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Reinventing Civil Liberties:
Religious Groups, Organized Litigation, and the Rights Revolution

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B.A., Brandeis University, 2002
M.A., Emory University, 2008

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An abstract of
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Abstract
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Religious Groups, Organized Litigation, and the Rights Revolution
By Leah Weinryb Grohsgal

This dissertation argues that the twentieth-century reach of civil rights owes much to a religious group, the Jehovah's Witnesses. Beginning with the First World War, Jehovah's Witnesses carried out acts of civil disobedience, calculated to inspire court cases. Insisting on their rights to publish their religious opinions (which predicted an imminent Armageddon and condemned other religious groups), to proselytize in public, and to refuse to salute the flag, the group asserted that the rights to publish and to preach were inseparable from their First Amendment right to believe. "Judge" Joseph Rutherford, the group's leader and a lawyer himself, concluded that the best remedy was to bring "test cases" in the courts. The Jehovah's Witnesses adopted a strategy of civil disobedience and litigation which would be implemented widely later in the twentieth century. This dissertation argues that Jehovah's Witnesses were, in fact, pioneers of the twentieth century "rights revolution."

While historians have acknowledged that the Jehovah's Witness Supreme Court cases in the 1930s and 1940s were key to the expansion of religious liberty, neither the intentionality of this legal strategy, nor its linking of freedoms of speech, press and religion, have previously been made clear. Recognition of the strategic litigation implemented by Jehovah's Witnesses calls into question the broader story of civil rights in America. The religious liberty cases pursued by the Jehovah's Witnesses were critical to the protection of other civil rights. The converging strategies of the Jehovah's Witnesses, the ACLU, and other groups demonstrate that religious liberty, far from being an afterthought, was integral to the twentieth century transformation of civil rights.

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Table of Contents

Introduction: Reinventing Civil Liberties

The First Amendment holds exceptional sway over the American imagination. Free speech, religious liberty, and other rights are invoked frequently, and are thought to form the backbone of American liberty. Yet "liberty," like most of the rights contained in the First Amendment, is an indefinite term. What is certain is that, for most of American history, the liberties specified in the First Amendment were limited in scope, and rarely used effectively in favor of individual rights. Modern conceptions of "civil liberties" are, in fact, something of a twentieth century invention. As the scholar Samuel Walker has suggested, "What millions of Americans think of as ancient and hallowed rights are of very recent origin."[1] Although they had been incorporated into the United States Constitution over a century before, civil liberties were, essentially, reinvented during the twentieth century.

The American Civil Liberties Union is, perhaps, the most well-known agitator for civil liberties in the United States. Scholars have argued that the First World War, and the formation of the ACLU, were touchstones in the modern era of civil liberties. The government's response to widespread fears of foreign invaders and dangerous political sentiments was the passage of the Espionage and Sedition Acts in 1917 and 1918—legislation which criminalized speech and publications critical of the United States. Authorities arrested thousands of agitators, imprisoning hundreds. Their trials were usually quick and laden with the rhetoric of patriotism. The ACLU, founded in part to protect these economic and political dissenters, attempted to counter this use of patriotism, styling the Constitutional rights to free speech, press and assembly—

[1] Samuel Walker, *Hate Speech: The History of an American Controversy* (Lincoln, Nebraska: University of Nebraska Press, 1996), 12.

guaranteed by the First Amendment—as the real locus of Americanism. "Jails and prisons," ACLU founder Roger Baldwin later remarked, "have often been the cradles of liberty."[2] ACLU agitators worked to broaden these rights against government encroachment.

However, the twentieth century reach of First Amendment rights also owes much to an extraordinary, and unconventional, religious group: the Jehovah's Witnesses. Between the First World War and the 1980s, various groups challenged the meaning of constitutional guarantees of equal rights. While scholars have described the expansion of civil liberties in secular terms, the legal transformation owed much to this religious group, working in concert with other civil rights organizations. Jehovah's Witnesses argued that the right to practice their religion was inseparable from the right to believe, and that free speech, press and assembly were integrally connected with religious liberty. In the 1930s and 1940s, Jehovah's Witnesses argued and won dozens of cases before the United States Supreme Court—prompting decisions which would change the meaning of religious liberty, and civil rights in general, forever.[3] Nor did Jehovah's Witnesses simply find themselves in the courts. For three decades, members of the group used calculated acts of civil disobedience as a springboard for legal action. This is a dissertation about how the Jehovah's Witnesses joined with civil libertarians, labor activists, and other religious groups to redefine the freedoms all Americans enjoy.

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[2] Roger N. Baldwin, "Human Rights: The Last Twenty Years in the U.S.," speech, Brandeis University, June 8, 1969; Roger Nash Baldwin Papers, 1885-1891, Box 4, Folder 23, "Correspondence—Brandeis University—1962-1969"; Public Policy Papers, Department of Rare Books and Special Collections, Princeton University Library.

[3] See "Appendix I: Cases Involving Jehovah's Witnesses Decided by the U.S. Supreme Court, 1938-1955."

Zechariah Chafee, Jr. first expounded on the changed condition of civil liberties in America resulting from the First World War.[4] Chafee maintained that the bounds of civil liberties, and of free speech in particular, responded to social demands, rather than being abstract legal constructs. Since Chafee's influential work, scholars have considered the First World War to be a turning point in attitudes toward the freedom to express unpopular ideas. Civil liberties became a national political issue with the crisis over the suppression of dissent during the war. This was an era in which Americans' commitment to civil liberties was challenged by widespread dissent and pervasive minority ideologies, from socialism and communism to religious pacifism. The imprisonment of political dissidents during the First World War spurred the beginnings of modern conceptions of civil liberties.[5] The American Civil Liberties Union was founded in 1920, bringing together several organizations and many civil libertarians who had fought to defend free speech during the war.[6] The guarantees contained in the Bill of Rights, argued these civil liberties activists, must reflect the breadth of opinion which existed in American society, and must be enforced in law.

Yet the civil libertarians who pushed for this new model rarely made religious liberty a primary concern. The founders of the ACLU had more difficulty defining religious liberty than other civil liberties, such as free speech and press, and tended to ignore this part of the First Amendment. In fact, although the ACLU is known today as a staunch critic of religion in the public square, during the organization's early years its

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[4] Zechariah Chafee, Jr., *Freedom of Speech* (New York: Harcourt, Brace and Howe, 1920).

[5] Chafee, *Freedom of Speech*; Paul L. Murphy, *World War I and the Origins of Civil Liberties in the United States* (New York: W.W. Norton & Company, 1979).

[6] The ACLU was founded by Crystal Eastman and Roger Baldwin in 1920, incorporating members of the American Union Against Militarism, Civil Liberties Bureau, National Civil Liberties Bureau, and New York Bureau of Legal Defense.

members found themselves at odds over the meaning of the religious liberty clauses. In part, this was due to the fact that, during the war and the interwar years, civil libertarians were bogged down dealing with issues of free speech, press and assembly, which were in some ways easier to define. In part, perhaps, it was because a good portion of the ACLU's founding members, including John Haynes Holmes, Norman Thomas, and Harry Ward, were Protestant clergymen, who had difficulty advocating a complete separation of church from state.[7] ACLU activists were some of the most prominent champions of civil liberties after the war; yet religious liberty was barely mentioned during the organization's early years, and when it was, civil libertarians disagreed about what it meant.

The idea that the First Amendment's guarantees offered broad protection for civil liberties was itself quite new in the 1920s. When civil libertarians of any stripe argued that the United States Constitution—as well as state constitutions—protected civil liberties expansively, their assertions were not exactly based on legal precedent. The most obvious problem with expansive interpretations of civil liberties was simply the language of the First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press, or the right of the people peaceably to assemble." *Congress* shall make no law—ostensibly, at least, the First Amendment applied only to the federal government.[8] Until the twentieth century, the states had followed a different

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[7] Just as many of the lay founders of the ACLU were radicals, the Reverends Ward, Holmes and Thomas were radical clergy. Nonetheless, they found religious liberty difficult to define, and debated the appropriate limits and applications of the idea throughout the early decades of the ACLU.

[8] The Supreme Court had ruled that the Bill of Rights applied only to the federal government, not to the states, in *Baron v. Baltimore*, 32 U.S. 243 (1833); affirmed in *United States v. Cruikshank*, 92 U.S. 542 (1875). Regarding the First Amendment's religion clauses specifically, the Supreme Court had

set of rules. Even after the passage of the Fourteenth Amendment, which prohibited the states from depriving citizens of "life, liberty, or property, without due process of law," and required states to afford all citizens "equal protection of the laws," there was little clarity on what these liberty guarantees actually meant in practice.[9]

Moreover, on a practical level, it was exceptionally difficult to argue that the courts would protect civil and religious liberty in any meaningful way. Many of the founding members of the ACLU sought to publicize issues surrounding civil liberties, hoping that the organization could influence citizens and politicians. With a few exceptions, interwar civil libertarians were less interested in the courts, assuming that redress in the judicial arena would be the most difficult to obtain. As the Reverend Sydney Dix Strong, a Congregational minister and outspoken critic of the war, argued, "The best guarantees of our liberties are not to be found behind constitutional bulwarks, but in the forward sweep of a society which sees in freedom of thought, of religion, of discussion, the vital breath of democratic progress."[10] Early civil libertarians sought to change society and politics; changes in the law and in jurisprudence would follow.[11]

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similarly ruled that the religious liberty clauses did not apply against state action. See *Permoli v. Municipality No. 1 of the City of New Orleans*, 44 U.S. 589 (1845).

[9] The Fourteenth Amendment had been passed, shortly after the Civil War, in an attempt remedy southern states' habit of depriving black citizens of their basic Constitutional liberties. Yet despite its expansive language, the Fourteenth Amendment's liberty guarantees remained largely dormant well into the twentieth century, having been weakened almost immediately after its ratification by a series of Supreme Court decisions. Famously, in *Plessy v. Ferguson*, 163 U.S. 537 (1896), which confirmed that "separate-but-equal" facilities did not violate the Fourteenth Amendment, severely limiting its power, as well as the *Slaughter-House Cases*, 83 U.S. 36 (1873), and the *Civil Rights Cases*, 109 U.S. 3 (1883). See Laurence Tribe, "Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation," 108 *Harvard Law Review* 1121, 1297 n. 247 (1995), in which Tribe observed that the *Slaughter-House Cases* "gutted" the privileges or immunities clause of the Fourteenth Amendment.

[10] National Civil Liberties Union, *The Case of the Christian Pacifists in Los Angeles, California* (January 1918); Papers of the National Civil Liberties Bureau, Peace Collection, Swarthmore College.

