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THE SUPREME COURT'S ROLE: GUARANTOR OF INDIVIDUAL AND MINORITY GROUP RIGHTS

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We have just celebrated the Bicentennial of the United States Bill of Rights, a marvelous document that not only has been used to secure a broad range of freedoms for many people in this country, but also has inspired and served as a model for liberty-loving peoples the world over. However, the freedoms enunciated in the Bill of Rights — as well as in other Constitutional provisions — are not self-enforcing.

As recognized in writings of the Constitution's framers, and as explicitly held by Chief Justice John Marshall in the landmark case of *Marbury v. Madison*,[1] it is the special responsibility of the federal courts, headed by the United States Supreme Court, to interpret and enforce the Constitution. That responsibility is especially important in cases involving the rights of individuals and minority groups. Although all government officials take an oath to uphold the Constitution, officials who are elected by majority vote often reflect the majoritarian interests to which they are accountable. In contrast, the Constitution provides that federal judges have lifetime tenure, subject to removal only under extraordinary circumstances, through impeachment. This insulation from the political sphere ensures that federal courts should be able to enforce the rights of even unpopular individuals and minority groups.

Perhaps the most eloquent expression of this special federal court role is Justice Jackson's statement in *West Virginia State Board of Education v. Barnette*,[2] which struck down statutes forcing public school students to salute the American flag, even when their religious beliefs — as in the case of Jehovah's Witness children — forbade the salute. Justice Jackson declared:

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1. 5 U.S. (1 Cranch) 137 (1803).

2. 319 U.S. 624 (1943).

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[3]

During much of this century, the Supreme Court fulfilled its unique role as the ultimate guarantor of individual and minority group rights by subjecting governmental decisions that infringed on those rights to searching judicial review. Especially under the leadership of Chief Justices Earl Warren and Warren Burger, the Court helped to transform the paper promises of the Bill of Rights and other constitutional provisions — notably, the equality and due process guarantees of the post-Civil War constitutional amendments — into actual rights for many groups and individuals whose liberty had been ignored or oppressed by the majoritarian branches of governments. These included African-Americans, other racial and religious minorities groups, women, and children.

Under the leadership of Chief Justice Rehnquist, however, the Court has abandoned its constitutionally prescribed, unique role as the guardian of individual and minority group rights. Instead, it routinely defers to and upholds the decisions of majoritarian governmental officials, even when those decisions infringe fundamental rights of minorities.

One of many rulings that dramatically illustrates the Rehnquist Court's hands-off posture is *Employment Division v. Smith*,[4] a 1990 decision which refused to enforce the First Amendment's religious freedom guarantees to protect individuals who had used peyote in sacramental rites of the Native American Church, where the state's criminal drug laws made no exemption for the religious use of peyote. The Court said that the only recourse for members of the Native American Church was to try to persuade the state legislature to enact such an exemption. The *Smith* opinion candidly acknowledged that, in being forced to seek protection for their religious practices through the political process, members of minority religions are "at a relative disadvantage."[5] It dismissed

3. *Id.* at 638.
4. 110 S. Ct. 1595 (1990).
5. *Id.* at 1606.

this concern, though, with the conclusory assertion that the discriminatory abridgment of the constitutional rights of minority groups is the "unavoidable consequence of democratic government."[6]

To the contrary, it is the Court's constitutional and historic responsibility to avoid exactly such consequences. As the supreme enforcer of the Bill of Rights, its unique role is to prevent the "tyranny of the majority" that our founders feared would occur absent judicially enforceable freedoms. Indeed, Justice O'Connor's separate opinion in *Smith* sharply criticized the majority's relegation of minority rights to an admittedly unsympathetic political process. She noted that "the First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility," and quoted the stirring statement from *Barnette* set out above.[7]

In contrast to Justice O'Connor's opinion, the *Smith* majority opinion did not cite *Barnette*. To the contrary, the majority opinion twice relied on *Minersville School District v. Gobitis*,[8] the long since discredited decision that rejected the religious freedom claims of Amish schoolchildren and that *Barnette* had overruled. Ominously, in citing *Gobitis*, the *Smith* majority did not even note the fact that it was subsequently overruled by a decision that has been hailed as a landmark of liberty. This breach of the basic rules of citation signals that the Court is literally rewriting constitutional history and constitutional law.

Devastating as the *Smith* decision was from the perspective of religious freedom, it is important to stress that its adverse impact transcends the sphere of religious liberty. It exemplifies the Court's general abdication of its special constitutional role as the protector of the entire spectrum of fundamental rights for individuals and minority groups. This abandonment has marked the Court's recent decisions concerning every constitutional liberty, including freedom of speech, which many experts have considered a "preferred" right. As Justice Thurgood Marshall charged, in his last dissenting opinion before resigning from the Court, the Rehnquist majority

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6. *Id.*

7. *Id.* at 1613 (O'Conner, J., concurring).

8. 310 U.S. 586 (1940), *overruled by* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

"will squander the authority and the legitimacy of this Court as a protector of the powerless."[9]

9. Payne v. Tennessee, 111 S. Ct. 2597, 2625 (1991) (Marshall, J., dissenting).