ADVANCE SHEET – November 25, 2022

Thanksgiving

Yesterday was the start of the holiday season. Most of the individual holidays that go into making up "the season" are fairly easy to keep track of. Now, I'm not talking about the essence of what goes into making them what they are, but the basics such as how much longer until they are here and just exactly how long are they here for.

For Hanukkah, once you determine when it starts, it is a simple matter of being able to count to eight. Christmas is tracked by many through use of Advent calendars, which have greatly increased in popularity over the past few years. It seems that every time my wife goes to Aldi, she brings back another calendar for the kids or us. We are now able to count down the days to Christmas with cheese, chocolate and coffee. Kwanzaa, which dates to just 1966, is too new for people to have become complacent about, instead, maintaining the joy and pride responsible for its creation.

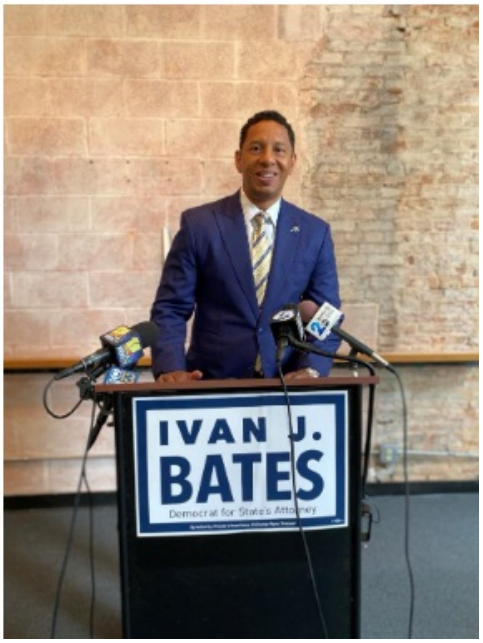
Now, what about Thanksgiving? I suppose many know that it is celebrated in the United States on the fourth Thursday in November. But, is it just one day? We hear people say it should be a year long observance where thanks is given for what we have rather than the usual lamenting over what we do not. For years, I would watch the movie *White Christmas* on Thanksgiving. Although the alleged villainy of Bing Crosby toward his children has kept me away for quite some time, I can still remember the lyrics of one of the songs: "When my bankroll is getting small, I think of when I had none at all, and then I fall asleep counting my blessings."

There are so many blessings that we enjoy, each and every one of us. Often, instead of counting them, we take them for granted. Did you ever think that simply by living in the 21st century we live longer and better than the kings and queens of days gone by?

One of the touchstones of modern life is free time. Up until quite recently it was more about surviving than living well. I suggest some of that leisure time be dedicated to counting those blessings and to in fact make Thanksgiving Day every day of the year.

I wish you a happy and healthy holiday season and look forward to seeing you soon.

Joe Bennett



Ivan J. Bates to Speak at the Bar Library

On Tuesday, December 6, 2022, at 5:00 p.m., Ivan J. Bates, Esquire, the newly elected State's Attorney for Baltimore City, will be in the Main Reading Room of the Baltimore Bar Library to speak on his plans and aspirations for the next four years. The program will be in-person as well as by way of Zoom.

After completing high school, Ivan J. Bates enlisted in the United States Army serving his country while assigned to the 32nd Air Defense Artillery Command in Europe. Following his military service, he attended and graduated from the Howard University, School of Communications as an Honor Graduate. He continued his education earning his Juris Doctorate at the College of William and Mary, School of Law. Upon graduation from law school, Mr. Bates was selected to serve as Law Clerk for the Honorable David B. Mitchell of the Circuit Court for Baltimore City. When his term with Judge Mitchell ended, he was offered a position as an Assistant State's Attorney in the Baltimore City State's Attorney's Office. After his time at the State's Attorney's Office, Mr. Bates joined the firm of Schulman, Treem, Kaminkow, Gilden and Ravenell. While there, at the age of 37, he served as co-counsel in a case argued before the Supreme Court of the United States, *Maryland v. Blake*. In 2006, Mr. Bates started his own firm, Bates and Garcia. His passion for the community, the law and public service, extends beyond his practice of law. He is the former President of the Monumental City Bar Association; served as a member of the Board for Baltimore Healthcare Access; is a former member of the Board to Elect the Baltimore City Sitting Judges; and is a current member of the Monumental Bar Foundation as well as a member of the New Metropolitan Baptist Church.

Time: 5:00 p.m., Tuesday, December 6, 2022, with the Library's famous wine & cheese reception immediately following.

R.S.V.P.: If you would like to attend telephone the Library at 410-727-0280 or reply by e-mail to **jwbennett@barlib.org**. Please remember to indicate whether you will be attending in-person or by way of Zoom. If you are joining us remotely, a Zoom link will be forwarded the week of the program.

Democratic Justice: Felix Frankfurter, the Supreme Court, and the Making of the Liberal Establishment

On Monday, November 14, Professor Brad Snyder of Georgetown Law was in the Main Reading Room of the Bar Library speaking on his new biography of Justice Felix Frankfurter. In his review of the work (September 30 *Advance Sheet*), Board President Mr. George W. Liebmann states:

"Taken in all, this is an exemplary book. Its production is elegant and free of typographical errors. It discusses most of the important issues of Frankfurter's turbulent era and fully grasps the value and great contributions of its subject. It will remain for a long time the gold standard of Supreme Court biography."

In conjunction with his presentation, the Library ordered copies of Professor Snyder's book, most of which have sold, but a few copies of which remain, including three copies signed by the author. The cost is $35.

Books – The Perfect Present

As part of a literacy campaign, not sure whether it is still out there or not, we were all told, I suppose especially the young, that "Reading is Fundamental." We found out during the pandemic, that it really is not a bad way to spend time. Many of the speakers who have appeared as part of the Bar Library Lecture series have done so in promotion of a book they had recently published. The Library obtained numerous copies for sale at the lectures and retained those that were not sold so that those who could not attend might have the chance to purchase them at a later time. Thus was born the Bar Library bookstore. The following are available for purchase. For yourself, for someone who is interested in the law or history, stop by and visit our store. If you already know what you would like, just let us know and we will get it to you – including that favorite modern day favorite – curbside pick-up. Just call 410-727-0280 or e-mail us at **jwbennett@barlib.org**.

