Train Up A Child In The Way He Should Go: The Jehovah's Witness' Supreme Court Cases of the Early 1940s

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Abstract

The cases brought by the Jehovah’s Witnesses in the early 1940s prompted the Supreme Court to confront the situations that occurred when children’s interests came into conflict with parental rights over religious issues. With *Minersville v. Gobitis* in 1940, the Court held that the expulsion of Witness children from public schools did not constitute a violation of the religious rights of parents even though the objection was religiously based. The Court overturned this decision three years later with *West Virginia v. Barnette*, ruling that such expulsions did, in fact, violate the religious rights of the parents involved. It was in 1944 with the case of *Prince v. Massachusetts* that the rights of children became a point of consideration, and the Court decided firmly in favor of children’s rights, ruling that the interests of children trumped parental religious beliefs. This precedent, coupled with the Children’s Rights Revolution of the 1960s, is still the guiding principle in religious free exercise cases involving children’s rights.
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Foreword

Almost since their inception, Jehovah’s Witnesses have faced prosecution in United States courts on the basis of their beliefs. They have had more cases go to the Supreme Court than any other group, and are the leaders in challenging violations of the First Amendment “freedom of religion” clause. They have been brought to trial over their refusal to obtain the proper permits for selling their literature, to participate in the draft, and to accept blood transfusions. Justice Harlan Fiske Stone went so far as to write in a letter to Chief Justice Charles Evans Hughes in 1941 that “I think the Jehovah’s Witnesses ought to have an endowment in view of the aid which they give in solving the legal problems of civil liberties.” Although there are many instances of conflict between Jehovah’s Witnesses and the United States courts, among the most memorable and influential are those involving children. Witness children seemed as sympathetic victims as their civil rights were being denied at a time when adult Jehovah’s Witnesses were very unsympathetic victims to many “mainstream” Americans.¹

Witness History and Basic Theology

Many Americans were (as some still are) hostile to the Witnesses simply because no major Christian sectarian movement in recent history has so consistently prophesied the end of the present world in such definite ways or on such specific dates as have the Jehovah’s Witnesses. Charles Taze Russell, the first president of the Witness legal society, originally predicted that the year 1874 would mark the beginning of Christ’s invisible presence on Earth, that the years 1878 and then 1881 would see the change of church members from their fleshly bodies to their spiritual bodies, and that the year 1910 would be the beginning of widespread trouble that would lead to the end of the world, an event which would occur in the year 1914. When these prophecies failed to materialize, they had to be reinterpreted or simply thrown out; however, this did not discourage Russell and his followers from setting new dates or in some cases from just claiming that the end of the world was only a few years or a few months away and that their numbers had only been “off” by a little bit. Thus, for well over a century, the constant theme of the Jehovah’s Witnesses has been that the end is near and that soon, Christ will appear and destroy all those who oppose the Witnesses. The theology of the Witnesses, then, is not exactly conducive to the incorporation of the sect into mainstream America; in fact, Witnesses generally take pride in the fact that they are a people set apart. ²

The sect originated in 1870 in Pittsburgh, Pennsylvania, as a small Bible class organized by Charles Taze Russell. Russell established the basic theology of the movement and set the precedent for its heavy reliance on the printed word for missionary purposes. The Witnesses believe that the Bible reveals God’s entire plan for mankind but

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² Penton, Apocalypse Delayed, 3-4; David R. Manwaring, Render Unto Caesar: The Flag Salute Controversy (Chicago: UC Press, 1962), 19-23.
also believe that the guidance necessary to interpret the Bible and understand God’s intentions is available only through God Himself speaking via His chosen agents, the Witness leadership.³

Witness theology centers largely on the imminent and violent end of the world, as forecast in the book of Revelation. According to Witness belief, in tempting Adam and Eve, Satan challenged Jehovah’s supremacy, asserting that He could not place anyone on earth who would remain faithful in the face of such strong opposition. Thus, the Witnesses claim that Jehovah refrained from destroying Satan immediately and even left him in full charge of the earth so that this assertion could be put to a fair test. The Witnesses prophesy that Satan’s time is running out, but that by dying on the cross, Christ won back mankind’s lost right to physical immortality, setting the stage for the restoration of the original divine scheme. At the great battle of Armageddon, which, according to Witness belief, will be fought in this generation, heavenly forces will take Satan prisoner and destroy all of his works and the vast majority of mankind who have given him their allegiance. None will be spared but the faithful—the Jehovah’s Witnesses—those whom Satan originally claimed would not exist. The earth will then be restored to a state of Eden, and a substantial portion of those who died in years past will be resurrected and made physically perfect and immortal. After a thousand years of peace under Christ’s rule, Satan will be released for a short time to tempt the people once more, and then he and all those that follow him will be destroyed. Those who remain faithful will live on forever under the direct rule of Jehovah.⁴

³ Penton, Apocalypse Delayed, 4-5; Manwaring, Render Unto Caesar, 17-20.
⁴ Manwaring, Render Unto Caesar, 17-20
Although this general world view has remained unchanged throughout the history of the sect, the Witnesses' vision of their own role in this world has changed drastically since World War I. Originally, Russell pictured the group as comprising the last remnant of the 144,000 saints chosen from birth to rule with Christ in Heaven after Armageddon. The members of this small group were set apart by their saintly character and ability to comprehend and accept Russell's message. Widespread proselytization would be pointless, according to Russell; most of humanity would die at Armageddon and be, resurrected for a second chance during the thousand-year rule of Satan. Russell did virtually all of the preaching himself as he sought to call out all of the "elect" before the onset of Armageddon, which he predicted would come sometime in 1914. When this prediction failed to come to pass, the Witnesses were left with some explaining to do. "Judge" Rutherford, Russell's successor, met this crisis with a major doctrinal innovation, the concept of the "Jonadab" class, otherwise known as the "great crowd" doctrine. This class consists of the majority of the world who are sinners, not through evil intent but through ignorance, as opposed to the "elect" who are saints from birth. The Jonadab class may be saved from destruction at Armageddon, but only if they leave their evil ways and join God's organization, the Jehovah's Witnesses. This Jonadab class, however, will not go to Heaven with the elect at the onset of Armageddon, but rather they will stay on Earth to begin re-populating it prior to the general resurrection of the dead.5

The concept of the Jonadab class completely revolutionized the Witness Movement in that it made calling out this class a primary focus. Reaching out to the greater world was urgently needed in an effort to uncover as many of the Jonadabs as

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5 Penton, Apocalypse Delayed, 71-72 and 194-95; Manwaring, Render Unto Caesar, 18-19.
possible. The Witnesses now felt that every human being must have the chance to choose sides, either for or against Jehovah. To them, this meant personal ministry. Today, each Witness, whether elect or Jonadab, is expected to devote every spare bit of time, money and effort to the spreading of the “good news.” Each Witness is an ordained minister with the responsibility to preach the gospel to as much of the non-Witness world as he can.\(^6\)

The Jonadab concept is also important to the narrowing of the Witness standards of behavior. When only a few were considered able to receive the truth, unbelievers were less at fault for their ignorance, and Witnesses could speak of a general resurrection of the dead after Armageddon. However, since the “truth” is now considered receivable by anyone not actually evil at heart, those who reject Witness doctrine are affirmatively casting their lot with Satan and will die at Armageddon without hope of resurrection. The Witnesses become in effect the instruments through which God will carry out the last judgment. The same “one chance” rule applies to the Witnesses themselves; a Witness who is deemed unacceptable in any substantial matter of doctrine or conduct is considered doomed beyond hope of redemption. Both the elect and Jonadabs are regarded as being in a covenant with Jehovah, with specific duties and rewards; any violation nullifies this contract. The basic outline, then, is relatively simple: Witnesses in good standing are automatically saved, everyone else is automatically bound for destruction.\(^7\)

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Witness Membership and Organization

Information on the numbers, distribution, and characteristics of Jehovah’s Witnesses is very sketchy, largely due to the extreme secretiveness of the Witnesses themselves, especially under the leadership of Rutherford. Recently, however, the church has released some statistics on the number of Witnesses actually engaged in preaching. Today’s numbers may be contrasted with those of the two year most important to this study:^8

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of Witnesses in the United States</th>
<th>Number of Witnesses Worldwide</th>
</tr>
</thead>
<tbody>
<tr>
<td>1938</td>
<td>28,400</td>
<td>72,000</td>
</tr>
<tr>
<td>1943</td>
<td>72,200</td>
<td>137,000</td>
</tr>
<tr>
<td>2004</td>
<td>1,019,696</td>
<td>6,513,132</td>
</tr>
</tbody>
</table>

Only subjective estimates are possible as to the types of people who become Jehovah’s Witnesses. On the whole, they tend to include a fairly faithful cross-section of the general population, although the typical Witness is likely to be somewhat below average in wealth and education. The education level was exceptionally low under Rutherford, who was openly skeptical of the value of secular education. Witness membership also has an unusually high percentage of men and elderly people. Those who join and remain in the movement are incredibly zealous; they see themselves as soldiers of the Lord in a great struggle and welcome persecution as a divinely permitted test of their faith.^9

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^9 Manwaring, Render Unto Caesar, 20-21.
Children in Witness homes often receive a great deal of religious instruction. Regular activities typically include weekly home Bible study, daily studies from the *Yearbook of Jehovah’s Witnesses*, and prayer at the table and at bedtime, in addition to regular congregational meetings, Witness conventions, and door-to-door preaching work. Witness children are taught to be obedient to their parents, school authorities, the police, and elders within the congregation, but that they must respect God over all. If parents or other authorities order them to violate a Christian principle, the children are taught to obey God rather than men. Although Witnesses are raised to have a deep respect for secular authority, they are ultimately aware that their highest allegiance must be to God.¹⁰

To help them carry out their preaching work, the Witnesses use two corporations, both based in Brooklyn, New York. The Watchtower Bible and Tract Society, founded in Pittsburgh in 1884, is the principal corporation of the movement and is referred to as “the Society” by Witnesses. The Watchtower Bible and Tract Society, Inc. was established in New York in 1909 to handle the sect’s expanding business affairs. This organization owns all the sect’s physical properties in the United States. Witnesses were encouraged to see the great struggle as being between God’s and Satan’s organizations, a conflict which Rutherford “legitimized” in 1938 by publishing scriptural proof that God was personally directing the Witness organizations and that all officers should be appointed by God’s chosen agents in the national office, meaning himself and his assistants. The vast majority of Witnesses accepted this loss of local autonomy with great enthusiasm.¹¹

¹⁰ Penton, *Apocalypse Delayed*, 267-68.
In his “theocratic” reorganization of 1938, Rutherford divided the United States into six regions, each under a separate servant. Below these regional servants were 154 zones, which were responsible to their zone servants. Each congregation, or company, was run by a company servant, who was directly accountable to his or her respective zone servant. The zone servants were primarily responsible for maintaining discipline and pushing their congregations forward with the Witness work. With the tighter organization came greater stress on individual discipline and conformity, and the national office developed an extremely efficient surveillance network capable of quickly seeking out and punishing any Witness slacking in his work or his faith.\(^{12}\)

Witnesses proselytize almost entirely through the use of the printed word. The Witnesses’ own printing plant turns out large numbers of books and pamphlets and two semi-monthly magazines, *The Watchtower* and *The Awake!*\(^{13}\) Witness literature is generally sold, although Witnesses will often give away smaller items for the sake of getting it into the hands of the public, especially with a new prospect. The amount of profit made by the Witnesses is a matter of dispute, especially considering that the Witnesses claim that it takes a loss on its literature is weakened by its seven-figure annual turnover and the near-total secrecy surrounding its finances. Witnesses spread their message primarily by going from door to door with their literature, trying to persuade each household to take some. In February 1940, Witnesses began using street corners to


\(^{13}\) *The Watchtower* has been the primary method for distributing Witness doctrine and teachings since 1879. *The Awake!,* which was first published in 1919 as *The Golden Age* and known as the *Consolation* during the period in this study, is the news-oriented companion to *The Watchtower.*
spread their message, stationing themselves at downtown intersections, bearing specially designed magazine bags, and sometimes calling out their message or carrying posters.\textsuperscript{14}

Witnesses also hold annual conventions, where attendance sometimes doubles or triples their estimated active membership. Besides furnishing the occasions for major doctrinal revelations, these gatherings directly promote the Witness work; the thousands of attendees spend all their spare time distributing new publications throughout the convention city, saturating it to a degree that would otherwise be impossible.\textsuperscript{15}

**History of Religious Free Exercise**

The Jehovah's Witnesses played a dramatically important role in shaping the interpretation of the Free Exercise Clause of the First Amendment and the Due Process Clause of the Fourteenth Amendment. The First Amendment to the United States Constitution states simply that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof....” The Due Process Clause of the Fourteenth Amendment to the United States Constitution adds: “nor shall any State deprive any person of life, liberty, or property, without due process of law....”

In addition to the federal Free Exercise Clause, every state also has Constitutional provisions guaranteeing freedom of religion. In fact, the bulk of cases involving freedom of religion have come under state jurisdiction; by comparison, federal precedents are relatively scattered and recent. This is largely due to the fact that states are in charge of the day-to-day regulation that is most likely to come in conflict with the activities of religious sects.\textsuperscript{16}

\textsuperscript{14} Manwaring, *Render Unto Caesar*, 22-24; Penton, *Apocalypse Delayed*, 83-86.
\textsuperscript{15} Manwaring, *Render Unto Caesar*, 20; Penton, *Apocalypse Delayed*, 58-59.
\textsuperscript{16} Manwaring, *Render Unto Caesar*, 38.
The first federal religious freedom litigation dealt with the plural marriage of the Mormons. Shortly after Utah became an incorporated territory, Congress made polygamy a crime. The Supreme Court upheld this legislation in 
*Reynolds v. US* despite the defendants’ argument that their religion made the practice obligatory. In 1890 with *Davis v. Beason*, the Court upheld a statute which denied voting rights to practicing Mormons. Later in the same year, the Court upheld a law that dissolved the Mormon church’s corporation and confiscated most of its property. Shortly thereafter, the Mormon church officially renounced polygamy as a religious practice.\(^{17}\)

This situation changed as the Supreme Court began to take a more liberal view of the Fourteenth Amendment during the 1930s. As early as 1923, in *Meyer v. Nebraska*, the Court hinted that religious freedom might be included in the “liberty” protected by the Fourteenth Amendment.\(^{18}\) In 1934 with *Hamilton v. Regents*, the Court actually held that such was indeed the case, and in 1940 with *Cantwell v. Connecticut*, the Court held that the Due Process Clause applied the entire religious freedom guarantee to the states.\(^{19}\) These rulings were significant because they made the First Amendment the minimum standard for all law, whether state or federal, and because they allowed the federal court the opportunity to decide all the issues with which the states had been dealing; in essence they made all religious freedom questions federal questions.\(^{20}\)

\(^{17}\) Manwaring, *Render Unto Caesar*, 45-46.

\(^{18}\) *Meyer v. Nebraska*, 262 US 390 (1923); The Petitioner taught German at a grade school and he was convicted under a Nebraska law that prohibited teaching of foreign language in grade schools; the court held that this was a violation of the Due Process Clause of the Fourteenth Amendment.

\(^{19}\) *Hamilton v. Regents*, 293 US 245 (1934); The court held that Due Process Clause of Fourteenth Amendment conferred no right to attend a state university without taking prescribed courses in military training; *Cantwell v. Connecticut*, 310 US 296 (1940); The Court reversed the state’s conviction of three Jehovah’s Witnesses, on the grounds of religious liberty. Never before had the Court invalidated the action of a state for this reason.

