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# A Change of Heart, A Changing Time, A Brilliant Legal Mind: Reconciling Robert H. Jackson's Opinions in Dennis and Barnette

"We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch at the very heart of the existing order."[1] Robert H. Jackson's impassioned defense of freedom of thought and expression from *West Virginia v. Barnette* is, on the surface, difficult to reconcile with his concurring opinion in *Dennis v. United States,* wherein he states "Also, it is urged that since the conviction is for conspiracy to teach and advocate, and to organize the Communist Party to teach and advocate, the First Amendment is violated, because freedoms of speech and press protect teaching and advocacy regardless of what is taught or advocated. I have never thought that to be the law."[2] In one case, he appears to defend the right to freedom of expression of any and all ideas, yet in the other he rejects the notion that preventing the Communist party from teaching or advocating its cause is a violation of the first amendment.

Did Jackson genuinely change his mind about the limits of free speech in the seven years between *Barnette* and *Dennis,* during which time he saw firsthand in Nuremburg the atrocities committed by the totalitarian Nazi regime? Did he, like so many other Americans of his time, simply get caught up in the Second Red Scare and allow his bias to enter the courtroom with him? Or, did he find some meaningful legal distinction between the two cases that justifies the seemingly contradictory opinions? Being that we can no longer ask the man himself or anyone who knew him personally, we will likely never know the true answer to those questions. A closer look at the context surrounding these seemingly diametrically opposed positions, however, along with analysis of supplemental materials reveals that there is likely an element of truth to all three proposed explanations.

## *West Virginia Board of Education v. Barnette*

Before the reasons for the conflicting opinions are analyzed, the circumstances surrounding each case must be discussed. Following the court's 1940 decision in *Minersville School District v. Gobitis* that upheld mandatory expressions of patriotism in public schools, the state of West Virginia's Board of Education passed a resolution stating that a daily salute to the flag of the United States was now mandatory for all schoolchildren. Those who refused to participate would be expelled until they were willing to comply, opening up their parents to charges of delinquency. For historical context, the resolution was passed in January 1942, just a few weeks after the attack on Pearl Harbor and the United States' entrance into World War II, during which time levels of patriotism in the country were extremely high. A father of two school-aged daughters in West Virginia by the name of Barnette filed suit in United States district court seeking an injunction to halt implementation of the order on the grounds that it violated the freedom of speech and freedom of religion clauses of the first amendment, among other rights violations. The Barnettes were Jehovah's Witnesses, a religious group whose members believe that saluting the flag is a violation of the Ten Commandments. The case quickly made its way to the Supreme Court, where Justice Jackson wrote the 6-3 opinion of the court declaring the resolution an unconstitutional violation of the first and fourteenth amendments, effectively ending the longstanding debate over mandatory patriotic displays in public schools. Jackson's opinion is widely regarded today as one of the most eloquent defenses of freedom of expression ever issued.[3]

## *Dennis v. United States*

*Dennis v. United States,* on the other hand, is not widely known today, but was highly publicized when it took place. In 1948, Eugene Dennis, the secretary general of the Communist Party in the United States, along with several other high ranking officials, was indicted for violations of the Smith Act. The Smith Act states that it is illegal to advocate for the violent overthrow of the government, or to organize a group or to be a member of a group that advocates the same. The prosecution did not argue that the defendants had advocated any specific acts of violence that actually came to pass, but rather that the mission of the communist party in general was to violently overthrow the government, and that by advocating for the communist party they were by extension guilty of advocating for a violent overthrow of government. Even more so than in *Barnette*, it is important to examine the historical context surrounding the *Dennis* case.[4] The original trial, the appeal, and the Supreme Court case all

occurred between 1948 and 1950, at the height of the second red scare in America. The FBI and the House of Representatives' Un-American Activities Commission were investigating tens of thousands of Americans for any possible ties to communism, Senator McCarthy was making headlines as an anti-Communist crusader, and the Cold War was just beginning. Anti-Communist sentiment ran so high that to even be accused of having ties to Communism made one almost unemployable, regardless of whether the accusation had any merit.[5] Despite the overwhelmingly negative public opinion of Communism, the defendants used the trial as a stage to advocate for Communist causes. Their primary defense was that parts of the Smith Act were unconstitutional because they limited the defendants' first amendment right to freedom of speech. The question of whether or not the defendants could be convicted in the absence of any specific instances of incitement was also addressed. In limiting free speech, the court had, up until this case, relied upon the clear and present danger test, which stated, broadly, that speech could be censured only when it presented a clear and present danger to the interests of the country. In his concurring opinion upholding the convictions, Jackson broke significantly from this precedent, claiming that the test could not logically be applied in this case because if it were, the government would be powerless to stop a violent overthrow until after it had already begun.[4] It is interesting to note that while the defendants' convictions were never overturned, the case of *Yates v. United States* in 1957, after the red scare had largely subsided and three years after Justice Jackson had passed away, overturned much of the precedent set in *Dennis* and declared parts of the Smith Act unconstitutional violations of free speech.