Abraham Lincoln & Treason In The Civil War (Hardcover) (Signed By Author) $35.00
Abraham Lincoln & Treason In The Civil War (Softcover) (Signed By Author) $20.00
American Constitutional History: A Brief Introduction $30.00
Ancient Law $75.00
Art of Crosss-Examination $95.00
Baltimore & The Nineteenth Of April 1861 $15.00
Baltimore Lives $30.00
Birthright Citizens $20.00
Blackstone's Commentaries n The Laws f England $500.00
Brady v. Maryland: A Fiftieth Anniversary Commemoration $20.00
Daggers Drawn: 35 Years Of KAL Cartoons In The Economist $35.00
The Death Penalty As Torture $20.00
Emancipation – The Union Army . . . (Signed By Author) $35.00
Ex Parte Merryman: Two Commemorations $15.00
Failure To Flourish $30.00
The Fall Of The House Of Speyer $35.00
51 Imperfect Solutions $20.00
The Ghosts Of Johns Hopkins (Signed By Author) $20.00
Great American Law Reviews (3 Volume Set) $300.00
Holding Fast To Dreams $25.00
I'm Not Really Guilty $25.00
Lincoln On Law, Leadership, And Life (Signed By Author) $12.50
The Lost Indictment Of Robert E. Lee (Signed By Author) $20.00
Louis D. Brandeis $35.00
Louis D. Brandeis: American Prophet $20.00
The Making Of Africa America $25.00
Mencken: The Days Trilogy $30.00
Mencken's Prejudices Debunked $20.00
Military Law And Precedents $75.00
Odessa: Architecture – Monuments $35.00
The Order Of The Coif $95.00

Our Little Monitor: The Greatest Invention Of The Civil War (Signed By Author) $25.00
Prohibition In Maryland: A Collection Of Documents $15.00
Promise And The Dream $30.00
Reason And Imagination: The Selected Correspondence of Learned Hand $35.00
The Secret Life Of Lady Liberty $20.00
The Spirit Of The Common Law And Other Writings $150.00
Telemachus $20.00

Speaking of meritorious works:

Republican Press At A Democratic Convention: Reports Of the 1867 Maryland Constitutional Convention By The Baltimore American And Commercial Advertiser with Annotations and Commentary by John J. Connolly is a comprehensive volume of over 800 pages. It is currently available at the Bar Library for $50, a fraction of what is currently paid not just for law books, but for supplements to those books. Copies can be purchased through the Library's bookstore, which offers shipping and curbside pick-up. To place your order, telephone 410-727-0280 or e-mail us at jwbennett@barlib.org. As a Maryland lawyer there are two documents that you cannot know enough about, one being the Constitution of the United States and the other the Constitution of the State of Maryland. That said, how invaluable is a work that sets forth a substantial amount of information concerning the adoption of one of these documents. Yes, that is right, you should order your copy today!

Speaking of Frankfurter

"Frankfurter wrote many opinions, few memorable for their prose. His most remembered opinion, his dissent in the second flag salute case, was published against the advice of several of his friends and colleagues: 'as judges, we are neither Jew nor Gentile, neither Catholic nor agnostic. We are equally attached to the Constitution and are equally bound by our judicial obligations whether we derive our citizenship from the earliest or the latest immigrants to our shores.'" - George W. Liebmann

Supreme Court of the United States.

WEST VIRGINIA STATE BOARD OF EDUCATION et al.
v.
BARNETTE et al.

No. 591.
Argued March 11, 1943. Decided June 14, 1943.

Synopsis

Suit by Walter Barnette and others against the West Virginia State Board of Education, etc., and others for an injunction to restrain enforcement of a regulation requiring children in public schools to salute the American flag. From a decree, 47 F.Supp. 251, granting an injunction, the defendants appeal.

Affirmed.

Mr. Justice FRANKFURTER, dissenting.

One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution. Were my purely personal attitude relevant I should whole-heartedly associate myself with the general libertarian views in the Court's opinion, representing as they do the thought and action of a lifetime. But as judges we are neither Jew nor Gentile, neither Catholic nor agnostic. We owe equal attachment to the Constitution and are equally bound by our judicial obligations whether we derive our citizenship from the earliest or the latest immigrants to these shores. As a member of this Court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard. They duty of a judge who must decide which of two claims before the Court shall prevail, that of a State to enact and enforce laws within its general competence or that of an individual to refuse obedience because of the demands of his conscience, is not that of the ordinary person. It can never be emphasized too much that one's own opinion about the wisdom or evil of a law should be excluded altogether when one is doing one's duty on the bench. The only opinion of our own even looking in that direction that is material is our opinion whether legislators could in reason have enacted such a law. In the light of all the circumstances, including the history of this question in this Court, it would require more daring than I possess to deny that reasonable legislators could have taken the action which is before us for review. Most unwillingly, therefore, I must differ from my brethren with regard to legislation like this. I cannot bring my mind to believe that the 'liberty' secured by the Due Process Clause gives this Court authority to deny to the State of West Virginia the attainment of that which we all recognize as a legitimate legislative end, namely, the promotion of good citizenship, by employment of the means here chosen.

Not so long ago we were admonished that 'the only check upon our own exercise of power is our own sense of self-restraint. For the removal of unwise laws from the statute books appeal lies, not to the courts, but to the ballot and to the processes of democratic government.' United States v. Butler, 297 U.S. 1, 79, 56 S.Ct. 312, 325, 80 L.Ed. 477, 102 A.L.R. 914 (dissent). We have been told that generalities do not decide concrete cases. But the intensity with which a general principle is held may determine a particular issue, and whether we put first things first may decide a specific controversy.

The admonition that judicial self-restraint alone limits arbitrary exercise of our authority is relevant every time we are asked to nullify legislation. The Constitution does not give us greater veto power when dealing with one phase of 'liberty' than with another, or when dealing with grade school regulations than with college regulations that offend conscience, as was the case in Hamilton v. Regents, 293 U.S. 245, 55 S.Ct. 197, 79 L.Ed. 343. In neither situation is our function comparable to that of a legislature or are we free to act as though we were a superlegislature. Judicial self-restraint is equally necessary whenever an exercise of political or legislative power is challenged. There is no warrant in the constitutional basis of this Court's authority for attributing different ro les to it depending upon the nature of the challenge to the legislation. Our power does not vary according to the particular provision of the Bill of Rights which is invoked. The right not to have property taken without just compensation has, so far as the scope of judicial power is concerned, the same constitutional dignity as the right to be protected against unreasonable searches and seizures, and the latter has no less claim than freedom of the press or freedom of speech or religious freedom. In no instance is this Court the primary protector of the particular liberty that is invoked. This Court has recognized, what hardly could be denied, that all the provisions of the first ten Amendments are 'specific' prohibitions, United States v. Carolene Products Co., 304 U.S. 144, 152, 58 S.Ct. 778, 783, 82 L.Ed. 1234, note 4. But each specific Amendment, in so far as embraced within the

Fourteenth Amendment, must be equally respected, and the function of this Court does not differ in passing on the constitutionality of legislation challenged under different Amendments.

When Mr. Justice Holmes, speaking for this Court, wrote that 'it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts', Missouri, Kansas & Texas R. Co. v. May, 194 U.S. 267, 270, 24 S.Ct. 638, 639, 48 L.Ed. 971, he went to the very essence of our constitutional system and the democratic conception of our society. He did not mean that for only some phases of civil government this Court was not to supplant legislatures and sit in judgment upon the right or wrong of a challenged measure. He was stating the comprehensive judicial duty and ro le of this Court in our constitutional scheme whenever legislation is sought to be nullified on any ground, namely, that responsibility for legislation lies with legislatures, answerable as they are directly to the people, and this Court's only and very narrow function is to determine whether within the broad grant of authority vested in legislatures they have exercised a judgment for which reasonable justification can be offered.