While all of the federal precedents dealing with the religious refusal of individuals to perform a required act (rather than individuals who were performing "illegal" acts) are somehow tied to military service, there does not seem to be any case on record that directly disputes compulsory military service on a religious basis. Conscientious objectors have long been excused from the draft, but there is little doubt that Congress (if it so chose) could compel them to serve. The process for the naturalization of foreign citizens has come into question under this category, as the twenty-second question on a preliminary form in the process asks, "If necessary, are you willing to take up arms in defense of this country?" In the 1929 case of United States v. Schwimmer, the United States Supreme Court held that an affirmative answer to this question was a necessary prerequisite in the process of naturalization. Two years later, this rule was applied to a religious objector in United States v. Macintosh.21

Although the Jehovah's Witnesses played a dramatic role in shaping the interpretation of the Free Exercise Clause of the First Amendment, theirs was not the only religious group to have an impact. Other religious groups also had their practices limited by state and federal policies and subsequent court decisions. For example, under the Eighteenth Amendment and the National Prohibition Act, the State Department limited the use of wine for Jewish sacramental purposes to five gallons per family per

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21 United States v. Schwimmer, 279 U.S. 644 (1929): Schwimmer stated that she could not take the oath to become a United States Citizen because she would not answer affirmatively to question 22. The court held that it was proper for her application for citizenship to be denied; United States v. Macintosh, 283 US 605 (1931): Macintosh was a Canadian citizen, a Baptist minister, and professor of theology at Yale University who was willing to take the statutory oath of allegiance, but would not give an unqualifiedly affirmative answer to question 22; Manwaring, Render Unto Caesar, 46-47.
year. In Shapiro v. Lyle, this statute was upheld by the District Court for the Western District of Washington.22

In the Morrill Act of 1862, Congress made substantial land grants to any state that would guarantee that the proceeds from the sale of the land would be devoted to the maintenance of at least one college teaching agricultural science and other standard branches of instruction, including military science. While the statute did not expressly require that the military instruction be compulsory for the students, every state so provided in accepting the grants. With the case of Hamilton v. Regents, two members of the Methodist Episcopal Church were suspended from the University of California for religious refusal to take the courses in military science. The Court unanimously affirmed for the first time that freedom of religion was protected by the due process clause of the Fourteenth Amendment, but also held that attendance at a state university was a privilege rather than a right and could be subject to reasonable conditions. Justice Cardozo’s concurring opinion (joined by Justices Brandeis and Stone) relied on the fact that even the grace given conscientious objectors had never been stretched to free them from requirements so indirectly related to military service.23

The “secular regulation rule,” which weighs heavily in the cases hereafter discussed, holds that there is no constitutional right to exemption on religious grounds from the compulsion of a general regulation dealing with non-religious matters. This rule applies equally to legal requirements and legal prohibitions, but the law in question must be truly secular. The logical corollary of the “secular regulation rule” is that the courts will not consider the validity of the asserted religious scruple; there would be no point in

22 Shapiro v. Lyle, 30 F.2d 971 (1929); The Washington District Court upheld the interpretation of the National Prohibition Act to include the distribution of wine for Jewish religious purposes; Ibid.
23 Hamilton v. Regents, 293 US 245 (1934); Manwaring, Render Unto Caesar, 47-48.
it. Moreover, it would involve the very governmental meddling in religious doctrine that the First Amendment seeks to avoid. However, the question of which matters are religious and which are secular is itself a religious question, making some “religious” interpretation inevitable.24

On the whole, both the public opinion and religious precedents which the Witnesses faced going into the flag-salute cases were decidedly unfavorable to them, but the way the court and public opinion changed during the duration of the following cases presented the opportunity for the Witnesses to set a very important precedent in the Flag Salute Controversy and further establish the legitimacy of children as litigants, both in name and in fact. The cases brought by the Jehovah’s Witnesses in the early 1940s prompted the Supreme Court to confront the situations that occurred when children’s interests came into conflict with parental rights. After struggling a bit with the Gobitis and Barnette decisions, the Court planted itself firmly on the side of the children with its ruling in Prince v. Massachusetts, setting a precedent that is still in use.

24 Manwaring, Render Unto Caesar, 48-52.
The Flag Salute: *Gobitis* and *Barnette*

Background of the Pledge

Francis Bellamy, a Christian Socialist and Baptist Minister, wrote the Pledge of Allegiance in August of 1892 as an expression of the ideas of his first cousin, Edward Bellamy, author of the American utopian socialist novels *Looking Backward* (1888) and *Equality* (1897). The pledge was introduced nation-wide in the September 8, 1892, issue of *Youth’s Companion* magazine as part of a patriotism campaign. The original flag salute ceremony involved participants facing the flag while reciting, “I pledge allegiance to my flag and the Republic for which it stands, one nation indivisible, with liberty and justice for all.” When participants reached the words “to my flag,” they extended their right hands with the palms up and slightly raised and held this position until the end of the pledge. The 1923 and 1924 National Flag Conferences produced an amended pledge: “I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands; one nation, indivisible, with liberty and justice for all.” In 1942, Congress changed the proper hand placement during the pledge to the right hand over the heart because of the resemblance of the former salute to that of the Nazis. After a
campaign by the Knights of Columbus to insert “under God” into the Pledge of Allegiance, a resolution passed on June 14, 1954, officially stating that the phrase would follow the words “one nation.” According to President Eisenhower, this was “in order to remind Americans that despite our great physical strength, we must remain humble” during this time of Cold War.\(^{25}\)

The first state to enact a statute regarding the flag-salute ceremony was New York in 1898—the day after the U.S. declared war on Spain. The New York statute—and similar ones that followed it in other states—made it the duty of the state school superintendent to prepare a flag-salute ceremony for use by public schools in the state. These statutes did not make it clear whether local school officials were required to use the prepared ceremony, unlike the succession of statutes that began in Washington state in 1919. The later statutes made it mandatory that the pledge ceremony be conducted once a week in public schools, and failure of school officials to ensure that this was carried out was cause for dismissal, as well as a misdemeanor. These later laws represented more than the “benevolent meddling with the curriculum” of the earlier ones; they were evidence of growing post-World War I nationalism. Although none of the statutes made the flag salute mandatory for each individual student, local officials were free to do so.\(^{26}\)

Groups supporting the integration of the flag-salute ceremony into the public school curriculum included the American Legion, the Veterans of Foreign Wars (VFW) and the Ku Klux Klan. Perhaps surprisingly, the early opposition to the movement came mainly from teachers, who resented the restrictions and obligations placed on them by the


\(^{26}\) Manwaring, Render Unto Caesar, 3-4.
statutes. Other opponents attacked the effectiveness of the ceremony rather than its propriety, claiming that the repetition made the ceremony “perfunctory” and “devoid of feeling.”

Religious Opposition

Religious opposition to the flag-salute ceremony in public schools prior to the involvement of the Jehovah’s Witnesses was kept out of the courtroom because of the restrictions of the various religions regarding court appearances. Although many religious sects, all unaffiliated with the Jehovah’s Witnesses, objected to the mandatory ceremony, none were willing to take the matter to court. They preferred instead to settle the dispute through arbitration, and when that tactic was unsuccessful, they simply opened up their own schools rather than pursue the matter through the legal system.

Such was the case with the Mennonites, a small, conservative sect whose opposition to the ceremony was based on its general opposition to war. The members felt that saluting the flag implied support of the military, with which their pacifism conflicted. The first recorded conflict between Mennonites and the flag-salute ceremony was in 1918, with another instance in 1926. In 1928, after thirty-eight Mennonite children were expelled from a Delaware school system, the Mennonites began the practice of privately educating their children.  

The Jehovahites, a small religious sect based out of Denver, Colorado, considered the flag-salute ceremony (along with all other ceremonies) idolatrous. By April 1926, at least fifty Jehovahite children had been expelled from Denver public schools. This was the first conflict in which the ACLU became involved, but the group’s efforts to use the

Jehovites as a test case in the court system were rendered ineffective by the Jehovites' religious objections to serving as plaintiffs. The conflict resolved itself unexpectedly when the dominant figure on the local school board moved away.\textsuperscript{29}

The Elijah Voice Society also objected to the flag-salute ceremony on the grounds of pacifism, in addition to their refusal to recognize the authority of any manmade government. Their small organization of followers of Charles Taze Russell split apart from the main Jehovah's Witness movement in 1918 in protest of the changes advocated by Russell's successor. In 1926, Mr. Tremain, a member of the Elijah Voice Society, was brought to trial because Russell, his nine-year-old son, had objected to saluting the flag. The father refused to recognize the court's jurisdiction and made no defense; as a result, he was convicted and served eight days in jail. Russell was taken into state custody, and his parents refused to fight to regain custody through the court system, despite efforts by the American Civil Liberties Union (ACLU) to convince them to do so. The courts attempted to compromise by letting Russell return to his family on the condition that he be placed in public or private school. The Tremains held firm, and the courts eventually relented, allowing the boy to return to his home with no promise of education.\textsuperscript{30}

It is important to note that early religious opposition to the public school flag-salute ceremony was concentrated in fringe religious groups that featured extreme views of the relationship between church and state. Only the Jehovites viewed the ceremony's purpose as idolatry, something other than what was actually intended by the writers and by the great majority of Americans; protests based on the salute's intense patriotism and

\textsuperscript{29} Manwaring, \textit{Render Unto Caesar}, 12-13.
\textsuperscript{30} Manwaring, \textit{Render Unto Caesar}, 13-14.
support of the military were based on an interpretation that was considered positive by the general public. Only when viewed in light of the groups' beliefs regarding church and state was the intent distasteful.

Although religious opposition made its presence known, no clear pattern of dealing with the opposition was established. Many districts chose to ignore the issue; more chose expulsion or negotiation. To establish a clear, nationally uniform procedure would require a religious group that both opposed the flag-salute ceremony and were willing to defend their protestations in court.

**Jehovah’s Witnesses and the Flag-Salute Ceremony (Prior to 1940)**

As established earlier, the flag salute and Pledge of Allegiance were introduced in 1892 as part of a patriotism campaign. According to Jehovah’s Witness literature, however, the flag-salute ceremony was a U.S. imitation of the “Heil Hitler” salute of Nazi Germany imported to the states in 1935 solely to cause discord between the Witnesses and the state. This theory disregards the fact that the ceremony had actually been introduced more than four decades earlier and that it had been opposed by other religious groups.31

Witnesses based their refusal primarily on the Biblical passage found in Exodus 20:3-5: “Thou shalt have no other gods before me. 4Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth: 5Thou shalt not bow down thyself to them, nor serve them, for I the Lord thy God am a jealous God....”

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The key assumption was that saluting a flag constituted an act of religious devotion, as worshipping King Nebuchadnezzar's golden image did to Shadrach, Meshach, and Abednego. Because of the Witnesses' belief that "the nations of the world are under the control of Satan and the Devil," an act of religious devotion to such a nation would be much akin to teaming up with the enemy. Even those Witnesses who chose not to believe that governments were completely corrupt still refused to salute the flag on the grounds that they believe God's word expressly forbids the religious act of saluting no matter how worthy of respect the object is. It was this last argument that would become the primary legal one for the Witnesses during the 1940s. Although it was considered a sin for a non-Witness to salute the flag, it was a forgivable sin; for a Witness to salute, however, was to violate his covenant with God and to earn certain destruction at Armageddon. In the Witnesses' view, a non-Witness who saluted the flag was doing so merely because he or she knew no better and was thereby relatively safe from God's wrath; for a Witness who knew that saluting was an unforgivable sin, paying homage to the secular government was nothing short of blasphemy. The primary focus of Witness litigation, then, was not the compulsory flag-salute ceremony in itself, for it was not any more harmful than anything else the secular world was doing, but rather its application to the Witness community.\footnote{Daniel 3:1-30; Manwaring, \textit{Render Unto Caesar}, 33-34.}

The first Witness encounter with the law regarding the flag salute issue was not led by official church doctrine; rather, it was the decision of a third-grader in Lynn, Massachusetts. At the 1935 convention of Witnesses, "Judge" Rutherford, leader of the Witness movement at that time, denounced the "Heil Hitler" salute of Nazi Germany as a claim of salvation by the government, which to some lay Witnesses seemed to apply.
equally as well to the American Pledge of Allegiance. This line of reasoning prompted a student at Lynn Classical High School in Massachusetts to refuse to lead the flag salute ceremony during graduation exercises. On September 20, 1935, Carleton Nicholls, Jr. applied this same reasoning to his own young life and refused to salute the flag in his third-grade classroom, stating that he could not pledge his allegiance to “the Devil’s emblem.” On September 30, Carleton Nicholls, Sr. and another Witness friend accompanied Carleton, Jr. to school and remained seated during the ceremony, despite the demands of the principal that they participate. The two older men were arrested after refusing to leave, and were fined.\textsuperscript{33}

On October 6, Rutherford delivered a national radio address on “Saluting a Flag” which made it clear that the Witness organization supported young Carleton’s stance one hundred percent. Legal counsel funded by the Witness organization was sent to Lynn to argue for Carleton; however, on October 8 the Lynn school committee voted to expel Carleton from school until he agreed to participate in the ceremony. On October 25, a petition was filed requesting a writ of mandamus from the state Supreme Court to order the Lynn school committee to reinstate Carleton to the public school system. The case (\textit{Nicholls v. Lynn}) was referred directly to the Supreme Court of Massachusetts, where on April 4, 1937, the Witnesses and their allies were defeated by a unanimous decision of the court, which ruled that the flag salute had “nothing to do with religion.”\textsuperscript{34}

In the period between September 1935 and June 1940, the public school flag-salute ceremony became an issue in at least twenty states, leading to actual expulsions in

\textsuperscript{33} Manwaring, \textit{Render Unto Caesar}, 31.
\textsuperscript{34} Manwaring, \textit{Render Unto Caesar}, 31-32 and 59.
sixteen of those states.* In most cases, Witness children chose to stand silently during the ceremony, but early on in the movement there were some who refused to rise at all and other variations in the method of refusal. After the “theocratic” reorganization of the sect in 1938, such variation largely disappeared. Teachers who chose to report students for refusal to salute the flag were still sporadic, however, so the cases remained relatively few and far between.35

The phenomenal way that a seemingly ordinary issue such as refusal to salute the flag turned into two of the biggest freedom-of-religion cases ever decided by the Supreme Court and a virtual bloodbath seems incredible, until one examines the context in which it took place. Judge Rutherford’s attempt to unify and mobilize the Witness movement in 1938 came near the same time that the rest of the country was beginning to recognize the horrors that were occurring in Germany as part of the Nazi regime. Although the United States would not become officially involved in World War II until 1941, the country was beginning to show early signs of the intense patriotism that accompanies warfare, evidenced by the number of compulsory flag-salute regulations imposed during this time. For the Witnesses to be viewed as unpatriotic at a time when U.S. involvement in World War II seemed sure to come or had already come to pass proved to be disastrous for them.

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* States with expulsions, either actual or imminent: Massachusetts, Georgia, New Jersey, California, Texas, New York, Florida, Pennsylvania, Vermont, Ohio, Maryland, Washington, Arizona, West Virginia, Minnesota, Connecticut. States without expulsions, but with authority to expel: Oklahoma, Kansas, Illinois, Michigan.

Minersville v. Gobitis

*Opening Scenes*

In 1940, Minersville, Pennsylvania, was a small community with a population of only 8,686 persons. Walter Gobitis, patriarch of the Gobitis family in question, had lived in Minersville all of his life, aside from one year in his childhood. In his childhood, he had attended the Minersville schools and had saluted the flag without objection. He ran a self-service grocery store and seemed to have been a generally well-liked and respected businessman in the community. Mr. and Mrs. Gobitis had a mixed Catholic-Protestant marriage before converting to Jehovah’s Witnesses in 1931. At the time the controversy first began, the Gobitis family had two children in school, Lillian, in seventh grade, and William, in fifth grade, along with three younger children.36

The flag-salute ceremony had been customary in the Minersville School District since 1914, and while there was no formal rule requiring participation in the ceremony, there had never in recent memory been a case of a student refusing to participate. Shortly after “Judge” Rutherford’s October 1935 radio address on “Saluting A Flag,” William and Lillian Gobitis stopped participating in the flag-salute ceremony. The superintendent of schools, Charles E. Roudabush, attempted to settle the matter personally with Mr. Gobitis, with no results. Roudabush, seeking advice from the Department of Public Instruction, learned that the Gobitis children’s refusal to salute the flag might be considered insubordination and punished as such only if there were a formal flag-salute

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requirement. On October 21, Edmund Wasliewski, a sixth grader, joined the Gobitis children in their refusal to salute the flag.\textsuperscript{37}

At their regular meeting on November 6, the Minersville School Board resolved by unanimous vote

\textit{[t]hat the Superintendent of the Minersville Public Schools be required to demand that all teachers and pupils of the said schools be required to salute the flag of our Country as a part of the daily exercises. That refusal to salute the flag shall be regarded as an act of insubordination and shall be dealt with accordingly.}

Immediately following the vote, Roudabush announced, "I hereby expel from the Minersville schools Lillian Gobitis, William Gobitis, and Edmund Wasliewski for this act of insubordination, to wit, failure to salute the flag in our school exercises." The expulsions seem to have been received very calmly by the Minersville community; there was no mention of it in the local press, and there was very little public resentment directed at any member of the Gobitis family—a proposed boycott of the family grocery store was abandoned after just one day.\textsuperscript{38}

The mandates of the school board did not settle the issue as hoped; instead, the Gobitis family remained adamant about their position, and the children stayed out of public school. Eventually, the children were enrolled in the Kingdom School in Andreas, Pennsylvania, which was run by Witnesses and financed entirely by the parents of the children who attended the school. After Lillian finished the eighth grade, the highest grade offered in the Kingdom School, she enrolled in the Pottsville Business College, the only non-religious private school within a reasonable traveling distance.\textsuperscript{39}

\textsuperscript{37}Peters, \textit{Judging Jehovah's Witnesses}, 36-37; Manwaring, \textit{Render Unto Caesar}, 82.
\textsuperscript{38}Manwaring, \textit{Render Unto Caesar}, 83; Defendant's Motion to Dismiss, \textit{Gobitis Record}, 8, 32; Manwaring, \textit{Render Unto Caesar}, 84.
\textsuperscript{39}Manwaring, \textit{Render Unto Caesar}, 84; \textit{Gobitis Record}, 74 and 78.
Walter Gobitis was eager to take his troubles to court, and with Olin R. Moyle, national legal counsel for Jehovah's Witnesses, as his lawyer, he filed a bill of complaint in the United States District Court for the Eastern District of Pennsylvania at Philadelphia requesting an injunction against the continued enforcement of the acts of the Minersville School Board against the Gobitis children on May 3, 1937. He declared the expulsion of his children a violation of the Eighth and Fourteenth Amendments to the Constitution. The Witnesses retained Harry M. McCaughey, a Philadelphia lawyer who had previously handled some Witness cases, as local counsel of record because Moyle was not a member of the Pennsylvania state or federal bars, but Moyle was in very firm control throughout the proceedings.\textsuperscript{40}

On May 12, 1937, the Minersville school board met to consider the suit against them and decided unanimously to fight the case. The firm of Rawle and Henderson was retained to represent the board, and Joseph W. Henderson, head of the firm, was in charge of the litigation. On May 27, 1937, Henderson filed with the District Court a motion to dismiss the bill of complaint with reasonable costs to be awarded to the defendant school authorities.\textsuperscript{41}

The suit was technically brought by Walter Gobitis as next friend of his two minor children against the Minersville School District, the Minersville School Board, and the individual board members plus Superintendent Roudabush. The Bill of Complaint asserted that the suit was one to redress deprivation under color of state law of rights secured by the United States Constitution, and that it arose under the Constitution and

\textsuperscript{40} Bill of Complaint, Gobitis Record, 4; Manwaring, Render Unto Caesar, 85.
\textsuperscript{41} Motion to Dismiss, Gobitis Record, 13; Manwaring, Render Unto Caesar, 85.
involved a property right worth more than $3000. It stated that the Minersville regulation was invalid on its face under the Fourteenth Amendment, and that the regulation as applied to the Gobitis children denied them freedom of speech and religion and the equal protection of the law. It argued that expulsion from public school, with its attendant hardships and dangers, was both a cruel and unusual punishment for mere non-saluting and a violation of the Eighth Amendment. The Bill alleged that the regulation and expulsions therefore violated in various ways the federal due process rights of Walter Gobitis, and that the acts could not be justified under the police power because failure to salute the flag “does not and cannot affect the public interest or safety or the rights and welfare of others.”

