

CONTROLLING LEGAL PRINCIPLES

Free Exercise Clause Decision – The “Contemplation of Justice” *Palko v. Connecticut, 302 U.S. 319 (1937)*



On the other hand, the due process clause of the Fourteenth Amendment may make it unlawful for a state to abridge by its statutes the freedom of speech which the First Amendment safeguards against encroachment by the Congress, *De Jonge v. Oregon*, 299 U. S. 353, 299 U. S. 364; *Herndon v. Lowry*, 301 U. S. 242, 301 U. S. 259; or the like freedom of the press, *Grosjean v. American Press Co.*, 297 U. S. 233; *Near v. Minnesota ex rel. Olson*, 283 U. S. 697, 283 U. S. 707; or the free exercise of religion, *Hamilton v. Regents*, 293 U. S. 245, 293 U. S. 262; *cf. Grosjean v. American Press Co.*, *supra*; *Pierce v. Society of Sisters*, 268 U. S. 510; or the right of peaceable assembly, without which speech would be unduly trammled, *De Jonge v. Oregon*, *supra*; *Herndon v. Lowry*, *supra*; or the right of one accused of crime to the benefit of counsel, *Powell v. Alabama*, 287 U. S. 45. In these and other situations, immunities that are valid as against the federal government by force of the specific

Page 302 U. S. 325

pledges of particular amendments [Footnote 2] have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states.

The line of division may seem to be wavering and broken if there is a hasty catalogue of the cases on the one side and the other. Reflection and analysis will induce a different view. There emerges the perception of a rationalizing principle which gives to discrete instances a proper order and coherence. The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty. To abolish them is not to violate a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts*, *supra*, p. 291 U. S. 105; *Brown v. Mississippi*, *supra*, p. 297 U. S. 285; *Hebert v. Louisiana*, 272 U. S. 312,

Thoughts, Words and Actions for Plaintiff's Quintessential Rights of the First Amendment:
Truths that manifest Life, Liberty & Pursuit of Happiness pursuant to the Free Exercise Clause

272 U. S. 316. Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them. What is true of jury trials and indictments is true also, as the cases show, of the immunity from compulsory self-incrimination. *Twining v. New Jersey, supra*. This too might be lost, and justice still be done. Indeed, today, as in the past, there are students of our penal system who look upon the immunity as a mischief, rather than a benefit, and who

Page 302 U. S. 326

would limit its scope, or destroy it altogether. [Footnote 3] No doubt there would remain the need to give protection against torture, physical or mental. *Brown v. Mississippi, supra*. Justice, however, would not perish if the accused were subject to a duty to respond to orderly inquiry. The exclusion of these immunities and privileges from the privileges and immunities protected against the action of the states has not been arbitrary or casual. It has been dictated by a study and appreciation of the meaning, the essential implications, of liberty itself.

We reach a different plane of social and moral values when we pass to the privileges and immunities that have been taken over from the earlier articles of the federal bill of rights and brought within the Fourteenth Amendment by a process of absorption. These, in their origin, were effective against the federal government alone. If the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that neither liberty nor Justice would exist if they were sacrificed. *Twining v. New Jersey, supra*, p. 211 U. S. 99. [Footnote 4] This is true, for illustration, of freedom of thought, and speech.

Page 302 U. S. 327

Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom. With rare aberrations, a pervasive recognition of that truth can be traced in our history, political and legal.