The framers of the federal Constitution might have chosen to assign an active share in the process of legislation to this Court. They had before them the well-known example of New York's Council of Revision, which had been functioning since 1777. After stating that 'laws inconsistent with the spirit of this constitution, or with the public good, may be hastily and unadvisedly passed', the state constitution made the judges of New York part of the legislative process by providing that 'all bills which have passed the senate and assembly shall, before they become laws', be presented to a Council of which the judges constituted a majority, 'for their revisal and consideration'. Art. III, New York Constitution of 1777. Judges exercised this legislative function in New York for nearly fifty years. See Art. I, s 12, New York Constitution of 1821. But the framers of the Constitution denied such legislative powers to the federal judiciary. They chose instead to insulate the judiciary from the legislative function. They did not grant to this Court supervision over legislation.

The reason why from the beginning even the narrow judicial authority to nullify legislation has been viewed with a jealous eye is that it serves to prevent the full play of the democratic process. The fact that it may be an undemocratic aspect of our scheme of government does not call for its rejection or its disuse. But it is the best of reasons, as this Court has frequently recognized, for the greatest caution in its use.

The precise scope of the question before us defines the limits of the constitutional power that is in issue. The State of West Virginia requires all pupils to share in the salute to the flag as part of school training in citizenship. The present action is one to enjoin the enforcement of this requirement by those in school attendance. We have not before us any attempt by the State to punish disobedient children or visit penal consequences on their parents. All that is in question is the right of the state to compel participation in this exercise by those who choose to attend the public schools.

We are not reviewing merely the action of a local school board. The flag salute requirement in this case comes before us with the full authority of the State of West Virginia. We are in fact passing judgment on 'the power of the State as a whole'. Rippey v. Texas, 193 U.S. 504, 509, 24 S.Ct. 516, 517, 48 L.Ed. 767; Skiriotes v. Florida, 313 U.S. 69, 79, 61 S.Ct. 924, 930, 85 L.Ed. 1193. Practically we are passing upon the political power of each of the forty-eight states. Moreover, since the First Amendment has been read into the Fourteenth, our problem is precisely the same is it would be if we had before us an Act of Congress for the District of Columbia. To suggest that we are here concerned with the heedless action of some village tyrants is to distort the augustness of the constitutional issue and the reach of the consequences of our decision.

Under our constitutional system the legislature is charged solely with civil concerns of society. If the avowed or intrinsic legislative purpose is either to promote or to

discourage some religious community or creed, it is clearly within the constitutional restrictions imposed on legislatures and cannot stand. But it by no means follows that legislative power is wanting whenever a general non-discriminatory civil regulation in fact touches conscientious scruples or religious beliefs of an individual or a group. Regard for such scruples or beliefs undoubtedly presents one of the most reasonable claims for the exertion of legislative accommodation. It is, of course, beyond our power to rewrite the state's requirement, by providing exemptions for those who do not wish to participate in the flag salute or by making some other accommodations to meet their scruples. That wisdom might suggest the making of such accommodations and that school administration would not find it too difficult to make them and yet maintain the ceremony for those not refusing to conform, is outside our province to suggest. Tact, respect, and generosity toward variant views will always commend themselves to those charged with the duties of legislation so as to achieve a maximum of good will and to require a minimum of unwilling submission to a general law. But the real question is, who is to make such accommodations, the courts or the legislature?

This is no dry, technical matter. It cuts deep into one's conception of the democratic process—it concerns no less the practical differences between the means for making these accommodations that are open to courts and to legislatures. A court can only strike down. It can only say 'This or that law is void.' It cannot modify or qualify, it cannot make exceptions to a general requirement. And it strikes down not merely for a day. At least the finding of unconstitutionality ought not to have ephemeral significance unless the Constitution is to be reduced to the fugitive importance of mere legislation. When we are dealing with the Constitution of the United States, and more particularly with the great safeguards of the Bill of Rights, we are dealing with principles of liberty and justice 'so rooted in the traditions and conscience of our people as to be ranked as fundamental'—something without which 'a fair and enlightened system of justice would be impossible'. Palko v. Connecticut, 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288; Hurtado v. California, 110 U.S. 516, 530, 531, 4 S.Ct. 111, 118, 119, 292, 28 L.Ed. 232. If the function of this Court is to be essentially no different from that of a legislature, if the considerations governing constitutional construction are to be substantially those that underlie legislation, then indeed judges should not have life tenure and they should be made directly responsible to the electorate. There have been many but unsuccessful proposals in the last sixty years to amend the Constitution to that end. See Sen. Doc. No. 91, 75th Cong., 1st Sess., pp. 248—51.

Conscientious scruples, all would admit, cannot stand against every legislative compulsion to do positive acts in conflict with such scruples. We have been told that such compulsions override religious scruples only as to major concerns of the state. But the determination of what is major and what is minor itself raises questions of policy. For the way in which men equally guided by reason appraise importance goes to the very heart of policy. Judges should be very diffident in setting their judgment against that of a state in determining what is and what is not a major concern, what means are appropriate to proper ends, and what is the total social cost in striking the balance of imponderables.

What one can say with assurance is that the history out of which grew constitutional provisions for religious equality and the writings of the great exponents of religious freedom—Jefferson, Madison, John Adams, Benjamin Franklin—are totally wanting in justification for a claim by dissidents of exceptional immunity from civic measures of general applicability, measures not in fact disguised assaults upon such dissident views. The great leaders of the American Revolution were determined to remove political support from every religious establishment. They put on an equality the different religious sects—Episcopalians, Presbyterians, Catholics, Baptists, Methodists, Quakers, Huguenots—which, as dissenters, had been under the heel of the various orthodoxies that prevailed in different colonies. So far as the state was concerned, there

was to be neither orthodoxy nor heterodoxy. And so Jefferson and those who followed him wrote guaranties of religious freedom into our constitutions. Religious minorities as well as religious majorities were to be equal in the eyes of the political state. But Jefferson and the others also knew that minorities may disrupt society. It never would have occurred to them to write into the Constitution the subordination of the general civil authority of the state to sectarian scruples.

The constitutional protection of religious freedom terminated disabilities, it did not create new privileges. It gave religious equality, not civil immunity. Its essence is freedom from conformity to religious dogma, not freedom from conformity to law because of religious dogma. Religious loyalties may be exercised without hindrance from the state, not the state may not exercise that which except by leave of religious loyalties is within the domain of temporal power. Otherwise each individual could set up his own censor against obedience to laws conscientiously deemed for the public good by those whose business it is to make laws.

The prohibition against any religious establishment by the government placed denominations on an equal footing —it assured freedom from support by the government to any mode of worship and the freedom of individuals to support any mode of worship. Any person may therefore believe or disbelieve what he pleases. He may practice what he will in his own house of worship or publicly within the limits of public order. But the lawmaking authority is not circumscribed by the variety of religious beliefs, otherwise the constitutional guaranty would be not a protection of the free exercise of religion but a denial of the exercise of legislation.