The defendants moved to dismiss the complaint on the basis that the District Court had no jurisdiction, because the jurisdictional amount was “inadequately urged,” the controversy was not one arising under the Constitution or laws of the United States, and there was no federally secured right at issue. Under Section 24 (1) of the Judicial Code, federal District Courts have original jurisdiction over civil suits in law or equity arising under the Constitution or laws of the United States and involving more than $3000. The defendants denied that either prerequisite was present, stating that “we fail to see how the plaintiffs can reasonable spend $3000 in an adjoining public school or in a local private day school,” and that the rights “secured” by the Constitution were only those arising out of national citizenship, such as freedom of movement, freedom to petition Congress, etc., and that freedom of speech and religion were only “protected” against state infringement and must be tried through the state courts. As to the merits, the defendants stressed that wide discretion must be given to local school boards in

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42 Manwaring, Render Unto Caesar, 85-86; Bill of Complaint, Gobitis Record, 11.
matters like these and that the Witnesses were simply wrong in affixing religious significance to the flag ceremony.\textsuperscript{43}

The Complainants’ Brief on the Motion to Dismiss, written by Moyle, simply reviewed the complainant’s position on the jurisdictional issues as stated in the Bill of Complaint, with the added argument that all Constitutional rights were “secured” rather than merely “protected.” Although Moyle’s main point continued to be that the regulation invaded freedom of religion in violation of the due process clause of the Fourteenth Amendment, he also here began to invoke more strongly the First Amendment, claiming that the compulsory flag salute constituted a violation of freedom of speech. He likewise asserted, rather weakly, that the compulsory salute violated Walter Gobitis’ constitutional right to control the education of his children; since the state could not interfere with parents’ decision to send their children to private schools, as determined by the \textit{Pierce} precedent\textsuperscript{44}, it could not interfere with a decision to send them to public schools.\textsuperscript{45}

On December 1, 1937, Judge Albert Branson Maris denied the motion to dismiss the case and ordered the case to trial. Maris rejected the general ruling in state decisions that the flag salute had nothing to do with religion: “If an individual sincerely bases his acts or refusals to act on religious grounds they must be accepted as such and may only be interfered with if it becomes necessary to do so in connection with the exercise of the police power….” Assuming the absence of justification for such interference, he held that the Minersville regulation, as applied to the Gobitis children, violated the religious

\textsuperscript{43} Manwaring, \textit{Render Unto Caesar}, 86 and 88.

\textsuperscript{44} \textit{Pierce v. Society of Sisters}, 268 US 510 (1925): The court unanimously struck down Oregon’s attempt to compel all school-age children to attend public schools, recognizing to some extent a parent’s right of control over the upbringing of his children.

\textsuperscript{45} Manwaring, \textit{Render Unto Caesar}, 89-90.
freedom guaranties of the Pennsylvania and United States Constitutions. Maris claimed jurisdiction in the case under Section 24(1) of the Judicial Code; he asserted that the regulation was perfectly reasonable on its face, but the application was what was being challenged, and this abuse of legally vested authority was within the prohibition of the Fourteenth Amendment.46

This rebuff in court seems only to have hardened the resolve of the Minersville authorities to fight to the finish. Public embarrassment in losing does no good for anyone’s ego, and the Minersville School Board reacted no differently than one would expect the losing team in a children’s kickball match to do—they wanted a re-match, a do-over of sorts. Roudabush stated publicly and emphatically that he would not readmit the Gobitis children without the flag salute unless and until a final court order was placed in his hands. In the Joint and Several Answers filed by the defendants, the factual allegations identifying the parties and relating the history of the controversy up to the bringing of suit were admitted. The paragraphs dealing with the Gobitis family’s religious beliefs were neither admitted nor denied, with the defendants pleading ignorance but demanding strict proof of the beliefs at trial. The defendants denied the allegation of paragraph X of the Bill of Complaint, that the plaintiffs were law-abiding, loyal citizens, and paragraph V, that the federal District Court had jurisdiction.47

In addition to these formal responses, the defendants were also able to claim in their Joint and Several Answers that Walter Gobitis could have found alternative education for his children more cheaply than he had, and that public education was not a property right enforceable at equity. It stated that “the failure or refusal of any pupil or

47 Joint and Several Answers, Gobitis Record, 35.
group of pupils to salute the national flag would be disrespectful to the government of
which the flag is a symbol and would tend to promote disrespect for that government and
its laws, with the result that the public welfare and safety and well-being of the citizens of
the United States would be ultimately harmed and seriously affected thereby,” and
outlined the grounds the defense would use at trial to show that the Gobitis children’s
refusal to salute the flag was harmful to the public good. On a final note, the Joint and
Several Answers once again requested that the District Court dismiss the action with
costs.48

The District Court: Trial and Decision

The trial was held on February 15, 1938. The first witness called by the
complainants was Walter Gobitis. He gave the factual background of the case and
testified regarding his and his family’s religious beliefs. Gobitis also made it clear that he
had not instructed his children not to salute the flag: “Well, I have taught them to believe
and study the Bible for a long time...and as we were talking things over at home, no
doubt, they got a lot of knowledge in that respect concerning idolatry, we have talked
about that.” A large portion of Gobitis’ testimony dealt with the issue of money and the
formula used by the complainants to reach the figure of $3000 for the children’s
education. The main cause for concern for the defense was the allocation of monies for
the drive back and forth from the school that the children were attending. Gobitis was
finally allowed to estimate his expenses at four cents per mile, yielding a grand total of
$1180.80 for past and future foreseeable costs should the children continue to attend the
Kingdom School and then progress to the Pottsville Business College. Eventually, the
court established that the sum of the expenses that Walter Gobitis would incur would

48 Manwaring, Render Unto Caesar, 93; Joint and Several Answers, Gobitis Record, 35.
exceed $3000 if the children were not allowed to return to their public schools; therefore, the court had jurisdiction in the case and the trial could continue.49

The next witness called to the stand as the day progressed was the young William Gobitis, age 12, who testified briefly of his religious beliefs and his conscientious objections to the flag salute. Under questioning, he testified that he loved his country and wanted to do everything he could to be a good citizen, but could not salute the flag.50

Lillian Gobitis, age 14, was the next to testify, and readily identified the Biblical passages that she used to justify her decision not to salute the flag. Like William, Lillian also testified briefly that she believed in being loyal to her country and had obeyed all school rules except for the flag-salute regulation.51

Frederick William Franz, a leading editor in The Watchtower Bible and Tract Society, was the last witness for the complainants and testified regarding Jehovah’s Witness doctrines dealing with the flag salute. The testimony was allowed over objections by the defense because the court found that it could have some bearing on the Gobitis’s sincerity. Franz clearly stated that if a Jehovah’s Witness saluted the flag, he or she would incur absolute destruction at the hand of God. He supported this assertion with biblical passages equating “bowing down” with all gestures of adoration, pointed to the refusal of the ancient Israelites to salute the banners they carried in battle, and noted the quasi-religious expressions of reverence often directed at the American flag.52

The defendants only called one witness, Superintendent Roudabush. He testified that there were several good parochial schools near Minersville that admitted non-

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49 Walter Gobitis, testimony (summary), Gobitis Record, 50.
50 William Gobitis, testimony (summary), Gobitis Record, 62.
51 Lillian Gobitis, testimony (summary), Gobitis Record, 64.
52 Frederick William Franz, testimony (summary), Gobitis Record, 73.
Catholics, often at little or no expense, but when questioned, could not testify as to whether these schools demanded the flag salute. He went on to state that, in his opinion, if a few children did not salute the flag while the rest of the students did so, “[I]t would be demoralizing on the whole group...the tendency would be to spread.” Roudabush went on to call the Gobitis children’s view of the pledge as religiously significant “probably sincerely held, but misled” and “perverted.” During the last stages of his testimony, Roudabush admitted, however, that loyalty could be taught without the flag salute and that, aside from the flag-salute issue, the Gobitis children’s behavior in school had been exemplary.\footnote{Charles Roudabush, testimony (summary), \textit{Gobitis} Record, 92-93.}

U.S District Judge Albert B. Maris handed down his final decision in the case of \textit{Gobitis v. Minersville School District} on June 18, 1938. Maris reviewed the established facts, eventually stating that the “enforcement of defendants’ regulation requiring the flag salute by children who are sincerely opposed to it upon conscientious religious grounds is not a reasonable method of teaching civics, including loyalty to the State and Federal Government, but tends to have the contrary effect upon such children.” He found that the Gobitis family’s expense in educating Lillian and William totaled $3200, and summed up his findings with the statement that “it is not for this court to say that since the act has no religious significance to us, it can have no such significance to them,” and the opinion that refusal to salute the flag “cannot even remotely prejudice or imperil the safety, health, morals, property, or personal rights of their fellows.” The decree permanently enjoined the various defendants and their agents from “continuing in force the order expelling the said minor complainants from the Minersville Public Schools and from
prohibiting their attendance at said schools and requiring said minor complainants to salute the national flag as a condition of their right to attend said schools.\textsuperscript{54}

\textit{The Circuit Court of Appeals}

The Minersville School Board voted unanimously to appeal the decision on June 29, 1938. On August 9, Judge Maris allowed the appeal, providing that the appeal would stay the effect of the injunction until a final determination could be reached in a higher court. The Appellants' brief to the Court of Appeals was much the same as they had submitted to the District Court; the Appellees' brief was overhauled considerably. Moyle strengthened his argument that the Gobitis children's convictions that the flag salute was religious in nature made it so for them, and that overriding these convictions made the compulsory nature of the flag salute a violation of religious freedom. He also argued that the state must prove the justification of the violation of a constitutional right, and that no such justification had been shown by the defendants. The American Civil Liberties Union also filed an \textit{amicus curiae} brief, arguing that it was obvious that the children had been expelled for religious refusal to salute and were therefore deprived of their religious liberty and that the compulsory salute did not cultivate patriotism and was like those used in Germany and Italy at the time.\textsuperscript{55}

The case was argued on November 9, 1938, but was not decided until November 10, 1939, when the United States Third Circuit Court of Appeals unanimously affirmed the decision of the lower court. Judge William Clark's opinion held that the Witnesses' beliefs fell within the "minimum" definition of "religion" set forth in \textit{Davis v. Beason}—


\textsuperscript{55} Manwaring, \textit{Render Unto Caesar}, 106-10.
“one’s views of his relations to his Creator, and to the obligations they impose...”

Judge Clark concluded that American society had overruled religious objections in three types of situations: “(a) wherever its mental or physical health is affected; (b) wherever a violation of its sense of reverence makes a breach of the peace reasonably foreseeable, and (c) wherever the ‘defense of the realm’ is imperiled.” He went on to note that almost all these instances had involved anti-social actions, rather than refusals to act, by religiously motivated individuals; only in cases involving military service and vaccination had the state penalized religiously motivated refusals to act. Clark also made the “clear and present danger” test relevant, bringing it from the freedom-of-speech sphere into that of freedom of religion, further supporting the appellee’s argument that the burden of proof must be upon the school authorities to support their infringement on religious rights.

On January 8, 1940, the Minersville School Board finally authorized their lawyer, Mr. Henderson, to file a petition for a writ of certiorari with the Supreme Court. The delay of nearly two months in filing was due to a suggestion from the State Department of Public Instruction that the board might be liable for the Gobitis children’s educational expenses even if it had been correct in expelling them; if this were actually going to be the case, they wanted to spare the expense of another appeal. Mr. Henderson was finally able to assure them that they could not possibly be held financially responsible regardless

56 Davis v. Beason, 133 U.S. 333 (1889): The court held that members of the Church of Jesus Christ of Latter-Day Saints (commonly known as Mormons) who at the time encouraged the practice of bigamy were committing a crime by swearing to the state oath in required to vote that they were not members of any organization that encouraged bigamy.

57 The “clear and present danger” test was developed in 1919 Supreme Court case of U.S. v. Schenk for proposed restrictions on freedom of speech, making such restrictions allowable only if “the words create a clear and present danger that they will bring about substantive evils Congress has a right to prevent.”

of the way the Supreme Court decided, and a Patriotic Association and the American Legion pledged to fund their appeal to the Supreme Court, so the School Board carried forward with its appeal. On March 4, 1940, the Supreme Court granted a writ of certiorari.\textsuperscript{59}

\textit{The Supreme Court: Briefs and Arguments}

In all, four briefs were filed with the Supreme Court. Rawle and Henderson filed the petitioners' brief for the Minersville School Board. The legal office of the Watchtower Bible and Tract Society filed the brief for the Gobitis family as respondents. Both the American Civil Liberties Union and the Bill of Rights Committee of the American Bar Association filed \textit{amicus curiae} briefs in support of the Witnesses.

In the brief for the Minersville School District, Henderson abandoned all jurisdictional questions posed to the lower courts and the procedural errors committed therein and focused on whether the expulsion of the children was a violation of their rights and whether their refusal to salute the flag was founded on a religious belief. He appealed strongly to the "secular regulation" rule, arguing that the Witnesses could not be exempt from a completely secular rule based on religious convictions. Henderson built a case around the public policy involved in making the salute compulsory, citing that the end, the strengthening of public morale, "should be fostered and encouraged"; that the method of strengthening the morale was a reasonable one; and that an adverse decision in the Supreme Court would cause many children, even those who were not Jehovah's Witnesses, to refuse to salute the flag and then the "morale of their respective communities, and ultimately that of the nation itself, will be shaken and demoralized."\textsuperscript{60}

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\textsuperscript{59} Manwaring, \textit{Render Unto Caesar}, 116-117.  
\textsuperscript{60} Brief for Appellants, \textit{Gobitis} Record, 1-33 (card four of seven).
Finally, Henderson attempted to show that the children’s belief was not only incorrect, but also that it was not religious because “the act of saluting the national flag at daily school exercises cannot be made a religious rite by the respondents’ mistaken interpretation of the Bible.” He went on to claim that the Bible actually approves of saluting the flag, citing six different Biblical passages, only one of which mentions saluting, and even then not in the context of a flag.\textsuperscript{61} The passages refer to giving the government the respect that it is due, but do not mention the specific ways in which this is allowable. He closed with the assertion that, with regards to Jehovah’s Witnesses as a whole, “they do not accord to others the religious freedom which they demand for themselves, claiming that there is no limit to which they may go when they think they are worshipping God.”\textsuperscript{62}

The brief for the Jehovah’s Witnesses was written by “Judge” Rutherford, then leader of the Witnesses, after Moyle, the previous counsel, was fired and expelled from the movement after becoming involved in a dispute with Rutherford. Rutherford’s brief focused primarily on the argument that the Minersville regulation violated the religious freedom guarantee of the Pennsylvania Constitution, and asserted that “the issue may be stated thus: The arbitrary totalitarian rule of the State versus full devotion and obedience to the THEOCRATIC GOVERNMENT or Kingdom of Jehovah God under Christ Jesus His anointed King.” He continued throughout the brief with this holier-than-thou tone,

\textsuperscript{61} Henderson cited the following verses: 1 Peter 2:17: “Honour all men. Love the brotherhood. Fear God, Honour the king.”; Romans 13:7: “Render therefore to all their dues: tribute to whom tribute is due; custom to whom custom; fear to whom fear; honour to whom honour.”; Matthew 22:21: “They say unto him, Caesar’s. Then saith he unto them, Render therefore unto Caesar the things which are Caesar’s; and unto God the things that are God’s.”; Mark 12:17: “And Jesus answering said unto them, Render to Caesar the things that are Caesar’s, and to God the things that are God’s. And they marveled at him.”; Luke 20:25: “And he said unto them, Render therefore unto Caesar the things which be Caesar’s, and unto God the things which be God’s.”; Matthew 10:12: “And when ye come into an house, salute it.”