[11] The notion that society must change before the law would change fit with some legal realist theory, yet presents an interesting tension in developing the constitutional rights of (often unpopular) minorities. Under such a framework, Judges were assumed to make law, rather than simply clarifying what was already there. Their biases, backgrounds, and intentions all played into their decisions. However, the balance between society and jurists, and the extent to which each played into the system of law, was less

"Judge" Joseph Franklin Rutherford, leader of the Jehovah's Witnesses between 1917 and 1942, disagreed. Jehovah's Witnesses had little interest in changing society, and even less in politics. Nor did they endeavor to broaden civil liberties for civil liberties' sake. What they wanted, simply, was to confirm their rights to practice and to preach, without hindrance from earthly authorities. Rather than appealing solely to "higher" or "divine" law (although they frequently referred to God's law), or seeking to change society, the Jehovah's Witnesses invoked fundamental constitutional rights, which they said protected their religious practices. Rutherford's view of the law was an instrumental one. The opinions of judges, and thus the law itself, were not derived from natural phenomena, but from their own ideas, biases and inclinations. In other words, judges did not find law, they made law. When individuals thought they were being treated unfairly at the hands of the law, it was therefore their responsibility as citizens to fight for their rights. Judge Rutherford, a lawyer himself, concluded that the only way to remedy bad law was to bring "test cases" in the courts. Rutherford and his followers found the actions of organized labor—including arrests of speakers and spectators at labor assemblies—to be instructive. "The most fundamental rights," one Jehovah's Witness publication quoted, "remain idle abstractions unless the courts are able to give them efficacy through enforcement."[12]

Based on this philosophy, beginning with the First World War, Jehovah's Witnesses carried out acts of civil disobedience, calculated to provoke court cases.

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clear. See James Willard Hurst, *The Growth of American Law: The Law Makers* (Boston: Little, Brown and Company, 1950); Kermit Hall, *The Magic Mirror: Law in American History* (New York: Oxford University Press, 1989). Analysts who pioneered the use of social history when studying the law, like Hurst and Hall, encouraged the abandonment of a top-down, institution-focused legal history, and insisted on including ordinary actors and social forces in their analyses.

[12] Quoted from Reginald Heber Smith, a famed Boston lawyer and founder of the Legal Aid movement in America. Reginald Heber Smith, "Defects in the Administration of Justice," *The Golden Age*, March 31, 1920, 430.

Insisting on their rights to publish their incendiary religious opinions (which both predicted an imminent Armageddon and condemned other religious groups), to proselytize on the public streets, and to refuse to salute the American flag in public schools, the group asserted that the rights to publish and to preach were inseparable from the First Amendment right to believe. The Jehovah's Witnesses adopted a strategy of civil disobedience and planned litigation which predated that of the NAACP by at least a decade, and provided a model for strategic litigation which would be implemented widely later in the twentieth century. The Jehovah's Witnesses were, in fact, pioneers of the "rights revolution" of the twentieth century.

At first glance, the group might seem an unlikely one to be involved in revising the scope of constitutional rights. The group was relatively new, a home-grown American religious movement which had originated in western Pennsylvania in the 1870s, distributing a prolific literature through the Watch Tower Bible & Tract Association.[13] Founder Charles Taze Russell had urged a return to early Christianity, teaching that the Catholic Church, and then all Protestant groups, had grown increasingly distant from first-century Christianity. Russell's dislike for the Catholic and Protestant churches was twofold. For one thing, the churches were too much "of the world." Amassing wealth and growing increasingly powerful, these churches had abused their power and corrupted Christianity. Russell's dismissal of other Christian groups was also doctrinal. Russell had challenged the contemporary Higher Criticism, insisting that the whole Bible was the Word of God. However, he had also rejected many doctrines of older Christian groups, including ideas of the Trinity, the immortality of souls, and eternal torment.

[13] Established in 1884.

Bible Students considered the doctrines of the Trinity, the immortal soul, and eternal torment after death to be unscriptural. The group, which later changed its name to Jehovah's Witnesses, believed that these doctrines were beliefs incorporated after the second century of Christianity. Members of the group, who called themselves the only true Christians, asserted that there was only one God, who was called Jehovah. Russell had urged that Jesus had made a "ransom sacrifice" for mankind, opening the way for them to have "what Adam had lost, the prospect of eternal life in human perfection."[14] While Russell had acknowledged that other Christian groups held some similar individual components, he had argued only his movement consolidated all of the true Bible teachings—while rejecting unscriptural doctrines.

Russell had initially been inspired by mid-nineteenth century Adventism, which predicted the imminent Second Coming of Christ. Even after Russell's death, Watch Tower members considered the anticipation of Christ's Kingdom to be tantamount. The important thing was to educate all people about Christ and Christianity. Russell had believed that Christ would return not in the flesh, as other Adventists would have it, but as a spirit.[15] After Christ's return, there would be a millennial struggle, and a "little flock" (numbering 144,000) would be "joint heirs in his Kingdom," chosen to rule with Jesus Christ in heaven.[16] In fact, Russell had several times predicted the exact date for

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[14] *Zion's Watch Tower*, July 1879. Russell eventually broke with his Adventist collaborator, Nathan Barbour, regarding the ransom sacrifice. See *Jehovah's Witnesses: Proclaimers of God's Kingdom*, 129.

[15] Charles Taze Russell, *The Object and Manner of Our Lord's Return*, (1877). The Second Advent, according to Russell, would not happen in a single moment, but would proceed over a period of time.

[16] Initially, Russell had taught that 144,000 Christians would be granted immortal life in the Kingdom of Jehovah's Witnesses later embraced the idea that, in addition to those who would join Jehovah in heaven, another number of "Jonadabs" ("other sheep") who became witnesses for Jehovah would be granted everlasting life on earth. The anointed Jehovah's Witnesses would go to Heaven, but a "great

the Second Coming. Eventually, Bible Students had come to believe that Christ's invisible presence on Earth had already begun—and they sought to spread the word. Those who preached these truths would be part of God's "little flock."

"Judge" Joseph Rutherford, who took over leadership of the group after Russell's 1916 death, maintained Russell's teaching that Christians were waiting for the Kingdom of Heaven.[17] He emphasized that the current system was ruled by Satan; Christ's rule would only be established when the unrighteous governments of the Earth were overthrown.[18] When the "present wicked system" was deposed, Kingdom rule would transform the Earth into a paradise. During the war of Armageddon, which would be a violent struggle, God would use social malcontents to overthrow present institutions. Bible Students "understood the war of Armageddon to be associated with violent social revolution," involving "this great army of discontents—patriots, reformers, socialists, moralists, anarchists, ignorants and hopeless."[19]

While he maintained many of Russell's fundamental teachings, Rutherford's style of leadership was more autocratic, and more organized. He sought to control the activities of the group, disseminating instructions from the central organization.[20]

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multitude" of Jonadabs, who showed faith in Jehovah and preached the Truth, would live in the Kingdom of Heaven on Earth. *Jehovah's Witnesses: Proclaimers of God's Kingdom*, 83.

[17] When Rutherford assumed leadership of the group in 1916, there was a split within the movement, with offshoot Bible Student groups arguing that Rutherford had departed from Russell's teachings and forming their own groups.

[18] Joseph Franklin Rutherford, *The Kingdom, the Hope of the World* (1931).

[19] Charles Taze Russell, *The Day of Vengeance*, vol. IV of *Millennial Dawn / Studies in the Scriptures (*Renamed *The Battle of Armageddon* in 1910) (Allegheny, Pennsylvania: Watch Tower Bible & Tract Society, 1897). Quoted in *Jehovah's Witnesses: Proclaimers of God's Kingdom*, 140; See also *The Watch Tower*, July 15, 1925; Joseph Franklin Rutherford, *Deliverance* (New York: International Bible Students Association, 1926).

[20] The Jehovah's Witnesses have modified their understandings of Scripture and behavior over the years—for example, adding to the "little flock" of those who would go to heaven the multitude of others who would be allowed to live in paradise on earth. In addition, since 1945, members of the group have refrained from receiving blood transfusions, believing that, according to Genesis, "taking blood into the body through mouth or veins violates God's law." *The Watchtower*, July 1, 1945. While there had been

Calling the group Bible Students until he changed their name to Jehovah's Witnesses in 1931, Rutherford vehemently opposed priests, Protestant clergy, and other religious authorities.[21] Every believer was a minister, and had the responsibility of spreading the truth of God's word—and the truth about the churches. Judge Rutherford criticized existing Catholic and Protestant churches harshly, maintaining not only that organized religion had led people away form the truth, but also that religious leaders had formed an unholy alliance with the state. Catholic and Protestant leaders alike, he wrote, had misled the people, steering them away from God's word for their own selfish purposes. "The papal system is the mother of all harlots," he explained. "The term 'mother of harlots' signifies her daughters are likewise harlots….Harlotry means the unlawful relationship between ecclesiastical and civil powers."[22] Among scores of "indictments" against the clergy, Rutherford accused the Catholic Church of engaging in "Spiritual fornication," forming an "illicit relationship between church and state."[23]

Asserting that established religion, government, and business interests were parts of an "evil trinity" by which Satan controlled the Earth, Judge Rutherford encouraged withdrawal from worldly affairs. Yet before he was a religious leader, Rutherford had had been a lawyer (a stint on the Missouri bench lent him the lasting moniker "Judge"), and he brought to the group a distinctly legal mindset—even framing such issues as the fall of Adam and Eve in courtroom terms.[24] "Big, blue-eyed Judge Rutherford" had,

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mentions of blood since the 1920s, the suggestions about not accepting blood transfusions were issued in 1945, under the leadership of Nathan H. Knorr.

[21] When Rutherford changed the group's name from Bible Students to Jehovah's Witnesses in 1931, he likely had the legal—as well as the evangelistic—meaning of the word in mind. See chapter 3.

[22] *Kingdom News*, I, no. 3, May 1918.

[23] *The Golden Age*, September 29, 1920, 705.

[24] Charles Taze Russell, *The Finished Mystery* (Brooklyn, New York: International Bible Students Association, 1917). This strain of Rutherford's thought was emphasized by Barbara Grizutti Harrison, in *Visions of Glory: A History and a Memory of Jehovah's Witnesses* (New York: Simon and Schuster, 1978).

before joining the religious movement, "accompanied William Jennings Bryan in his first Presidential campaign because he believed that zealous Presbyterian was 'appointed by God to straighten out the problems of the world'."[25] When he joined the Bible Student movement in 1906, Rutherford had adopted Russell's belief that the way to straighten out the problems of the world was not through politics, but by bringing the word of God to the people. Nonetheless, this "neutrality principle" (by which Bible Students were expected to abstain from worldly politics) did not preclude the group's participation in the legal system, and Rutherford soon turned the Jehovah's Witnesses into skilled operators in this realm. While this simultaneous dismissal of worldly politics and participation in the legal arena might have seemed paradoxical, Rutherford saw no contradiction.

Rutherford and the Bible Students first landed in trouble during the First World War, for their publications calling the war "human butchery," and denouncing all wars of the "Christian era."[26] In the age of Espionage and Sedition Acts, the group's anti-war stance drew accusations of disloyalty and seditious behavior. Federal agents raided Bible Student headquarters in Brooklyn and Los Angeles, seizing the group's publications and arresting hundreds of Bible Students. Federal authorities arrested Rutherford and several of his associates for violating the Espionage Act—alongside radicals like Eugene Debs and Emma Goldman—and for distributing tracts critical of the United States. After a bizarre and contentious trial, the Bible Student leaders were shipped off to the Federal Penitentiary in Atlanta, where they remained for nine months. Freed in 1920 after the

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See also J.F. Rutherford, *A Great Battle in the Ecclesiastical Heavens, As Seen by a Lawyer* (Brooklyn, New York: Bible Students Association, 1915).

[25] "Religion: Jehovah's Witnesses," *Time*, June 10, 1935.

[26] Russell, *The Finished Mystery*, 247-253.

wartime hysteria had waned (along with hundreds of socialists and anarchists imprisoned during the war), Rutherford insisted that the group had been illegally persecuted for their beliefs—and vowed to ensure that such a thing would never happen again.