The essence of the religious freedom guaranteed by our Constitution is therefore this: no religion shall either receive the state's support or incur its hostility. Religion is outside the sphere of political government. This does not mean that all matters on which religious organizations or beliefs may pronounce are outside the sphere of government. Were this so, instead of the separation of church and state, there would be the subordination of the state on any matter deemed within the sovereignty of the religious conscience. Much that is the concern of temporal authority affects the spiritual interests of men. But it is not enough to strike down a non-discriminatory law that it may hurt or offend some dissident view. It would be too easy to cite numerous prohibitions and injunctions to which laws run counter if the variant interpretations of the Bible were made the tests of obedience to law. The validity of secular laws cannot be measured by their conformity to religious doctrines. It is only in a theocratic state that ecclesiastical doctrines measure legal right or wrong.

An act compelling profession of allegiance to a religion, no matter how subtly or tenuously promoted, is bad. But an act promoting good citizenship and national allegiance is within the domain of governmental authority and is therefore to be judged by the same considerations of power and of constitutionality as those involved in the many claims of immunity from civil obedience because of religious scruples.

That claims are pressed on behalf of sincere religious convictions does not of itself establish their constitutional validity. Nor does waving the banner of religious freedom relieve us from examining into the power we are asked to deny the states. Otherwise the doctrine of separation of church and state, so cardinal in the history of this nation and for the liberty of our people, would mean not the disestablishment of a state church but the establishment of all churches and of all religious groups.

The subjection of dissidents to the general requirement of saluting the flag, as a measure conducive to the training of children in good citizenship, is very far from being the first instance of exacting obedience to general laws that have offended deep religious scruples. Compulsory vaccination, see Jacobson v. Massachusetts, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643, 3 Ann.Cas. 765, food inspection regulations, see Shapiro v. Lyle, D.C., 30 F.2d 971, the obligation to bear arms, see Hamilton v. Regents, 293 U.S. 245, 267, 55 S.Ct. 197, 206, 79 L.Ed. 343, testimonial duties, see Stansbury v. Marks, 2 Dall. 213, 1 L.Ed. 353, compulsory medical treatment, see

People v. Vogelgesang, 221 N.Y. 290, 116 N.E. 977 —these are but illustrations of conduct that has ofteen been compelled in the enforcement of legislation of general applicability even though the religious consciences of particular individuals rebelled at the exaction.

Law is concerned with external behavior and not with the inner life of man. It rests in large measure upon compulsion. Socreates lives in history partly because he gave his life for the conviction that duty of obedience to secular law does not presuppose consent to its enactment or belief in its virtue. The consent upon which free government rests is the consent that comes from sharing in the process of making and unmaking laws. The state is not shut out from a domain because the individual conscience may deny the state's claim. The individual conscience may profess what faith it chooses. It may affirm and promote that faith—in the language of the Constitution, it may 'exercise' it freely—but it cannot thereby restrict community action through political organs in matters of community concern, so long as the action is not asserted in a discriminatory way either openly or by stealth. One may have the right to practice one's religion and at the same time owe the duty of formal obedience to laws that run counter to one's beliefs. Compelling belief implies denial of opportunity to combat it and to assert dissident views. Such compulsion is one thing. Quite another matter is submission to conformity of action while denying its wisdom or virtue and with ample opportunity for seeking its change or abrogation.

I n Hamilton v. Regents, 293 U.S. 245, 55 S.Ct. 197, 79 L.Ed. 343, this Court unanimously held that one attending a state-maintained university cannot refuse attendance on courses that offend his religious scruples. That decision is not overruled today, but is distinguished on the ground that attendance at the institution for higher education was voluntary and therefore a student could not refuse compliance with its conditions and yet take advantage of its opportunities. But West Virginia does not compel the attendance at its public schools of the children here concerned. West Virginia does not so compel, for it cannot. This Court denied the right of a state to require its children to attend public schools. Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070, 39 A.L.R. 468. As to its public schools, West Virginia imposes conditions which it deems necessary in the development of future citizens precisely as California deemed necessary the requirements that offended the student's conscience in the Hamilton case. The need for higher education and the duty of the state to provide it as part of a public educational system, are part of the democratic faith of most of our states. The right to secure such education in institutions not maintained by public funds is unquestioned. But the practical opportunities for obtaining what is becoming in increasing measure the conventional equipment of American youth may be no less burdensome than that which parents are increasingly called upon to bear in sending their children to parochial schools because the education provided by public schools, though supported by their taxes, does not satisfy their ethical and educational necessities. I find it impossible, so far as constitutional power is concerned, to differentiate what was sanctioned in the Hamilton case from what is nullified in this case. And for me it still remains to be explained why the grounds of Mr. Justice Cardozo's opinion in Hamilton v. Regents, supra, are not sufficient to sustain the flag salute requirement. Such a requirement, like the requirement in the Hamilton case, 'is not an interference by the state with the free exercise of religion when the liberties of the Constitution are read in the light of a century and a half of history during days of peace and war.' 293 U.S. 245, 266, 55 S.Ct. 197, 206, 79 L.Ed. 343. The religious worshiper, 'if his liberties were to be thus extended, might refuse to contribute taxes * * * in furtherance of any other and condemned by his conscience as irreligious or immoral. The right of private judgment has never yet been so exalted above the powers and the compulsion of the agencies of government.' Id., 293 U.S. at page 268, 55 S.Ct. at page 206, 79 L.Ed. 343.

Parents have the privilege of choosing which schools they wish their children to attend.

And the question here is whether the state may make certain requirements that seem to it desirable or important for the proper education of those future citizens who go to schools maintained by the states, or whether the pupils in those schools may be relieved from those requirements if they run counter to the consciences of their parents. Not only have parents the right to send children to schools of their own choosing but the state has no right to bring such schools ‘under a strict governmental control’ or give ‘affirmative direction concerning the intimate and essential details of such schools, intrust their control to public officers, and deny both owners and patrons reasonable choice and discretion in respect of teachers, curriculum and textbooks'. Farrington v. Tokushige, 273 U.S. 284, 298, 47 S.Ct. 406, 408, 409, 71 L.Ed. 646. Why should not the state likewise have constitutional power to make reasonable provisions for the proper instruction of children in schools maintained by it?

When dealing with religious scruples we are dealing with an almost numberless variety of doctrines and beliefs entertained with equal sincerity by the particular groups for which they satisfy man's needs in his relation to the mysteries of the universe. There are in the United States more than 250 distinctive established religious denominations. In the state of Pennsylvania there are 120 of these, and in West Virginia as many as 65. But if religious scruples afford immunity from civic obedience to laws, they may be invoked by the religious beliefs of any individual even though he holds no membership in any sect or organized denomination. Certainly this Court cannot be called upon to determine what claims of conscience should be recognized and what should be rejected as satisfying the ‘religion’ which the Constitution protects. That would indeed resurrect the very discriminatory treatment of religion which the Constitution sought forever to forbid. And so, when confronted with the task of considering the claims of immunity from obedience to a law dealing with civil affairs because of religious scruples, we cannot conceive religion more narrowly than in the terms in which Judge Augustus N. Hand recently characterized it:

‘It is unnecessary to attempt a definition of religion; the content of the term is found in the history of the human race and is incapable of compression into a few words. Religious belief arises from a sense of the inadequacy of reason as a means of relating the individual to his fellow-men and to his universe. * * * (It) may justly be regarded as a response of the individual to an inward mentor, call it conscience or God, that is for many persons at the present time the equivalent of what has always been thought a religious impulse.’ United States v. Kauten, 2 Cir., 133 F.2d 703, 708.