\textsuperscript{62} Brief for Appellants, Gobitis Record, 1-33 (card four of seven).
and attempted to prove that any state law contrary to God’s law was void under the Pennsylvania Constitution, and that God’s law, in fact, forbade the flag salute. He defined religion as “a formal ceremony or reverence...bestowed upon, a higher power, real or supposed, thereby attributing to such higher power sovereignty, protection and salvation....” He argued that such a religious observance of the flag salute was strictly forbidden by Exodus 20:3-5\(^3\), and then attacked the rationale of the Minersville regulation by asking if the flag salute was so desirable, why not require it of all school children, or even from all citizens, ignoring the obvious differences between the legal status of adults and children. Rutherford’s brief, as a whole, did little to advance the cause of the Witnesses before the court, instead tending only to irritate with its heavy-handed religious accusations rather than focusing on the Constitutional issues.\(^4\)

The American Civil Liberties Union Brief was written by George K. Gardner, who had become very interested in the flag-salute issue through his involvement with Commonwealth v. Johnson, a flag-salute case pending in the Massachusetts Supreme Court when Gobitis was decided. His offer to brief and argue the case was gladly accepted by Moyle, and the two agreed to split the allotted oral-argument time. The brief was almost solely devoted to the religious freedom issue. He argued that the defendants’ right to hold and to act on their beliefs was protected by the Fourteenth Amendment. Gardner stated that it was settled by Hamilton v. Regents that “America secures to each individual the right to refrain from expressions which do violence to his beliefs.” He stated that although some people believe it is a sin to eat pork, dance, or attend public

\(^3\) Exodus 20:3-5 states: “Thou shalt have no other gods before me. 4Thou shalt not make unto thee any graven image, or likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth: 5Thou shalt not bow down thyself to them, for I the Lord thy God am a jealous God...”

\(^4\) Brief for Appellees, Gobitis Record, 1-33 (card five of seven).
schools, it does not make them religious rites. However, to compel them to do so, he continued, does violate the Free Exercise Clause, just as compelling the *Gobitis* children to salute the flag violates the Free Exercise Clause.\(^{65}\)

Gardner also argued that the children were deprived of their rights without due process of law because the "secular regulation" rule applied only to beliefs that would result in "overt acts against peace and good order." He further argued that the fact that refusal to salute the flag could lead to prosecution for delinquency would lead to a dominant emotion of fear rather than love of country in those persons who were compelled to salute, thereby rendering the purpose of the salute ineffective—an argument that wasn't quite germane, but addressed issues of popular concern. The ACLU brief made a substantial contribution to the solidarity of the Witnesses’ argument, but Gardner’s tendency to focus on delinquency proceedings largely overshadowed his Constitutional arguments and made the American Bar Association’s brief invaluable to the cause.\(^{66}\)

The American Bar Association’s Committee on the Bill of Rights’ brief focused primarily on clarifying the law of civil liberties. Written predominantly by Grenville Clark, it argued that authorities must demonstrate not only the reasonableness but the necessity of the infringement on the right of religious freedom. He argued that the regulation should be subject to the "strict scrutiny" approach rather than just "rational review," making it necessary for the Minersville School Board to prove that the regulation involved both a substantial legislative interest and that the means used to obtain the government interest were necessary, rather than just reasonable. He further

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\(^{65}\) ACLU *amicus curiae* Brief, *Gobitis* Record, 1-30 (card six of seven).

\(^{66}\) ACLU *amicus curiae* Brief, *Gobitis* Record, 1-30 (card six of seven).
stated that the Minersville regulation had not been and could not be justified because morale was not a valid legislative interest, and even if it were, the compulsory flag salute was neither a reasonable nor necessary means of promoting morale.  

Clark’s brief demolished the argument that attending school was a privilege and therefore subject to any restrictions that the school board approved by stressing the substantial nature of the injury suffered by Gobitis, denying that such an injury could be justified by a state’s proprietary interest in its schools. He also revoked the “no religious significance” argument by stating that “[t]he truth is that the attempt to adjudge whether or not a particular ceremony can have or does in fact have a religious significance is something beyond the competence of legislatures and courts.” Even more importantly, he logically and coherently argued against the secular regulation rule.

The oral argument before the court on April 25, 1940, was not well documented, with the exception of Rutherford’s argument, which was re-printed in Witness literature and emphasized the theological arguments against flag saluting. Rutherford chose to split his argument time with Gardner, who was treated rather roughly by the justices, with no further explanation forthcoming, other than Justice Frankfurter’s recognized tendency to badger the counsel. Henderson’s argument, as recalled by him at a later date, echoed the main arguments of his brief with special emphasis on the section dealing with the Fourteenth Amendment.

On May 20, 1940, between the oral argument in Gobitis and the handing down of the Supreme Court’s decision in that case, the same court handed down a decision on

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67 American Bar Association’s Committee on the Bill of Rights amicus curiae Brief, Gobitis Record, 1-29 (card six of seven), 30-43 (card seven of seven).
68 American Bar Association’s Committee on the Bill of Rights amicus curiae Brief, Gobitis Record, 1-29 (card six of seven), 30-43 (card seven of seven).
69 Manwaring,Render Unto Caesar, 131-32.
Cantwell v. Connecticut, in which three brothers had been convicted of selling Witness literature door to door without the permit required by state law. The Supreme Court reversed the decisions in an opinion by Justice Roberts, holding that the permit statute was an unconstitutional prior restraint on religious expression. The opinion held for the first time that the Fourteenth Amendment extended to freedom of religion the exact same measure of protection against state action which was secured against federal action by the First Amendment. It also held that the First Amendment

embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society...In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.

Though on the surface the decision supported the Witnesses’ case in Gobitis, it must be remembered that the permit statute was explicit in its interference with religious affairs and that the opinion laid heavy emphasis on the Cantwells’ right to free expression of the religious beliefs and as such presented no challenge to the secular-regulation rule.70

The Supreme Court Decision

The final decision in Minersville v. Gobitis was handed down on June 3, 1940; in an eight-to-one decision, the Court ruled that the flag salute requirement was not in violation of the plaintiff’s rights. Justice Felix Frankfurter wrote the majority opinion, which was divided into two main sections, the first dealing with the religious freedom issue and the second addressing the due process issue.

As for religious freedom, Frankfurter asserted that it was a historical concept and should therefore be confined to the meaning that it held for the Framers of the

Constitution. He stated that the "government may not interfere with organized or 
individual expression of belief or disbelief," but that the secular-regulation rule must still 
be able to limit expression if society is to function:

Conscientious scruples have not, in the course of the long struggle for religious 
tolerations, relieved the individual from obedience to a general law not aimed at 
the promotion or restriction of religious beliefs. The mere possession of religious 
convictions which contradict the relevant concerns of society does not relieve the 
citizen from the discharge of political responsibilities.

He cited Reynolds v. United States, Davis v. Beason, Selective Draft Law Cases, and 
Hamilton v. Regents71 in support of the secular-regulation rule, and refused to recognize 
any differences between this and other secular requirements that had been upheld against 
religious objections.72

Frankfurter then admitted that the case did not involve the "exertion of legislative 
power for the promotion of some specific need or interest of secular society," as do the 
other objectives of the police power, but stated that the "ultimate foundation of a free 
society is the binding tie of cohesive sentiment." He stated further that the flag is "a 
symbol of our national unity, transcending all internal differences..." that evokes "that 
unifying sentiment, without which there can ultimately be no liberties, civil or religious."
and therefore upholding such a symbol was a necessity. He went on to say that to debate 
educational policies would, in effect, make the Supreme Court the "school board for the 
country." He held that the school authorities were merely asserting their right to "awaken 
in the child's mind considerations as to the significance of the flag contrary to those

71 Reynolds v. United States, 98 U.S. 145 (1878): The Court held that George Reynolds could not practice 
bigamy although encouraged by his religion to do so. Davis v. Beason (133 U.S. 333, 1889); Selective 
Draft Law Cases, 245 U.S. 366 (1918): The Court held that draft laws neither established a religion nor 
implanted by the parent,” and that as long as the parents’ right to teach the children their own beliefs remains unmolested, it is good for the children to see the differing opinions. He also affirmed the Minersville School Board’s assertion that granting exceptions to those who claimed exemption on religious grounds would undermine the purpose of the entire exercise for the other children. As for the familial autonomy notion, Frankfurter dismissed it with the statement that “the preciousness of the family relation, the authority and independence which give dignity to parenthood, indeed the enjoyment of all freedom, presuppose the kind of ordered society which is summarized by our flag.” The judgment of the court below was reversed.73

Justice Harlan F. Stone wrote a dissenting opinion, in which he centered entirely on the First Amendment. He stated that the law “seeks to coerce these children to express a sentiment which, as they interpret it, they do not entertain, and which violates their deepest religious convictions,” and that such compulsion is prohibited by the Bill of Rights protections of personal liberty, freedom of speech, and freedom of religion. Stone recognized the importance of secular regulation precedents, but limited them to the necessary ends there involved, such as defense and crime prevention. He also asserted that even though national unity may be a compelling government interest, there are other ways to achieve that interest that would be less intrusive on the beliefs of the Witness children. The basic difference between Stone and Frankfurter’s opinions was that Frankfurter viewed suspiciously any regulation on its face “aimed” or “directed” at minorities; Stone extended such scrutiny to any “legislation which operates to repress” them.74

Their defeat in *Gobitis* seemed crushing to the Witness cause. They had achieved their goal of making the Supreme Court rule on the flag-salute issue only to have the decision (rather unexpectedly) go against them. Even though the court recognized the right of the Gobitis children to have religious beliefs and the right of their parents to teach them the tenets of their religion, the state's interest in promoting "national unity" won out. The flag-salute issue was far from settled, however. It would once again reach the Supreme Court within three years, when the Witnesses would be given another chance.

**Interim: From Prosecution to Persecution and Back**

*Reaction to Gobitis*

Press reaction to *Gobitis* was largely unfavorable, but not nearly as emphatic as the general public reaction to the decision. Prosecution turned to persecution during the summer of 1940 as Witnesses encountered waves of mob violence. Few groups triggered more intense suspicion and hatred during this time when Americans were paranoid of covert German invasion than the Jehovah’s Witnesses, due at least in part to the public’s view of them as unpatriotic.

Events in Texas seem to have been among the most vicious. On May 22, 1940, a crowd of four hundred citizens forced three Witnesses out of Del Rio after they attempted to distribute their literature and play recordings of Witness speeches. Throughout the summer of 1940, attacks continued with little or no interference by the police; at times, police officials even actively participated in the bullying. One of the worst anti-Witness incidents in Texas occurred in Odessa, where after a small regional meeting on June 2, 1940, approximately seventy-five Witnesses were arrested. The next day, they were
grown on the back of a truck to the county line and told to start walking. The crowd of citizens that followed them would not allow them to stop for rest despite the sweltering heat and the advanced age of some members of the group.75

The attacks were not limited to Texas, however. During the week of June 8, 1940, in Kennebunk, Maine, a newly established Witness congregation was victimized by a barrage of rocks and stones, two separate fires (one of which completely destroyed the Kingdom Hall), and numerous beatings. In Richwood, West Virginia, witnesses were tied together and forced to drink castor oil and march through the streets. One of the religion’s most prominent members remarked that his fellow Witnesses were “beaten, kidnapped, tarred and feathered, throttled in castor oil, tied together and chased through the streets, castrated, maimed, hanged, shot, and otherwise consigned to mayhem.” By the end of 1940, more than 1500 Witnesses in the United States had been the victims of 335 separate attacks. Throughout all of this persecution, the Witnesses themselves were generally the ones who were prosecuted (when there was anyone prosecuted at all). This prosecution was usually on trumped-up charges of flag desecration, failure to have the proper permit, or contributing to the delinquency of minors.76

The persecution extended into the economic realm as well. Adult Witnesses were fired from their jobs or forced to quit and were denied relief benefits. Even in the mid-1930s, Witnesses who owned their own businesses were targeted for boycotts and protests because their beliefs and practices had offended members of their community so much.77

75 Peters, Judging Jehovah’s Witnesses, 73-75.
76 Peters, Judging Jehovah’s Witnesses, 75-80; Manwaring, Render Unto Caesar, 163-66; Peters, Judging Jehovah’s Witnesses, 8-10.
77 Peters, Judging Jehovah’s Witnesses, 153.
The time period between *Gobitis* and *Barnette*, the case that would overturn it, was an especially hard one for Witnesses. Subjected to physical and emotional abuse, they were forced to rely more than ever on their spiritual guidance, the very thing for which they were being persecuted. Rather than backing away from their faith, however, they pushed onward, determined to find relief.

**Legal Developments**

At the beginning of 1940, Witness children in fifteen states had been expelled or were about to be expelled from school. By 1943, all forty-eight states had taken part in expelling more than 2000 Witness children. Many communities passed their flag-salute requirements in direct response to *Gobitis*; others simply found new zeal in enforcing old statutes.\(^78\)

On June 22, 1942, Congress passed a joint resolution on flag respect, which stated in part that “civilians will always show full respect to the flag when the pledge is being given by merely standing at attention.” Opponents of the compulsory salute claimed this as a victory, saying that Congress had therein expressed disapproval of mandating the flag salute. On July 18, 1942, Victor Rotnem, head of the Civil Rights Section in Washington, sent Assistant Attorney General Berge a memo which stated that the resolution

lays down a Federal standard with regard to a matter which is primarily a concern of the national government and there is, therefore, a very real question whether any local regulation…prescribing a different measure of respect can be enforced. For example: flag salute regulations of local school boards….\(^79\)

This memorandum was sent out to all United States attorneys. Jehovah’s Witnesses acted on this and came up with an alternative pledge of allegiance, and began

\(^{78}\) Manwaring, *Render Unto Caesar*, 187.

submitting presentations to local school boards requesting them to amend the flag-salute regulations to allow objectors to stand at attention and recite the alternate pledge rather than the one previously mandated. This approach worked well in some cases, allowing the Witness children to be readmitted to school. In *Commonwealth v. Nemchik* (1942), Vera Nemchik’s conviction for not having her five children in some form of school after they had been expelled from the public schools of Wapwallopen, Pennsylvania, was overturned solely on the basis of Rotnem’s interpretation of this Congressional resolution. The approach failed miserably in other cases, however. Three state attorneys general handed down official opinions explicitly rejecting Rotnem’s interpretation of the resolution, and in December 1942, the Minersville school board unanimously refused to re-admit the Gobitis children despite the strong urging on the part of the local United States attorney.\(^{80}\)

Officials in some areas, not content with simply expelling the children from school, sought further action against the children and their parents. In the period before June, 1943, there were five appellate decisions dealing with official attempts to deprive Witness parents of their children. All five decisions went in favor of the Witnesses: two contended that there was no “misbehavior” involved with refusal to salute the flag; one stated that any punitive action would have to be taken against the children rather than the parents; one stated that further punitive action would have to be taken against the parents rather than the children; and the last simply said that children could not be given to the husband in a divorce case simply on the basis that the wife was a Witness.\(^{81}\)

Three state decisions went directly against the *Gobitis* precedent. In *Brown v.*

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\(^{81}\) Manwaring, *Render Unto Caesar*, 190-93.
Skustad (1942), the St. Louis County District Court issued an injunction restraining further enforcement of the flag-salute statute. In *State v. Smith* (1942), the Kansas Supreme Court held that the Kansas flag-salute statute had never intended to make participation compulsory; and even if it had been so intended, it would have violated the religious freedom guarantee of the state Constitution. In *Bolling v. Superior Court* (1943), the Washington Supreme Court completely denounced the *Gobitis* precedent, ruling that a custom that is on its face inoffensive might have great religious significance to some people and that Washington's flag salute statute, as applied to the Witnesses, violated the religious freedom guarantee of the state's Constitution. 82

The willingness of state and appellate courts to ignore and even renounce the Supreme Court's ruling in *Gobitis* was yet another example of hostile reaction to the case, this time generally in favor of the Witnesses. The reaction of the general public was to strike out at the Witnesses; it was the duty of the court system to prevent this from happening as much as possible. The two purposes seemed destined to clash over and over again unless a change was made.