Rutherford and his group were different from other religious pacifists, such as Quakers and Mennonites. In addition to protesting against the draft and the military, the Bible Student leaders had been prosecuted for their speeches and publications, and their complaints thus rested on free speech and free press grounds. During the war, Rutherford, outraged that the government had so vigorously arrested and jailed dissenters for the things they said and wrote, began to assert that civil liberties, sadly abandoned in the United States, must now be reinstated. Much like the activists of the nascent ACLU, the Bible Students urged that it was most important to preserve constitutional liberties during times of national distress. However, the group ran into the same problems that all civil libertarians did during this period. The notion that the purpose of the Bill of Rights was to protect minorities—be they political, ideological, or religious—was largely untested.

This uncertainty was particularly true of religious liberty. In the nineteenth century, the Supreme Court had ruled that Mormons could not legally practice plural marriage in the West, although they argued that this practice was fundamental to their religion and thus protected by the First Amendment.[27] This ruling went far beyond Mormon polygamy, however; well into the twentieth century, it was taken to mean that citizens could not use religious belief as justification for illegal actions. Because of this reading, for half a century the scope of the First Amendment's "free exercise of religion"

[27] *Reynolds v. United States*, 98 U.S. 145 (1879); *Davis v. Beason*, 133 U.S. 333 (1890); *The Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States* (1890).

had been extremely limited. The right to religious liberty was absolute only in the sense that it entailed an unqualified right to *believe*. *Actions*, however, were always subject to regulation and prohibition by the government. By 1920, when Rutherford and his associates got out of prison and resumed Watch Tower operations, this belief-action distinction was firmly entrenched in readings of the First Amendment.

Rutherford and his group had no interest in defending polygamy, but they did set out to challenge this limited reading of the First Amendment. Belief and action, they argued, went hand in hand. Their argument, formed during the First World War, had at its core the idea that the rights to preach and to publish freely were inseparable from the right to believe. Galvanized by their wartime experiences, Rutherford and his associates developed a calculated legal strategy to guarantee the liberty to practice and to preach. This strategy involved civil disobedience, education of Jehovah's Witnesses in court and legal proceedings, and direct legal advocacy. Deliberately challenging local authorities, they provoked arrests and pushed their cases through the courts. The group's literature from the 1920s and 1930s contains cogent legal discussions of religious and civil liberties, as well as Scriptural explanations for these rights.

Although he and his associates had been released from prison and exonerated, resentment of Rutherford's message only expanded after the war—perhaps bolstered by the group's increasingly active proselytizing. "You are his publicity agents," Rutherford intoned at the group's convention in 1922. "Advertise, advertise, advertise, the King and his kingdom!"[28] In fact, Jehovah's Witnesses argued that their faith was *based* on "preaching the Kingdom message" to the people. They used every technology available, distributing leaflets and books, holding public meetings, and broadcasting speeches over

[28] *Jehovah's Witnesses: Proclaimers of God's Kingdom*, 77.

the radio. In 1927, Rutherford instructed his followers that Sunday was the best day for witnessing, being the most opportune day to find people at home.[29] In the 1930s, members of the group began driving the streets in "sound cars" and setting afloat in "sound boats," from which they played recordings of Rutherford's lectures. They also began carrying portable phonograph players on their door-to-door visits, asking residents and people walking down the street whether they would care to listen to a recording of Judge Rutherford. All this gave rise to a proselytizing movement of extraordinary scale and control.[30]

The Sunday canvass, the noisy and disruptive record players and sound cars, and the insulting nature of the group's message to other religious faiths provoked ire in many communities. Police arrested Jehovah's Witnesses in scores, using a wide variety of legal means to try to prevent their activities. Local and state attorneys charged Jehovah's Witnesses with violation of old (often dormant) ordinances regulating door-to-door peddling and the use of public spaces. Then, many states and localities passed new "hawking and peddling" ordinances and rules requiring permits for public assemblies, which seemed (and often were acknowledged to be) specially aimed at Jehovah's Witnesses. Police rounded up members in groups of ten to several hundred, accusing them of selling without licenses, canvassing without permits, violating Sunday statutes,

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[29] Alexander H. Macmillan, *Faith on the March* (Englewood Cliffs, New Jersey: Prentice-Hall, 1957), 152.

[30] The Watch Tower Society has kept careful statistics on membership and preaching activities. "Membership" included only those actively involved in the preaching work, and thus is not directly comparable with membership statistics for most other religious groups. Nonetheless, the statistics are useful in gaining some understanding of the group's numbers and growth. In 1914, according to the Jehovah's Witnesses themselves, 5,155 Bible Students were actively preaching in 43 "lands," and 18,243 Bible Students attended the Memorial (a commemoration of Christ's death, observed on the Passover with the Lord's Evening Meal). In 1919, 5,793 Bible Students were preaching in 43 lands, and 21,411 Bible Students attended the Memorial. By 1935, there 56,153 "kingdom publishers"—members actively engaged in field service, in 115 lands, and 63,146 Jehovah's Witnesses attended the Memorial. *Jehovah's Witnesses: Proclaimers of God's Kingdom*, 717-722.

and disturbing the peace. These scenes were repeated in towns and cities across dozens of states. In the 1930s, Jehovah's Witnesses even went out on their preaching work with their toothbrushes, expecting to go to jail.[31]

As is often the case with groups expressing views which run contrary to the majority opinion, some members of the community accused Jehovah's Witnesses of holding unpatriotic loyalties. In the 1920s, citizens and newspapers accused them of being radicals, communists, "reds" who sought to undermine the American system. By the 1930s, authorities labeled their speeches and publications as hate speech, and Jehovah's Witnesses, rather than members of the Bund, were the first people prosecuted under so-called "Anti-Nazi" legislation—ironically, since the Nazis persecuted Jehovah's Witnesses in Germany early and extensively.[32] When, beginning in the mid-1930s, Jehovah's Witnesses refused to participate in patriotic exercises (such as saluting the American flag), fears that the group were Nazi sympathizers, or at the very least Communists, seemed to many to be confirmed. Authorities expelled children from school in droves, and occasionally arrested their parents, threatening to remove the children from their homes. Several localities even passed laws which required anyone wishing to distribute literature to salute the flag before a permit would be authorized—a regulation clearly aimed at Jehovah's Witnesses.

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[31] Interview with Jehovah's Witness Lowell Yeatts at his home in Cumming, Georgia, September 20, 2008. In possession of the author.

[32] The most notorious Anti-Nazi legislation was introduced in 1934 in the New Jersey legislature by Assemblyman John Rafferty; the purpose of the law to "prohibit the spread of propaganda inciting religious or racial hatred." The ACLU, communist, labor and religious groups opposed legislation of this sort—although several Jewish groups supported it, to the great chagrin of the ACLU. See Warren Grover, *Nazis in Newark* (Piscataway, New Jersey: Transaction Publishers, 2003), 88. The Jehovah's Witnesses, for their part, declared "The 'Anti-Nazi bill' out-Nazis the Nazis." "'Why Burn Your House to Rid it of Rats?'" *The Golden Age*, May 23, 1934, 529.

In fact, one of the major reasons the Jehovah's Witnesses gave for pursuing their cases through the courts was their perception that local and state authorities had passed laws specifically aimed at them, or had inappropriately misused laws already on the books—an assessment strikingly similar to the protests of civil rights activists in later decades. Accusing officials and lawmakers of "framing mischief by law," Rutherford and his associates asserted that the authorities had chosen "to prostitute the courts for their evil purposes."[33] Not only were statutes (primarily ordinances regulating "hawing and peddling") which had lain dormant for decades now being used to prosecute Jehovah's Witnesses, the group pointed to many instances where laws had been framed specifically to inhibit the group's activities. Rutherford and his Watch Tower legal team, much like Martin Luther King and civil rights movement lawyers a generation later, focused on the inequality inherent in these laws, and the fact that regulations were enforced unevenly, targeting one group.

In the 1930s, the Watch Tower Society went on the offensive, not only advising Jehovah's Witnesses about their rights, but also launching "divisional campaigns" in the locations where they encountered opposition. Under this system, when Jehovah's Witnesses were arrested, they would call a hotline, and several dozen members of the group would be dispatched to "canvass" (proselytize) the same area. In most cases, this canvassing led to more arrests. When convicted, canvassers refused to pay the fines they were offered, choosing instead to serve time in jail. After arrest, Jehovah's Witnesses followed a procedure outlined in the "Order of Trial," a pamphlet authored by Rutherford which detailed the entire process, from first encounter with the police to the courtroom.

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[33] "Proclaiming on the Housetops," *The Golden Age*, February14, 1934, 314-319; "Obeisance to the Pope in Griffin, Ga.," *The Golden Age,* April 8, 1936, 438.

Ordinary Jehovah's Witnesses became well versed in their legal rights, filing motions to dismiss their cases and making oral arguments on their own behalf at trial.[34] Members of the group were encouraged to appeal their cases, and were instructed on how to make as clean a record as possible for this purpose.

From 1932, the Watch Tower Society kept records of arrests and convictions, while Rutherford and other members of the central organization assisted in court defense at the appellate level. Rutherford emphasized the importance of non-violent action, urging his followers to assert their rights calmly and confidently, submitting to arrest without violent reaction. During the 1930s, workers would "take turns defending themselves on this issue of worship," conducting mock trials at their weekly service meetings.[35] "It is the duty and the privilege of any Christian who is arrested for exercising his religious belief," he instructed, "to appear in court, employ counsel, demand a fair trial and the full protection of the law."[36] Rutherford reminded his followers that they were not seeking mere religious "toleration." What they sought, Rutherford advised, quoting Justice Cooley's 1868 treatise *Constitutional Limitations*, lay at the very heart of American society—not religious toleration, but religious equality.

The group's members brought hundreds of cases to court, citing both state and federal constitutions to challenge ordinances and laws. They persistently appealed these cases because lower court judges' opinions of the Jehovah's Witnesses' rights ran the gamut, and members of the group felt that, had they not appealed, "such a mass of

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[34] First published in *The Golden Age* for two years, the Jehovah's Witnesses printed the "Order of Trial" as a separate booklet in 1933. J.F. Rutherford, *Order of Trial* (Brooklyn, New York: Watch Tower Bible & Tract Society, 1933).

[35] *Jehovah's Witnesses in the Divine Purpose* (Brooklyn, New York: Watch Tower Bible & Tract Society, 1959), 132.

[36] *The Golden Age*, March 20, 1929, 392.

adverse judgments would have accumulated against us that it would have been impossible for us to carry on our work at all."[37] In spite of their unpopularity, Jehovah's Witnesses endeavored to push their cases to the Supreme Court. Citing the First and Fourteenth Amendments to the federal Constitution, as well as state constitutional provisions, the group's leadership continued to implement an intensive legal strategy to guarantee the liberty to preach—not only for Jehovah's Witnesses, but for everyone.

This was all the more innovative because, aside from the Mormon cases, some conscientious objector cases, and a handful of other instances, before the twentieth century the Supreme Court had limited application of the First Amendment to federal law—leaving church-state matters in particular largely to state and local control. In the 1920s, and beginning with the right to free speech, the Supreme Court used a process called "incorporation," extending certain Bill of Rights guarantees to apply to state and local action (rather than merely to federal laws) by use of the Fourteenth Amendment's due process clause ("No state shall deprive any person of…liberty…without due process of law…").[38] Throughout the 1930s and 1940s, the Supreme Court held that the

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[37] *Jehovah's Witnesses in the Divine Purpose*, 132.