Consider the controversial issue of compulsory Bible-reading in public schools. The educational policies of the states are in great conflict over this, and the state courts are divided in their decisions on the issue whether the requirement of Bible-reading offends constitutional provisions dealing with religious freedom. The requirement of Bible-reading has been justified by various state courts as an appropriate means of inculcating ethical precepts and familiarizing pupils with the most lasting expression of great English literature. Is this Court to overthrow such variant state educational policies by denying states the right to entertain such convictions in regard to their school systems because of a belief that the King James version is in fact a sectarian text to which parents of the Catholic and Jewish faiths and of some Protestant persuasions may rightly object to having their children exposed? On the other hand the religious consciences of some parents may rebel at the absence of any Bible-reading in the schools. See State of Washington ex rel. Clithero v. Showalter, 284 U.S. 573, 52 S.Ct. 15, 76 L.Ed. 498. Or is this Court to enter the old controversy between science and religion by unduly defining the limits within which a state may experiment with its school curricula? The religious consciences of some parents may be offended by subjecting their children to the Biblical account of creation, while another state may offend parents by prohibiting a teaching of biology that contradicts such Biblical account. Compare Scopes v. State, 154 Tenn. 105, 289 S.W. 363, 53 A.L.R. 821. What of conscientious objections to what is devoutly felt by parents to be the poisoning of

impressionable minds of children by chauvinistic teaching of history? This is very far from a fanciful suggestion for in the belief of many thoughtful people nationalism is the seed-bed of war.

There are other issues in the offing which admonish us of the difficulties and complexities that confront states in the duty of administering their local school systems. All citizens are taxed for the support of public schools although this Court has denied the right of a state to compel all children to go to such schools and has recognized the right of parents to send children to privately maintained schools. Parents who are dissatisfied with the public schools thus carry a double educational burden. Children who go to public school enjoy in many states derivative advantages such as free text books, free lunch, and free transportation in going to and from school. What of the claims for equity of treatment of those parents who, because of religious scruples, cannot send their children to public schools? What of the claim that if the right to send children to privately maintained schools is partly an exercise of religious conviction, to render effective this right it should be accompanied by a quality of treatment by the state in supplying free textbooks, free lunch, and free transportation to children who go to private schools? What of the claim that such grants are offensive to the cardinal constitutional doctrine of separation of church and state?

These questions assume increasing importance in view of the steady growth of parochial schools both in number and in population. I am not borrowing trouble by adumbrating these issues nor am I parading horrible examples of the consequences of today's decision. I am aware that we must decide the case before us and not some other case. But that does not mean that a case is dissociated from the past and unrelated to the future. We must decide this case with due regard for what went before and no less regard for what may come after. Is it really a fair construction of such a fundamental concept as the right freely to exercise one's religion that a state cannot choose to require all children who attend public school to make the same gesture of allegiance to the symbol of our national life because it may offend the conscience of some children, but that it may compel all children to attend public school to listen to the King James version although it may offend the consciences of their parents? And what of the larger issue of claiming immunity from obedience to a general civil regulation that has a reasonable relation to a public purpose within the general competence of the state? See Pierce v. Society of Sisters, 268 U.S. 510, 535, 45 S.Ct. 571, 573, 69 L.Ed. 1070, 39 A.L.R. 468. Another member of the sect now before us insisted that in forbidding her two little girls, aged nine and twelve, to distribute pamphlets Oregon infringed her and their freedom of religion in that the children were engaged in ‘preaching the gospel of God's Kingdom’. A procedural technicality led to the dismissal of the case, but the problem remains. McSparran v. City of Portland, 318 U.S. 768, 63 S.Ct. 759, 87 L.Ed. 1139.

These questions are not lightly stirred. They touch the most delicate issues and their solution challenges the best wisdom of political and religious statesmen. But it presents awful possibilities to try to encase the solution of these problems within the rigid prohibitions of unconstitutionality.

We are told that a flag salute is a doubtful substitute for adequate understanding of our institutions. The states that require such a school exercise do not have to justify it as the only means for promoting good citizenship in children, but merely as one of diverse means for accomplishing a worthy end. We may deem it a foolish measure, but the point is that this Court is not the organ of government to resolve doubts as to whether it will fulfill its purpose. Only if there be no doubt that any reasonable mind could entertain can we deny to the states the right to resolve doubts their way and not ours.

That which to the majority may seem essential for the welfare of the state may offend the consciences of a minority. But, so long as no inroads are made upon the actual exercise of religion by the minority, to deny the political power of the majority to enact laws concerned with civil matters, simply because they may offend the consciences of

a minority, really means that the consciences of a minority are more sacred and more enshrined in the Constitution than the consciences of a majority.

We are told that symbolism is a dramatic but primitive way of communicating ideas. Symbolism is inescapable. Even the most sophisticated live by symbols. But it is not for this Court to make psychological judgments as to the effectiveness of a particular symbol in inculcating concededly indispensable feelings, particularly if the state happens to see fit to utilize the symbol that represents our heritage and our hopes. And surely only flippancy could be responsible for the suggestion that constitutional validity of a requirement to salute our flag implies equal validity of a requirement to salute a dictator. The significance of a symbol lies in what it represents. To reject the swastika does not imply rejection of the Cross. And so it bears repetition to say that it mocks reason and denies our whole history to find in the allowance of a requirement to salute our flag on fitting occasions the seeds of sanction for obeisance to a leader. To deny the power to employ educational symbols is to say that the state's educational system may not stimulate the imagination because this may lead to unwise stimulation.

The right of West Virginia to utilize the flag salute as part of its educational process is denied because, so it is argued, it cannot be justified as a means of meeting a 'clear and present danger' to national unity. In passing it deserves to be noted that the four cases which unanimously sustained the power of states to utilize such an educational measure arose and were all decided before the present World War. But to measure the state's power to make such regulations as are here resisted by the imminence of national danger is wholly to misconceive the origin and purpose of the concept of 'clear and present danger'. To apply such a test is for the Court to assume, however unwittingly, a legislative responsibility that does not belong to it. To talk about 'clear and present danger' as the touchstone of allowable educational policy by the states whenever school curricula may impinge upon the boundaries of individual conscience, is to take a felicitous phrase out of the context of the particular situation where it arose and for which it was adapted. Mr. Justice Holmes used the phrase 'clear and present danger' in a case involving mere speech as a means by which alone to accomplish sedition in time of war. By that phrase he meant merely to indicate that, in view of the protection given to utterance by the First Amendment, in order that mere utterance may not be proscribed, 'the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.' Schenck v. United States, 249 U.S. 47, 52, 39 S.Ct. 247, 249, 63 L.Ed. 470. The 'substantive evils' about which he was speaking were inducement of insubordination in the military and naval forces of the United States and obstruction of enlistment while the country was at war. He was not enunciating a formal rule that there can be no restriction upon speech and, still less, no compulsion where conscience balks, unless imminent danger would thereby be wrought 'to our institutions or our government'.