In the two years following *Gobitis*, the Witnesses lost eight cases in the Supreme Court. Not a single justice voted in favor of the Witnesses during this period; in fact, six of the eight decisions were handed down without argument or opinion, but this unanimity of the court regarding Jehovah's Witness cases would not last indefinitely.

On June 8, 1942, the Court handed down a five to four decision in *Jones v. Opelika*. This group of cases attacked the Constitutionality of license tax ordinances in Opelika, Alabama; Fort Smith, Arkansas; and Casa Grande, Arizona. The ordinances required payment of a specified tax before a license for book distribution or general

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82 Manwaring, *Render Unto Caesar*, 190-95.
peddling would be issued. Witnesses were arrested and convicted in all three cities for distributing their literature without the required license. Justice Stanley Reed held in the majority opinion that because the Witness activities fell into a category customarily subject to state control and taxation, they were required to obtain the proper license. The dissenting opinions stated that the amount of the taxes was oppressive and was clearly prohibitive as applied to the Witnesses and should be overturned. Justices Hugo Black, William Douglas, and Frank Murphy included in their dissent that even though they joined with the court's opinion on Gobitis, they "now believe it also was wrongly decided." When added to Justice Stone, who dissented in the first place, this made four justices in favor of overruling Gobitis.83

On October 5, 1942, Justice James F. Byrnes resigned, leaving the Court in an even split (four to four) on the flag-salute issue, and making the President's choice of a replacement extremely important. Roosevelt appointed Wiley Rutledge in February 1943. The same day that Rutledge was sworn in, the Supreme Court granted a rehearing for Opelika and granted certiorari for Murdock v. Pennsylvania, a new case that raised the same license tax issues as Opelika.84

In Murdock v. Pennsylvania, the Witnesses were fighting an ordinance in Jeannette, Pennsylvania, that required all door-to-door solicitors to acquire a license and pay a tax. By early 1940, more than fifty Witnesses had been arrested for violation of this ordinance, and Murdock v. Pennsylvania arose out of the arrests of eight Witnesses in February 1940. Douglas v. Jeannette, in which the lower court had issued an injunction restraining further enforcement of the ordinance, reached the court at the same time. On

83 Jones v. Opelika, 310 US 584 (1943).
84 Peters, Judging Jehovah's Witnesses, 239; Manwaring, Render Unto Caesar, 202-203.
May 3, 1943, the Supreme Court voted five to four to reverse the lower court's decision to uphold the ordinance in *Murdock v. Pennsylvania* and their own decision in *Jones v. Opelika*. The injunction in *Douglas v. Jeannette* was affirmed. In the *Murdock* opinion, the secular regulation rule was clearly overruled, this time by a majority.\(^{85}\)

These legal changes coupled with the intensely negative public reaction to the decision against the Witnesses in the Minersville case paved the way for *Gobitis* to be overturned. It appeared, based on their votes in the previously mentioned cases, that Justices Murphy, Stone, Black, Douglas, and now Rutledge were prepared to reconsider the flag-salute issue. On March 11, the same day that *Murdock* was argued, the Court heard oral argument in *West Virginia State Board of Education v. Barnette*, a test of the West Virginia flag-salute regulation.

**West Virginia State Board of Education V. Barnette, et al.**

*Opening Scenes*

Since 1923, West Virginia law had required that every school, public or private, instruct its students in history and civics. On January 9, 1942, the State Board of Education passed a resolution that all public school teachers and all students would be required to salute the flag and that refusal to comply would be considered an act of insubordination. The salute thus became a state-wide requirement in all West Virginia public schools. Because of this resolution, Witness children were expelled in nearly every county in the state in 1942. West Virginia law required all children to attend school between the ages of seven and fourteen, thereby forcing the parents of the children who had been expelled to seek alternate, private education for their children or risk being

fined or punished.\textsuperscript{86}

Walter Barnette and his two sisters, Mrs. Lucy B. McClure and Mrs. Paul Stull, had a total of seven children enrolled in the Charleston, West Virginia, public school system. All three families were quite poor, and the Barnettes had strong Witness ties going back at least a generation. By the end of January 1942, all seven children from the three families had been expelled for their refusal to salute the flag. In the spring of 1942, Horace S. Meldahl brought three separate actions in the West Virginia Supreme Court on behalf of the Witnesses seeking a prohibition against continued enforcement of the State Board of Education’s resolution. All three actions were denied without hearing, but with the Supreme Court’s decision in Jones v. Opelika on June 8, 1942, the legal scene shifted dramatically.\textsuperscript{87}

Meldahl, in conjunction with Hayden Covington (who had assisted the Witness cause in the Gobitis case), realized the change in legal scenery and filed a Bill of Complaint with the federal District Court for the Southern District of West Virginia in early August 1942. The suit was brought in the names of Walter Barnette, Paul Stull, and Lucy McClure, but it was, in fact, a class-action suit on behalf of these plaintiffs and all others in similar circumstances. The State Board of Education, its members individually, the Superintendent of Charleston Public Schools, and all persons acting on their behalf were named as defendants. The complaint alleged that the state School Board’s resolution was unconstitutional because it violated the guarantee of freedom of speech and religion, it violated the parents’ rights, and it deprived the parents of their liberty without due process of law. The complaint asked the District Court to issue a permanent

\textsuperscript{86} Manwaring, \textit{Render Unto Caesar}, 209-11.
\textsuperscript{87} Manwaring, \textit{Render Unto Caesar}, 210-211.
injunction forbidding the enforcement of any flag-salute regulation against the children of Jehovah’s Witnesses.\textsuperscript{88}

The State Attorney General and his assistant filed a motion to dismiss the claim on September 14, 1942, arguing that the \textit{Gobitis} precedent made this case unquestionable and that there was no substantial federal question to be decided. Meldahl, on August 27, filed a further motion requesting an interlocutory injunction pending the trial of the case. Also on August 27, District Judge Ben Moore set up the three-judge tribunal that would hear the case, enlisting the help of District Judge Harry E. Watkins and Circuit Court of Appeals Judge John J. Parker.\textsuperscript{89}

The hearing for Meldahl’s motion for an interlocutory injunction occurred on September 14. Assistant Attorney General Partlow argued on behalf of the Board and made it clear that he did not agree with the Board’s position but would defend its legality. Judge Parker openly criticized the Board’s position, imposing a recess on the hearing to allow the Board to consider his suggestion that they amend the regulation to excuse conscientious objectors from the ceremony. The Board voted against this amendment, and on September 15 the hearing resumed. Judge Parker refuted Partlow’s dismissal of the case through reliance on \textit{Gobitis}, citing the handling of that case in \textit{Jones v. Opelika}. The motion to dismiss was denied, and the defendants were allowed two weeks to file an answer, which they apparently never did. Both sides agreed that there was no point in proceeding to trial, since the facts of the case were not in question.\textsuperscript{90}

On October 6, 1942, the District Court handed down its decree, which

\textsuperscript{88} First Amended Complaint, \textit{West Virginia State Board of Education v. Barnette}, 319 US 624 in Records and Briefs of the United States Supreme Court (Microfiche edition: Congressional Information Services, 1943), 1-16 (card 1 of 8), hereafter referred to as \textit\textquotedblleft Barnette Record\textquotedblright.

\textsuperscript{89} Motion to Dismiss, \textit{Barnette Record}, 43-45 (card 1 of 8).

\textsuperscript{90} Manwaring, \textit{Render Unto Caesar}, 212.
permanently enjoined all defendants from requiring the plaintiffs or any other conscientious objectors to salute the flag or from expelling them for not saluting. The court’s decision was unanimous. Judge Parker wrote the opinion, stating that although a Supreme Court decision is absolutely binding on lower Federal courts, he felt that the Court’s handling of Gobitis in Jones v. Opelika warranted an exception. Parker rejected the “secular regulation” rule, holding that the statute infringed upon religious freedom when it overrode sincere religious scruples, rejecting any inquiry into the reasonableness of said scruples, much like the lower court’s rulings in Gobitis.91

State school authorities complied fully with the District Court order at once, and the Barnette, McClure, and Stull children were readmitted almost immediately. On October 23, the State Board of Education voted to appeal the decision to the United States Supreme Court. W. Holt Wooddell was the attorney assigned by the Attorney General’s office to argue for the Board. The appeal reached the Supreme Court in December 1942.

In all, five briefs were filed with the Supreme Court for the Barnette case. Covington filed a long brief for the appellees and Wooddell filed a very short brief for the State Board of Education. Three amicus curiae briefs were also filed, one each by the American Civil Liberties Union, the Bill of Rights Committee of the American Bar Association, and the American Legion, which formally entered the controversy for the first time. The briefs for the appellees had the purpose of keeping the five votes (Rutledge, Stone, Black, Douglas and Murphy) that they knew they were very likely to get. Brief writers for the State Board of Education had quite the opposite and much

91 District Court Decision, Barnette Record, 45-54 (card 1 of 8).
harder task: to induce one or more of the hostile justices to put aside their dislike of the flag salute in respect for *stare decisis*.

Covington’s Brief for the Appellees borrowed liberally from the briefs filed in *Gobitis* by the Bill of Rights Committee and by Henderson on behalf of the Witnesses. He began by emphasizing the loyalty and sincerity of the Witness children and parents, and the intolerable situation in which they were placed by the West Virginia regulation and statutes. He contended that the flag salute regulation, as applied to Witness children, violated religious freedom as protected by the Fourteenth Amendment, that the regulation violated the Due Process Clause of the Fourteenth Amendment regardless of the religious character of the objection, and that the *Gobitis* precedent was destructive in both its doctrine and effects and should be overruled. Covington argued that restrictions on religious freedom are presumptively invalid and as such should be subject to the strict scrutiny test: statutes are only sustainable if there is a valid government interest at stake and the means used are necessary to achieve the realization of the interest. He argued that freedom of religion could only be restricted when it presented a “clear and present danger” to the community, and then went on to another First Amendment right, stating that freedom of speech must include the freedom not to utter expressions of religious belief that one considers repulsive.  

Covington then moved on to the rights of parents, referring to the “inherent, Constitutional and absolute power of the parent to direct the spiritual education of the child, and his power to direct the secular education of the child in public and private schools.” Once finished with the section on the rights of parents, Covington launched into a vigorous attack on *Gobitis* and the effects it had produced. He pointed to the wave

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92 Brief for Appellees, *Barnette* Record, 1-63 (card 4 of 8) and 64-90 (card 5 of 8).
of anti-Witness persecution that had swept the country after that decision and noted the widespread attempts at prosecution of parents and expelling of children who refused to salute the flag. He cited the favorable appellate decisions the Witnesses had won in such cases and included a long list of law periodicals and newspapers which had openly criticized the Gobitis opinion. He finished with an attack on the American Legion’s amicus curiae brief, calling it “un-American, self-serving and biased” in this case.93

The American Bar Association’s Committee on the Bill of Rights filed an amicus curiae brief, which was written mainly by Professor Zechariah Chafee, Jr. of Harvard Law School on March 8, 1943. The brief stressed the Committee’s interest in the question of freedom of conscience, omitting any reliance on substantive due process of law, which had been a main part of the Gobitis brief. Other parts of the Gobitis brief were reiterated and strengthened, arguing against the secular-regulation rule by stating that “the compulsion of a child to participate in a ceremony which he considers idolatrous worship cannot be brushed aside as raising no issue of religious liberty.” In the final section of his brief, Chafee cited various aspects of the public reaction to the Gobitis decision that tended to discredit it. Chafee cited twenty-one law-review comments about the decision in Gobitis, seventeen of which were critical, and seventeen comments written before the decision, of which twelve attacked the compulsory-salute statute. He cited finally the state court decisions which ran contrary to the Gobitis opinion, and closed with the statement that

everything turns on the question whether there is any reasonable connection between the enforced participation of the children in a sinful ceremony and the

93 Brief for Appellees, Barnette Record, 1-63 (card 4 of 8) and 64-90 (card 5 of 8).
promotion of national unity. The more one looks squarely at the facts and probabilities, the better he can see that there never was a reasonable connection.\footnote{Amicus curiae brief of American Bar Association’s Committee on the Bill of Rights, Barnette Record, 1-26 (card 7 of 8).}

William G. Fennell wrote the amicus curiae brief of the American Civil Liberties Union. It opened with a strong plea that Gobitis be overruled, noting that a majority of the justices who were still on the Court who had participated in that case agreed with him. He showed that the Fourteenth Amendment protected religious freedom, that the appellee’s objections were religious in nature, and that the “privilege” argument was invalid under these circumstances. He sharply criticized Frankfurter’s deference to legislative judgment, stating that this was more than a mere case of educational policy, but that the School Board is “admittedly trying to compel [the children] to perform an act....” He argued that the Jehovah’s Witnesses fell into the category of “discrete and insular” as described in Justice Stone’s Carolene Products footnote, and that Justice Frankfurter’s reliance on the general public to remove legislators who persecuted them was unrealistic. He urged the court to give religious freedom the same preferred status as freedom of speech by applying the “clear and present danger” rule, under which the regulation was clearly unconstitutional:

> if grown men can advocate doctrines tending to overthrow the government under the constitutional guaranty of freedom of speech (so long as their advocacy does not present a clear and present danger to society), it is absurd to say that the failure of school children to salute the flag presents any greater danger to public safety.

Fennell also argued that by laying down a general federal standard governing flag respect, Congress had ousted all state power to deal with the subject. He argued that even if the Court should hold that there was some room for state regulation, the West Virginia regulation was still unconstitutional and inconsistent with the federal standard. The
Congressional standard accepted standing at attention as “full respect,” and the Civil Rights Section of the Justice Department had taken a similar stand; therefore, Fennell argued, the West Virginia regulation was unreasonable and should be struck down.\footnote{Amicus curiae brief for the American Civil Liberties Union, *Barnette Record*, 1-21 (card 5 of 8), 22-23 plus appendices (card 6 of 8).}

The Brief for the West Virginia State Board of Education’s brief, written by Wooddell, counsel for the appellants, argued that the Witnesses’ complaint should have been dismissed for want of a substantial federal question, in view of the *Gobitis* ruling. Wooddell quoted at length from Frankfurter’s *Gobitis* opinion, reproducing in full his statement of the “secular regulation” rule. He then attempted to counteract Covington’s emphasis on the various attempts which had been made to punish non-saluters and their parents by citing this sentence from the *Gobitis* opinion in support of such actions: “The preciousness of the family relation, the authority, and independence which give dignity to parenthood, indeed the enjoyment of all freedom, presuppose the kind of ordered society which is summarized by our flag.” He concluded by insisting that the Congressional standard on flag-saluting had made no change in the legal situation created by *Gobitis*. He further stated that the enactment in question was not a law, but merely an expression of congressional opinion, and that Congress had shown no intent to alter existing state law by expressing the opinion. In assuming that *Gobitis* would be automatically controlling, Wooddell appealed to the underlying value of *stare decisis*: that the court should be consistent, so that people might safely conduct their lives on the basis of existing decisions. It was, however, a very shaky leg to stand on in light of the events occurring in the years between the cases.\footnote{Brief for Appellants, *Barnette Record*, 1-15 (card 3 of 8).}

The American Legion’s *amicus curiae* brief was written by Ralph B. Gregg and
contributed little in the way of new argument. Gregg reiterated the contention that the Congressional expression had in no way impaired the legality of the state and local flag-salute regulations. Like the State Board of Education's brief, Gregg's brief relied exclusively on *Gobitis*, adding that the flag salute was not a religious rite and that the objective of the compulsory salute—the promotion of national unity—was important enough that the regulation should be upheld even if it was a religious rite.\(^\text{97}\)

On June 14, 1943—Flag Day—the Supreme Court handed down its decision in *West Virginia State Board of Education v. Barnette*, affirming the decision below by a six to three vote and expressly overruling *Gobitis*. Justice Jackson delivered the opinion of the court, which was joined by Justices Stone, Black, Douglas, Murphy, and Rutledge. Jackson began his opinion by stating the characteristics that distinguished this case from other Supreme Court cases. He first said that "[t]he freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual," a position which made the license tax cases inapplicable. He then stated that the issue was not prejudiced by the court's holding in *Hamilton v. Regents* that college students may not be excused from a military-training requirement on the basis of conscientious objections because attendance at the school was not optional, as was attending that particular college in *Hamilton*, and because of the state's special interest in militia service. With this distinction, he also brushed aside the "privilege" argument in stating that school attendance was mandatory rather than optional.\(^\text{98}\)

Jackson then launched his attack on *Gobitis*, disputing all four of what he believed to be Justice Frankfurter's main arguments. He first attacked Frankfurter's use of the

\(^{97}\) *Amicus curiae* brief for the America Legion, *Barnette* Record, 1-17 (card 6 of 8), 17-23 plus appendixes (card 7 of 8).

