from taxation, and this statement is equally true of the other state constitutional provisions. It may be concluded that neither in the state or the federal constitutions was general taxation of church or press interdicted.

Is there anything in the decisions of this Court which indicates that church or press is free from the financial burdens of government? We find nothing. Religious societies depend for their exemptions from taxation upon state constitutions or general statutes, not upon the Federal Constitution...

It may be said, however, that ours is a too narrow, technical and legalistic approach to the problem of state taxation of the activities of church and press; that we should look not to the expressed or historical meaning of the First Amendment but to the broad principles of free speech and free exercise of religion which pervade our national way of life. It may be that the Fourteenth Amendment guarantees these principles rather than the more definite concept expressed in the First Amendment. This would mean that as a Court, we should determine what sort of liberty it is that the due process clause of the Fourteenth Amendment guarantees against state restrictions on speech and church.

But whether we give content to the literal words of the First Amendment or to principles of the liberty of the press and the church, we conclude that cities or states may levy reasonable, non-discriminatory taxes on such activities as occurred in these cases...

The national Government grants exemptions to ministers and churches because it wishes to do so, not because the Constitution compels. Where camp meetings or revivals charge admissions, a federal tax would apply if Congress had not granted freedom from the exaction.

It is urged that such a tax as this may be used readily to restrict the dissemination of ideas. This must be conceded by the possibility of misuse does not make a tax unconstitutional. No abuse is claimed here...

This 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. That the burden may be heavy is shown by the record in the Jeannette cases... The distributors of religious literature, possibly of all informatory 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.

Nor do we think it can be said, properly, that these sales of religious books are religious exercises. The opinion of the Court in the Jeannette cases emphasizes for the first time the argument that the sale of books and pamphlets is in itself a religious practice...We shall assume the first two publications, also, are religious books. Certainly there can be no dissent from the statement that selling religious books is an age-old practice or that it 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. Many sects practice healing the sick as an evidence of their religious faith or maintain orphanages or homes for the aged or teach the young. These are, of course, in a sense, religious practices but hardly such examples of religious rites as are encompassed by the prohibition against the free exercise of religion.

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.

The rites which are protected by the First Amendment are in essence spirtual—prayer, mass, sermons, sacrament—not sales of religious goods. The card furnished each witness to identify him as an ordained minister does not go so far as to say the sale is a rite. It states only that the witnesses worship by exhibiting to people 'the message of said gospel in printed form, such as the Bible, books, booklets and magazines, and thus afford the people the opportunity of learning of God's gracious provision for them.' On the back of the card appears: 'You may contribute twenty-five cents to the Lord's work and receive a copy of this beautiful book.' The sale of these religious books has, we think, relation to their religious exercises, similar to the 'information march,' said by the witnesses to be one of their 'ways of worship' and by this Court to be subject to regulation by license in Cox v. New Hampshire[10].

The attempted analogy in the dissenting opinion in Jones v. Opelika, which now becomes the decision of this Court, between the forbidden burden of a state tax for the privilege of engaging in interstate commerce and a state tax on the privilege of engaging in the distribution of religious literature is wholly irrelevant. A state tax on the privilege of engaging in interstate commerce is held invalid because the regulation of commerce between the states has been delegated to the Federal Government. This grant includes the necessary means to carry the grant into effect and forbids state burdens without Congressional consent. It is not the power to tax interstate commerce which is interdicted but the exercise of that power by an unauthorized sovereign, the individual state. Although the fostering of commerce was one of the chief purposes for organizing the present Government, that commerce may be burdened with a tax by the United States. Commerce must pay its way. It is not exempt from any type of taxation if imposed by an authorized authority. The Court now holds that the First Amendment wholly exempts the church and press from a privilege tax, presumably by the national as well as the state governments.

The limitations of the Constitution are not maxims of social wisdom but definite controls on the legislative process. We are dealing with power, not its abuse. This late withdrawal of the power of taxation over the distribution activities of those covered by the First Amendment fixes what

[10] Case 1A-R-012 on this website.

seems to us an unfortunate principle of tax exemption, capable of indefinite extension. We had thought that such an exemption required a clear and certain grant. This we do not find in the language of the First and Fourteenth Amendments. We are therefore of the opinion the judgments below should be affirmed.

DISSENT: FRANKFURTER/JACKSON...While I wholly agree with the views expressed by Mr. Justice REED, the controversy is of such a nature as to lead me to add a few words...

It cannot be said that the petitioners are constitutionally exempt from taxation merely because they may be engaged in religious activities or because such activities may constitute an exercise of a constitutional right. It will hardly be contended, for example, that a tax upon the income of a clergyman would violate the Bill of Rights, even though the tax is ultimately borne by the members of his church. A clergyman, no less than a judge, is a citizen. And not only in time of war would neither willingly enjoy immunity from the obligations of citizenship. It is only fair that he also who preaches the word of God should share in the costs of the benefits provided by government to him as well as to the other members of the community. And so no one would suggest that a clergyman who uses an automobile or the telephone in connection with his work thereby gains a constitutional exemption from taxes levied upon the use of automobiles or upon telephone calls. Equally alien is it to our constitutional system to suggest that the Constitution of the United States exempts church-held lands from state taxation. Plainly, a tax measure is not invalid under the federal Constitution merely because it falls upon persons engaged in activities of a religious nature.