## The Case for a Change of Heart

With the circumstances of the cases in question described, attention can now be turned to the question of how to reconcile Jackson's two differing opinions. The simplest explanation for the discrepancy would be that Jackson simply changed his mind as to the limits of freedom of speech under the law. The vast majority of experts in law both during Jackson's time and today believe the Constitution does allow for some limits on the freedom of speech, however the extent of those limits is often hotly contested. As a practical, rational interpreter of the law, Jackson would have been well within his rights to change his opinion if presented with new information. As he himself would later say in Brown v. Allen, "We are not final because we are infallible, but we are infallible only because we are final."[6] It is not hard to see a man who so understood his own fallibility changing his mind on an important issue if he thought it to be the best course of action.

This line of thought, however, begs the question of what he may have seen or learned in the seven years between the two decisions that would have changed his mind. Fortunately, one must not look very far for such a potential watershed moment in Jackson's life. At the Nuremburg Trials, Jackson saw firsthand the consequences of unchecked extremism, both from the defeated Nazis, as well as to a lesser extent from the Soviet Union. To show the brutality of the perpetrators of the holocaust, extremely graphic video depicting the concentration camps was shown, including such horrifying images as a bulldozer moving piles of corpses.[7] It is certainly not inconceivable that being witness to those acts and being responsible for prosecuting their perpetrators changed Jackson's perspective on the degree of freedom that political minorities should be afforded, as Jackson was adamant that the German people as a whole were not to blame for the atrocities; rather a small group of ruthless, evil men had taken over the country through subversive means and imposed their ideology on their citizens. As he said in his opening address at Nuremburg, "We would also make clear that we have no purpose to incriminate the whole German people. We know that the Nazi Party was not put in power by a majority of the German vote. We know it came to power by an evil alliance between the most extreme of the Nazi revolutionists, the most unrestrained of the German reactionaries, and the most aggressive of the German militarists."[8] Given his opinion in the Dennis case, it is not difficult to imagine that he believed the communist party in America posed a similar threat.

## The Case for the Influence of the Second Red Scare (A Changing Time)

Today, twenty-six years after the end of the Cold War, it is difficult to imagine any sort of communist takeover of the United States. In the late 1940s and early 1950s, it was difficult not to imagine it. Fear and paranoia swept the country, and government officials were not immune. In fact, people like Sen. Joseph McCarthy and FBI Director J. Edgar Hoover were primarily responsible for driving it. Warnings about the spread of communism, when delivered by such seemingly credible sources of information, captured the imaginations of nearly everyone in the country, uneducated conspiracy-theorists and high minded intellectuals alike. It was such a troubled time that in 1950 McCarthy rose to national prominence by claiming that hundreds of communists had infiltrated the State Department, and, despite a complete lack of evidence, many thousands of Americans believed him.[5]

Considering the pervasiveness of anti-communist sentiment and the fact that it had either worked its way into or originated from some of the highest levels of government, it does not seem inconceivable that the Supreme Court would have been affected as well. Of course,

Jackson had a reputation as a Justice that decided cases strictly on their merits under the law without considering personal preferences or biases. However, even if Jackson did not consciously allow any personal preferences into his opinion in *Dennis,* they likely still would have had a subtle influence on his work. It is a hallmark of the human condition that it is much easier to make an argument leading to an end-goal that one believes is right, in this case the imprisonment of the leaders of the Communist Party, than to argue for something one does not believe in. Jackson, while one of the greatest legal minds of the 20th century, was, after all, still human.

