

## *Gobitis and Barnett: The Flag Salute and the Changing*

### Interpretation of the Constitution

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In *Minersville School District vs Gobitis* (1940) the United States Supreme Court ruled 8 to 1 overturning lower court decisions barring states from implementing compulsory flag salutes. Three years later, the Supreme Court overturned that ruling with a 6 to 3 decision in *West Virginia State Board of Education v. Barnette* (1943). The cases were nearly identical and argued similarly but had different outcomes. How did the landscape of America change so drastically in a three-year period? First, the Supreme Court did not see a danger in the rise of nationalism in the United States or the social impact the ruling would bring. Second, the violence that followed *Gobitis* decision caused Jehovah's Witnesses, a pacifist group that was uninvolved in politics, to become more persistent in utilizing the legal system and more vocal concerning persecution of its members. Finally, the Supreme Court was not the same. A change in justices and a shift in the focus of the Court from economic matters to personal liberties created a different political landscape, when *West Virginia State Board of Education vs. Barnett* reached the Court in 1943.

Jehovah's Witnesses sought to spread their message and seek new members through distribution of the organizations magazines and books, playing recorded phonograph messages from organization leaders, and through public lectures. The group was frequently arrested for selling books without a license. Other areas developed specific ordinances to target Jehovah's Witnesses. One community in Georgia passed an ordinance that prohibited anyone calling on houses to offer any printed material.<sup>47</sup> Jehovah Witnesses trace their origins to a group founded in the late nineteenth century in Pittsburg, Pennsylvania. The theology grew out of the Christian Millerite movement, part of the Adventist movement that developed among Protestant Christianity, focused on the Second Coming of Christ.<sup>48</sup> Charles Taze Russell, the first President of the Watch Tower Bible and Tract Society, built on an Adventists prediction of the return of Christ in 1874. Russell argued that the return of the Christ had occurred as predicted, but was a spiritual event, not a physical one. Russell concluded through study and calculations that Christ would gather the faithful in a forty year "harvest" culminating with the arrival of God's Kingdom of a thousand years in 1914.<sup>49</sup> By 1881, the number of congregations following the teachings of

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1. Watch Tower Bible and Tract Society, *1975 Yearbook of Jehovah's Witnesses* (Brooklyn, New York: Watchtower Bible and Tract Society, 1974), 175.

2. Shawn Francis Peters, *Judging the Jehovah's Witnesses: Religious Persecution and the Dawn of the Rights Revolution* (Lawrence, Kansas: Kansas University Press, 2000), 28-29.

3. Detlef Garbe, *Between Resistance and Martyrdom Jehovah's Witnesses in the Third Reich*, trans. Dagmar G. Grimm (Madison, Wisconsin: University of Wisconsin Press, 2008), 29.

Russell had begun to grow. Russell established the Watch Tower Society to publish books and magazines, recruited pastors and sent the first missionaries to England and Canada.<sup>50</sup> Russell moved the headquarters to Brooklyn, New York in 1909 and formed the People's Pulpit Association. In 1914 another association based in London was added, the International Bible Students Association. The group had become a separate denomination and referred to themselves afterwards as the Bible Students. Many Bible Students believed the outbreak of World War I in 1914 was a sign that God's Kingdom on earth would soon arrive. With Russell's passing in 1916 and unfulfilled expectations of the arrival of God's Kingdom, the organization would pass into a tumultuous period.<sup>51</sup>

The Watch Tower Society elected Joseph Franklin Rutherford as its second president in 1917. Rutherford, an attorney known for his outspoken, antagonistic style, reshaped doctrine and placed the group in the midst of conflict. Under Rutherford's leadership, the Watch Tower Society changed its position on military service, became active in evangelizing, and adopted a negative viewpoint towards persons outside the denomination. Rutherford and seven other Watch Tower Society directors were arrested for sedition and sentenced to prison for a campaign during the summer of 1917 condemning "militarism and clerical support for the war." After serving nine months Rutherford and the directors were released. Later in 1920, the convictions were reversed.<sup>52</sup> In 1914, Russell recommended members seek religious exemptions as conscientious objectors when possible or seek non-combat positions. Russell did not encourage members to refuse military service or clash with authorities-but reaffirmed that Christians were not to kill.<sup>53</sup> After World War I, Rutherford called upon all Bible Students to participate in the proselytizing. Each congregation was assigned a territory and members reported time spent in effort to distribute materials house-to-house.<sup>54</sup>

Under Russell's leadership, members thought of themselves as preachers but did not engage in evangelizing. They believed as the end of the world neared the truth of Christ would be revealed, giving all an opportunity to take a stand on God's side.<sup>55</sup> Rutherford interpreted that that only those who conformed to God's requirements would survive the impending battle of Armageddon. Members sought to reach people with the message of God's Kingdom so they could take a stand for God and offer warnings to non-believers about the destruction to come.<sup>56</sup> Under Rutherford's leadership, the Watch Tower Society produced a series of lectures and tracts

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4. David T. Smith, *Religious Persecution and Political Order in the United States* (New York: Cambridge University Press, 2015), 91.

5. Garbe, *Between Resistance and Martyrdom*, 29-30.

6. Smith, *Religious Persecution and Political Order*, 94-96.

7. Garbe, *Between Resistance and Martyrdom*, 29-30.

8. James Penton, *Apocalypse Delayed: The Story of Jehovah's Witnesses, Third Edition* (Buffalo, New York: University of Toronto Press, 2015), 80-81.

9. Smith, *Religious Persecution and Political Order*, 91-92.

10. Garbe, *Between Resistance and Martyrdom*, 37.

proclaiming themselves as the only true Christians and condemning all other religious groups, particularly Catholics, for corrupting the Christian faith.<sup>57</sup> Rutherford reinterpreted the year 1914 as the year when God's reign had begun in heaven. God and Christ had waged a battle in heaven, defeating and casting Satan and his demons down to earth. True believers would face trials during the remaining time until the final battle of Armageddon between God and Satan. Satan sought to gather forces on earth and was using business, politics and religion as tools of global control.<sup>58</sup> During the 1920s, Bible Students dissatisfied with changes implemented by Rutherford broke off and formed independent groups. Members that remained associated with the Watch Tower Society adopted a new name, Jehovah's Witnesses, "derived from the Book of Isaiah" in 1931 to distinguish themselves from groups that had broken off from the denomination.<sup>59</sup>