Lincoln dilemma⁹⁹ to justify governmental strength as an oversimplification which “lacks the precision necessary to postulates of judicial reasoning.” He said that if that line of reasoning were applied, it would resolve every issue of power in favor of those in authority. He next attacked Frankfurter’s statement that to interfere with the authority of educational officers “would in effect make us the school board for the country,” holding that “none who acts under color of law is beyond reach of the Constitution.” Jackson went on to condemn Frankfurter’s caveats regarding the limitations of judicial competence in educational matters and his desire to let the “forum of public opinion” and legislative bodies work out such issues by stating that “[t]he 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.” He then demolished what he called “the very heart of the Gobitis opinion,” the assumption that national unity was a substantial legislative interest and that the government may therefore compel its citizens to action under the guise of promoting that interest. He completely excluded questions of religious freedom from this argument, thereby avoiding the “secular regulation” rule. Instead, he asked whether West Virginia could compel any student to salute the flag rather than just those with conscientious objections. He stated that “[n]ational unity as an end which officials may foster by persuasion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement.”¹⁰⁰

He then went on to talk about “struggles to coerce uniformity of sentiment,”

⁹⁹ A famous quote by Abraham Lincoln which was cited in the Gobitis opinion: “Must a government of necessity be too strong for the liberties of its people or too weak to maintain its own existence?”
which was interesting because no one was actually asking the Witnesses to believe anything, an important distinction from punishing them for a belief they already held. He also neglected to address the distinction between the things which children can be compelled to do as opposed to those things which adults can be compelled to do. He closed by affirming the judgment enjoining enforcement of the West Virginia regulation and overturning Gobitis in beautiful language:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us. We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control. 101

Jackson’s aggressive assault on the Gobitis opinion, which was written by a man who was still his colleague on the Court, seems a bit unusual. As David Manwaring, author of Render Unto Caesar: The Flag Salute Controversy, states: “the arrangement and phrasing seemed to reflect a writer who had read the Gobitis opinion repeatedly, been thoroughly irritated by it, and spent long hours composing rebuttals to its more obnoxious points.” It is obvious that the majority of the justices wanted to overrule Gobitis as publicly and emphatically as possible, but the superior tone in Jackson’s opinion must be at least partially attributable to the poor relations on the Court between Frankfurter and his fellow justices. 102

Justices Black, Douglas, and Murphy wrote concurring opinions, each of which emphasized that any law governing religious freedom must pass the “clear and present

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102 Manwaring, Render Unto Caesar, 235.
danger” test, which it did not in the Barnette case. Nothing further was substantially added to the opinion of the Court.103

Frankfurter responded to Jackson’s attack with a long, drawn-out cry of outrage that the majority of his Brethren should have decided so wrongly in this case and in doing so ripped apart one of his opinions. He began by pointing out the limited nature of infringement on liberty in this case; he cited no further attempt at punishment of expellees or parents, and the desirability of the flag salute and the pledge. He invoked the “privilege” argument, stating that West Virginia did not and could not require children to attend public schools; they could get their education elsewhere if they wished. Frankfurter also emphasized the importance of judicial self-restraint, stating that “the Court has no reason for existence if it merely reflects the pressures of the day,” citing the fact that every justice except Jackson and Rutledge had voted at least once to uphold what the court was now striking down as “evidence” that they were merely reacting to public opinion. He rejected the notion that the Witnesses were being compelled to believe anything: “[c]ompelling belief implies denial of opportunity to combat it and to assert dissident views.” Frankfurter concluded his dissent with a strong warning against letting go of the “secular regulation” rule, which the Court in fact did not expressly do in its majority opinion.104

The contrast of the legal proceedings in this case to that of Gobitis is noteworthy. The Gobitis trial was extremely contentious, with both sides wrangling over every possible legal point, from the amount of money involved to the jurisdiction of the court. Even though decision after decision went against it, the Minersville School Board fought

with everything it had to keep the Witness children out of their schools. In *Barnette* the case went through quickly on admitted jurisdiction and facts, and the School Board complied immediately with the first adverse decision. The lack of enthusiasm on the part of the counsel for the West Virginia State Board of Education has already been noted, but this fails to explain the complacency of the Board itself. The driving personal convictions that were obvious in *Gobitis* were noticeably lacking in *Barnette*. It seems that neither the School Board nor its counsel really cared about the outcome of the case—at least not in outward appearance.\(^{105}\)

Child Labor v. Religious Freedom: *Prince v. Massachusetts*

Although the peak of Witnesses' persecution in the United States had passed after the summer of 1940 with the release of the *Gobitis* opinion, Witnesses continued to suffer brutal assaults and unjust arrests. They realized that despite victories like *Barnette* on their side, their civil liberties were still far from completely secured. Witnesses kept challenging the arrests that they considered unjust, as was the case in *Prince v. Massachusetts*.

One thing that made this case distinct from the other Witness cases, however, was the inclusion of a minor child as a defendant in the case. In contrast to the flag-salute cases, the child had now become one of the subjects in the case rather than simply an object of contention. That the existing child-labor law was designed to "protect" children was reflective of the growing awareness in America of the need to defend children and their rights. Although the Jehovah's Witnesses never challenged the general constitutionality of this law, they did claim that its application to their activities was unconstitutional. The Witnesses felt that in their case, the children that the law was
designed to help were actually being harmed by its application, and it was on these grounds that they challenged its applicability.

**Background of American Children’s Rights Movement**

The children’s rights movement in America has a history almost as old as America itself. One of the earliest “advancements” in the area of children’s rights in America was the loophole left by Massachusetts Bay colonists in their “Stubborn Child” Act of 1641. This loophole allowed children room for self-defense if the parents were abusive. Although this provision was quite limited, having such an exception in the pre-industrial world was considered quite remarkable.\(^{106}\)

There was some recognition of children’s rights during the colonial period; however, there was no real movement on their behalf. The creation of public schools and institutions for troubled children in the nineteenth century indicated the growing concern about children during that decade. Late in the nineteenth century and early into the twentieth century, a wave of reform swept through the country with the Progressive Era. This was the American birth of child-labor reform.\(^{107}\)

At the beginning of the American experiment, most children started to work as soon as they were able. Household work generally did not bring any comment from the larger community unless there were clear indications of abuse, and hard, even dangerous work did not of itself constitute abuse as defined in pre-industrial America. With the Industrial Revolution, though, the factory system created new conditions for children’s work. Factory owners preferred to hire children because they provided cheap labor and because they were thought to be more agile and less likely to go on strike. As more and

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more children went to work to help support their working-class families, the abuses and
dangers of the practice of employing children in factories became evident.108

The first reaction against the practice of employing children in factories was to
require children in factories to attend school for a certain number of hours. However, the
factory owners often got around the laws because the government generally required no
proof of age, and many of the statutes contained no enforcement provisions. There were
also many loopholes in the laws: parents could opt to negate the laws, and the laws did
not apply to orphans.109

Of all the Progressive-era reforms, none captured the attention of the American
public quite like child-labor reforms. Through the graphic photographs taken by Jacob
Riis and Lewis Hine of children working in horrible conditions, the American public
came to understand the impact of industrial society upon American children. The
National Child Labor Committee began its investigations in 1905, but it had mixed
success in getting legislation passed in the states to regulate the age at which children
could begin work and the hours that they could work. In 1912, the committee succeeded
in getting a bill passed by Congress that created the U.S. Children’s Bureau, which was
charged with investigating and reporting on all matters pertaining to child welfare. One
dramatic event that helped arouse sympathy for the child-labor reform cause was the
infamous fire at the Triangle Shirtwaist Company in March 1911. Over 140 people died
in the fire, most of them young women and girls, because the building had only one fire
escape.110

110 Hawes, The Children’s Rights Movement, 73.
A federal child-labor law, the Keating-Owen Act, was not passed until 1916, however, because of enormous opposition on the part of the factory owners. This act was struck down by the Supreme Court as unconstitutional in 1918. Child-labor reformers were immediately able to get a new bill passed, the Pomerine Amendment, which was struck down by the Supreme Court in 1922. Having failed twice to attain federal child-labor reform legislation, the proponents of such legislation sought a more indirect route, going back to compulsory school attendance laws as a way to keep children out of the factories; after all, if the children were in school, they could not be working in the factories. The Supreme Court did not uphold a child-labor regulation act until the Fair Labor Standards Act of 1938, which also created a minimum wage and maximum hours for all workers as well as prohibited the employment of children under age sixteen in industries engaged in interstate commerce and under eighteen in dangerous occupations. Although child labor was not entirely eliminated, the federal government made it clear that children under a certain age could be prohibited from engaging in certain "occupations," thus paving the way for the Massachusetts state law that would encounter intense conflict in the case of Prince v. Massachusetts.\footnote{\textit{Hawes, The Children's Rights Movement}, 102.}

\textbf{Prince v. Massachusetts}

\textit{Opening Scenes}

On December 18, 1941, Sarah Prince of Brockton, Massachusetts, was proselytizing on the public streets of her hometown, as she had done on numerous other occasions. This time she happened to be accompanied by her niece, Betty M. Simmons, who was then nine years old. Prince and Simmons were occupying the same street
corner, standing approximately twenty feet apart. Simmons was carrying a magazine bag on which was printed the following: "Watchtower explains the Theocratic Government" and "5¢ a copy." Inside the bag were copies of Watchtower and Consolation, and in one of her hands she held up a copy of each. As passersby approached, she exclaimed, "Remedy for World Distress" and "Read the Watchtower." When George S. Perkins, attendance officer of Brockton, happened upon the two at approximately a quarter of nine in the evening, Prince refused to give him the name and age of Simmons despite the Brockton statute which required her to divulge the information.\(^{112}\)

At the time of the conflict, Betty Simmons was living with her aunt, Sarah Prince, and attending the Shaw School in Brockton. She would later testify that she was on the street distributing literature because "I love the Lord and He commands us to." It was also her statement that before she went on the street that night, her aunt did not want to take her, but that she, Betty, started to cry and wanted to go. Upon Betty's own request, Prince gave her the bag and magazines.\(^{113}\)

Prince testified that she did tell her niece to get contributions for the magazines, but did not tell her where to stand. When Mr. Perkins, the Supervisor of Attendance, came over and asked for Betty's name, she said, "She belongs to me and you know her. She attends the Shaw School." Mr. Perkins replied, "I am sorry. I don't know her"; he finally asked Betty what her name was, and her aunt said, "Tell him to ask your aunt." It was at this point that Witness official Roger Flint joined the conversation and the group

\(^{112}\) Defendant's Substitute Bill of Exceptions, Commonwealth of Massachusetts v. Sarah Prince, 321 U.S. 158, in Records and Briefs of the United States Supreme Court (Microfiche edition: Congressional Information Service, 1944), 14 (card 1 of 5) hereafter referred to as "Prince Record."

\(^{113}\) Defendant's Substitute Bill of Exceptions, Prince Record, 14 (card 1 of 5).
discussed the validity of the laws regulating the Witnesses' actions. Prince finally took Simmons home, stating that it was late and she needed to get the child into bed.\textsuperscript{114}

\textit{The District Court: Pre-Trial Motions}

The Commonwealth of Massachusetts filed three complaints against Prince. The first asserted that she refused to give Perkins "such information being required for the proper enforcement of the law" by not telling him the name of the child. The second complaint alleged that she furnished the magazines to Betty Simmons, knowing that she intended to sell them. The third complaint stated that Prince was the custodian of Simmons and permitted her to work contrary to the law.

Prince filed a motion to dismiss all three complaints, arguing that they were invalid and void on their face and also as construed and applied in this case because they violated the First Amendment rights of both the defendant and the minor child and also violated the due process clause of the Fourteenth Amendment. The Motion further contended that the laws placed children and minors under a certain age in an unreasonable classification, thereby denying them the privileges and immunities of citizens of the United States. According to the Motion, the children were denied the unencumbered right of pursuing an occupation or calling, which was granted to those who were above the ages prescribed in the statutes. With regard to the charge that she failed to give the attendance officer Simmons' name, Prince responded that it was invalid because it "punishes for failure to give evidence against one's self contrary to the Fifth Amendment." The court denied the Motion, ruling that worship, religion, and Christianity were not the issues in this case, and noted that the statute would have prevented the child from selling even the \textit{Ladies Home Journal}. Sarah Prince did, in fact,

\textsuperscript{114} Defendant's Substitute Bill of Exceptions, \textit{Prince Record}, 14 (card 1 of 5).
furnish the magazines to Betty Simmons with the knowledge that she intended to sell them, said the court.\textsuperscript{115}

\textit{Trial-Level Testimony}

The first witness called to testify at the trial was George S. Perkins, who said that he was appointed on April 1, 1931, and that his duties were to “investigate all cases pertaining to school attendance, to enforce the law on minors, and in street trades to insist on enforcement of the Child Labor Laws.” He stated that he knew Mrs. Prince for two years prior to December 18, 1941, but that he did not know Betty Simmons prior to their encounter on that date. His account of the events of that night portrayed his own behavior as polite and inoffensive—“Mrs. Prince, please, this is necessary for me to ask you this”—and Prince’s behavior as rather abrasive—“neither you nor anyone else can stop me.” He stated that approximately one year before this encounter with Prince, he warned her about taking her sons to preach on the street with her, and that he even went to her sister’s house and explained the law to her there for half an hour, and also let her read the law for herself. After that incident, Shaw said that he mailed Prince a letter on October 4, 1940, again detailing the law. Regarding the incident involving Betty Simmons, he said that he later found out Simmons’ name by calling her school and giving them her description. The Commonwealth rested its case when Perkins finished testifying.\textsuperscript{116}

The defense began by calling Sarah Prince, who testified that she had resided in Brockton practically all her life (she was thirty-one years old), and that she was one of Jehovah’s Witnesses and that as such she was an ordained minister of the gospel and had

\textsuperscript{115} Motion to Dismiss, \textit{Prince Record}, 3-4 (card 1 of 5).
\textsuperscript{116} George Perkins, testimony, \textit{Prince Record}, 15-18 (card 1 of 5).
been such for approximately five years. She attained her ordination by taking her stand according to Isaiah 61:1-2 and Isaiah 43: 10-12.\textsuperscript{117} She testified that she had not wanted to take Simmons with her on the night in question, but that the child had cried and insisted. She claimed that neither she nor Simmons received any money or gave any literature away on that night, but that on occasions when Simmons did receive a contribution, it was given to Prince, who gave it to Roger Flint, Company Servant in charge of local distribution. She said that the “5¢ per copy” on the bag meant, “you can contribute 5¢ and have a copy. If you have not the 5¢ and are interested in reading, we will give it to you.” Prince testified that when Mr. Perkins approached them that night, he threatened to take them to court or have her arrested if she did not give him Sinimons’ name. She said that Roger Flint then joined the conversation, that they rehashed the law a little while longer, and that she later went home to put Simmons to bed. She said that she knew Mr. Perkins prior to that night because they had spoken regarding the flag-salute cases, but that on the occasion in October 1940 to which Mr. Perkins referred, he only took away some of the children’s books and did not tell her that it was against the law for her to allow her two children to accompany her. She further testified that the first letter she received from Perkins was dated December 26, 1941.\textsuperscript{118}

Roger M. Flint was the next witness called by the defense. He testified that he was one of Jehovah’s Witnesses and, as such, was an ordained minister of Jehovah God,

\textsuperscript{117} Isaiah 61:1-2: “The Spirit of the Lord God is upon me; because the Lord hath anointed me to preach good tidings unto the meek; he hath sent me to bind up the brokenhearted, to proclaim liberty to the captives, and the opening of the prison to them that are bound; To proclaim the acceptable year of the Lord, and the day of vengeance of our God; to comfort all that mourn”;

Isaiah 43: 10-12: “Ye are my witnesses, saith the Lord, and my servant whom I have chose: that ye may know and believe me, and understand that I am he: before me there was no God formed, neither shall there be after me. I, even I, am the Lord; and beside me there is no saviour.”

\textsuperscript{118} Sarah Prince, testimony, Prince Record, 18-21 (card 1 of 5).
the Company Servant of the Brockton Company of Jehovah’s Witnesses, and was in charge of the distribution of literature in Brockton. He further stated that he sent the money received from contributions on literature to the Watch Tower Bible and Tract Society, Inc. in Brooklyn, New York, and that he received no profit from the receipts. He emphasized that there was no profit whatsoever from the literature: “It is a Christian work, a charitable work. Jehovah’s Witnesses lose much money getting this message to people of good will.”

The last witness, Henry Judson, testified that he had been one of Jehovah’s Witnesses for thirty-three years and as such was an ordained minister, “spending full time in the Lord’s service.” He stated that he had supervised the receipt of contributions and the sending of them to the Watch Tower Bible and Tract Society, where they went into the general fund used to “carry forward the work of publishing books, booklets, and the distribution through countries of the world.” He insisted that the printing on the Consolation magazine which read “5¢ a copy, $1.00 for a year, $1.25 in Canada and Foreign Countries” meant “a person may have received his first copy for free or he may have contributed for his first copy. If he saw something there that interested him, for that amount or any more he may care to give, he would receive the Consolation magazine every two weeks.” Testimony ended with Mr. Judson.120

Trial Court Decision and Appeal to the Massachusetts Supreme Court

The records and briefs of the Supreme Court state only that the trial court found Prince guilty and levied a total fine of $45. Prince then appealed to the District Court of

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119 Roger Flint, testimony, Prince Record, 21 (card 1 of 5).
120 Henry Judson, testimony, Prince Record, 21-22 (card 1 of 5).
Plymouth County, on the grounds that the laws had been incorrectly interpreted to include Prince and Simmons.