Overall political climate of the time aside, reading Jackson's opinion in *Dennis* does give one a sense that he harbored some animosity towards the Communist Party beyond simple political disagreement. While the opinion of the court primarily discusses the constitutionality of sections 2 and 3 of The Smith Act, Jackson's concurring opinion stresses the unique threats posed by the Communist Party and the need to take action to stop it in its "period of incubation". The court held that the clear and present danger test was applicable and that the criteria for limiting the speech and teachings of the Communist Party had been met, but Jackson took a slightly different approach. He rejected the application of the clear and present danger test to the case, implying that its application would have led to an acquittal by saying "the Communist stratagem outwits the anti-anarchist pattern of statute aimed against 'overthrow by force and violence' if qualified by the doctrine that only 'clear and present danger' of accomplishing that result will sustain the prosecution." Instead, he argued that the country could not be held captive by the "judge-made verbal trap" that was the clear and present danger test, and that a more "realistic" approach was needed. Effectively, he argued that the *Dennis* case was so unique as to justify disregarding established judicial precedent in favor of a novel approach.

It is also interesting to examine some of the language Jackson used to describe the Communist Party in his *Dennis* opinion and to contrast it with the beautifully flowing prose of his *Barnette* opinion. While both opinions, and most everything Jackson ever wrote, are very well-written, there is a reason that the *Barnette* case is so well remembered today while the *Dennis* case has faded into relative obscurity. To truly get a sense of the difference in tone of the two opinions, they should be read carefully and then reread, but to summarize, West Virginia v. Barnette is an impassioned defense of civil rights filled with assertions of the greatness of our democracy and The Bill of Rights. Dennis, on the other hand, is much darker, filled with negative adjectives, and reads more like a warning to the country about the dangers of Communism than a defense of any sort of principle. Phrases like "closed system of thought",

"foothold in government", "embarrass the authorities", "infiltrate and control", "pretending to be just another political party", and "ruthlessly denied", when used in describing the Communist Party, set a dark, foreboding tone that suggest that Jackson either feared or had a deep dislike of Communism.

Of course, the possibility that Jackson disliked radicalism in general or was simply a defender of democracy must be considered. The best evidence for this line of thought comes from Jackson's opening statement at the Nuremburg Trial. In it, he used language to describe the Nazi party that is strikingly similar to that which he used years later to describe the communist party, saying "No greater mistake could be made than to think of the Nazi Party in terms of the loose organizations which we of the western world call 'political parties'. In discipline, structure, and method the Nazi Party was not adapted to the democratic process of persuasion. It was an instrument of conspiracy and of coercion. The Party was not organized to take over power in the German State by winning support of a majority of the German people; it was organized to seize power in defiance of the will of the people." Ultimately, it is impossible to know to what extent Jackson's dislike of communism influenced his decision in Dennis, but the evidence presented here suggests, at the very least, that it did in fact play some role.

## The Case for a Meaningful Legal Distinction (A Brilliant Legal Mind)

Central to the question of whether or not Jackson found a meaningful legal distinction between the two cases, and what it might be if he did, is the clear and present danger test. A more thorough understanding of this doctrine and its history is thus necessary before moving on to the cases at hand.

The clear and present danger test was first introduced by Justice Oliver Wendell Holmes Jr. in 1919 in the case of *Schenck v. United States*, and stated that speech was subject to censure or its speaker subject to punishment if "the words are used in such circumstances and 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."[9] Important as the original wording is, it would be a mistake to interpret the test and how it may be applied based solely on those words. The historical use of the test must be examined because it is not a piece of legislation nor part of any codified set of laws, but rather judicial precedent, open to interpretation by future judges and not binding in the manner that law passed by Congress would be.

The *Schenck* case centered on the distribution of pamphlets to recently drafted soldiers in World War I that encouraged them to resist their being drafted. Charges were brought against the distributors of the pamphlets on the grounds that they violated the Espionage Act of 1917, prohibiting anyone from attempting to interfere with army operations or to encourage insubordination or mutiny. The defendants were convicted and appealed to the Supreme Court on the grounds that their first amendment right to freedom of speech had been violated. A unanimous court upheld the convictions and endorsed Justice Holmes' clear and present danger test as a means for determining when speech can be censured or its speakers punished.[9]

However, just 8 months later, the court heard *Abrams v. United States*, a very similar case that involved Russian immigrants distributing pamphlets critical of United States military involvement in Russia. A majority of the court did uphold the convictions, citing the clear and present danger test, but Justice Holmes himself, joined by Justice Brandeis, who would later be a friend and something of a mentor to Robert Jackson, dissented. Interestingly, they were concerned about a rising hysteria[9] in the country that was infringing on freedom of speech, in other words, the first red scare. Though shorter than the second red scare, it was no less intense; members of state legislations were expelled, Russian immigrants were deported without cause, and citizens attacked those they thought to be extremists in the streets.[10] In light of these developments, Justice Holmes amended his clear and present danger test to read "the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent."[11] While the new formulation reads much the same as the old, the use of the word imminent in place of present implies a higher standard of danger would need to be posed by speech in order for it to be considered criminal.