### Saluting a Flag

The conflict involving the Jehovah's Witnesses and national symbols in the 1930s and 1940s originated in Germany. The Bible Students remained a small religious minority compared to the total population of Germany yet became the largest group outside the United States by 1926. German Bible Students accounted for over one quarter of Bible Students worldwide.<sup>60</sup> Jehovah's Witnesses faced persecution in Germany for their refusal to join the Nazi Party, to vote, to serve in the military, or to offer the "Heil Hitler" salute. In June 1933, the group was banned in Germany.<sup>61</sup> Members were arrested, children were removed from families, and some were sent to concentration camps.<sup>62</sup> Jehovah's Witnesses in the United States faced harassment and discrimination that intensified after clarification of the organization's doctrine on the flag salute. At the Washington, D.C., convention on June 3, 1935 a question was raised by school children about the organization's stand on the flag salute. The President of the Jehovah's Witnesses, also known as The Watch Tower Society, J.F. Rutherford told the school children, "to salute an earthly emblem, ascribing salvation to it, was unfaithfulness to God."<sup>63</sup>

At the beginning of school in the fall of 1935 children of Jehovah's Witness refused to take part in the Pledge of Allegiance. The response from schools was mixed. Students Barbara Meredith and Carleton Nichols refused to stand for the flag salute on the same day. Both attended schools in the state of Massachusetts. Meredith's teacher and school did not make an issue of her religious convictions

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11. Smith, *Religious Persecution and Political Order*, 98.

12. Garbe, *Between Resistance and Martyrdom*, 38-39.

13. Smith, *Religious Persecution and Political Order*, 97.

14. Garbe, *Between Resistance and Martyrdom*, 46.

15. John J. Michalczyk ed., *Confront! Resistance in Nazi Germany* (New York: Peter Lang Publishing, Inc., 2004), 26-29.

16. Watch Tower Society, *1974 Yearbook* (1973), 112-121.

17. *Ibid.*, 168-169.

whereas Nichols' school did. Nichols' refusal to stand for the flag salute became national news. J.F. Rutherford was asked for a statement by the Associated Press (AP) on the incident. Rutherford provided a statement, but AP did not publish it. In response, Rutherford spoke on the topic of the flag salute in a radio address on October 6, 1935. The radio address was also published by the Watch Tower Society as part of a thirty-two page booklet titled, *Loyalty*, released afterwards, clarifying doctrine on the flag salute. Jehovah's Witnesses viewed the ceremony of the flag salute as an act of worship forbidden by the Ten Commandments.<sup>64</sup> In the radio address, Rutherford compared Jehovah's Witnesses in Germany refusing to salute Hitler to the Jehovah's Witnesses in the United States refusing to salute the flag and drew parallels to the Old Testament. Rutherford, referenced the third chapter of the book of Daniel in the Bible when Hebrews in Babylon were cast into a furnace after refusing to bow down to an image, but emerged unscathed.

The present day attempt to compel school children and others who believe in and serve Jehovah God to salute any flag or sing any song is exactly in line with Babylonish law just mentioned. To salute a flag means, in effect, that the person saluting ascribes salvation to what the flag represents, whereas salvation is of Jehovah God. The Hitler government, a stench in the nostrils of all good people, requires all persons of Germany to give a certain salute and to cry out "Heil Hitler!" and those who refuse to do so are severely punished. At the present time more than twelve hundred Jehovah's Witnesses are in prison in Germany because of the commission of the 'grave offense' of declining to shout, "Heil Hitler!"<sup>65</sup>

Rutherford said of the United States flag, "The flag of the United States is not the flag of Jehovah God and Christ Jesus. It is an emblem of the power that rules the nation; and no one can truthfully say that God and Jesus Christ rule a government where crime is rampant." To Rutherford, all earthly governments were under the control of the Devil. "Men have organized governments, and Satan the Devil overreaches men and rules them because of their refusal to obey God, and hence the nations of the world are under the control of, Satan the Devil". Despite the belief that the Devil was in control of world governments, Rutherford called on Jehovah's Witnesses to obey "laws of the state or government that are not in conflict with God's law." Rutherford cited Luke 20:25, where Jesus commanded to "Render therefore unto Caesar things that be Caesar's and unto God, things which be God's."<sup>66</sup>

In the booklet *Loyalty*, Rutherford once again made the comparison between Jehovah's Witnesses in Germany refusing to salute Hitler to the Jehovah's Witnesses in the United States refusing to salute the flag.

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18. Ibid.

19. Joseph Franklin Rutherford, *Loyalty* (Brooklyn, New York: Watchtower Bible and Tract Society, 1935), 18.

eBook, accessed November 23, 2017, <https://archive.org/details/Loyalty>.

20. Ibid., 18-19.

...In Germany the people are compelled to say “Heil Hitler!” and to give a specific salute. The meaning of the phrase and the salute is that the person who does it is saying: “I look to Hitler for Salvation”; whereas the scriptures plainly show salvation is of God and none other.<sup>67</sup>

Rutherford continued to the topic of the flag salute in the United States.

Is it right to compel people to salute a flag? If anyone desires to salute a flag, that is his privilege, and no one has a right to say that he shall not salute it. But to compel people to salute a flag or any other image is wrong, and particularly if that person believes in God and Christ Jesus. For the Christian to salute the flag is in direct violation of God’s specific commandment.<sup>68</sup>

### *Minersville School District vs Gobitis*

After Rutherford’s radio address many more Jehovah’s Witnesses joined in abstaining from participating in the pledge of allegiance. Lillian and William Gobitis<sup>69</sup> were children of Jehovah’s Witnesses in seventh and fifth grade during the fall of 1935 and attended school in a predominantly Catholic community of Minersville, Pennsylvania. After the school superintendent learned of their refusal to participate in the pledge of allegiance, he sought a resolution from the school board requiring the flag salute as “part of the daily exercises.” Students who refused would be punished for insubordination. Lillian and William were expelled November 6, 1935. Their parents were forced to send the children to attend a private school.<sup>70</sup> Their father Walter Gobitis filed a suit against the Minersville School Board in the United States District Court for the Eastern District of Pennsylvania. The Gobitis family had incurred heavy expenses sending the children to a private school. In a case decided December 1, 1937, Gobitis unsuccessfully attempted to recuperate the costs of sending his children to a private school<sup>71</sup> from the district that had barred them from attending.<sup>72</sup> Although the court refused a financial settlement against the district, in a

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21. *Ibid.*, 8.

22. *Ibid.*

23. The proper spelling of the family name is “Gobitas”. Due to an error of a court clerk the name appears spelled as “Gobitis”. See Peter Irons (1988). *The Courage of Their Conviction*, New York: Free Press, ch 1.

24. Tony Konkoly. “Famous Dissents *Minersville School v. Gobitis* (1940)” Thirteen.org, accessed November 24, 2017,

[https://www.thirteen.org/wnet/supremecourt/personality/landmark\\_minersville.html](https://www.thirteen.org/wnet/supremecourt/personality/landmark_minersville.html).