The flag salute exercise has no kinship whatever to the oath tests so odious in history. For the oath test was one of the instruments for suppressing heretical beliefs. Saluting the flag suppresses no belief nor curbs it. Children and their parents may believe what they please, avow their belief and practice it. It is not even remotely suggested that the requirement for saluting the flag involves the slightest restriction against the fullest opportunity on the part both of the children and of their parents to disavow as publicly as they choose to do so the meaning that others attach to the gesture of salute. All channels of affirmative free expression are open to both children and parents. Had we before us any act of the state putting the slightest curbs upon such free expression, I should not lag behind any member of this Court in striking down such an invasion of the right to freedom of thought and freedom of speech protected by the Constitution.

I am fortified in my view of this case by the history of the flag salute controversy in this Court. Five times has the precise question now before us been adjudicated. Four times the Court unanimously found that the requirement of such a school exercise was

not beyond the powers of the states. Indeed in the first three cases to come before the Court the constitutional claim now sustained was deemed so clearly unmeritorious that this Court dismissed the appeals for want of a substantial federal question. Leoles v. Landers, 302 U.S. 656, 58 S.Ct. 364, 82 L.Ed. 507; Hering v. State Board of Education, 303 U.S. 624, 58 S.Ct. 752, 82 L.Ed. 1087; Gabrielli v. Knickerbocker, 306 U.S. 621, 59 S.Ct. 786, 83 L.Ed. 1026. In the fourth case the judgment of the district court upholding the state law was summarily affirmed on the authority of the earlier cases. Johnson v. Deerfield, 306 U.S. 621, 59 S.Ct. 791, 83 L.Ed. 1027. The fifth case, Minersville District v. Gobitis, 310 U.S. 586, 60 S.Ct. 1010, 84 L.Ed. 1375, 127 A.L.R. 1493, was brought here because the decision of the Circuit Court of Appeals for the Third Circuit ran counter to our rulings. They were reaffirmed after full consideration, with one Justice dissenting.

What may be even more significant than this uniform recognition of state authority is the fact that every Justice —thirteen in all—who has hitherto participated in judging this matter has at one or more times found no constitutional infirmity in what is now condemned. Only the two Justices sitting for the first time on this matter have not heretofore found this legislation inoffensive to the 'liberty' guaranteed by the Constitution. And among the Justice who sustained this measure were outstanding judicial leaders in the zealous enforcement of constitutional safeguards of civil liberties —men like Chief Justice Hughes, Mr. Justice Brandeis, and Mr. Justice Cardozo, to mention only those no longer on the Court.

One's conception of the Constitution cannot be severed from one's conception of a judge's function in applying it. The Court has no reason for existence if it merely reflects the pressures of the day. Our system is built on the faith that men set apart for this special function, freed from the influences of immediacy and form the deflections of worldly ambition, will become able to take a view of longer range than the period of responsibility entrusted to Congress and legislatures. We are dealing with matters as to which legislators and voters have conflicting views. Are we as judges to impose our strong convictions on where wisdom lies? That which three years ago had seemed to five successive Courts to lie within permissible areas of legislation is now outlawed by the deciding shift of opinion of two Justice. What reason is there to believe that they or their successors may not have another view a few years hence? Is that which was deemed to be of so fundamental a nature as to be written into the Constitution to endure for all times to be the sport of shifting winds of doctrine? Of course, judicial opinions, even as to questions of constitutionality, are not immutable. As has been true in the past, the Court will from time to time reverse its position. But I believe that never before these Jehovah's Witnesses cases (except for minor deviations subsequently retraced) has this Court overruled decisions so as to restrict the powers of democratic government. Always heretofore, it has withdrawn narrow views of legislative authority so as to authorize what formerly it had denied.

In view of this history it must be plain that what thirteen Justices found to be within the constitutional authority of a state, legislators cannot be deemed unreasonable in enacting. Therefore, in denying to the states what heretofore has received such impressive judicial sanction, some other tests of unconstitutionality must surely be guiding the Court than the absence of a rational justification for the legislation. But I know of no other test which this Court is authorized to apply in nullifying legislation.

In the past this Court has from time to time set its views of policy against that embodied in legislation by finding laws in conflict with what was called the 'spirit of the Constitution'. Such undefined destructive power was not conferred on this Court by the Constitution. Before a duly enacted law can be judicially nullified, it must be forbidden by some explicit restriction upon political authority in the Constitution. Equally inadmissible is the claim to strike down legislation because to us as individuals it seems opposed to the 'plan and purpose' of the Constitution. That is too tempting a basis for finding in one's personal views the purposes of the Founders.

The uncontrollable power wielded by this Court brings it very close to the most sensitive areas of public affairs. As appeal from legislation to adjudication becomes more frequent, and its consequences more far-reaching, judicial self-restraint becomes more and not less important, lest we unwarrantably enter social and political domains wholly outside our concern. I think I appreciate fully the objections to the law before us. But to deny that it presents a question upon which men might reasonably differ appears to me to be intolerance. And since men may so reasonably differ, I deem it beyond my constitutional power to assert my view of the wisdom of this law against the view of the State of West Virginia.

Jefferson's opposition to judicial review has not been accepted by history, but it still serves as an admonition against confusion between judicial and political functions. As a rule of judicial self-restraint, it is still as valid as Lincoln's admonition. For those who pass laws not only are under duty to pass laws. They are also under duty to observe the Constitution. And even though legislation relates to civil liberties, our duty of deference to those who have the responsibility for making the laws is no less relevant or less exacting. And this is so especially when we consider the accidental contingencies by which one man may determine constitutionality and thereby confine the political power of the Congress of the United States and the legislatures of forty-eight states. The attitude of judicial humility which these considerations enjoin is not an abdication of the judicial function. It is a due observance of its limits. Moreover, it is to be borne in mind that in a question like this we are not passing on the proper distribution of political power as between the states and the central government. We are not discharging the basic function of this Court as the mediator of powers within the federal system. To strike down a law like this is to deny a power to all government.