Several other cases between *Abrams* and *Dennis* applied the clear and present, or imminent, danger test. In *Gitlow v. New York*, the court applied the test to another case involving the distribution of pamphlets, this time allegedly advocating the overthrow of the United States government. Notably, the court upheld the conviction despite lack of a clear incitement to criminal activity. Again, Justices Brandeis and Holmes dissented, for much the same reasons as in the *Abrams* case.[9] Whitney v. California saw the conviction of a member of the Communist Labor party, an organization whose stated goal was to use revolution as a means to overthrow capitalism, for being a member of a criminal organization. While the court this time was unanimous in upholding the conviction, Justices Holmes and Brandeis wrote a

separate opinion concurring in the result while simultaneously raising concerns about infringement of free speech and the need for a clear and present danger to be imminent in order to justify censorship of speech.[9] Several more clear and present danger cases were heard between the inception of the test and the Dennis case, but the pattern is clear: in cases involving radical political movements, a majority of the court upholds the government's right to censure speech that presents a clear and present danger to its vital interests, while Justices Holmes and Brandeis dissent, arguing for a higher standard of danger to be required in order to justify limiting free speech.

Then, thirty-one years after *Schenck*, enter the Dennis case, eerily similar to the Abrams case of thirty years past. A new generation of justices sat on the court and, as Jackson pointed out in his opinion, "the era of World War II [had] revealed the subtlety and efficacy of modernized revolutionary techniques used by totalitarian parties."[2] That statement lies at the heart of why Jackson chose not to apply the clear and present danger test, along with his criticism that "If we must decide that this Act and its application are constitutional only if we are convinced that petitioner's conduct creates a 'clear and present danger' of violent overthrow, we must appraise imponderables, including international and national phenomena which baffle the best informed foreign offices and our most experienced politicians."[2] Effectively, he is arguing that changes in tactics by radical revolutionaries would prevent the clear and present danger test from accomplishing its original purpose of preventing a radical overthrow of government while still preserving free speech to the greatest degree possible, and that in this case there would be no way to gauge whether or not the actions of the defendants actually posed a clear and present danger until such time as they had actually attempted to overthrow the government.

Jackson's first point presents one possible reason why he would have broken with the liberal tradition of Justices Holmes and Brandeis and indeed even his own previous decisions, and advocated for a more restrictive interpretation of freedom of speech. No matter how similar the cases may have appeared, Jackson clearly believed, at least by this point in his career, that judicial precedent must be made responsive to the ever changing nature of modern society. The country, he believed, could not become caught up in a "judge-made verbal trap"[2] that prevented the taking of preemptive action against those who might wish the country or its people harm, leaving the only course of action to be the punishment of wrongdoers after their worst crimes had already been committed. Instead, he rather vaguely wrote that conspiracy cases could not be held to any hard and fast rule, but rather decided by the court based on the facts presented in each case. Effectively, Jackson would give the court broad authority to

punish those whom it believed acted with malice towards the government, provided they did so as part of a group rather than as individuals. This line of thinking was certainly not new to the court, as evidenced by several of the notable clear and present danger cases described above, but was new to Jackson. His book, *The Struggle for Judicial Supremacy*, published just a year before he joined the court, is a stinging rebuke of the early 20th century court's increase in power.[12] It must be noted that *The Struggle for Judicial Supremacy* dealt mainly with the 14th amendment and the concept of un-enumerated rights, but the fact remains that in one case he was arguing for an increase in the court's authority to interpret law, and in another lamenting a very similar increase.