25. In *Gobitis v. Minersville* 21 F. Supp. 581 (E.D. Pa. 1937) Gobitis sought to recover \$3,000 as expense incurred sending the children to a private school. Saving.org approximates the value of the amount in 2017 to be equivalent to \$51,735.43. <https://www.saving.org/inflation/>.

26. *Gobitis v. Minersville* 21 F. Supp. 581 (E.D. Pa. 1937) accessed November 24, 2017, <https://law.justia.com/cases/federal/district-courts/FSupp/21/581/1943607/>.

separate case they agreed that the rights of the students had been violated.<sup>73</sup> In June of 1938, the Court ruled that the plaintiffs were entitled to an injunction and that the Minersville School District had deprived them "...of their liberty without due process of law in violation of the Fourteenth Amendment." Participating in the flag salute should not be a condition of the right to attend a public school.<sup>74</sup> The Minersville School District appealed the verdict to the Third Circuit Court of Appeals. Once again, the court sided with the Jehovah's Witnesses. "Eighteen big states have seen fit to exert their power over a small number of little children." Judge William Clark recounted the history of the flag salute in the United States and recent actions of state legislatures regarding the flag salute. Clark argued that the compulsory flag salute as a method of teaching loyalty, "...is of at least doubtful efficacy and, as applied to appellees, plainly lacking in necessity." Judge Clark cemented his ruling with a quote from George Washington guaranteeing religious protections to Quakers, the first European settlers of Pennsylvania who had come to the colonies to flee religious intolerance. Clark concluded that the religious convictions of the students ought to be respected by the school district.<sup>75</sup> The Minersville School District appealed the case to the United States Supreme Court which agreed to hear it. Yet, the Supreme Court had refused to hear appeals on flag salute cases from Georgia, California, New Jersey and Massachusetts where lower courts had ruled in favor of school districts and against the Jehovah's Witnesses.<sup>76</sup>

#### The Political Landscape of 1940

Five years had passed since the expulsion of the Gobitis children from the Minersville school district. The rise to power of Adolf Hitler and the Nazi Party in Germany in 1933 that brought attention to national symbols and Jehovah's Witnesses position of neutrality now had worldwide consequences. In 1935, Hitler began the process of building an army in violation of the Treaty of Versailles. In 1936, thirty-five thousand German troops moved into the Rhineland, a buffer zone between Germany and France. In July, Hitler and the Fascist Dictator of Italy Benito Mussolini, sent aircraft to assist rebel forces led by General Francisco Franco in the Spanish Civil War. In November of 1936, Germany formed alliances with Japan and

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27. *Gobitis v. Minersville* 24 F. Supp. 271 (E.D. Pa. 1938) no 9727 gives current cost of Lillian's education as \$600 plus an additional \$600 in the future for a total of \$1200. William's Education had cost \$800 and would be an additional \$1200 for a total of \$2000. Gobitis had incurred \$1400 at that time equivalent of \$23,472.56 in 2017 per savings.org and would spend an additional \$1800 equivalent of \$30,179 in 2017 per <https://www.saving.org/inflation/>.

28. *Gobitis v. Minersville School Dist.*, 24 F. Supp. 271 (E.D. Pa. 1938) no. 9727, law.justia.com.

29. *US Court of Appeals for the Third Circuit - 108 F.2d 683 (3d Cir. 1939) No. 6862 November 10, 1939*. Writ of Certiorari Granted March 4, 1940, accessed November 24, 2017, <https://law.justia.com/cases/federal/appellate-courts/F2/108/683/1477941/>.

30. "Can Tots Be Forced To Salute Flag?" *Valley Morning Star* (Harlingen, Texas), March 5, 1940, accessed November 25, 2017, newspapers.com database.

Fascist Italy. By March of 1938 Austria was annexed and fell to the Nazis.<sup>77</sup> In the same year, the Third Reich launched a war of propaganda to stir discontent among ethnic Germans in the Sudetenland region of Czechoslovakia and advanced troops near the border in May. Throughout the summer Germany prepared for war and intensified propaganda against the Czech government. Czechoslovakia had been created in the settlement of the Treaty of Versailles, was developed as a parliamentary democracy, and presented an obstacle to the eastward expansion of the Reich. Desperate to hold off war at any cost, representatives of France and Britain agreed to concede territory to the Reich without the presence of the Czech delegation. The annexation of the Sudetenland in September marked a shift in the beginning of the march towards war. Germany sought war and would not be pacified with a section of Czechoslovakia. War had been postponed but Western powers had shown weakness, convincing the Reich that aggression eastward would not face interference.<sup>78</sup> The evening of March 15, 1939, Prague fell to Hitler's forces.<sup>79</sup> Italy invaded Albania in April. In August, Hitler signed a non-aggression pact with Joseph Stalin of Russia, containing secret protocols for the partition of Poland and division of territory of other European countries. On September 1, 1939, Germany invaded Poland, a French and British ally, which marked the beginning of World War II.<sup>80</sup> Denmark, Norway, Holland, and Belgium were invaded by German armies in the spring of 1940 and surrendered by the end of May. France surrendered to Axis powers June 22, 1940, leaving Britain the only nation in Europe opposing the Nazis.<sup>81</sup>

The United States became isolated and less formidable on the world stage during the 1930s.<sup>82</sup> In the United States, public sentiment opposed involvement in foreign wars. The Great Depression had crippled the nation economically, leading to a rise in nativist sentiments. In 1940, after eleven years of economic depression, 17 percent of the population remained unemployed.<sup>83</sup> Anti-Semitic and fascist groups sprung up across the United States during the 1930s. The Christian Front, an Anti-Semitic Catholic organization, flourished under leadership of public figure and radio personality Father Charles E. Coughlin.<sup>84</sup> Father Coughlin stoked fears of rising Communist sympathies in the United States.<sup>85</sup> William Dudley Pelly sought to form

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31. David Kennedy, *Freedom From Fear The American People in Depression and War, 1929-1945* (New York: Oxford University Press, 1999), 385.

32. Thomas Childers, *The Third Reich* (New York: Simon and Schuster, 2017), 401-416.

33. William I. Shirer, *The Rise And Fall of the Third Reich A History of Nazi Germany* (New York: Simon and Schuster, 1960), 448.

34. Kennedy, *Freedom From Fear*, 425-426.

35. William E. Leuchtenburg, *Franklin D. Roosevelt and the New Deal 1932-1940* (New York: Harper Perennial, 2009), 299.

36. Kennedy, *Freedom From Fear*, 393-396.

83. Doris Kern Goodwin, *No Ordinary Time Franklin and Eleanor Roosevelt: The Home Front in World War II* (New York: Simon and Schuster, 1994), 42.