[38] "Incorporation" via the Fourteenth Amendment was when the Court began to extend certain provisions in the Bill of Rights to the states. Some scholars trace the beginnings of incorporation to the case *Chicago, Burlington and Quincy Railroad v. City of Chicago*, 166 U.S. 226 (1897), in which the Court incorporated the "takings clause" of the Fifth Amendment by requiring states to provide just compensation for seizing private property. The Bill of Rights had previously been thought to apply only to the federal government. Many scholars trace "incorporation" of civil liberties guarantees to *Gitlow v. New York*, 268 U.S. 652 (1925), in which the Court ruled that the Fourteenth Amendment's "due process" clause made the First Amendment's free speech guarantee applicable to state, rather than only federal, laws. The era which began with *Gitlow* led to the incorporation of most, though not all, of the Bill of Rights to apply to state, rather than only federal, action—and a consequent expansion of civil liberties.The Court never incorporated the entire Bill of Rights, using instead a process known as selective incorporation. Justice Cardozo outlined a test in the late 1930s, in which the Court would ask whether a right was "fundamental" to "ordered liberty." *Palko v. Connecticut*, 302 U.S. 319 (1937).

See Akhil Reed Amar, "The Bill of Rights and the Fourteenth Amendment," *The Yale Law Journal* 101, no. 6 (April 1992): 1193-1284; David Rabban, "The Emergence of Modern First Amendment Doctrine," *University of Chicago Law Review* 50 (Fall 1983): 1205-1135; Paul Murphy, *The Constitution in Crisis Times* (New York: Harper & Row, 1972); Paul Murphy, *The Bill of Rights and American Legal History* (New York: Garland Pub., 1990); Raoul Berger, *Government by Judiciary: The Transformation of*

Fourteenth Amendment to the federal Constitution made a number of the rights set out in the Bill of Rights applicable not only to legislation from the federal Congress, but to the states as well. The fundamental civil liberties of free speech and press, as well as the freedom of religion, became matters of national policy.

When appealing their cases, Jehovah's Witnesses insisted that the principles of free speech and press were integrally connected with the First Amendment right to religious liberty. The distinction between belief and action, established in legal precedent by the Mormon cases, was fallacious—religious liberty was an empty guarantee if it did not contain the right to act. It has been noted that religious liberty, although the first stated, was the last of the rights embodied in the First Amendment to be "incorporated" into the Fourteenth Amendment's liberty guarantees. It was the Jehovah's Witnesses, with Rutherford at their helm, who tied religious liberty to the rights of free speech, press, and assembly. Far from belonging to a separate category of rights, the religious liberty cases pursued by the Jehovah's Witnesses were crucial to the protection of other constitutional and civil rights. Religious liberty, rather than being an afterthought, was integral to the twentieth century transformation of civil rights.

Because of their broad view of American liberties, the Jehovah's Witnesses partnered with other civil liberties organizations, eventually welcoming their participation in the legal battles. In some ways, the groups appeared to be unlikely allies—on the surface, it would not seem that ardent Bible Students occupied with spreading the Truth would be compatible with the socialists and what were sometimes referred to as those

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the Fourteenth Amendment (Indianapolis: Liberty Fund, 1997); William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* (Cambridge: Harvard University Press, 1988); Michael J. Perry, *We The People: The Fourteenth Amendment and the Supreme Court* (New York: Oxford University Press, 1999).

"damned Jew lawyers" at the ACLU.[39] Yet for both groups, their regard for the principles and value of civil liberties overrode vastly differing worldviews. As Rutherford and the Jehovah's Witness leadership began to recognize the viability of using legal strategy to expand their rights, the ACLU and other groups took note of the group's acts of civil disobedience, and the potential for using these cases to expand civil liberties. Judge Rutherford and the Watch Tower lawyers collaborated extensively with ACLU and labor lawyers throughout the 1930s and 1940s to build their cases. While the Jehovah's Witnesses were assisted by the ACLU, the American Bar Association, labor organizations, and other advocates, the legal work and strategy in the group's own cases were largely of their own formulation.

The role of the ACLU in defining First Amendment rights should not be overlooked. Yet the connection of religious liberty with these other civil liberties, and the early implementation of strategic litigation springing from civil disobedience, was the work of this small, oft-maligned religious group. In fact, nearly all of the cases involving religious liberty heard by the Supreme Court in the 1930s and 1940s were Jehovah's Witness cases, regarding both canvassing and flag salute issues. Rutherford himself argued cases, with the assistance of Watch Tower lawyers Olin R. Moyle and Hayden Covington. These cases were occasionally bolstered by amicus (friend of the court) briefs filed by the ACLU, the Workers' Defense League, and other labor and civil liberties organizations. The success rate of the Jehovah's Witnesses is impressive: between 1938 and 1955, the Jehovah's Witnesses argued thirty-nine cases before the

[39] See article by the labor journalist McAlister Coleman; Arthur Garfield Hays Papers, Box 1, Folder 13, "Correspondence"; Department of Rare Books and Special Collections, Princeton University Library.

Supreme Court and won thirty—a record rivaled only later by Thurgood Marshall of the NAACP.[40]

In fact, in the three decades preceding the *Brown* school desegregation decisions, the Jehovah's Witnesses and their allies succeeded in portraying religious liberty as a civil rights issue. While legal historians have acknowledged that the Jehovah's Witness Supreme Court cases in the 1940s were key to the expansion of religious liberty, neither the intentionality of their legal strategy, nor its linking of freedoms of speech, press and religion, have previously been made clear. Recognition of the strategic litigation implemented by the Jehovah's Witnesses calls into question the broader story of civil liberties in twentieth-century America. Groups prior to the Jehovah's Witnesses had generated test cases for the Supreme Court.[41] The ACLU had become involved in defending civil liberties during the interwar period.[42] Nonetheless, it is significant that the Jehovah's Witnesses' legal strategy, which specifically incorporated civil disobedience, so strongly resembled that of the NAACP—and preceded it by at least a decade.

The NAACP Legal Defense and Education Fund is often regarded as the pioneer of organized litigation in the United States. Between 1915 and 1935, the NAACP won a few Supreme Court victories under the leadership of the experienced litigator Moorfield

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[40] This comparison was made by Samuel Walker, *In Defense of American Liberties: A History of the ACLU* (New York: Oxford University Press, 1990), and Jennifer Jacobs Henderson, "Hayden Covington, The Jehovah's Witnesses and their Plan to Expand First Amendment Freedoms," *Journal of Church and State* 46, no. 4 (Autumn 2004): 811-832.

[41] See, for example, *Plessy v. Ferguson*, 163 U.S. 573 (1896); *The United States of America v. Susan B. Anthony* (and other suffragette cases).

[42] The trial of Eugene Debs (*Debs v. United States*, 249 U.S. 211 (1919)); the Scopes Trial (*State v. Scopes*, 152 Tenn. 424 (1926)); *Powell v. Alabama*, 287 U.S. 45 (1932); *Norris v. Alabama*, 294 U.S. 587 (1935) (Scottsboro cases).

Storey (then the organization's president) and then Thurgood Marshall.[43] However, the Supreme Court continued to maintain that it lacked jurisdiction in such matters as restrictive covenants and school segregation. In 1930, the NAACP commissioned the lawyer Nathan Margold to formulate a plan to combat legal segregation; in his report, Margold recommended attacking segregation in primary and secondary education. The plan was not acted upon at once, however, and Margold left the NAACP for financial reasons. By 1935, the NAACP's Charles Hamilton Houston initiated a plan to attack educational segregation—focusing on graduate and professional schools first.[44] After the NAACP created the Legal Defense and Education Fund in 1938, William Hastie and Thurgood Marshall agreed in 1945 to take on restrictive covenants (clauses in real estate deeds which were often used for segregationist purposes) as a comprehensive step in a broader legal strategy.[45] In the 1940s, the NAACP contemplated far-reaching cases in the realm of education, seeking those which would affect the rights of many.[46] The NAACP efforts to attack segregation in education and housing eventually caused a revolution in constitutional law. Yet many elements of that strategy, including civil disobedience, concerted legal action, and the education of ordinary group members in

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[43] For example, *Buchanan v. Warley*, 245 U.S. 60 (1917), in which the Court held that a Louisville, Kentucky law requiring racial segregation by city blocks was unconstitutional.

[44] Houston and the NAACP encouraged Lloyd Gaines to protest his exclusion from law school at the University of Missouri on Fourteenth Amendment grounds. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938). Lloyd Gaines disappeared on March 19, 1939, and was never heard from again. He never attended law school; the NAACP did not pursue a similar case for another decade. Similar challenging of he "separate-but-equal" practices in higher education included *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950).

[45] Clement E. Vose, *Caucasians Only: The Supreme Court, the NAACP, and the Restrictive Covenant Cases* (Berkeley, California: University of California Press, 1967).

[46] Richard Kluger described the reluctance of NAACP leaders to take on smaller claims; their energies, Kluger demonstrated, were better spent on cases affecting a wide group of those "similarly situated." Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality* (New York: Alfred A. Knopf, 1975).

trial and legal proceedings, were implemented after the Jehovah's Witnesses had used similar strategies.

Much like the civil rights movement lawyers, Jehovah's Witnesses asserted that they sought not to change constitutional law, but merely to have existing provisions enforced. Like civil rights legal activists, Jehovah's Witnesses maintained that they did not seek to have new laws enacted. Most of the laws and ordinances of which they sought review, both groups insisted, had been passed in direct contravention of constitutional provisions guaranteeing liberty. Moreover, racial and religious civil rights were equated more than once, even during the 1930s. For example, Justice Harlan Stone, eventually an ardent defender of civil liberties, recommended increased scrutiny of any legislation restricting the civil liberties of racial and religious minorities. In 1938, following years of controversy over the constitutionality of New Deal economic regulations, Justice Stone suggested that the Court must scrutinize laws "directed at particular religious, or national, or racial minorities."[47] The American Fund for Public Service Committee on Negro Work (closely affiliated with the NAACP), wrote in 1930 that the "issue is much broader than that of simply preventing discrimination against Negroes, for already such restrictive covenants have been used against Jews and Catholics."[48] Similarly, the Jehovah's Witnesses, while primarily a religious group, sought to broaden civil liberties not only for their own members, but for everyone.

In contrast to civil rights movement battles, only a few scholars have given serious attention to the Jehovah's Witnesses' cases. Likely because of their public image as a fringe religious movement, little scholarly research has been done regarding the

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[47] *United States v. Carolene Products Co*., 304 U.S. 133 (1938), drawing on concepts of "ordered liberty" outlined by Justice Benjamin Cardozo in *Palko v. Connecticut*, 302 U.S. 319 (1937).

[48] Vose, *Caucasians Only*.

Jehovah's Witnesses in general. Much of what has been written about Jehovah's Witnesses has consisted of negative personal accounts—"tell-all memoirs" and the like—of people who left the group.[49] Over a decade ago, the sociologists Rodney Stark and Laurence Iannaccone deplored the lack of scholarly attention to the Jehovah's Witnesses, writing that "if the Witnesses frequently appear on our doorsteps, they are conspicuously absent from our journals."[50] However, Stark and Iannaccone's primary purpose was to test a model of religious growth, rather than to provide a history or examination of the group—and not much has changed since they lamented the lack of scholarly attention to Jehovah's Witnesses. Several empirically-based studies of the group have been published by sociologists and political scientists, seeking to explain the group's growth despite its seeming unpopularity.[51] The political scientist Pauline Cote and the sociologist James T. Richardson presented a model describing the "disciplined litigation"

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[49] Joy Castro, *The Truth Book: Escaping a Childhood of Abuse Among Jehovah's Witnesses: A Memoir* (New York: Arcade Publishing, 2005); Jacqueline Woodson, *Hush* (New York: Putnam's, 2002); Barbara Grizzuti Harrison, *Visions of Glory: A History and a Memory of Jehovah's Witnesses* (New York: Simon and Schuster, 1978). Harrison's memoir stands apart; although negative, she incorporates a large amount of balanced research detailing the organization's history.