The whole Court is conscious that this case reaches ultimate questions of judicial power and its relation to our scheme of government. It is appropriate, therefore, to recall an utterance as wise as any that I knew in analyzing what is really involved when the theory of this Court's function is put to the test of practice. The analysis is that of James Bradley Thayer:

‘* * * there has developed a vast and growing increase of judicial interference with legislation. This is a very different state of things from what our fathers contemplated, a century and more ago, in framing the new system. Seldom, indeed, as they imagined, under our system, would this great, novel, tremendous power of the courts be exerted, —would this sacred ark of the covenant be taken from within the veil. Marshall himself expressed truly one aspect of the matter, when he said in one of the later years of his life: ‘No questions can be brought before a judicial tribunal of greater delicacy than those which involve the constitutionality of legislative acts. If they become indispensably necessary to the case, the court must meet and decide them; but if the case may be determined on other grounds, a just respect for the legislature requires that the obligation of its laws should not be unnecessarily and wantonly assailed.’ And again, a little earlier than this, he laid down the one true rule of duty for the courts. When he went to Philadelphia at the end of September, in 1831, on that painful errand of which I have spoken, in answering a cordial tribute from the bar of that city he remarked that if he might be permitted to claim for himself and his associates any part of the kind things they had said, it would be this, that they had ‘never sought to enlarge the judicial power beyond its proper bounds, nor feared to carry it to the fullest extent that duty required.’

‘That is the safe twofold rule; nor is the first part of it any whit less important than the second; nay, more; to-day it is the part which most requires to be emphasized. For just here comes in a consideration of very great weight. Great and, indeed, inestimable as are the advantages in a popular government of this conservative influence,—the power of the judiciary to disregard unconstitutional legislation,—it should be remembered that the exercise of it, even when unavoidable, is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the

people thus lose the political experience, and the moral education and stimulus that come from fighting the question out in the ordinary way, and correcting their own errors. If the decision in Munn v. Illinois and the 'Granger Cases,' twenty-five years ago, and in the 'Legal Tender Cases,' nearly thirty years ago, had been different; and the legislation there in question, thought by many to be unconstitutional and by many more to be ill-advised, had been set aside, we should have been saved some trouble and some harm. But I venture to think that the good which came to the country and its people from the vigorous thinking that had to be done in the political debates that followed, from the infiltration through every part of the population of sound ideas and sentiments, from the rousing into activity of opposite elements, the enlargement of ideas, the strengthening of moral fibre, and the growth of political experience that came out of it all,—that all this far more than outweighed any evil which ever flowed from the refusal of the court to interfere with the work of the legislature.

'The tendency of a common and easy resort to this great function, now lamentably too common, is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility. It is no light thing to do that.

'What can be done? It is the courts that can do most to cure the evil; and the opportunity is a very great one. Let them resolutely adhere to first principles. Let them consider how narrow is the function which the constitutions have conferred on them,—the office merely of deciding litigated cases; how large, therefore, is the duty intrusted to others, and above all to the legislature. It is that body which is charged, primarily, with the duty of judging of the constitutionality of its work. The constitutions generally give them no authority to call upon a court for advice; they must decide for themselves, and the courts may never be able to say a word. Such a body, charged, in every State, with almost all the legislative power of the people, is entitled to the most entire and real respect; is entitled, as among all rationally permissible opinions as to what the constitution allows, to its own choice. Courts, as has often been said, are not to think of the legislators, but of the legislature,—the great, continuous body itself, abstracted from all the transitory individuals who may happen to hold its power. It is this majestic representative of the people whose action is in question, a coo rdinate department of the government charged with the greatest functions, and invested, in contemplation of law, with whatsoever wisdom, virtue, and knowledge the exercise of such functions requires.

'To set aside the acts of such a body, representing in its own field, which is the very highest of all, the ultimate sovereign, should be a solemn, unusual, and painful act. Something is wrong when it can ever be other than that. And if it be true that the holders of legislative power are careless or evil, yet the constitutional duty of the court remains untouched; it cannot rightly attempt to protect the people, by undertaking a function not its own. On the other hand, by adhering rigidly to its own duty, the court will help, as nothing else can, to fix the spot where responsibility lies, and to bring down on that precise locality the thunderbolt of popular condemnation. The judiciary, to-day, in dealing with the acts of their coordinate legislators, owe to the country no greater or clearer duty than that of keeping their hands off these acts wherever it is possible to do it. For that course—the true course of judicial duty always—will powerfully help to bring the people and their representatives to a sense of their own responsibility. There will still remain to the judiciary an ample field for the determinations of this remarkable jurisdiction, of which our American law has so much reason to be proud; a jurisdiction which has had some of its chief illustrations and its greatest triumphs as in Marshall's time, so in ours, while the courts were refusing to exercise it.' J. B. Thayer, John Marshall, (1901) 104-10.

Of course patriotism cannot be enforced by the flag salute. But neither can the liberal spirit be enforced by judicial invalidation of illiberal legislation. Our constant preoccupation with the constitutionality of legislation rather than with its wisdom tends to preoccupation of the American mind with a false value. The tendency of focusing

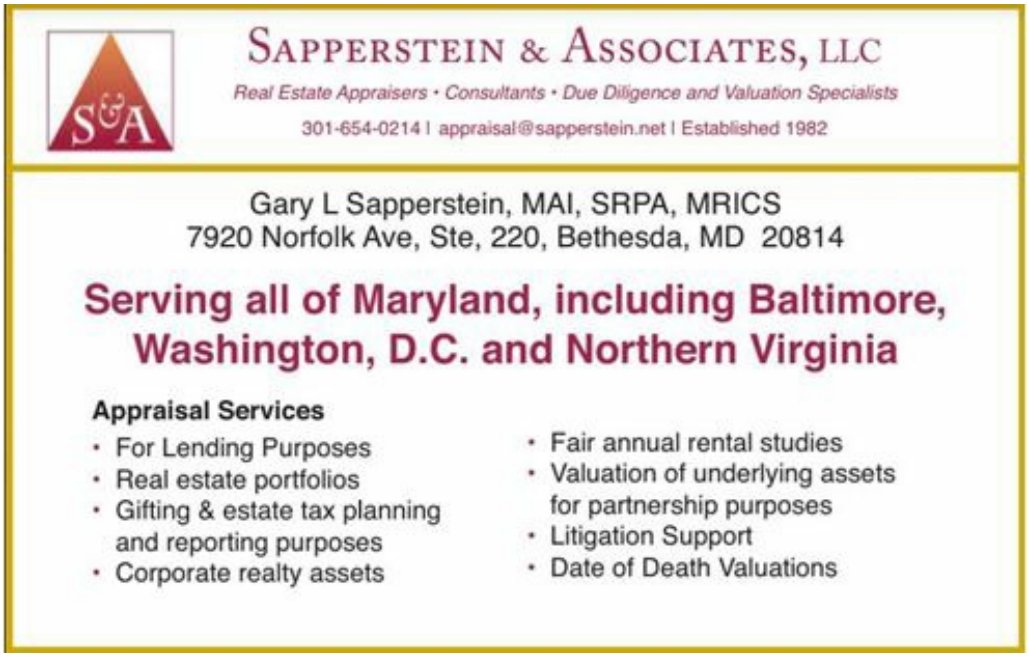
attention on constitutionality is to make constitutionality synonymous with wisdom, to regard a law as all right if it is constitutional. Such an attitude is a great enemy of liberalism. Particularly in legislation affecting freedom of thought and freedom of speech much which should offend a free-spirited society is constitutional. Reliance for the most precious interests of civilization, therefore, must be found outside of their vindication in courts of law. Only a persistent positive translation of the faith of a free society into the convictions and habits and actions of a community is the ultimate reliance against unabated temptations to fetter the human spirit.