38. Leuchtenburg, *Franklin D. Roosevelt and the New Deal*, 276-277.

39. Arthur M. Schlesinger, Jr. *The Age of Roosevelt The Politics of Upheaval* (Boston: Houghton Mifflin Company The Riverside Press Cambridge, 1960), 17-18.

a “Christian Militia” to advance pro-Nazi ideologies in the United States by forming the Silver Shirts after Hitler came to power in Germany.<sup>86</sup> In 1939, a pro-Nazi group, the German –American Bund, gathered at Madison Square Garden with 20,000 in attendance to protest alliances with European democracies, policies of Franklin D. Roosevelt’s administration, and “International Jewry.”<sup>87</sup> Isolationists held power in Congress and were supported by public sentiment. 1935 marked the eighteenth anniversary of the United States’ entry into World War I and was observed by peace rallies led by veterans groups and students. Congress passed neutrality legislation, preventing the sale of armaments to all nations involved in armed conflict. Despite the official policy of non-intervention, the United States continued to supply aggressor states with oil and other raw materials. The League of Nations took action against Italy for the invasion of Ethiopia and asked the United States, the supplier of half the world’s oil, to cut off shipments. The United States argued that oil did not classify as “arms, ammunition or implements of war” and refused to cut off shipments, although this would have disabled Mussolini’s army.<sup>88</sup> Roosevelt was reluctant to support an oil embargo due to public sentiment among Italian-Americans opposing the League’s sanctions against Italy.<sup>89</sup> When sanctions failed, the League of Nations blamed the United States. The outcome of the 1938 negotiation to annex the Sudetenland marked a turning point in foreign policy of the United States. Roosevelt realized that preparedness policy needed to be revised, including the neutrality acts put in place by congress. Of neutrality acts Roosevelt said, “We have learned that when we deliberately try to legislate neutrality, our neutrality laws may operate unevenly and unfairly—may actually give aid to an aggressor and deny it to the victim. We ought not to let that happen anymore.”<sup>90</sup> Revisions to the Neutrality Act in 1939 sought to insulate the Western Hemisphere from the war in Europe. This revision allowed the sale of arms to nations at war but required purchases be made in cash and transportation to be provided for the goods purchased. American ships were forbidden to enter ports of nations at war and blocked from entering areas deemed as combat zones, and American citizens were barred from sailing on vessels of nations at war.<sup>91</sup> As German forces advanced in May of 1940, Roosevelt appeared before Congress, requesting an additional \$1.3 billion to build a “two-ocean Navy” with a production goal of fifty thousand planes annually to supply allied forces.<sup>92</sup> Although the United States had not joined the war, they were a part of the war effort.

*Minersville School District v. Gobitis* at the Supreme Court

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40. Ibid., 80-81.

87. “Bund Denounces World Jews, Mocks F.D.R. and Cabinet” *The Kingston Daily Freeman* (Kingston, New York), February 21, 1939, accessed March 11, 2018, newspapers.com database.

42. Kennedy, *Freedom From Fear*, 393-396.

43. Leuchtenburg, *Franklin D. Roosevelt and the New Deal*, 220-222.

44. Kennedy, *Freedom From Fear*, 420-421.

45. Leuchtenburg, *Franklin D. Roosevelt and the New Deal*, 295.

46. Kennedy, *Freedom From Fear*, 446.



The United States was preparing to aid European allies, as Hitler and the German armies battled for control of Norway and Denmark in April of 1940 when the first flag salute case was argued in the Supreme Court. The school district argued in the plaintiff's brief that they had adopted the compulsory flag salute procedure lawfully and had a right to expel students for non-participation. Olin R. Moyle, who had been the attorney on the case, had been replaced by J.F. Rutherford, the president of the Watchtower Society. The respondent's brief, authored by Rutherford focused on Biblical arguments and the persecution the Jehovah's Witnesses faced with less of a focus on constitutional law. Two friends of the court briefs were submitted in the case on behalf of the Gobitis family. The American Bar Association's Committee on the Bill of Rights and the American Civil Liberties Union (ACLU) submitted briefs focusing on constitutional arguments.<sup>93</sup> The 8 to 1 decision issued in June 3, 1940, in favor of the Minersville School District overturned the lower court ruling. The majority opinion written by Justice Felix Frankfurter upheld the right of the school board to make decisions for local areas. The court he argued should not be, "...the school board for the country. That authority has not been given to this Court, nor should we assume it." Frankfurter argued that the flag salute served the purpose of, "the promotion of national cohesion." He argued that "National unity is the basis of national security."<sup>94</sup>

Hayden Covington, a member of the Watchtower Society's Legal Team who worked with Rutherford on the *Gobitis* case, credited the loss to the political climate of the war years: "Brother Rutherford argued that one, but he did a good job. The reason that it was lost was not because of Brother Rutherford, but because of the times we were in," Covington said. "The war was going on and the heat was on us from every angle."<sup>95</sup>

### **Aftermath of *Gobitis***

Although there is evidence that arguments in the case left some members of the Supreme Court conflicted, particularly Justice Frank Murphy,<sup>96</sup> they were unaware that the decision would unleash violence. The attacks on Jehovah's Witnesses that

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47. ACLU of Massachusetts, "The Story of the Bill of Rights Chapter 14", Rights Matter.org, 2006, accessed October 28, 2017, <http://www.rightsmatter.org/teachers/chapter14.html>.

48. *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), accessed October 1, 2017, <http://caselaw.findlaw.com/us-supreme-court/310/586.html>.

49. "Hayden C. Covington Interview" interview by Jerry Murray, No Location, November 19, 1978, transcript, archive.org, accessed November 4, 2017, [https://archive.org/stream/HaydenCCovingtonInterview/HaydenCovingtonInterview\\_djvu.txt](https://archive.org/stream/HaydenCCovingtonInterview/HaydenCovingtonInterview_djvu.txt).

50. Laura Krugman Ray, (2012) "Circumstance and Strategy: Jointly Authored Supreme Court Opinions." *Nevada Law Journal*, vol 12, no. 3, (2012): 730-773, accessed November 4, 2017, <http://scholars.law.unlv.edu/nlj/vol12/iss3/20>.

followed the *Gobitis* decision were a symptom of the fear and suspicion that had overtaken American society. Patriotic fervor, paired with fear and paranoia created a volatile situation in the United States. Americans realized that they were no longer beyond the reach of the warring armies abroad. In the Northeast, groups formed to protect communities from invasion by paratroopers. President Roosevelt passed the Smith Act requiring 3.5 million resident aliens to register with the government, and imposed fines and prison sentences for spoken, written, or printed words that could “cause insubordination, disloyalty, mutiny or refusal of duty ...” in the military.<sup>97</sup> Fear of conspiracy and secret subversives led individuals to investigate persons they suspected of being involved in activities to undermine the government. Members of local governments and law enforcement shirked their responsibility to hold order. Some joined mob violence against the Jehovah’s Witnesses, led by fraternal organizations, such as the American Legion. Attacks in Maine,<sup>98</sup> Illinois,<sup>99</sup> and Maryland<sup>100</sup> followed within two weeks of the *Gobitis* decision. Although violent incidents occurred throughout the United States, Jehovah’s Witnesses in Texas, faced some of the most violent and consistent persecution, including the lynching of O.L. Pillars in 1942.