In the Superior Court of Plymouth County, Albert and Covington filed a Motion to Dismiss on February 10, 1942, as counsel for the Witnesses. This Motion to Dismiss was almost an exact replica of the one filed in the trial court, repeating the ideas that the statutes were invalid because they violated the freedoms of speech, press, and worship of both the defendant and the minor child; that they placed children and minors under a certain age in an unreasonable classification; and that they denied minor children the unencumbered right of pursuing an occupation or calling. This Motion to Dismiss was denied, and there being no further motions, the court’s opinion was handed down on February 11, 1942.\textsuperscript{121}

Justice Stanley Qua’s opinion for the Massachusetts Supreme Court stated that Prince’s contention that the statutes involved did not apply to her activities or to those of Simmons rested in general upon the argument that these statutes were aimed at the regulation of street trades of well-known types commonly carried on by children for money and was therefore unsound. Qua held that the acts of Prince and Simmons fell within the literal terms of the statutes regardless of the statutes’ original intent, and that to exclude their activities would be to “rewrite the statutes and insert in them exceptions which the Legislature could have inserted if it had desired that such exceptions should exist.” The opinion also held that “there is nothing in that section that restricts its scope to selling with an ultimate net profit in view,” rendering void the Witness argument that there was no profit received from the transactions. The opinion also invalidated Prince’s

\textsuperscript{121} Motion to Dismiss, \textit{Prince} Record, 29-31 (card 1 of 5).
argument that Simmons was not employed by Prince or “working” on the night of the incident, finding that “exposing or offering for sale” the magazines violated the statute “whether or not that is carried on under a technical employment or for a wage.” On Prince’s contention that she was punished for refusing to furnish evidence against herself, Qua maintained that under the circumstances of this case, an answer to Mr. Perkins’s questions “would have furnished to the Commonwealth ready means for producing all the evidence required to convict the defendant” on the other complaints, which would make requiring her to give an answer unconstitutional. Finally, the court held that “we cannot say that the evils at which the statutes were directed attendant upon the selling by children of newspapers, magazines, periodicals, and other merchandise in streets and public places do not exist where the publications are of a religious nature.” The trial court’s conviction on the first complaint (regarding Prince’s refusal to give Simmons’s name to Mr. Perkins) was therefore overturned, and the convictions on the other two counts were affirmed.  

On May 14, 1943, Prince filed an appeal with the Supreme Court of the United States, backed all the way by the Watch Tower Bible and Tract Society, the corporate arm of the Jehovah’s Witnesses.  

*The United States Supreme Court: Motions and Briefs*

The Assignments of Error filed by the appellant included the ideas that the statutes interfered with the appellant’s right to bring up children in the “nurture and admonition of the Lord” and to direct their spiritual welfare and that the statutes denied

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122 Prince v. Commonwealth of Massachusetts, 64 S. Ct. 784 (1943).  
123 Prince v. Commonwealth of Massachusetts, 64 S. Ct. 784 (1943).
the appellant’s and her niece’s freedom of speech, press, and worship contrary to the First and Fourteenth Amendments.¹²⁴

The Brief submitted by the appellants to the Supreme Court presented three main arguments. The first was that the statute was unconstitutional because it denied the appellant’s right to

educate, teach, and direct the spiritual welfare of the child, to maintain a family, and to discharge her moral obligations as personal guardian of the child and the child is denied the right to the benefits of such a relationship, all contrary to the First and Fourteenth Amendments of the United States.¹²⁵

Albert and Covington argued that the prosecution of the appellant through “misapplication” of the statute was a step toward destroying the family, which they claimed was one of the oldest and most fundamental institutions of society and also the backbone of all orderly governments. They cited Meyer v. Nebraska¹²⁶ as evidence that the liberties secured by the federal compact were not merely negative freedoms, like the freedom from bodily restraint, but they also included positive freedoms, like the right to engage in the common occupations of life, to marry, establish a home, and bring up children. They did not claim that the right to maintain a family was absolute, however; they allowed that the State could intervene when there was an abuse by the parent or guardian in the exercise of the right. They contended that such was not the case in this instance. They based this contention on the argument that the police power is not supreme and is not unlimited.¹²⁷

¹²⁴ Assignments of Error, Prince Record, 47-48 (card 1 of 5).
¹²⁵ Brief for Appellants, Prince Record, 1-15 (card 2 of 5) and 16-43 (card 3 of 5).
¹²⁷ Brief for Appellants, Prince Record, 1-15 (card 2 of 5) and 16-43 (card 3 of 5).
They further stated that any statute that infringes on the freedoms guaranteed by the First Amendment is presumptively invalid, and that the burden falls on the authority asserting the police power to prove that the statute is a valid exercise of the power directed at some abuse of the Constitutional rights which would present a clear and present danger to the health, safety, or general security of the community. They further argued under their first main point that children are not considered wards of the state in a democratic society, and that except in the case of abuse of a privilege, parents must have the right of control over their children. Citing *Murdock v. Pennsylvania,*128 Albert and Covington argued that the court below “failed to discharge the burden placed upon the appellee to show an abuse of the parental prerogative or clear and present danger resulting from the activity in question.” They argued that the activity did not in any way impair the morals, education, welfare, physical, or mental capacity of children, nor did it adversely affect any interest of the state.129

The second major argument submitted in the same brief was that the statute “abridges and denies appellant’s and the child’s freedom to worship Almighty God according to the demands of Jehovah and their freedom of conscience contrary to the First and Fourteenth Amendments to the United States Constitution.” Here, Albert and Covington argued that the primary responsibility for the Christian education of children rests upon the parents, citing Deuteronomy 6:6-9130 as evidence that this was as God had

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128 *Murdock v. Pennsylvania,* 319 US 105 (1943): The Court found that the Jeanette ordinance requiring solicitors to purchase a license from the borough was an unconstitutional tax on the Jehovah’s Witnesses’ right to freely exercise their religion.
129 Brief for Appellants, *Prince* Record, 1-15 (card 2 of 5) and 16-43 (card 3 of 5).
130 Deuteronomy 6:6-9: “And these words, which I command thee this day, shall be in thine heart: And thou shalt teach them diligently unto thy children, and shalt talk of them when thou sittest in thine house, and when thou walkest by the way, and when thou liest down, and when thou risest up. And thou shalt bind them for a sign upon thine hand, and they shall be as frontlets between thine eyes. And thou shalt write them upon the posts of thine house, and on thy gates.”
intended. They also conceded that it was not only Jehovah’s Witnesses who had the right to train their children in religious matters, but also that Protestant, Jewish, and Catholic parents had the same right. They further contended that the Witnesses’ liberty was not confined to belief and opinion but extended to the practice of their belief, using this as a bridge to their next argument: if other denominations could have altar boys and young choir singers, the government could not say that only Jehovah’s Witnesses could not have young participants in their religious activities. They argued that parents were obligated as Jehovah’s Witnesses to allow their children to take their stand for Jehovah if they so chose, lest they provoke the children to anger, which would be a violation of Ephesians 6:4.\textsuperscript{131} Whether young or old, they stated that one who claimed to be a Witness MUST practice what he preached, and that the state had no authority to tell children at what age they could begin practicing the requirements of Almighty God. As evidence that children were fully capable of preaching the gospel, Albert and Covington cited the following verses: Jeremiah 1: 6-7; Psalm 8:2; Luke 8:16; and Luke 2: 46-47.\textsuperscript{132} The brief called the Massachusetts Supreme Court’s holding that the volunteer activity of children constituted work “distortions of the facts and the record.” They argued that the Christian activity of Betty Simmons...was just as necessary and appropriate to her spiritual welfare as is the approved practice in the recognized faiths of taking a child to mass, to Sunday School, to hear a sermon or permitting a child to sing in a church choir or act as altar boy. The only distinction that can be drawn between the rights to engage in the various activities is the forum.

\textsuperscript{131} Ephesians 6:4: “And, ye fathers, provoke not your children to wrath: but bring them up in the nurture and admonition of the Lord.”

\textsuperscript{132} Jeremiah 1: 6-7: “Then said I, Ah, Lord God! behold, I cannot speak: for I am a child. But the Lord said unto me, Say not, I am a child: for thou shalt go to all that I shall send thee, and whatsoever I command thee thou shalt speak.”; Psalm 8:2: “Out of the mouth of babes and sucklings hast thou ordained strength because of thine enemies, that thou mightest still the enemy and the avenger.”; Luke 8:16: “No man, when he hath lighted a candle, covereth it with a vessel, or putteth it under a bed; but setteth it on a candlestick, that they which enter in may see the light.”; and Luke 2: 46-47: “And it came to pass, that after three days they found him in the temple, sitting in the midst of the doctors, both hearing them, and asking them questions. And all that heard him were astonished at his understanding at answers.”

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They even cited *Barnette* as evidence that the state’s right to direct the patriotism of children is subordinate to their conscientious objections.\(^{133}\)

The Witnesses’ third main argument was that the statute was unconstitutional because “it abridges and denies appellant’s and the child’s privileges, rights and immunities secured by the Constitution in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.” They maintained that the statute, as construed, discriminated against Jehovah’s Witnesses and their children and persons of various orthodox faiths in the matter of directing the religious practice of their children, and that the classification of children as a special class that could not participate in the sale of literature on the street was arbitrary and made without substantial basis in law. \(^{134}\)

Albert and Covington closed by stating that “no freedom possessed and secured by the sovereign people is cherished like that of freedom to enjoy a family relationship and to worship God according to the dictates of conscience.” They also once again attacked the “presumption of validity” claim of the appellants, and maintained that the issues at hand were of importance to every American, not just Jehovah’s Witnesses. They claimed that the judgment of the court below “outrages the very thing the sovereign is now fighting to protect” and that it ought to be reversed.\(^{135}\)

The Appellee’s Brief, filed by Massachusetts Attorney General Robert Bushnell and his assistants, Ralph V. Rogers and William L. Macintosh, contained three major arguments. The first was that “[t]he Massachusetts statutes in question do not fall within

\(^{133}\) Brief for Appellants, *Prince* Record, 1-15 (card 2 of 5) and 16-43 (card 3 of 5).

\(^{134}\) Brief for Appellants, *Prince* Record, 1-15 (card 2 of 5) and 16-43 (card 3 of 5).

\(^{135}\) Brief for Appellants, *Prince* Record, 1-15 (card 2 of 5) and 16-43 (card 3 of 5).
the prohibition of any rule heretofore laid down by this Court." In support of this statement, the defendants' brief cited the following cases: *Schneider v. State, Cantwell v. Connecticut, Jamison v. Texas, Largent v. Texas, Jones v. City of Opelika, Murdock v. City of Jeannette*, and *Martin v. City of Strathers.* They claimed that these cases went no further than to support the propositions that a state may not restrict freedoms of the press and speech through the medium of taxation; that a state may not place an absolute restriction upon the dissemination of ideas through the medium of handbills on the public streets; and that the right to exercise the constitutionally guaranteed freedoms may not be subjected to previous restraint through the medium of censorship by a permit-issuing official.

The appellee's brief also cited *Barnette* (as did the appellant's), interpreting it to mean only that access to public education may not be denied to children who for religious reasons cannot comply with certain compulsory activities. They contended that the Massachusetts statutes in question did not violate any of these fundamental constitutional principles; that they didn't force the appellant to pay a tax in order to act in such a

136 *Schneider v. State,* 308 US 147 (1939): The Court struck down ordinances from four cities which prohibited the distribution of all types of flyers and handbills on the public streets by a vote of 8-1; *Cantwell v. Connecticut,* 310 US 296 (1940); *Jamison v. Texas,* 318 US 413 (1943): Jehovah's Witnesses were charged with distributing handbills on the streets of Dallas, Texas, in violation of a city ordinance. The court determined that the Witnesses could, in fact, distribute the handbills; *Largent v. Texas,* 318 US 418 (1943): An ordinance requiring a permit from the mayor, who was to issue the permit only if he deemed it "proper or advisable," was declared invalid as creating an administrative censorship; *Jones v. City of Opelika,* 319 US 103 (1943): In the first version of this case, the Court upheld a statute prohibiting the selling of literature without a license because it only covered individuals engaged in an commercial activity rather than a religious ritual. In the second hearing of this case, the Court ruled the practice of charging a flat fee for people distributing literature was unconstitutional. The freedom of press was not to be restricted only to those who can afford to pay the licensing fee; *Douglas v. City of Jeannette,* 319 US 157 (1943): The Supreme Court refused to prevent the City of Jeannette, Pennsylvania, from threatening prosecution of Jehovah's Witnesses who were violating a law requiring the licensing of people selling books even while that law was being challenged before the Supreme Court; *Martin v. City of Struthers,* 319 US 141 (1943): Reversed the convictions of Jehovah's Witnesses who had been fined under an ordinance that banned the door-to-door distribution of handbills.

137 Brief for Appellees, *Prince Record,* 1-24 (card 4 of 5).
manner; that they did not place an absolute restriction upon the appellant’s activities; that they did not submit her activities to censorship; and that they did not deal with access to public education. They also pointed out that each of the statutes that was struck down in the cases above was a regulatory measure, which they defined as “a statute or ordinance by means of which a state undertook to regulate overt activity on the part of the person proceeded against there under.” They claimed that this did not apply to their situation because the statute was not regulatory with respect to parents or custodians, which category would include Sarah Prince. 138

Their second main argument was that

[t]he statutes in question are valid state laws for the preservation of public order, to promote and protect the health, safety, morals and general welfare of the state’s minor children, and their specific provisions do not offend against the constitutional guaranties of the First and Fourteenth Amendments to the Constitution of the United States.

Here, Bushnell and his assistants claimed that the state, acting as parens patriae, was competent to lay down rules and regulations looking to invoke the police powers in protection of minor children. Citing Chesapeake & Ohio Railroad Company v. Stapleton, Sturges & Burn Manufacturing Company v. Beauchamp, Hammer v. Dagenhart, Bailey v. Drexel Furniture Company, and Pierce v. Society of Sisters, 139 they asserted that the states had the power to forbid the employment of minors and to punish

138 Brief for Appellees, Prince Record, 1-24 (card 4 of 5).
139 Chesapeake & Ohio Railroad Company v. Stapleton, 279 US 587 (1929): The Supreme Court ruled that a Kentucky statute that limited the age of employees in certain occupations and punishing its violations had no bearing on the civil liability of a railroad to an underage employee injured in interstate commerce; Sturges & Burn Manufacturing Company v. Beauchamp, 231 US 320 (1913): The Supreme Court held that a minor injured while operating a press could recover damages, despite the fact that he was working in violation of the law; Hammer v. Dagenhart, 247 US 251 (1918): The Supreme Court struck down an act passed in 1916 which prohibited the interstate shipment of goods produced in factories or mines in which children under age fourteen were employed or adolescents between ages fourteen and sixteen worked more than eight hours a day; Bailey v. Drexel Furniture Company, 259 US 20 (1922): The Supreme Court held that Congress could not impose a tax on goods made with child labor and shipped in interstate commerce because the tax was really a regulatory penalty that invaded the states’ police powers; and Pierce v. Society of Sisters, 268 US 510 (1925).
the forbidden employment; all questions relative to the care, control, and custody of minor children belonged exclusively to the state. They argued that the government had the right to restrain the freedom of the individual for the good of the social whole, and that the liberty of parents to bring up their children in the religious beliefs of the parents is a natural and personal liberty rather than a civil liberty. The distinction, they continued, was important because the Constitution did not protect natural liberties (defined as "the power of acting as one thinks fit, without any restraint or control unless by the law of nature...But every man, when he enters into society, gives up a part of his natural liberty") and did protect civil liberties. They continued to say that legislation had been enacted in all of the states that established limits within which a parent must control and care for his minor children. They insisted that the courts of the several states were unanimous in holding that state legislation for the protection of minor children, founded on the principle of the position of the state as *parens patriae*, was not an unconstitutational interference with the parent’s freedom of religion, even though such legislation violated a particular parent’s religious beliefs.\textsuperscript{140}

They also objected to the appellant’s contention that the Massachusetts statutes in effect established a classification of minor children, arguing that statutes were not open to the objection of class discrimination unless the classification was so lacking in any adequate or reasonable basis as to preclude the assumption that it was made in the exercise of the legislative judgment and discretion, calling the appellant’s reference to altar boys and choirs “a deliberate attempt at confusion.” They held that these particular statutes did not prohibit the appellant from permitting and encouraging her minor children to engage in any activity that she felt to be of a religious character in any place

\textsuperscript{140} Brief for Appellees, *Prince Record*, 1-24 (card 4 of 5).
other than on the public streets, and therefore could not be considered a violation of her Constitutional rights. They also contended that the moving consideration in passing the statute was the welfare of the minor children, not what may or may not please an individual parent. They stated their reluctance to turn to the Bible for backing as born “not out of the belief that the Bible supports their contention and denies our claim of the right of the state to govern individuals for the common good, but rather is it born out of our inherent consciousness of the holiness of the teachings of that great Book and a reluctance to despoil those teachings.” They also asserted that the appellant was trying to “shield” the case behind religion. ¹⁴¹

The third main argument advanced by the appellees was that the statutes do not deal with or concern in any manner or degree whatsoever the constitutional guaranties of freedom of religion, freedom of speech, or freedom of press, either by their specific provisions or through their application as construed by the Massachusetts courts; the scope and application of the statutes being strictly and solely limited to the regulation of designated activity of minor children of a specified age.