Canberry Sauce?

Is there any more divisive issue at Thanksgiving than canned cranberry sauce? One of my daughters, who refers to it as canberry sauce, loves it. Her father, who knows a little too much about food, at least eating copious amounts of it, not so much. The thing is, homemade cranberry sauce tastes like, well, cranberry sauce while its canned cousin tastes like, well, not cranberry sauce.

If one were to draft a memo in opposition to the use of canned cranberry sauce, they very likely would point out how incredibly easy the homemade variety is to make. In a sauce pan, put one cup of orange juice and add to it one cup of sugar. Once the sugar dissolves into the orange juice, add twelve ounces of cranberries, stirring often, until the berries pop open.

Now, for those of you in the nay column, you might be mortified to know that behind it all, i.e., the first to can cranberry sauce, is a gentleman by the name of Marcus L. Urann, the founder of Ocean Spray. Mr. Urann was by education, training and profession, a lawyer. Although he passed away in 1963, I'm thinking there must be someway to have him posthumously disbarred. Oh well, in the spirit of the holidays, perhaps we should just let it go.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LEGAL SPECTATOR & MORE

Jacob A. Stein

The Magazine Group
Washington, D.C.

IRVING YOUNGER AND JOE DIMAGGIO

The recent TV program replaying the life and times of Joe DiMaggio brought to mind Irving Younger. Mr. Younger frequently worked into his continuing legal education lectures references to Joltin' Joe as the embodiment of perfection in his chosen work.

For those who may not know of Irving Younger, he was, by common consent, the top banana on any CLE program. He brought the law of evidence to life with clever insights, humorous anecdotes, and inside stories. He extracted from the Federal Rules of Evidence a grand unifying theory that reconciles electromagnetism, gravity, and the speed of light.

His Hearsay lecture was unforgettable, and his lecture on the art of cross-examination was even better. Each lecture was worked and reworked so that anything that slowed it down was trimmed off. The final product had the impact of a fine vaudeville act. As he paced the platform he took off his jacket and rolled up his sleeves.

To emphasize a point he jumped into the air and screamed the applicable rule. When he completed his four-hour, nonstop lecture, he was the fighter who had gone fifteen rounds. He needed a robe thrown around him and the assistance of two handlers, one with ice water and the other with flattery.

He had excellent credentials. He attended Harvard undergraduate and the New York University Law School. He was an Assistant United States Attorney in Manhattan and thereafter was in private practice. He left private practice to serve as a trial judge in New York City. He then taught trial technique at Cornell, Columbia, Harvard, and Georgetown. In 1981 he joined Williams & Connolly. He left three years later to resume teaching.

In his lectures he reduced the technique of trying a lawsuit into ten black letter rules. Learn them by heart. If you violate them you do so at your client's peril.

He temporarily defrauded his audience of ambitious would-be trial lawyers into believing that each one of them was destined to be a prince of the forum, winning big cases, by following the Younger rules. It was while delivering his exhortations to excellence that he invoked Joe DiMaggio's memory and Joe's perfection in the New York Yankees' outfield and of course Joe's clutch hitting. Younger then shifted to the legendary triumphs of yesteryear's great trial lawyers. There was Max Steuer's cross-examination in the Triangle Shirtwaist company fire case. Max Steuer was defending the factory owners charged with causing the death of factory employees who were unable to flee the burning building because the owners had locked the exits. Steuer's cross-examination consisted of his asking the prosecution's key witness to repeat the story she gave on direct examination. She did so, word for word. That was the cross-

examination. Thus, so Irving Younger proclaimed, Mr. Steuer demonstrated that the witness had memorized a story the prosecutor had told her to say.

Mr. Younger gave instances of what happens when the lawyer asks one question too many and converts a good cross-examination into a disaster. And he warned against getting too excited. There was the lawyer who got so excited in arguing an arson case that he exclaimed: "Ladies and Gentlemen, the chimney took fire; it poured out volumes of smoke. Volumes, did I say? Whole encyclopedias, Members of the Jury."

He told of the lawyer who fainted dead away when appearing before Judge Learned Hand.

He preached elegance and relevance and brevity. No wasted motion, just like Joe DiMaggio. He was proud that a case he tried when he was a Williams & Connolly partner gave him the chance to perform like Joe DiMaggio.

He represented the *Washington Post* when it had been sued for libel by the president of the Mobil Oil Corporation. The plaintiff called a trucking executive to the stand. The trucking executive gave testimony helpful to the plaintiff. Mr. Younger's cross-examination consisted of four elegant questions:

Q: Mr. Hoffman, did you just get into Washington about an hour ago?

A: About an hour and a half, I would think.

Q: Did you come up from Florida?

A: No, I did not.

Q: Where did you come from?

A: Indianapolis.

Q: How did you get from Indianapolis to Washington?

A: On the Mobil corporate jet.

"It was a hand grenade in the courtroom," Mr. Younger recalled, "the kind of moment a trial lawyer savors for the rest of his life."

Despite the elegance and brevity of the cross-examination, the jury returned a substantial plaintiff's verdict. When commenting on the verdict in one of his CLE courses he said with a smile that Joe DiMaggio occasionally struck out even though his swing was perfect. Mr. Younger finally prevailed for his client in the court of appeals.

This led to Mr. Younger's warning that the trying of cases requires a tolerance for disappointment. Trying cases is winning and losing. There was a lawyer in New York called Last Chance Levy. He got his cases after the jury returned a guilty verdict. Mr. Levy was the post-verdict and appellate man. He considered himself a winner each day the client was not behind bars. In one of his cases the day came when all appeals ended and the defendant found himself in court for the last time. As he was being led away he whispered to Levy, "What happens now?" Levy answered, "I shall be going to dinner and you are going to jail." Last Chance Levy developed a tolerance for defeat.

After several years in practice Irving Younger returned to his real love, teaching trial practice. Although his life was cut short at age 55, he lives on by and through the videotapes of his great performances, recorded live before spellbound CLE audiences.

Jacob Stein took part in the Bar Library Lecture Series on January 21, 2009 with a presentation on "Perjury, False Statements & Obstruction of Justice." Generous with his time, Mr. Stein was generous in other ways as well as indicated by the language in the preface to the third volume of Legal Spectator from which the following was taken. Mr. Stein wrote "This book is not copyrighted. Its contents may be reproduced without the express permission of, but with acknowledgement to, the author. Take what you

want and as much as you want." The works featured in the Legal Spectator, originally appeared in the Washington Lawyer, the American Scholar, the Times Literary Supplement, the Wilson Quarterly, and the ABA Litigation Section's publication. I want to thank former Bar Library Board of Director Henry R. Lord for his time and efforts in reviewing the writings of Mr. Stein for inclusion in the Advance Sheet.