By May of 1940 self-appointed groups had formed in Texas to investigate those they suspected as being members of the “fifth column”, subversives who sought to secretly undermine the war efforts.<sup>101</sup> The American Legion and Veterans of Foreign Wars formed secret committees at least as early as 1939 to investigative activity they deemed suspicious and forward the information officials in their organizations.<sup>102</sup> The American Legion organized, planned and carried out vigilante attacks in local communities on those they deemed subversive- frequently targeting Jehovah’s Witnesses. Through analysis of affidavits from victims, David T. Smith, author of *Religious Persecution and Political Order in the United States*, estimates that the American Legion were directly involved in 47 percent of incidents when authorities would not take action and over half of the incidents that involved mobs. Smith identifies The American Legion and other veterans groups in 42 percent of incidents involving assault.<sup>103</sup>

Law enforcement at a local, county, and state level were also involved in vigilante attacks on Jehovah’s witnesses. Less than a week after the *Gobitis* decision, a building where Jehovah’s Witness held meetings in Kennebunk, Maine was attacked

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51. Leuchtenburg, *Franklin D. Roosevelt and the New Deal*, 300-301.

52. Peters, *Judging the Jehovah’s Witnesses*, 76-81.

53. Watch Tower Society, *1975 Yearbook* (1974), 169.

54. “Jehovah’s Witnesses Hall is Raided in Flag Salute Battle” *Daily Times* (Salisbury, Maryland), June 20, 1940, accessed November 25, 2017, newspapers.com database.

55. “Pappy Urges All to Fight Unamericans” *The Brownsville Herald* (Brownsville, Texas), May 21, 1940, accessed November 25, 2017, newspapers.com database.

56. “San Benitans Will Discuss Fifth Column” *The Brownsville Herald* (Brownsville, Texas), May 20, 1940, accessed December 4, 2017, newspapers.com database.

57. Smith, *Religious Persecution and Political Order*, 135-136.

and burned by a mob of around 2,000.<sup>104</sup> Local and state law enforcement refused to provide protection after several incidents of mobs breaking windows, and hurling bottles and rocks through windows during meetings. Frustrated with a refusal by local authorities to offer protection or to reign in mob violence, although perpetrators were known to authorities, the Witnesses armed themselves for protection. In a later attack, Witnesses fired shots to clear a mob forming outside that launched projectiles through windows of the building. Two of the assailant were wounded and fled the scene. Local authorities refused to take action against members of the mob and instead charged two local Witnesses with assault with intent to kill, for firing shots to clear the mob. After local persons described as “drunk American Legion boys” learned that Witnesses had taken up arms in self-defense and wounded two members of a mob earlier in the evening, the group converged on the jail where the Jehovah’s Witnesses were being held. The mobs could not reach the Jehovah’s Witnesses inside, so instead marched on the Kingdom Hall. The building was ransacked and burned. Attacks spread as members involved in the Kennebunkport attack drove to nearby communities, breaking into residences of on Jehovah’s Witnesses and assaulting them in their homes. The press drew a connection between tactics used in Anti-Witness attacks and those used by the Ku Klux Klan. After several days of rioting and harsh condemnation in the press, Governor Lewis Barrows intervened to quell the violence. The summer vacation season was approaching and if order was not restored the economy would suffer.<sup>105</sup>

On June 16, 1940, a group of approximately 1,000 accosted a group of sixty-four Jehovah’s Witnesses in Litchfield, Illinois. Cars and property were destroyed in the incident. Four days later on June 20th a group attacked a meeting of the Jehovah’s Witnesses in Rockville, Maryland.<sup>106</sup> Law enforcement was at least complicit in the Rockville, Maryland attack. An estimated fifty persons took part in the incident according to a local patrolman. The leader of the group that launched the attack was mentioned by name in the local newspaper.<sup>107</sup> The county police chief was dismissed and two officers fined as a result of the incident.<sup>108</sup>

Members of law enforcement took part in vigilante attacks, sometimes actively though participation, or in other cases, confining chosen victims and turning them over to mobs, such as in the lynching of O.L. Pillars in 1942. Pillars and others had been arrested for preaching in Winnsboro, Texas. While waiting in the local marshal’s office, the mob entered and removed the group with no resistance from local authorities. The mob assaulted the group for the next six hours, trying to force

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58. “Sack Headquarters of Religious Sect” *The Daily Mail* (Hagerstown, Maryland), June 10, 1940, accessed November 25, 2017, newspapers.com database.

59. Peters, *Judging Jehovah’s Witnesses*, 77-81.

60. Watch Tower Society, *1975 Yearbook* (1974), 169.

61. “Jehovah’s Witnesses Hall is Raided in Flag Salute Battle” *Daily Times* (Salisbury, Maryland), June 20, 1940.

62. “Ten On Trial Today For Halting Meeting of Religious Sect” *Daily Times* (Salisbury, Maryland), July 22, 1940, accessed November 25, 2017, newspapers.com database.

them to salute the flag. First the mob dragged Pillars by a rope into the jail, then into the street where he was hung from a pipe that extended from the building. Pillars recalled losing consciousness and waking in the jail with a doctor examining him. The rope Pillars had been hung with broke, sparing his life. The doctor recommended he be transferred for treatment. After the doctor and marshal left, members of the mob who had carried out the attack walked through the jail to locate Pillars and see if he was “dead yet.” Pillars was transferred for medical treatment and survived the incident. The Federal Bureau of Investigation made inquiries about the incident, but the marshal and other officials who took part in the attack fled the state to escape prosecution.<sup>109</sup>

With authorities refusing to offer protection or hold order at a local level, Jehovah’s Witnesses appealed to the federal government for assistance and enlisted aid from the ACLU, which had authored a sympathetic brief in Gobitis. After dozens of complaints from Jehovah’s Witnesses to the justice department, Solicitor General Francis Biddle publicly condemned the outbreak of attacks in June of 1940. Biddle acknowledged the danger of the nation’s preoccupation with spying and subversion. Biddle called for Americans to be “alert and watchful but “cool and sane” when interacting with dissenters. “We shall not defeat the Nazi evil by emulating its methods,” Biddle said. A few weeks later before the Pennsylvania Bar Association, Biddle once again spoke about the persecution facing the witnesses. Biddle clarified that those who participated in Anti-Witness violence were violating federal civil rights statutes and could face prosecution. At the National Conference of Social Work, June 2, 1941, Biddle spoke about the continued persecution of Witnesses. Biddle was disturbed that local law enforcement allowed attacks to occur and some had led mobs against Jehovah’s Witnesses. “This betrayal of rights of citizens is done in the name of patriotism, and failure to salute the flag is made an excuse to desecrate the principles of which the flag is a symbol,” said Biddle. The Justice Department’s Civil Rights Section did investigate several cases, but were reluctant to press federal charges against those who perpetrated violent attacks.<sup>110</sup>