[50] Rodney Stark and Laurence Iannaccone, "Why the Jehovah's Witnesses Grow So Rapidly: A Theoretical Application," *Journal of Contemporary Religion* 12, no. 2 (1997): 133-157. In general, little secondary literature exists regarding the Bible Students and the Jehovah's Witnesses, aside from the Watch Tower Society's own publications. The dearth of scholarly investigation of the group is particularly noticeable in the broader literature of apocalyptic religion and millennialism after the Second Great Awakening. For example, the historian Paul Boyer affords the group virtually no space in his otherwise excellent *When Time Shall Be No More: Prophecy Belief in Modern American Culture* (Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 1992). A similar absence exists in Timothy Weber, *Living in the Shadow of the Second Coming: American Premillennialism, 1875-1925* (New York: Oxford University Press, 1979).

[51] M. James Penton, *Apocalypse Delayed: The Story of Jehovah's Witnesses* (Toronto: University of Toronto Press, 1985); James Beckford, *The Trumpet of Prophecy: A Sociological Study of Jehovah's Witnesses* (New York: Wiley, 1975); Pauline Cote and James T. Richardson, "Disciplined Litigation, Vigilant Litigation, and Deformation: Dramatic Organization Change in Jehovah's Witnesses," *Journal for the Scientific Study of Religion* 40, no. 1 (2001): 11-25; Daniel Cronn-Mills, *A Qualitative Analysis of the Jehovah's Witnesses: The Rhetoric, Reality and Religion in the Watch Tower Society* (Lewiston, New York: E. Mellen Press, 1999).

of the Jehovah's Witnesses.[52] They did so in order to support their "deformation thesis"—an attempt to explain dramatic changes in new religious organizations. To Cote and Richardson, litigation was a "reorganizing principle." Details about neither the group's history nor its judicial efforts have been examined widely by scholars, even those who write about pre-millennialism or American religious history. This study aims to treat the Jehovah's Witnesses on their own terms, showing the significance of their beliefs and actions to the general legal history of civil liberties and civil rights in the twentieth century.[53]

Additionally, Jehovah's Witnesses who ended up in court, however significant their numbers and regardless of their testimony, have too frequently been portrayed as unfortunate victims—and ones who sought only the protection of their own narrow rights to religious liberty. Only a handful of studies indicate the deliberate quality of the group's legal strategy. In the 1960s, the legal scholar David Manwaring crafted an insightful study of the flag salute cases.[54] However, Manwaring asserted that the Jehovah's Witness flag salute cases differed significantly from other examples of group litigation—for example, the restrictive covenant cases—in that all groups involved were motivated by wholly non-economic considerations. More recently, Jennifer Jacobs Henderson usefully drew parallels to what Clement Vose called the "myth of the hapless litigant" in her work on Hayden Covington, the Jehovah's Witnesses, and mass media

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[52] Pauline Cote and James T. Richardson, "Disciplined Litigation, Vigilant Litigation, and Deformation: Dramatic Organization Change in Jehovah's Witnesses," *Journal for the Scientific Study of Religion*: 11-25.

[53] As George Marsden wrote of his own study of fundamentalist Christians, he tried to treat "fundamentalism not as a temporary social aberration, but as a genuine religious movement or tendency with deep roots and intelligible beliefs." George Marsden, *Fundamentalism and American Culture* (New York: Oxford University Press, 2006), 5.

[54] David Manwaring, *Render Unto Caesar: The Flag Salute Controversy* (Chicago: University of Chicago Press, 1962).

law.[55] Henderson's work excels in pointing out that Jehovah's Witnesses did not merely find themselves in court. However, beginning with the most famous lawyer Hayden Covington in 1939, Henderson neglects the formation of a legal plan by Rutherford and the Society's first legal counsel, Olin Moyle. In fact, no scholar has detailed the roots of the group's legal strategy in the First World War era, or the extent and results of their early cooperation with civil libertarians and labor groups. As a result, most scholars have not seen Jehovah's Witnesses within the context of the broader civil liberties and civil rights contests of the twentieth century.

Due to the prevalence of cases in the era of the Second World War, most legal histories of the Jehovah's Witnesses have focused narrowly on this period, and have concluded with the group's victories in the mid-1940s. Such scholarship has recently attempted to focus on individual litigants and their motivations, in an attempt to add the human element into Supreme Court decisions. For example, the historian Merlin Owen Newton focused her attention on two Supreme Court cases originating in Alabama, which were litigated from 1939 to 1946.[56] Similarly, Shawn Francis Peters' valuable work on the Jehovah's Witnesses and the law explores only the years 1938 through 1946.[57] These studies have provided valuable insight into the backgrounds and beliefs of individual litigants in Jehovah's Witness cases. However, Judge Rutherford and his associates began to protest the neglect of their free speech and press rights during the First World

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[55] Jennifer Jacobs Henderson, *Hayden Covington, the Jehovah's Witnesses and their Plan to Expand First Amendment Freedoms* (Unpublished Doctoral Dissertation, University of Washington, 2002); "Hayden Covington, The Jehovah's Witnesses and their Plan to Expand First Amendment Freedoms," *Journal of Church and State* 46 (2004): 811-832.

[56] *Jones v. City of Opelika*, 316 U.S. 584 (1942), 319 U.S. 103 (1943) and *Marsh v. Alabama*, 326 U.S. 501 (1946). Merlin Owen Newton, *Armed with the Constitution: Jehovah's Witnesses in Alabama and the U.S. Supreme Court, 1939-1946* (Tuscaloosa, Alabama: University of Alabama Press, 1994).

[57] Shawn Francis Peters, *Judging Jehovah's Witnesses: Religious Persecution and the Dawn of the Rights Revolution* (Lawrence, Kansas: University of Kansas, 2000).

War; in the 1920s and 1930s, they formulated their strategy for challenging the narrow reading of religious liberty in the Constitution. They understood that they were working within a jurisprudential context which stretched from the First World War to the 1950s. The focus on the era of the Second World War tends to obscure the roots of Jehovah's Witness legal work in First World War radicalism, and the connections of Rutherford's views with interwar era civil liberties interpretations.

Even when they attempt to re-center the litigant in these legal processes, most studies (concerning Jehovah's Witnesses and other civil rights activists alike) of strategic litigation have focused on Supreme Court cases. While this is somewhat understandable, due to the availability of materials and the importance of the Court's rulings, it becomes critical to examine cases at the local and state levels when attempting to assess the practice of organized litigation. Extensive trial testimony, which is often omitted from the records of the Supreme Court, provides invaluable insight into the motives of litigants and the events which occurred. Furthermore, as only a tiny fraction of cases are appealed to the Supreme Court, and only a minute portion of these actually decided by that tribunal, circuit court cases (where most appeals end, and most rules are made) are also a critical and neglected component in assessing strategic litigation. As the legal scholar Frank Cross wrote, "it is the circuit courts that create U.S. law. They represent the true iceberg, of which the Supreme Court is but the most visible tip."[58]

Regarding broader issues of civil liberties in America, many fine studies exist. The literature regarding civil disobedience in the civil rights movement has been

[58] Frank B. Cross, *Decision Making in the U.S. Courts of Appeals* (Stanford, California: Stanford University Press, 2007), 2.

plentiful.[59] Historians recently have begun to question the chronology of the civil rights movement, arguing for a "long civil rights movement" whose roots extended back to the 1930s.[60] Yet this analysis can further benefit from the inclusion of other groups, such as the Jehovah's Witnesses, whose struggles helped to define Constitutional rights. There is much research to be done regarding the efforts of civil rights workers in the judicial realm, in planning specific litigation strategies, crafting and implementing test cases. The legal scholar Clement Vose's 1967 study of the restrictive covenant cases is a notable exception.[61] Vose wrote that his "chief aim was to learn something of the role of interest groups in the judicial process."[62] Yet relatively little research has been done since into the significant role interest groups have played in redefining civil rights, and religious liberty, specifically in the judicial (as opposed to the legislative) arena.

Incorporating the role of interest group litigation into the analysis of constitutional rights represents part of a central debate over the place of the Supreme Court in American society. Before the twentieth century, most studies of legal history were almost entirely self-contained: the law was thought to be an entity unto itself, and could be understood by

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[59] Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality* (New York: Vintage Books, 1975, 2004); Jack Greenberg, *Crusaders in the Courts: How a Dedicated Band of Lawyers Fought for the Civil Rights Revolution* (New York: Basic Books, 1994).

[60] Jacqueline Dowd Hall, "The Long Civil Rights Movement and the Political Uses of the Past," *Journal of American History* 91, no. 4 (March 2005): 1233-1263. Glenda Gilmore recently utilized the "long civil rights movement" framework, describing the association of civil rights activists with economic radicals in the interwar period. Glenda Gilmore, *Defying Dixie: The Radical Roots of Civil Rights, 1919-1950* (New York: W.W. Norton & Co., 2008).

The lack of association between Civil Rights Movement and NAACP legal battles with other civil liberties is, perhaps, a problem of definition. The concern of many civil rights scholars with differentiating between economic and non-economic concerns, while helping to broaden the historiography of the Civil Rights Movement, tends to obscure other civil liberties claims which contributed to this redefinition. See, for example, Robert Korstad and Nelson Lichtenstin, "Opportunities Found and Lost: Labor, Radicals, and the Early Civil Rights Movement," *Journal of American History* 75 (December 1988): 786-811; Mark Tushnet, *The NAACP's Legal Strategy Against Segregated Education, 1925-1950* (Chapel Hill, North Carolina: University of North Carolina Press, 2004).

[61] Vose, *Caucasians Only*.

[62] Ibid., ix.

describing lines of case precedent. Beginning in the late nineteenth century, scholars introduced the idea that other factors must be considered when studying the law—social factors, the backgrounds of individual justices, and eventually the work of litigants and groups.[63] Adherents to these two ways of looking at the law have been called "internalists" (those who focus primarily on the cases and legal doctrine), and "externalists" (who view the law as responsive to social factors, and argue that it cannot be understood without taking into account this broader picture).[64]

This debate is not merely the terrain of legal theorists; its implications are central to the way real Americans view the Supreme Court, and the law in general, in their lives. Should the courts merely attempt to follow precedent, or do social factors need to be taken into account? Is there a place for the courts to bypass the will of the majority in order to define individual rights—as the Supreme Court arguably did in the landmark school-integration case *Brown v. Board of Education* and other cases? To what extent can individuals and groups hope to influence the law, by forming interest groups and implementing planned litigation? The Jehovah's Witness cases spoke directly to the ongoing debate about judicial activism versus restraint.[65] Judge Rutherford, and the lawyers he retained, took the view that judges made the law. Groups were correct, thus,

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[63] Lawrence Friedman, *A History of American Law*, Third Edition (New York: Touchstone, 2005); Kermit Hall, *The Magic Mirror*.