Despite the inconsistencies across time in his own thinking, the answer to the question of whether or not Jackson found a meaningful legal distinction between *Barnette* and *Dennis*, is, of course, yes. He was too brilliant a jurist to make the novice mistake of failing to justify his position with established precedent. The portion of his opinion that seems least supported by precedent is the decision not to apply the clear and present danger test to *Dennis*. In previous similar cases, the court had either found that the alleged conduct met the standard of a clear and present danger or did not, as opposed to Jackson's contention that the test could not logically be applied to the current case. He does, however, justify that position with common sense, stating "When the issue is criminality of a hot-headed speech on a street corner, or circulation of a few incendiary pamphlets, or parading by some zealots behind a red flag, or refusal of a handful of school children to salute our flag, it is not beyond the capacity of the judicial process to gather, comprehend, and weigh the necessary materials for decision whether it is a clear and present danger of substantive evil or a harmless letting off of steam."[2] He went on to add that those previous cases had all had the benefit of hindsight to see what harm had come of the allegedly criminal acts at issue in each trial, whereas to apply the test to the Dennis case the court would have to predict the harm that the communist party would inflict upon the country. As it happens, the court had done just that in *Whitney v. United States*,[9] but it is hard to argue Jackson's underlying logic that there must be a better way to decide the case than to resort to attempts to predict the future. This line of thinking also justifies the apparent disconnect in Jackson's thoughts as to just how far the court could extend its power, affirming his stance from *The Struggle for Judicial Supremacy* that the court exercised too much power. While abandoning a hard and fast rule in favor of deciding on a case by case basis would seem to place more power in the hands of the justices, it would not grant them nearly so much power as to allow them to decide cases on the basis of a future they themselves predict.

## Reaching a Conclusion

As was stated from the outset, it would be a mistake to attempt to pin the entirety of the differences between Dennis v. United States and West Virginia State Board of Education v. Barnette on one of the three arguments laid out above. Robert H. Jackson was renowned for his legal reasoning skills and unbiased jurisprudence, winning respect on both sides of the political aisle. Rather than only taking one issue into account, he likely would have been influenced by a much wider array of factors than the three examined here. For example, he certainly would have listened to the opinions and reasoning of his colleagues on the court, as well as the written and oral arguments made by both sides of each case. For purposes of brevity, those influences will not be discussed here, but it should be acknowledged that they and many others likely had a significant impact on Jackson's thinking as well as the three main issues discussed above.

Despite the lack of a decisive answer to the question posed at the outset of this paper, several insights can still be made into Jackson's thinking. To begin, it is highly unlikely that the main influence on Jackson's more restrictive views on speech in Dennis was due mainly to the influence of the Second Red Scare. That is not to say it did not influence him at all, simply that it was not the main influence. There are two main reasons for this. First, Jackson had then and still has today a reputation as an honorable, intelligent man who stood against discrimination. Further, he was known to be as unbiased a justice as the court has ever seen, making it extremely unlikely he would allow a personal prejudice to be the deciding factor in his decision. And secondly, if Jackson truly had wanted to uphold the convictions simply because the men were communists, he could have just signed onto the majority opinion, which upheld the convictions. Instead he offered an entirely different line of reasoning as to why the convictions were upheld, which would have been entirely unnecessary had he simply wanted the defendants to be thrown in jail. Much more likely, Jackson did have a slight bias against communists, but this only subtly influenced how he thought about the Dennis case.

Separating the influences of a change in legal philosophy and Jackson's finding of a meaningful legal distinction is much more difficult than separating either from the influence of his dislike of communism. That question centers on whether or not Jackson's rejection of the clear and present danger test in Dennis was based on a meaningful legal distinction between that case and Barnette, where he does believe the test to be valid. Some would argue that it is not, as his decision to reject the test in Dennis was not based on precedent. Others might retort, however, that the common-sense wisdom Jackson uses in rejecting the test should count as a meaningful legal distinction. Either way, the point is fairly moot, considering one's

legal philosophy directly influences how they would interpret precedent, and one's interpretation of legal precedent in turn directly influence one's legal philosophy. In other words, the two are inseparable.

In reading Jackson's opinions in these two historic cases as well as many others, one gets a sense of why Robert Jackson was so well respected as a jurist. He masterfully blends high-minded idealism defending the Constitution and Bill of Rights with the common-sense wisdom needed to ensure the country runs smoothly and does not adhere to outdated principles simply because they are grounded in legal precedent. He was not afraid to take an unpopular position if he thought it was right, nor was he afraid to stand up to his own political party. The exclusively Harvard and Yale educated members of today's Supreme Court would do well to look to the example of Bob Jackson, the country lawyer without even a college degree.

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