The ACLU became the Witnesses “staunchest ally,” offering substantial rewards for information to bring to justice those who perpetrated vigilante attacks. The rewards served in an unexpected way: as a deterrent against future attacks. The ACLU noted in one of its publication that where rewards were offered, attacks against witnesses ceased. Local branches of the ACLU, acted to safeguard freedoms of Jehovah’s Witnesses in their communities by reporting local abuses to state and federal authorities and securing indictments against law enforcement involved in violent attacks.<sup>111</sup> The annual survey of the ACLU reported that Jehovah’s Witnesses “were more frequently victims of mob violence in the United States during 1940 than Communists, Nazis Bundists, and all other minority groups combined.” From May

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63. Watch Tower Society, *1975 Yearbook* (1974), 188-189.

64. Peters, *Judging Jehovah’s Witnesses*, 96-102.

65. *Ibid.*

to September attacks had occurred in 335 communities, in forty-four states, with over 1,000 members assaulted- with little or no protection from local authorities.<sup>112</sup> The ACLU published a pamphlet on persecution suffered by the Jehovah's Witnesses in January of 1941. The booklet defended the organizations first amendment rights, refuted claims that they were Nazi or Communist sympathizers and included affidavits from members who had experience violence since the Gobitis ruling.<sup>113</sup> According to the ACLU booklet attacks rarely occurred in communities with populations greater than five thousand.<sup>114</sup> The ACLU published a second pamphlet in 1942. Although attacks declined in 1941, they continued to take place. Small communities suffered from violence more than urban areas. Violence occurred, "almost always in small communities where prejudice and action are easily organized, and hard to check," according to the report.<sup>115</sup> The ACLU linked the attacks to the mistaken belief that Jehovah's Witnesses were secretly foreign agents, "because they refuse on religious grounds to salute the American Flag."<sup>116</sup> Evidence showed that many attacks were planned and organized in advance and may not have been based on patriotic fervor alone. Smith, author of *Religious Persecution and Political Order in the United States* argued the refusal of the Jehovah's Witnesses to salute the flag was used as an excuse for the attacks. However, the attacks were based on the desire of the American Legion to reaffirm a position of power in local communities. The attacks fit the criteria of establishment violence in, "an attempt to maintain established position as a privileged group within a political order."<sup>117</sup>

### Jehovah's Witnesses and the Courts

Prior to the incidents involving the flag salute, Jehovah's Witnesses had faced legal challenges, particularly involving evangelizing. Jehovah's Witnesses stirred controversy due to publicly spreading fiery messages authored by the organization's president J.F. Rutherford. After the decision in *Minersville v. Gobitis*, Jehovah's Witnesses became targets of discrimination and violence for private practice of their faith, and being members of the organization. Even in these circumstances, many members continued to proselytize. During the trying war years Hayden C. Covington would lead the legal team of the Jehovah's Witnesses. Covington first heard the message of the Jehovah's Witnesses as a young man while living in San Antonio Texas- through a roommate's father- who introduced him to radio addresses of Judge

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66. "The Witnesses" *Middletown Times Herald* (Middletown, New York), January 31, 1941, accessed November 25, 2017, newspapers.com database.

67. American Civil Liberties Union, *The Persecution of Jehovah's Witnesses*, (New York: American Civil Liberties Union, 1941), 1-24, eBook, accessed November 23, 2017, <https://lincolnmullen.com/courses/church-state.2014/docs/aclu-witnesses.pdf>.

68. *Ibid.*, 4.

69. Peters, *Judging Jehovah's Witnesses*, 102.

116. "The Witnesses" *Middletown Times Herald* (Middletown, New York), January 31, 1941.

71. Smith, *Religious Persecution and Political Order*, 120-138.

J.F. Rutherford. Part of Covington's attraction to Rutherford's message was youthful rebellion. "I was myself fed up with the way things were going and like all young kids I was dissatisfied with the establishment", Covington said in a 1978 interview about his years with the organization. "As a lawyer I could see that he knew what he was talking about 100%. He was very persuasive and I was a ready, willing listener, and I was willing to join up with him in his opposition, for the truth." Covington was admitted to the bar in 1933 and became part of the Jehovah's Witnesses soon afterward. Covington practiced law in Texas and legally defended local members who had been arrested for evangelizing. Covington gained the attention of the organization's leadership in New York, after meeting with the San Antonio Mayor to secure the rights of local Jehovah's Witness to hold an "information march". Covington received an invitation to attend the upcoming convention of Jehovah's Witnesses at Madison Square Garden, in New York from J.F. Rutherford's secretary, who had visited San Antonio while negotiations with the mayor were underway. The 1939 convention that Covington attended turned violent as protestors from the Catholic groups attempted to break it up. Covington made several trips back to New York to aid in the defense of attendants who had removed those disrupting the convention. Later that year, Covington received an invitation from J.F. Rutherford to join the Jehovah's Witnesses legal department after the organization's attorney Olin R. Moyle quit.<sup>118</sup>

The move to New York in 1939 would change Covington's career from a personal injury claims and damage suits lawyer, to a civil attorney defending the Constitutional rights of an unpopular religious minority.<sup>119</sup> From 1939 to 1955 Covington led the Jehovah's Witnesses legal defense team, arguing hundreds of cases and appearing before the Supreme Court forty-one times. Beginning in 1942, Covington would serve as Vice- President of the Jehovah's Witnesses for nearly two decades.<sup>120</sup> Covington authored a booklet, released in 1946, *Defending and Legally Establishing the Good News*, instructing members how to deal with legal matters that could arise from evangelizing and practicing their faith.<sup>121</sup>

Covington's task was neither easy nor safe. After the verdict in *Minersville v. Gobitis*, cases poured into the legal department, making it necessary for Covington to work up to eighteen hours a day and travel back and forth across the country. In Connorsville, Indiana the need to leave quickly to appear at another case may have saved his life. Covington described Connorsville as, "...a hot bed of American Legion action. They ruled the whole town." Covington had intended to stay until the next day to hear the verdict of the case defending the right of Jehovah's Witnesses to proselytize and distribute literature. But Covington left to appear at a case in Maine.

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72. "Hayden C. Covington Interview" interview by Jerry Murray, November 19, 1978, archive.org.