[64] Laura Kalman described the "internalist" versus "externalist" debate regarding the battles over New Deal legislation in "Law, Politics, and The New Deal(s)," *Yale Law Journal* 108 (1999): 2165. See also Neil M. Richards, "Review: The 'Good War,' the Jehovah's Witnesses, and the First Amendment," *Virginia Law Review* 87, no. 4 (June 2001): 781-811. Kalman also describes "new internalists," who have moved away from the idea that law is simply found, and toward a history of jurisprudence as institutional and intellectual history.

[65] See Peter Linzer, "The Carolene Products Footnote and the Preferred Position of Individual Rights: Louis Lusky and John Hart Ely vs. Harlan Fiske Stone," *Constitutional Commentary* 12 (Summer 1995): 277. See also Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (New York: Oxford University Press, 1998); Laura Kalman, *The Strange Career of Legal Liberalism* (New Haven: Yale University Press, 1996); Laura Kalman, "Law, Politics, and The New Deal(s), *Yale Law Journal* 108 (1999): 2165; Neil M. Richards, "Review: The 'Good War,' the Jehovah's Witnesses, and the First Amendment," *Virginia Law Review* 87, no. 4 (June 2001): 781-811.

in agitating on their own behalf, if they felt the system had mistreated them. Many other groups, in the twentieth century and beyond, would take a similar approach.

For all their insularity and religious conviction, Jehovah's Witnesses fought consistently for an active Supreme Court to define the principles of civil liberty—generally, and not only for the protection of their own rights. As fervently as he criticized other religious groups, Judge Rutherford was appalled at the suggestion that any group be muzzled—whether or not he agreed with their views. What was needed, and mandated by the fundamental law of the United States, Rutherford argued, was the clear and open opportunity for each group or individual to state his views. For this reason, Jehovah's Witnesses were in some ways civil libertarians—rather than merely another religious group seeking to have their own rights protected. The chance to speak and to publish, to practice and to preach, was what they sought. Rather than prohibiting the dissemination of unpopular views, Rutherford argued, what was necessary was open and free exchange of ideas. Of course, this view stemmed from Rutherford's belief that, if only people were allowed to hear the gospel and his views, they would be persuaded to "come into the Truth." Yet the fact that their primary purpose was evangelical does not obviate the talent of Jehovah's Witness lawyers for staging a broad defense of religious and civil liberties—for which they became well known in their time. In the 1930s, ACLU lawyers carried on an extended and friendly correspondence with Olin Moyle, the first chief counsel of the Watch Tower Legal Department. In the 1950s, Justice Department lawyers corresponded with the famous Jehovah's Witness lawyer Hayden Covington, asking him to recommend lawyers to pursue civil rights cases in the South unrelated to religious liberty. In the mid-1960s, Covington defended the boxer

Muhammad Ali (who was not himself a Jehovah's Witness) when he sought a draft exemption based on his religious beliefs.

Many groups, in the twentieth century, have used the courts to guarantee their fundamental rights, and to do battle on these social and constitutional issues. The modern definition of religious liberty was largely litigant-driven, as was the connection of this concept with other civil liberties. In the 1930s and 1940s, the Jehovah's Witnesses helped to transform the meaning of civil liberties in America. In so doing, they demonstrated the power of deliberate legal action in expanding minority rights. A wide variety of organizational litigants, including the ACLU and the NAACP, also became involved in planned litigation, ultimately reshaping the model of civil liberties and civil rights in America. Soon, civil rights movement advocates would push for expanded rights on a much larger scale. The converging strategies of Jehovah's Witnesses, the ACLU and other groups indicate that religious liberty, far from being an afterthought, was integral to the twentieth-century transformation of rights in America.

Chapter I: The First World War and the Birth of Civil Liberties

The Jehovah's Witnesses' involvement in expanding First Amendment rights began during the First World War, when they were known simply as Bible Students. "Come out of the mouth of the dragon…And out of the mouth of the beast," urged the International Bible Students Association in their book *The Finished Mystery*, published in July 1917.[1] *The Finished Mystery*, the seventh and final volume in the group's *Studies in the Scriptures* series, was an exhaustive interpretation of the Bible books Revelation and Ezekiel. It was purported to be the long-awaited, posthumously published work of Charles Taze Russell, founder of the Bible Student movement, who had died aboard a train en route from California to New York in late 1916.[2] Amid the book's six hundred pages detailing the Bible Students' expectation of an imminent apocalyptic struggle, several passages addressed the subject of war. "Nowhere in the New Testament is patriotism (a narrow minded hatred of other people) encouraged," the book advised.

> Everywhere and always murder in its every form is forbidden. And yet under the guise of patriotism civil governments of the earth demand of peace-loving men the sacrifice of themselves and their loved ones and the butchery of their fellows, and hail it as a duty demanded by the laws of heaven.[3]

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[1] Russell, *The Finished Mystery* (Brooklyn, New York: International Bible Students Association, 1917), 247. The Bible Students changed their name to Jehovah's Witnesses in 1931.

[2] The book was compiled by Bible Students Clayton J. Woodworth, George H. Fisher, and the group's new president, "Judge" Joseph F. Rutherford.

[3] Quoted in Ray Abrams, *Preachers Present Arms* (New York: Round Table Press, Inc., 1933), 183. In their reissue of *The Finished Mystery* in 1919, the IBSA changed the wording of the passage slightly. "Nowhere in the New Testament is hatred of other peoples encouraged," the revised version read. "Everywhere and always it is forbidden; and yet, under one guise or another it has been encouraged for centuries by the clergy class who should have been teaching the people the message given them by the Prince of Peace." Charles Taze Russell, *The Finished Mystery* (New York: International Bible Students Association, 1919), 248.

The Bible Students spoke out against earthly wars in general, and claimed that the Great War in particular had been started by politicians and the clergy for selfish and nefarious reasons.

Had it been published at any other time, indeed, *The Finished Mystery* might have drawn little attention from the public or from the authorities—save the thousands of people a year the Bible Students sought to "bring into the truth." However, Judge Rutherford, the group's president, issued the book at the height of the First World War. By mid-1917, the conflict had already claimed millions of lives in Europe, and the United States had officially entered the war in April of that year. The book was distributed throughout the United States and Canada by an army of door-to-door and public-square-preaching Bible Students. Members of the group refused military service, claiming conscientious objection. The group's public anti-war stance provoked accusations of disloyalty and seditious behavior. Patriotic mobs across the United States surrounded members of the group, tarring and feathering them, painting them yellow or marking them with crosses, and running them out of town.[4] Local authorities and private citizens seized Bible Student literature, which included several magazines and *The Finished Mystery*. In March 1918, agents from the Military Intelligence Bureau[5] and the Department of Justice raided Bible Student headquarters in Brooklyn, seizing carloads of pamphlets and books. And less than two months later, in early May, 1918, authorities returned to Brooklyn to arrest nine Bible Student leaders for conspiring to obstruct the United States' war effort. Rutherford and his associates would eventually spend nine months in the Federal Penitentiary in Atlanta, for violations of the Espionage Act—on

[4] See *Civil Liberties Bureau, Wartime Prosecutions and Mob Violence* (1917-1919). Papers of the National Civil Liberties Bureau, Peace Collection, Swarthmore College.

[5] A branch of the War Department.

charges similar to those leveled against the anarchists Emma Goldman and Alexander Berkman, and the socialist Eugene Debs. The experience would galvanize Rutherford and his group to defend their rights, as well as the rights of other religious and political minorities, to publish and to preach under the First Amendment.

Preparing for God's Kingdom on Earth: Political Neutrality and Free Speech

When Judge Rutherford announced the printing of *The Finished Mystery* to his closest followers on July 17, 1917, over breakfast at the Bible Students' Brooklyn home, the United States had been at war for three months. Rutherford was the president of a home-grown American religious group which, although it had existed for less than half a century in 1917, had already attracted both notoriety and scorn. In the first decades of their existence, members of the group—who became known as Jehovah's Witnesses in 1931—had been called Bible Students, the Watch Tower Society, "Millennial Dawnists," and "Russellites."[6] This last sobriquet paid tribute to the founder of the movement, Charles Taze Russell (1852-1916). In the late nineteenth and early twentieth centuries, "Pastor Russell" became known far beyond his western Pennsylvania origins.[7] Russell,

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[6] This variety of names was due in part, as Jerry Bergman has pointed out, to the fact that Russell himself had urged that his followers be called simply "Christians." During his lifetime, thus, adherents were called, variously, "Russellites," "Millennial Dawnists," the "Associated Bible Students," the "International Association of Bible Students," and, most commonly, the "Bible Students." Jerry Bergman, *Jehovah's Witnesses and Kindred Groups: An Historical Compendium and Bibliography* (New York: Garland Pub., 1984). In 1931, Russell's successor as president, Joseph F. Rutherford, changed the group's name to Jehovah's Witnesses, as they are known today.

[7] Despite his notoriety, there is surprisingly little information available about Russell's early life. No monograph-length biography of C.T. Russell exists, save David Horowitz's *Pastor Charles Taze Russell: An Early American Christian Zionist* (New York: Philosophical Library, 1986) which, though purporting to be a biography, is more concerned with Russell's views regarding Israel and biblical typology than with the narrative of his life. In general, little secondary literature exists regarding the Bible Students and the Jehovah's Witnesses, aside from the Watch Tower Society's own publications. This dearth of scholarly examination of the group is particularly noticeable in the broader literature of apocalyptic religion and millennialism after the Second Great Awakening. For example, the historian Paul Boyer affords the group virtually no space in his otherwise excellent *When Time Shall Be No More: Prophecy Belief in Modern American Culture* (Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 1992). A similar absence exists in Timothy Weber, *Living in the Shadow of the Second Coming: American Premillennialism, 1875-1925* (New York: Oxford University Press, 1979). The sociologists Rodney Stark

the son of a haberdasher, had expressed an interest in religion early in his life. Condemning the Pennsylvania churches of his youth for being "too much like social clubs," he was plagued by religious doubt, and he had abandoned first the devout Scotch-Irish Presbyterianism of his parents, and then his adopted Congregationalism.[8] Historians of religion have characterized the mid- to late-nineteenth century as a time when the inclination toward modernity—embodied by modern Biblical criticism, democratic social ideology, and scientific philosophy—attracted growing opposition.[9] Having thrown off the fetters of old-line Calvinist Christianity, Russell had also found little appeal in "modern" Protestantism. Drawn back into religion by a traveling Adventist preacher in 1869, Russell had begun to study the Scriptures intensely.[10]

The centerpiece of Russell's developing philosophy was that ordinary people must read the Bible for themselves. "Truth-seekers," Russell had stressed, "should empty their vessels of the muddy waters of tradition, and fill them at the fountain of truth—God's Word."[11] While initially influenced by William Miller's Adventism (an apocalyptic movement prone to messianic forecasts), Russell had broken with other

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and Laurence R. Iannaccone decried this lack of literature in their article "Why the Jehovah's Witnesses Grow So Rapidly: A Theoretical Application," *Journal of Contemporary Religion* 12, no. 2 (1997): 133-157.

[8] James Beckford, *The Trumpet of Prophecy: A Sociological Study of Jehovah's Witnesses* (New York: Wiley, 1975), 4, quoting from *Zion's Watch Tower*.

[9] See S. Persons, "Religion and Modernity, 1865-1914," in eds. James Ward Smith and A. Leland Jamison, *Religion in American Life* (Princeton, New Jersey: Princeton University Press, 1961). For Russell's position in this environment, see James Beckford, *The Trumpet of Prophecy*.