Nor can a tax be invalidated merely because it falls upon activities which constitute an exercise of a constitutional right. The First Amendment of course protects the right to publish a newspaper or a magazine or a book. **But the crucial question is—how much protection does the Amendment give, and against what is the right protected?** It is certainly true that the protection afforded the freedom of the press by the First Amendment does not include exemption from all taxation. A tax upon newspaper publishing is not invalid simply because it falls upon the exercise of a constitutional right. Such a tax might be invalid if it invidiously singled out newspaper publishing for bearing the burdens of taxation or imposed upon them in such ways as to encroach on the essential scope of a free press. If the Court could justifiably hold that the tax measures in these cases were vulnerable on that ground, I would unreservedly agree. But the Court has not done so, and indeed could not.

The vice of the ordinances before us, the Court holds, is that they impose a special kind of tax, a 'flat license tax, the payment of which is a condition of the exercise of these constitutional privileges (to engage in religious activities).' But the fact that an occupation tax is a 'flat' tax certainly is not enough to condemn it. A legislature undoubtedly can tax all those who engage in an activity upon an equal basis. The Constitution certainly does not require that differentiations must be made among taxpayers upon the basis of the size of their incomes or the scope of their activities. Occupation taxes normally are flat taxes, and the Court surely does not mean to hold that a tax is bad merely because all taxpayers pursuing the very same activities and thereby demanding the same governmental services are treated alike. Nor, as I have indicated, can a tax be invalidated because the exercise of a constitutional privilege is conditioned upon its payment. It depends upon the nature of the condition that is imposed, its justification, and the extent to which it hinders or restricts the exercise of the privilege...

The power to tax, like all powers of government, legislative, executive and judicial alike, can be abused or perverted. The power to tax is the power to destroy only in the sense that those who have power can misuse it. Mr. Justice Holmes disposed of this smooth phrase as a constitutional basis for invalidating taxes when he wrote 'The power to tax is not the power to destroy while this Court sits.' The fact that a power can be perverted does not mean that every exercise of the power is a perversion of the power. Thus, if a tax indirectly suppresses or controls the enjoyment of a constitutional privilege which a legislature cannot directly suppress or control, of course it is bad. But it is irrelevant that a tax can suppress or control if it does not. The Court holds that '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'. But this is not the same as saying that 'Those who do tax the exercise of this religious practice have made its exercise so costly as to deprive it of the resources necessary for its maintenance.'

The Court could not plausibly make such an assertion because the petitioners themselves disavow any claim that the taxes imposed in these cases impair their ability to exercise their constitutional rights. We cannot invalidate the tax measures before us simply because there may be others, not now before us, which are oppressive in their effect. The Court's opinion does not deny that the ordinances involved in these cases have in no way disabled the petitioners to engage in their religious activities. It holds only that 'Those who can tax the privilege of engaging in this form of missionary evangelism can close its doors to all those who do not have a full purse.' I quite agree with this statement as an abstract proposition. Those who possess the power to tax might wield it in tyrannical fashion. It does not follow, however, that every exercise of the power is an act of tyranny, or that government should be impotent because it might become tyrannical. The question before us now is whether these ordinances have deprived the petitioners of their constitutional rights, not whether some other ordinances not now before us might be enacted which might deprive them of such rights. To deny constitutional power to secular authority merely because of the possibility of its abuse is as valid as to deny the basis of spiritual authority because those in whom it is temporarily vested may misuse it...

It is strenuously urged that the Constitution denies a city the right to control the expression of men's minds and the right of men to win others to their views. But the Court is not divided on this proposition. No one disputes it. All members of the Court are equally familiar with the history that led to the adoption of the Bill of Rights and are equally zealous to enforce the constitutional protection of the free play of the human spirit. Escape from the real issue before us cannot be found in such generalities. The real issue here is not whether a city may charge for the dissemination of ideas but whether the states have power to require those who need additional facilities to help bear the cost of furnishing such facilities. Street hawkers make demands upon municipalities that involve the expenditure of dollars and cents, whether they hawk printed matter or other things. As the facts in these cases show, the cost of maintaining the peace, the additional demands upon governmental facilities for assuring security, involve outlays which have to be met. **To say that the Constitution forbids the states to obtain the necessary revenue from the whole of a class that enjoys these benefits and facilities, when in fact no discrimination is suggested as between purveyors of printed matter and purveyors of other things, and the exaction is not claimed to be actually burdensome, is to say that the Constitution requires, not that the dissemination of ideas in the interest of religion shall be**

free, but that it shall be subsidized by the state. Such a claim offends the most important of all aspects of religious freedom in this country, namely, that of the separation of church and state...

Under these circumstances, therefore, I am of opinion that the ordinances in these cases must stand.