73. Ibid.

74. Penton, *Apocalypse Delayed*, 106-107.

75. Ibid., 115.

After dark, crowds gathered in the streets seeking Covington, screaming and yelling that they were going to kill him. The case was not decided in favor of the Jehovah's Witnesses. Covington continued to battle the case, taking it to the Supreme Court of Indiana, where a ruling in favor of the Jehovah's Witnesses was announced on Pearl Harbor Day.<sup>122</sup>

Perseverance emerges as a central legal strategy of Jehovah's Witnesses. Unfavorable decisions were appealed. If the legal team did not get the results they wanted, they would take on another similar case and argue the issue again. Covington believed that the Supreme Court could reverse their decisions and reopen cases. Two issues that were at the forefront of the defense of Jehovah's Witnesses were license tax laws and resolutions requiring participation in the flag salute. Many communities required persons selling books or other products to purchase a license. Jehovah's Witnesses who asked for donations to cover the cost of published materials could be prosecuted for selling without a license. When Jehovah's Witnesses tried to purchase a license they were turned away and told they did not qualify for licenses.<sup>123</sup> A group of license tax cases were brought to the Supreme Court in *Jones v. City of Opelika* in June of 1942. Although the 5 to 4 ruling was not in favor of the Jehovah's Witnesses,<sup>124</sup> Covington was encouraged by Justice Frank Murphy's dissent acknowledging persecution the Jehovah's Witness had experienced.<sup>125</sup> Covington returned to the Supreme Court with a similar case the following year. In *Murdock v. Pennsylvania*, decided in May of 1943, the United States Supreme Court reversed its position and vacated the ruling of *Jones v. Opelika*. The Jehovah's Witnesses had also battled cases involving license tax since *Lovell v. Griffin* in 1938.<sup>126</sup>

*Jones v. Opelika* also encouraged Covington as it presented a way to bring a flag saluting case back to the Supreme Court. Three of the Justices who had sided with the majority in *Minersville v. Gobitis* included a separate dissent at the end of *Jones v. Opelika*, admitting they had wrongly decided the case. The government "has a high responsibility to accommodate itself to the religious views of minorities however unpopular and unorthodox those views may be."<sup>127</sup> Covington knew there was an opportunity for the Supreme Court to reopen and reverse the flag salute ruling. Covington brought an injunction case to the United States District Court in the District of West Virginia in order to halt enforcement of the state flag salute regulation requiring compulsory salute by children in the schools. By filing an injunction against

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76. "Hayden C. Covington Interview", interview by Jerry Murray, November 19, 1978, archive.org.

77. Ibid.

78. *Jones v. City of Opelika*, 316 U.S. 584 (1942), accessed October 8, 2017, <http://caselaw.findlaw.com/us-supreme-court/316/584.html>.

79. "Hayden C. Covington Interview", interview by Jerry Murray, November 19, 1978, archive.org.

80. Watch Tower Society, *1975 Yearbook* (1974), 178-180.

81. *Jones v. City of Opelika*, 316 U.S. 584 (1942) (*J. Murphy dissenting*), accessed October 8, 2017, <http://caselaw.findlaw.com/us-supreme-court/316/584.html>.

the enforcement of the measure and arguing it was unconstitutional, the case was assigned to a three judge Statutory Court with a right to directly appeal to the Supreme Court.<sup>128</sup>

### Changes at the Supreme Court

The landscape of the Court had changed since 1940. The makeup of the court and direction of the court had shifted from economic rights to individual rights. Two new Justices who opposed the *Gobitis* decision had joined the Court. Justice Charles Evan Hughes and Justice James Clark McReynolds had retired and been replaced by Justice Robert Jackson and Justice James Byrnes. Justice Byrnes left the Court to serve in the Roosevelt administration, whom was being replaced by Justice Wiley Rutledge. Justices Jackson and Rutledge would be a part of majority that would overturn *Gobitis*. Jackson had served as Attorney General prior to joining the Supreme Court. Jackson was aware of the violent persecution against the Jehovah's Witness and expressed disagreement with the ruling in a book published before joining the court. Jackson viewed *Gobitis* as a departure from the Court's, "usual vigilance," countering local governments when they sought to, "suppress free dissemination of ideas," that was essential for democracy. Rutledge, while at the U.S. Court of Appeals for the District of Columbia was a judge on a case that was similar to *Jones v. Opelika*. The U.S. District Appeal Court upheld convictions of two Jehovah's Witnesses for selling publications without obtaining licenses. Rutledge dissented arguing that the ordinance designed for regulating business was being used, "for suppression of unpopular religious and political causes."<sup>129</sup>

Justice Harlan Fiske Stone, the lone dissenter in *Minersville v. Gobitis* had been elevated to the position of Chief Justice.<sup>130</sup> Since 1937 the focus of the Supreme Court had begun to shift from regulation of the economy and business to matters involving individual rights. *United States v. Carolene Products*, footnote 4, authored by Justice Stone, served as an opening wedge for civil liberties and protections of civil rights of minority groups. In noneconomic cases, the Court might adopt a higher level of judicial scrutiny in cases involving minority groups, to ensure rights had not been abridged.

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### ***West Virginia Board of Education v. Barnett*—Background**

In early 1942, the West Virginia School Board enacted a requirement for all

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82. "Hayden C. Covington Interview", interview by Jerry Murray, November 19, 1978, archive.org.

83. Peters, *Judging Jehovah's Witnesses*, 230-248.

84. *West Virginia State Board of Education v. Barnett* 319 U.S. 624 (1943), accessed October 1, 2017, <https://supreme.justia.com/cases/federal/us/319/624/>.

85. Kermit Hall, Paul Finkelman, and James W. Ely, *American Legal History: Cases and Materials* (New York: Oxford University Press, 2011), 493-496.



students and teachers to take part in daily Pledge of Allegiance exercises.<sup>132</sup> The regulation quoted directly from the *Gobitis* decision and appeared to have been written specifically to target Jehovah's Witnesses. After the expulsion of a half dozen children of Jehovah's Witnesses near Charleston, they asked the West Virginia Supreme Court to block enforcement of the measure. When their request was turned down the families filed a request for an injunction in the Federal District Court for the Southern District of West Virginia.<sup>133</sup> The families argued that the law violated the due process clause of the Fourteenth amendment. The regulation would bar children from attending public schools and force families to pay tuition for private schools. This was a similar argument used by *Gobitis* at the District Court level. On October 6, 1942 Circuit Judge John Parker ruled in favor of the Jehovah's Witnesses and granted an injunction. Judge Parker defined the question to be answered as, "Whether children who for religious reasons have conscientious scruples against saluting the flag of the country can lawfully be required to salute it." Parker concluded, "We think that this question must be answered in the negative." Parker determined that in most cases a District Court was to follow precedent set by the Supreme Court. However, with the dissent in *Jones v. Opelika*, four of seven Justices who had participated in the case expressed the decision was "unsound." Justice Parker cited that speech could only be limited under the concept of clear and present danger. Parker concluded that school children refusing to participate in the flag salute for religious reasons did not meet the requirements of clear and present danger.<sup>134</sup> The Board of Education did not request a stay or an appeal. A law was passed by Congress in June of 1942 establishing a process for the flag salute under pressure from veteran's groups, specifically the American Legion. The federal requirements sought to discourage Americans from using the same style of salute used by the Nazis in Germany, while saluting the United States flag. The law allowed people to stand at attention with head coverings removed in respect of the flag- but did not require reciting the pledge. As a federal law, it preempted all state or local mandates. After Jehovah's Witnesses student began to return to schools, the State Board of education appealed to the Supreme Court.<sup>135</sup>