[10] Adventism was initially inspired by William Miller (1782-1849), who had taught that the Second Coming of Jesus Christ was imminent. The "Millerites" had become notorious for their calculations of the exact date of the Second Coming; when these messianic forecasts had failed to materialize—junctures referred to as the "great disappointments"—the Millerite movement had not disappeared. For the next three decades, these Adventists had spawned a handful of enduring religious groups (including the Seventh-Day Adventists and the Adventist Christian Church), and a large number of itinerant preachers without institutional affiliation.

[11] James Beckford, *The Trumpet of Prophecy*, 12.

Adventists in the 1870s, and had begun to publish his own tracts.[12] Never abandoning his Adventist roots, in 1886, Russell had predicted that 1914 would mark "the end of the time of the Gentiles." At this time, God's elect (numbering 144,000 Christian believers) would eventually return to live in God's Kingdom on earth.

Russell taught that the churches had deviated from true Christianity, incorporating "pagan" and other beliefs to suit their own ends. The idea of immortality of souls had been derived from "heathen religions," as had the doctrine that sinners would experience a hellfire of eternal torment, which became a "merciless doctrine" in the hands of the churches.[13] Russell had written that

> Eternal torment as the penalty for sin was unknown to the patriarchs of past ages; it was unknown to the prophets of the Jewish age; and it was unknown to the Lord and apostles; but it has been the chief doctrine of Nominal Christianity since the great apostacy—the scourge wherewith the credulous, ignorant and superstitious of the world have been lashed into servile obedience to tyranny. Eternal torment was pronounced against all who offered resistance to or spurned Rome's authority, and its infliction in the present life was begun so far as she had power.[14]

Russell's view had been that "death is death, and that our dear ones, when they pass from us, are really dead, that they are neither alive with the angels nor with demons in a place of despair."[15] Russell never claimed to be a prophet, and he did not profess to have had

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[12] First, pamphlets called *Zion's Watch Tower and Herald of Christ's Presence* (later *The Watch Tower*), and then, in the 1880s, a series of Bible guides called the *Millennial Dawn* series (later changed to *Studies in the Scriptures*), a set of simple guides to the Bible. The name change was due to the fact, as Russell explained later, that because of the title *Millennial Dawn*, "some were deceived thereby into thinking it a novel." Charles Taze Russell, *The Plan of the Ages* (Brooklyn, New York: International Bible Students Association, 1917), iii. The *Studies in the Scriptures* series eventually included seven volumes, of which *The Finished Mystery* was the final, posthumous installment.

[13] Charles Taze Russell, *Do the Scriptures Teach That Eternal Torment is the Wages of Sin?* (*The Old Theology*, 1889), quoted in *Jehovah's Witnesses: Proclaimers of God's Kingdom* (New York: Watchtower Bible & Tract Society, 1993), 128; See also Charles Taze Russell, *What Say the Scriptures about Hell?* (1896).

[14] *Jehovah's Witnesses: Proclaimers of God's Kingdom*, 128.

[15] *Jehovah's Witnesses: Proclaimers of God's Kingdom*, 129. In 1903, Russell debated E.L. Eaton, who represented an unofficial alliance of Protestant ministers in western Pennsylvania, about the

any exceptional divine inspiration. Instead, he taught that history was the progressive unfolding of a "divine plan," and maintained that humans could understand this plan as a series of dispensations—toward Armageddon and, ultimately, the kingdom of heaven on earth.[16] The Bible, he urged, was the key to understanding this plan.

Although he emphasized Bible reading, Russell's philosophy also challenged the status quo of American society. He taught that religion, government, and business were parts of an "evil trinity," by which Satan controlled the Earth. Declaring all religious groups to be false, Russell had also criticized secular governments as their corrupt instruments. True religion involved no church at all, and the establishment of God's kingdom on earth hinged on the abolition of creeds and churches. The churches, according to Russell, were in the hands of Satan, and "Satan must first be bound, restrained and deposed before Christ's reign of righteousness and peace can be established."[17] He reserved a particular disdain for the Catholic Church, with its reliance on religious imagery, hierarchy, and papal authority.[18] Satan owned not only the churches, but also "Gentile governments,"[19] and Christians had neither "time nor disposition to dabble in the politics of present governments."[20] Russell also condemned

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condition of the dead. Russell also organized a series of one-day conventions from 1905 to 1907, on the theme "To Hell and Back! Who Are There? Hope for Return of Many."

[16] James Beckford, *The Trumpet of Prophecy: A Sociological Study of Jehovah's Witnesses*, 2.

[17] Ibid., 69.

[18] Ibid. Russell's scorn for the Catholic Church, he said, stemmed from his insistence on reading the Scriptures, a practice of which, according to Russell, the Catholic Church had long deprived people. Protestantism had at first sought to remedy this, yet soon become overly reliant on intermediaries and interpretation as well.

[19] Ibid., 254.

[20] Russell, *The Plan of the Ages*, 267. No earthly government could be considered Christian, and no nation could rightfully be called a "Christian nation." Efforts to entrench "Christian" values in the United States government, thus, were misguided. During the late nineteenth century, both courts and legal theorists habitually debated the question of whether Christianity was a part of the common law of the United States; several churches became involved in these questions as well. Russell referred, for example, to Reformed Presbyterians' refusal to vote until certain measures were taken to institutionalize this connection between church and state. "Under this deception," he wrote, this group was "at present very

the flourishing industrialists of his time, urging the lower classes to recognize that they lived in an inequitable society. To participate in any part of this system, Russell taught, was only to bolster the power of Satan.

Bible Students were instructed to live by a "neutrality principle," abstaining from politics, established religion, and business. Yet the relationship of the Bible Students to civil government in America was more complicated than their neutrality principle might indicate. On the one hand, Russell taught that national affiliations, bolstered by the interests of big business, had led to many unnecessary wars. The churches, particularly the Catholic Church, had instigated many of these conflicts to further their own selfish aims. On the other hand, however, Russell expressed great admiration for American democracy. The Bible Students looked to ancient Israel which, they asserted, was God's example of a perfect government. "[T]o the confusion of those who ignorantly claim that the Bible sanctions an established empire rule over the people, instead of 'a government of the people by the people,' be it noted that this republican form of civil government continued for over four hundred years."[21] The American system of government, although it had been evilly influenced by the churches and business, was typified in the Bible. Yet it "is worth of note," Russell wrote, "that the laws of the most advanced civilization, in this twentieth century, do not more carefully provide that rich and poor shall stand on a common level in accountability before the civil law."[22] In ancient times, Russell pointed out, the priests had read the laws at festivals, so even the poor would not be ignorant of

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Solicitous that the name of God should be incorporated into the Constitution of the United States, that *thereby* this may become a Christian nation." According to Russell, however, this was outrageous. Rather than attempting to enlist governments and authorities to help maintain Christianity, from the beginning Russell encouraged a strict separation of church and state. Ibid., 270.

[21] Ibid., 48.

[22] Ibid., 49.

them.[23] Although they were not to become involved in politics, then, Bible Students urged the restoration of equal rights, and values of liberty and republicanism—and did not distance themselves from legitimate laws applied to all citizens equally.

From the beginning, the Bible Students had been "amazingly active evangelists."[24] Far from simply waiting for the establishment of God's kingdom on earth, Russell taught, the deposition of Satan must be accomplished by humans, actively spreading the message of God.[25] Bible Students distributed tracts and pamphlets to those they hoped to bring into the truth—even placing these publications (condemning churches) free at the doors of churches on Sundays.[26] In the early 1900s, Russell had embarked on national speaking tours, traveling by train across the United States. He arranged to have his lectures advertised widely, printing his speeches in newspapers across the nation.[27] In 1914, Russell launched a production entitled "The Photo-Drama of Creation," an elaborate four-part moving picture show comprised of slides and phonograph recordings of Russell's lectures that lasted eight hours.[28] He also established a "colporteur" division—a department of workers who placed the literature (books, circulars, and copies of the magazines) directly into people's hands across the country

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[23] Ibid., 50.

[24] The former Jehovah's Witness M. James Penton described Russell this way in *Apocalypse Delayed: The Story of Jehovah's Witnesses* (Toronto: University of Toronto Press, 1985), 29.

[25] This quality of individual empowerment harked back to the philosophy espoused by Miller himself. As the historian Paul Boyer observes, "Miller, himself possessing little formal education, insisted that *anyone* could interpret the prophecies. Indeed he urged others to check his system against their own calculations." Thus, Millerism, Boyer asserts, "heralded the full democratization of prophetic belief in the United States." Boyer, *When Time Shall Be No More*, 83.

[26] Russell, *The Finished Mystery*, 55.

[27] See, for example, "Millennial Dawn," *Daily Express (San Antonio)*, October 2, 1900; "Sermon by C.T. Russell," *New York Times*, June 8, 1901, 6; "A Pilgrim Preacher," *San Jose Mercury News*, 1903. Russell's sermons had been syndicated in over 2,000 newspapers by 1910.

[28] The display was widely advertised and even praised; for example, the *New York Times* raved in 1914 that "Although the main object of the Bible Students' Association in this production is to 'spread the Gospel through moving pictures,' the photodrama is not didactic, and it tells a vivid and interesting story, which runs nearly three hours." "Gospel by Film Drama," *New York Times*, January 12, 1914, 9.

and internationally. "Practically every home in America, England, Germany, Sweden, Australia, and other Protestant countries," the Bible Students boasted, "was reached by a deluge of free tracts."[29]

Perhaps because of these rampant proselytizing techniques, such as sending copies of their (largely anti-clerical) works "to all clergy whose names could be obtained," the Bible Students did not always receive a keen reception.[30] The movement's emphasis on public "witnessing" (distributing tracts and pamphlets widely on the streets, and discussing their beliefs with anyone who would listen) led, in some areas, to the perception that Bible Students were a public nuisance, even a "pestilential persuasion."[31] The *New York Times* reported in 1914 that the Bible Students had "invaded" Ocean Grove and Asbury Park, New Jersey at dawn, prompting residents to call the police. "Disciples of 'Pastor' Russell invaded Ocean Grove this morning about dawn"; upon being scolded by the police, the group disbanded quickly, but "'Pastor' Russell, in speaking of the incident later in the day at Asbury Park, said that the real objection to his association by the pastors in opposition to him was that he told the truth they did not dare to tell…"[32]

The group often chose to witness on Sundays, showing the Photo-Drama on that day as well, in defiance of regulations banning moving pictures on the Sabbath.[33] The

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[29] Russell, *The Finished Mystery*, 382.

[30] Specifically, they had sent Volume IV of the *Studies in the Scriptures* series, *The Battle of Armageddon* (1897); this seems to have been when the storm of disapproval of the Bible Students, and Russell in particular, erupted. Russell, *The Finished Mystery*, 241.

[31] Abrams, *Preachers Present Arms*, 182.

[32] "Russellites Turned Away," *New York Times*, June 30, 1914, 20.

[33] The Bible Students actually pursued one of these cases all the way to the state supreme court. See *State v. Morris*, 28 Idaho 599 (1916). In this case, the high court actually decided in the Bible Students' favor, overturning their convictions. See also J.F. Rutherford's description of an early conflict which occurred in Laurel, Mississippi. Although this dispute was eventually resolved extra-judicially, events of this type were not uncommon during the Bible Students' early history, and may help to explain

fact that Bible Students visited heavily Catholic ethnic neighborhoods in New Jersey likely only increased their conflicts with local police.[34] The very content of the Bible Students' religion, which necessitated evangelizing and promotion of their views, put their practices into conflict with secular authorities seeking to control their communities. Their religious practice was of an unfamiliar (if ancient) variety—instead of holding church services, the group preached their message in the public squares and on the streets, peddling publications which they printed at their own presses.