Here, Bushnell and his assistants claimed that freedom of religion as protected by the Federal Constitution extended only to freedom of thought and belief, not to unlimited freedom of action, citing Reynolds v. United States ¹⁴² as evidence of the Court’s opinion supporting this. They also claimed that the Court had always recognized that to allow absolute and unlimited individual freedom under the guise of freedom of religion would be to eventually establish an absolute freedom of individual action which would defeat the very freedoms sought to be made indestructible by our Constitution. They further asserted that this case was like those dealing with plural marriages and religious objections to vaccination laws where the good of the community had to outweigh the

¹⁴¹ Brief for Appellees, Prince Record, 1-24 (card 4 of 5).
¹⁴² Reynolds v. United States, 98 US 145 (1878).
good of the individual. They contended that the statutes had a reasonable relation to “some purpose which it is within the competency of the state to control and regulate,” meaning, of course, the restriction of child labor. They concluded with the statement that the statutes in question contained no trace of the objectionable “previous restraint” provisions of the many regulatory statutes previously struck down by the Supreme Court (mainly referring to the license-tax cases discussed in the previous chapter) because the statutes did not contain provisions providing that minors may sell magazines on the public streets after a public official had first determined the literature permissible to be sold.143

Supreme Court Opinions

Justice Wiley Rutledge delivered the majority opinion of the Supreme Court on January 31, 1944. Because both the trial court and the Massachusetts Supreme Court had already determined that Betty Simmons had “sold” the magazines, and that what she had been doing was, in fact, “work,” the Supreme Court considered only the question of whether the statutes were constitutional. They classified Prince’s complaint as resting squarely on religious freedom under the First Amendment, buttressed by the claim of parental right as secured by the due process clause of the Fourteenth Amendment. They saw the first freedom as belonging to Simmons, and the second as belonging to Prince: “Thus, two claimed liberties are at stake. One is the parent’s, to bring up the child in the way he should go, which for appellant means to teach him the tenets and the practices of their faith. The other freedom is the child’s, to observe these....” The opinion stated that the Court had recognized in Barnette the rights of children to exercise their religion and

143 Brief for Appellees, Prince Record, 1-24 (card 4 of 5).
the rights of parents to give them religious training and to encourage them in the practice of religious belief.\textsuperscript{144}

Rutledge further opined that through the \textit{Barnette} case and also \textit{Pierce v. Society of Sisters} and \textit{Meyer v. Nebraska},\textsuperscript{145} the court had established that it was extremely important that the custody, care, and nurture of children reside first in the parents, but went on to say that the family itself is not beyond regulation in the public interest. The opinion held that

acting to guard the general interest in youth’s well being, the state as \textit{parens patriae} may restrict the parent’s control by requiring school attendance, regulation or prohibiting the child’s labor, and in many other ways. It is not nullified because the parent grounds his claim to control the child’s course of conduct on religion or conscience.

The Court agreed that an ordinance that prohibited all adults from proselytizing on the streets would be unconstitutional, but held that simply because adults could not be barred from doing it did not mean that the ability of children to do it could not be regulated: “Such a conclusion would mean that a state could impose no greater limitation upon child labor than upon adult labor.” Rutledge held that the state’s authority over children’s activities is broader than over like actions of adults, particularly in matters of public activity and employment. He maintained that this was because “a democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens.” He stated that “[p]arents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.” He disposed of the “equal protection”

\textsuperscript{144} \textit{Prince v. Commonwealth of Massachusetts}, 321 U.S. 158 (1943).
argument by stating that "there is no denial of equal protection in excluding their children from doing there what no other children may do." The following statement summed up the court’s opinion: "what may be wholly permissible for adults therefore may not be so for children, either with or without their parent’s presence," and the judgment of the court below was affirmed.\textsuperscript{146}

Justice Frank Murphy wrote a dissenting opinion, which held that the attempt of the state of Massachusetts "to prohibit a child from exercising her constitutional right to practice her religion on the public streets cannot in my opinion, be sustained." Because Simmons was on the street of her own free will and did not receive any profit from the sale of the magazines, Murphy felt that she was engaging in a form of constitutionally protected religious expression. The opinion referred to the statutes as "indirect" restraints through parents or guardians on the free exercise of the religious beliefs of minors. Murphy agreed that the state had more power to regulate the expression of religious beliefs by minors than by adults, but argued that any statute that attempted to regulate First Amendment freedoms was presumptively invalid. He contended that the burden was therefore on the state to prove the reasonableness and necessity of the statutes, and that "[t]he burden in this instance, however, is not met by vague references to the reasonableness underlying child labor legislation in general." Murphy also contended that Simmons’ acts did not constitute a serious menace to the public, which would have rendered the "clear and present danger" test invalid in this case. He argued that Simmons did not even present a danger to herself, as she was under the watchful eye of her guardian.\textsuperscript{147}

\textsuperscript{146} Prince v. Commonwealth of Massachusetts, 321 U.S. 158 (1944).
\textsuperscript{147} Prince v. Commonwealth of Massachusetts, 321 U.S. 158 (1944).
Justice Robert Jackson wrote a separate dissenting opinion, with which Justices Owen Roberts and Felix Frankfurter joined. This opinion stated that the limitations which of necessity bound religious freedom only begin to operate when the religious activities begin to affect or collide with liberties of others or of the public. Jackson stated that “[r]eligious activities which concern only members of the faith are and ought to be free—as nearly absolutely free as anything can be.” The opinion closed with the idea that the Court was drawing a line based on age that cut across both true exercise of religion and auxiliary activities, which was “not a correct principle for defining the activities immune from regulation on grounds of religion.”

The decision in this case had proven to be a difficult one for the court. Justice Rutledge, author of the majority opinion, later confessed that he had been tempted to determine his vote in the case by flipping a coin and that he had nearly felt compelled to write the opinion the other way—to reverse the convictions rather than affirm them. As it stood, however narrow the margin of defeat, the Witnesses lost their case in *Prince v. Massachusetts.*

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Afterword

From *Gobitis* to *Barnette* to *Prince*, the Witnesses’ basic argument changed very little as they went from loss to win to loss in their Supreme Court battles. Major advancements in the area of child advocacy, however, facilitated changes in the ideology of the Court that allowed the cases to be decided in favor of the rights of the children rather than the religious rights of the parents. Even though these cases were not about the rights of the children to the Witnesses, as time went on they came to mean exactly that to the Supreme Court. Thus, although momentum seemed to be on the side of the Witnesses going into *Prince*, the Court placed emphasis on the rights of the children involved rather than on the religious rights of the parents, and the decision went the opposite way.

This shift in logic had its roots in the *Barnette* opinion, in which Justice Jackson, writing for the majority, asked if the state of West Virginia could compel any student to salute the flag, not just those with conscientious objections. Here, one begins to see the shift away from the focus on religious rights toward the contemplation of children’s rights as a whole. In *Barnette*, the rights of children and the rights of a religious minority
just happened to coincide. It is not until *Prince* that the rights of children and Jehovah’s Witnesses are seen as being at odds and the Court is able to take a firm stance on the side of children despite the parents’ religious objections.

With the *Prince* case, the Supreme Court explicitly laid the groundwork for the consideration of the rights of children in cases involving the rights of both parents and children. In the very opening of the section of the opinion that contained the holdings of the Court, Justice Rutledge recognized that “two claimed liberties are at stake. One is the parent’s…the other freedom is the child’s….” Rutledge then went on to explain that the *Barnette* case had helped establish that it was extremely important that the custody, care and nurture of children reside first in the parents, but that parental rights were not absolute because the states and the children themselves also had interest in the welfare of the children. Rutledge recognized the state as the party legitimately responsible for overseeing the interests and rights of children and, as such, the party with the authority to regulate the actions of said children until they reached the age of “full and legal discretion when they [could] make that choice for themselves.” In stating so explicitly the rights of children and the state’s responsibility to protect those rights, Rutledge enabled children’s rights to become the paramount issue when confronted with a situation involving conflicting interests of children and parents.\(^{151}\)


\(^{151}\) The children’s rights revolution in the 1960s and 70s also helps to explain the way that the *Prince* decision has held on so steadfastly. During this time, advocates like John Holt and Richard Farson urged equal legal treatment so that children would be treated as adults in legal matters, with full legal protections and obligations. Other advocates, such as Henry H. Foster, fought for more protection, services and care for children. At the 1970 White House Conference on Children, participants focused on children’s rights, a divergence from previous sessions of the conference held every ten years. In 1973, Marion Wright Edelman founded the Children’s Defense Fund which sought to pursue the same kind of prolonged advocacy for children that the NAACP provided for African-Americans. These advances in children’s rights coincided with the shift in logic on the Supreme Court and helped enable the *Prince* doctrine to survive. For further information on the Children’s Rights Revolution, see “What Ever Happened to
The battle between parental religious rights and children’s rights did not stop with the Court’s explicit holdings in the *Prince* decision, however; it did not even end the battle for the Jehovah’s Witnesses. The current issue concerning children’s rights and parental religious objections, which also involves Jehovah’s Witnesses, stems from their religious opposition to blood transfusions. Witnesses base their refusal to accept blood transfusions in part on the scripture in Genesis 9:4, Leviticus 17: 11-12, and Acts 15: 28-29. Their refusal is also grounded upon the possibility of one’s contracting diseases such as AIDS and syphilis through blood transfusions. Historically, their position emerged during the 1940s when they regarded blood transfusions as sacrifices to a false deity, in the form of supporting the United States in fighting World War II. Like the flag salute, then, an act that would seem of little religious significance to the general population constitutes something very much akin to civil religion for the Witnesses because of its link to supporting the federal government.

Although the United States Supreme Court has not yet heard a case regarding the blood transfusion issue, as blood transfusion cases began reaching state courts in the early 1970s, they began using the *Prince* opinion to determine the constitutionality of parents’ right to refuse blood transfusions for their children. For example, in 1972, with *In re Kevin Sampson*, the New York State Court of Appeals allowed the child of a Jehovah’s Witness to be transfused with blood over his mother’s religious objections. Kevin

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152 Genesis 9:4: “But flesh with the life thereof, which is the blood thereof, shall ye not eat.” Leviticus 17: 11-12: “For the life of the flesh is in the blood: and I have given it to you upon the altar to make an atonement for your souls: for it is the blood that maketh an atonement for the soul. Therefore I said unto the children of Israel, No soul of you shall eat blood, neither shall any stranger that sojourneth among you eat blood.” Acts 15: 28-29: “For it seemed good to the Holy Ghost, and to us, to lay upon you no greater burden than these necessary things; That ye abstain from meats offered to idols, and from blood, and from things strangled, and from fornication: from which if ye keep yourselves, ye shall do well. Fare ye well.”
Sampson, the child in question, was afflicted with a massive tumor on his face and neck known as von Recklinghausen’s disease, and as a result of this tumor, felt “so inferior and retarded that he [had] been exempted from school since the age of 9 and now, at age 15 [was] virtually illiterate.” The doctors in the case determined that his deformity could be vastly improved by surgery, and that if surgery were not performed, there would be practically no chance of his growing up into a “normal” adult. The surgery at issue would involve a considerable loss of blood, so blood transfusions would be necessary. Sampson’s mother was willing to consent to the surgery, but not to any blood transfusions, under which conditions the doctors refused to operate. The case was brought to trial under the issue of “neglect” on the part of the mother, although the court recognized that Sampson was well taken care of in all other aspects of life.¹⁵³

In this case, the New York State Court of Appeals affirmed the lower court’s holding that even though the condition posed no immediate threat to Sampson’s life, and despite the fact that the surgery would not cure him of the disease, but merely make it less noticeable in appearance, they could not “permit his mother’s religious beliefs to stand in the way of attaining through corrective surgery whatever chance he [might] have for a normal, happy existence....” In this opinion, the Court cited *Prince* as part of the precedent that led to this conclusion, stating that it was basically the “same issue presented here.”¹⁵⁴

The use of *Prince* as a guiding precedent in determining blood transfusion cases in favor of the child’s rights has continued through the present day. In 2004 with *The Matter of the Guardianship of L.S.*, the Supreme Court of Nevada held that their primary

¹⁵³ *In the matter of Kevin Sampson, a Child Alleged to be Neglected*, 317 N.Y.S.2d 641 (1970).
¹⁵⁴ *In the matter of Kevin Sampson, a Child Alleged to be Neglected*, 317 N.Y.S.2d 641 (1970).
responsibility was to protect the best interest of the child as well as the State's interest in the welfare of the child. In this case, a Witness couple gave birth to twins who were born with a condition called twin-to-twin transfusion syndrome, in which they were joined at the placenta, causing the blood flow to be directed more heavily toward one twin, L.S., and the other twin, H.S., to be anemic. After the twins' birth, H.S. remained critically ill, requiring a ventilator to help him breathe and medication to aid his circulation and pulse. Six days after his birth, H.S.'s blood platelet count dropped so significantly that the doctor felt that his life was in jeopardy if a blood transfusion was not performed immediately. Although a medical alternative was not available, H.S.'s parents would not consent to a blood transfusion because of their religious beliefs. The hospital performed the blood transfusion without parental consent.\footnote{In the matter of the guardianship of L.S. and H.S., Minor wards, Jason S. and Rebecca S., Appellants vs. Valley Hospital Medical Center and Michelle Nichols, R.N., Respondents, 87 P.3d 521 (2004).}

The next day, the hospital petitioned the court for temporary guardianship of both H.S. and his twin, who was significantly healthier than H.S. Their petition was based on "the substantial and immediate risk of physical harm, potential death, and the emergency circumstances surrounding the health and well-being" of both children. It requested special guardianship to allow them to make the medical decisions for the twin children, and asserted that a significant probability existed that H.S. and L.S. would require a blood transfusion within the next thirty days to survive. Nine days after the birth of the twins, the district court granted the hospital temporary guardianship of H.S. only for the "limited purpose of providing consent for the administration of blood and/or blood products" for thirty days; his brother, L.S., was doing significantly better and would not
likely require a transfusion, so the court did not extend the temporary guardianship to him.\textsuperscript{156}

The parents of the twins appealed this decision to the state Supreme Court on the basis that the district court erred when it granted temporary guardianship to the hospital under a statute which did not require state investigations rather than one which would have. The Nevada Supreme Court determined that the rights of the parents were protected just as well under one statute as the other, and proceeded to decide the case based on the child's best interest. Taking its lead from \textit{Prince}, the court stated that “[w]hile a parent has a fundamental liberty interest in the ‘care, custody, and management’ of his child, that interest is not absolute.” The court went on to state in its opinion that the state’s interest in the welfare of the children is strong enough to limit parental authority and may even permanently deprive parents of their children, thereby extending the principles set forth in the U.S. Supreme Court’s decision in \textit{Prince}.\textsuperscript{157}

The \textit{Prince} decision was not merely an anomaly in the line of logic of the United States court system. It was a deliberate attempt on the part of the Supreme Court to establish the rights of children as a viable interest in the court system, an interest that could even override one of the most protected rights in the Constitution, the right of religious free exercise. This case has been used as precedent by lower courts to such a degree that since then, the Supreme Court has not had to decide a case that challenged its doctrine and the trend toward the protection of children’s rights has continued. The \textit{Matter of the Guardianship of L.S.} illustrates that even in the twenty-first century the

\textsuperscript{156} In the matter of the guardianship of L.S. and H.S., Minor wards, Jason S. and Rebecca S., Appellants vs. Valley Hospital Medical Center and Michelle Nichols, R.N., Respondents, 87 P.3d 521 (2004).

\textsuperscript{157} In the matter of the guardianship of L.S. and H.S., Minor wards, Jason S. and Rebecca S., Appellants vs. Valley Hospital Medical Center and Michelle Nichols, R.N., Respondents, 87 P.3d 521 (2004).
Prince doctrine as determined by the Supreme Court in 1943 is still applicable in protecting the interests of child, even when it goes against the religious beliefs of the parents. The shift in logic from the decisions in Gobitis to Barnette to Prince was not temporary, but very much a lasting and dramatic change which would shape the decisions of the court to this very day.
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