Arguments took place March 11, 1943. Briefs were submitted on behalf of the Jehovah's Witnesses by the ACLU and the American Bar Association's Committee on the Bill of Rights. The ACLU argued that only Congress could, "establish a ceremony for saluting the American flag and define and punish the offense of disloyalty to the common emblem of the United States." The American

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86. The Robert Jackson Center, "Opinion of the Court, *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (June 14, 1943)", 2017, accessed November 24, 2017, <https://www.roberthjackson.org/opinion/opinion-of-the-court-west-virginia-state-board-of-education-v-barnette-319-u-s-624-june-14-1943/>.

87. Peters, *Judging the Jehovah's Witnesses*, 245.

88. *Barnette v. West Virginia State Board of Education* 47 F. Supp. 251 (S.D.W. Va. 1942), accessed October 1, 2017, <https://law.justia.com/cases/federal/district-courts/FSupp/47/251/1799514/>.

89. Peters, *Judging the Jehovah's Witnesses*, 247-248.

Legion submitted a brief in support of the school board, arguing that mandatory flag salute regulations were within the legal jurisdiction of local and state authorities. Although Hayden Covington appeared frequently before the court, he devoted a large portion to his brief explaining the religious objections the Jehovah's Witness had to the flag salute. Covington criticized the reasoning and the results of the *Gobitis* decision. Covington targeted the suggestion that minorities "could not turn to the judiciary" when local measures passed by popularly elected officials infringed on rights. He balked at the idea of minorities trusting that the majority would correct legislation that is unconstitutional or violates liberties.<sup>136</sup>

*West Virginia State Board of Education v. Barnett* -Decision

The decision was handed down on Flag Day, June 14, 1943. The date selected signified the importance of the ruling. Chief Justice Harlan F. Stone, who had authored the lone dissent in *Gobitis*, assigned the majority's opinion to Justice Jackson. The original draft included a footnote mentioning criticism of the *Gobitis* ruling in legal journals and the outbreak of persecution afterwards. By the time the decision was issued, the footnote was revised to exclude mention of persecution of Jehovah's Witnesses. Jackson argued that the outbreak of violence may have still happened even if the ruling on *Gobitis* was different.<sup>137</sup>

Instead of answering the question of mandatory flag salute in context of conflict it caused for a minority religious group, Jackson chose a more broad approach based on an expanded view of the First and Fourteenth Amendment. In *Gobitis*, the court had, "rejected a claim based on religious beliefs of immunity from an unquestioned general rule." The Court had refused to interfere with authority held by the states. Jackson clarified the changing understanding of the Fourteenth Amendment. "The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted," he wrote. Jackson argued that some rights were granted to persons directly by the constitution. "One's right to life, liberty, and property, to free speech, a free press, freedom to worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections," Jackson wrote. Jackson concluded the portion refuting *Gobitis* by challenging whether the compulsory acts to encourage unity were permitted by the constitution. After recounting horrors of nationalism and intolerance through the centuries Jackson concluded, "Compulsory unification of opinion achieves only the unanimity of the graveyard."<sup>138</sup>

Jackson acknowledged that the principles might be clear, but decision was more difficult because, "the flag involved is our own." But a free society had room for differences of opinion. In the most well know passage from the ruling Justice

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90. *Ibid.*, 248-249.

91. *Ibid.*, 250-251.

92. *West Virginia State Board of Education v. Barnett* 319 U.S. 624 (1943), accessed October 1, 2017, <http://caselaw.findlaw.com/us-supreme-court/319/624.html>.

Jackson explained this idea:

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.<sup>139</sup>

Although Justice Jackson addressed the mandatory flag salute based on freedom of speech, other justices opposed the flag salute regulation on the basis of freedom of religion. In separate concurring decisions, Justice Murphy argued the law infringed on freedom of speech and freedom of religion. Justice Hugo Black and Justice William O. Douglas concluded that compulsory flag salute laws directly conflicted with free exercise of religion. In a joint concurring opinion, they reiterated their dissent in *Jones v. Opelika*. Of the flag salute law in question they wrote, “We believe that the statute before us fails to accord full scope to the freedom of religion secured to the appellees by the First and Fourteenth Amendments.” Justice Black and Douglas noted that the Jehovah’s Witness refused to salute the flag not as a sign of disrespect but based on their understanding of the Bible. Even under persecution the Witnesses had held to their beliefs. “The devoutness of their belief is evidenced by their willingness to suffer persecution and punishment, rather than make the pledge,” they wrote. Justice Black and Douglas also made an important observation that when ceremonies such as the flag salute were forced they could become a, “handy implement for disguised religious persecution.”<sup>140</sup>

A rise in nationalistic violence following the *Gobitis* decision provided a visible and frightening reminder that what happened in Europe could also happen in the United States. Jehovah’s Witness had to take greater action in the courts and through governmental channels to secure protection and civil rights. They also had to build alliances with those outside of their denomination, in their search for justice. The ACLU, the Jehovah’s Witnesses staunchest ally, continued to reach out to members of the government and religious leaders. The ACLU built a coalition of twenty-two religious leaders who endorsed ideas in a pamphlet condemning persecution of the Jehovah’s Witness including members of the Catholic clergy.<sup>141</sup> This was something that likely made the Witnesses uncomfortable -- although it was necessary. The Court had shifted from an economic focus to an emphasis on personal liberties in the late 1930s, but few cases had come forward to test what the new attention would look like. *Barnette* offered an indication of which arguments would be most effective in personal liberty cases. The court had shifted to a more modern

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93. Ibid.

94. *West Virginia State Board of Education v. Barnett* 319 U.S. 624 (1943) (J. Black Concurring), accessed October 1, 2017, <http://caselaw.findlaw.com/us-supreme-court/319/624.html>.

95. Peters, *Judging Jehovah’s Witnesses*, 107.

interpretation of the Fourteenth Amendment – rights in the Constitution were more firmly guaranteed at both the Federal and State level. Finally, *Barnett* enshrined the First Amendment as the foundation for American freedom.