In its first decades, the movement had largely been driven by Russell's personality—he was by many accounts a "spellbinder," whose long white hair "gave him the appearance of a modern patriarch." Russell's great energy for personal conversation, his "natural charm, his seeming broad-mindedness, his devotion to the Bible, his extreme claims," had persuaded his followers to leave their old religious beliefs behind.[35] Most of those who came to the movement described simply being convinced upon reading one of the Society's publications or hearing Russell speak. Russell made a point of trying to convert Methodist, Lutheran, Baptist, Episcopalian, and Roman Catholic ministers, and delighted in publishing their testimonial letters in *The Watch Tower*. Yet most rank-and-file Bible Students seem not to have been former clergy, but rather ordinary middle class

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why they sought broader legal remedies. J.F. Rutherford, *A Great Battle in the Ecclesiastical Heavens, as Seen by a Lawyer* (Brooklyn, New York: International Bible Students Association, 1915), 46.

[34] Asbury Park, for example, was one of the densely populated New Jersey towns there Catholic ethnic identities were strong. See James T. Fisher, "Catholicism in the Middle Atlantic," in eds. Randall Balmer and Mark Silk, *Religion and Public Life in the Middle Atlantic Region: The Fount of Diversity* (Lanham, Maryland: AltaMira Press, 2006). Regarding places such as Jersey City, Fisher noted, "where municipal employees routinely cleared snow from the steps of parochial schools, the lines separating church and state were blurred beyond recognition." Fisher, "Catholicism in the Middle Atlantic," 80. See also James T. Fisher, *Communion of Immigrants: A History of Catholics in America* (New York: Oxford University Press, 2002).

[35] Herbert Stroup, *The Jehovah's Witnesses* (New York: Columbia University Press, 1945), 6-7.

people.[36] One scholar described nineteenth-century Bible Students as "largely upper-working and lower-middle class. Among farmers, laborers, and small businessmen there was a considerable number of professionals – medical doctors, lawyers, dentists, teachers, ex-clergymen, and retired army officers."[37] While generalizations regarding the backgrounds of Russell's early followers are difficult to make, "during Russell's time, while some may have become Bible Students out of a sense of deprivation, more were probably attracted by the rationalism so evident in the Pastor's writings and the whole idea of a 'divine plan'."[38]

Though headquartered first in Western Pennsylvania and then in Brooklyn, the Bible Student movement quickly expanded beyond the northeast. In 1893, members of the group met for the yearly convention in Chicago, apparently taking advantage of railroad fare discounts in connection with the Columbian Exposition. By the early years of the twentieth century, several conventions were organized each year in various parts of the country, and by 1909 there were more than 45 local assemblies. General conventions

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[36] Ibid., 76. Disappointingly little can be determined beyond general impressions about the social status and motivations of Bible Students before the First World War. In 1945, the sociologist Herbert Stroup complained about the paucity of sociological data on the Witnesses, due to the organization's close guarding of information about members' social statuses, reasons for conversion, etc. In fact, Rutherford himself warned his followers not to be forthcoming with information for Milton Czatt, who was attempting to complete his PhD dissertation, and of whom Rutherford had become suspicious ("The Timely Warning," *The Golden Age*, March 6, 1929). Several scholars have argued that the movement's adherents were "pretty average"—representing the percentage norms for the whole population. Alan Rogerson, *Millions Now Living Will Never Die* (London: Constable and Co., Ltd., 1969), 174-175; Penton, *Apocalypse Delayed*, 255. While Czatt surmised (without substantiating data) that early Bible Students were "predominantly laborers, mechanics, factory-workers, and farmers," and other early studies of the movement suggested that those who joined in its early days had little education, Rogerson and subsequent scholars have refuted this. Milton Czatt, *The International Bible Students*, 20-21, quoted in Stroup, *The Jehovah's Witnesses*, 73. The Former Jehovah's Witness James Penton argued that, in the movement's early existence, most adherents came from upper-working and lower-middle classes. Penton, *Apocalypse Delayed*, 255.

[37] Penton, *Apocalypse Delayed*, 255.

[38] Ibid. Penton, drawing on the work of Reginald Bibby and Merlin Brinkerhoff, warned against the "deprivation theory"—the inclination to suppose that people became Jehovah's Witnesses because they were economically, psychologically, or socially unprivileged in some way. Penton asserts that most converts were average. Penton, *Apocalypse Delayed*, 251.

in the United States and in Canada drew up to 4,000 people. Russell took speaking chartered tours all over the United States and Canada, himself visiting three hundred cities in North America and traveling through most of the countries in Europe, Russia, and the Middle East. In 1909, for example Russell attended the convention in Norway, with an attendance of 1,200. The same year, on a tour of Scotland, he addressed 2,000 people in Glasgow, and 2,500 in Edinburgh.[39]

In the forty years since he had founded the movement, Pastor Russell had "traveled a million miles, delivered 30,000 sermons and table talks—many of them 2 ½ hours long—wrote over 50,000 pages…of advanced Biblical exposition, often dictated 1,000 letters per month, managed every department of a world-wide evangelistic campaign employing 700 speakers, personally compiled the most wonderful Biblical drama ever shown…"[40] The prolific books, pamphlets, and periodicals were the product of a remarkable publishing establishment at the organization's headquarters near Pittsburgh. Bible Students gathered yearly at conventions, to hear Russell's lectures and to discuss the work. By the time of the First World War, Russell and the Watch Tower Society (founded in 1884 to disseminate Russell's teachings) had achieved significant notoriety in the United States.

A Lawyer Persuaded: "Judge" Rutherford and the Bible Students

One of the recipients of these evangelistic efforts was a lawyer named Joseph Franklin Rutherford (1869-1942). Born to a Missouri farm family, Rutherford had taken little interest in religion early in his life.[41] He had gone to college and studied law, but

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[39] Ibid. See also *Jehovah's Witnesses: Proclaimers of God's Kingdom*, 717.

[40] Russell, *The Finished Mystery*, 57.

[41] *American National Biography*, 92. No biography of Rutherford has been published, and very little is known about his early life. He was apparently raised in a nominally Baptist family.

only by paying a hired laborer to take his place on the family farm, at this father's insistence.[42] Rutherford became a court reporter at the age of 20, and three years later received his license to practice law in Missouri, serving as a public prosecutor for four years. He also served as a special (substitute) judge for the Eighth Judicial Circuit Court. To pay for law school, Rutherford had sold encyclopedias door-to-door, and remembered the difficulty of that work—having doors slammed in his face, and even falling into an icy stream while trekking from farm to farm. Rutherford had pledged that when he became a lawyer, he would never turn away a traveling salesman. He held true to this promise when two colporteurs had shown up at his office in 1894, and he had bought the first three volumes of the *Millennial Dawn* series.[43] After reading Russell's works some time later, Rutherford had traveled to hear Russell's lectures. Russell and his close associate, Alexander H. Macmillan—one of the Watch Tower Society directors—met Rutherford on one of their nation-wide speaking tours, and Russell enjoined Rutherford to write a book about his experience: *Man's Salvation from a Lawyer's Viewpoint* (1906).[44] In 1907, Rutherford joined Russell, in the position of legal adviser for the Watch Tower Society.[45]

Russell soon decided to move the Society's headquarters to New York, and he sent Rutherford ahead to purchase a series of properties in Brooklyn, which became both headquarters and residence for the Society's staff. They called the central location, at Columbia Heights, "Bethel"—the "House of God." Russell and most of his close

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[42] Biographical information about Rutherford may be found in Jerry Bergman's introduction to *Jehovah's Witnesses I: The Early Writings of J.F. Rutherford* (New York: Garland Publishing, 1990).

[43] Later called *Studies in the Scriptures. Jehovah's Witnesses: Proclaimers of God's Kingdom* , 67.

[44] Macmillan, *Faith on the March* , 43.

[45] Ibid., 67.

associates worked and lived together at this Brooklyn Bethel, along with the Society's staff. Those selected to live at Bethel called one another "brother" and "sister," and shared not only their work but also their lives—they were called the "Bethel family." All meals were prepared by the family on the premises, and eaten together in a large communal dining room. The days began and ended with Scriptural study, and the remainder of time was spent attending to the Society's work of preaching and publishing. Everyone in the Bethel family, no matter what position he or she filled, received the same small monthly stipend ($13 a month when the Society first moved to Brooklyn). Those living at Bethel were devoted to the Bible Student mission, and Rutherford, as legal counsel to the Society, was among their ranks.

Russell had been teaching since the 1880s that 1914 would signal the end of the "Gentile Times". The Bible Students took the inception of the First World War as a confirmation of their millenarian expectations.[46] On October 2, Russell came down to breakfast at the Brooklyn Bethel, "briskly clapped his hands and happily announced: 'The Gentile times have ended; their kings have had their day.' We all applauded." Russell, however, would not live to see his prediction that 1914 was the "beginning of the end times" fulfilled. He died aboard a train returning to New York from Los Angeles on October 31, 1916. After a brief power struggle, Rutherford took control of the Watch Tower Bible and Tract Society, and was elected its president on January 6, 1917.[47] Some

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[46] Macmillan, *Faith on the March*, 47. Alexander Macmillan remembered a speech he gave at a Saratoga Springs convention in late September, 1914, entitled "The End of All Things is at Hand; Therefore Let Us Be Sober, Watchful and Pray". Believing that the church was "going home" in October 1914, "Mac," as he was known, made what he later characterized as an "unfortunate" remark. "This is probably the last public address I shall ever deliver," he recollected mentioning, "because we shall be going home soon." When the world failed to end in September, Mac's embarrassment was diminished when Russell explained that the Bible Students were not physically to leave during that period.

[47] Despite his failing health, Russell had not named a successor. At the time of his death, leadership of the group was spread among members of the Watch Tower Society and People's Pulpit

followers criticized Rutherford for acting as "a Prosecuting Attorney rather than…a Christian," having "every earmark of the Lawyer, the Counselor, the Prosecuting Attorney."[48] In the end, despite criticism of some board members, Rutherford retained control over the Watch Tower Society—and eventually reformed it in his own image.

"It is true," Alexander Macmillan wrote, "that Rutherford was an altogether different type of man than Russell."[49] Where Russell had been gentle, quiet-mannered and persuasive, Rutherford was direct and outspoken, with a bluntness that could be misunderstood. He was stubborn, a lawyer to his core—analyzing Adam's original sin and expulsion from the Garden of Eden as a legal matter.[50] In his pamphlet *A Great Battle of the Ecclesiastical Heavens, as Seen by a Lawyer—an International Case, Reviewed by J.F. Rutherford of The New York City Bar* (1915), Rutherford had styled a faux court document, pitting "One Man, Defendant" (meaning Russell) against Catholics, Episcopalians, Methodists, Lutherans, Baptists, Presbyterians, et al., Plaintiffs, describing Bible Students' views—in a distinctively combative manner.[51] In one example, Rutherford described an early conflict with the law over the screening of the Photo-Drama of Creation, which occurred in Laurel, Mississippi. When the local cadre of Bible

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boards. Rutherford was able to succeed Russell as president in part because of his knowledge of the Society's legal affairs. M. James Penton, the historian and former Jehovah's Witness, emphasized this in his account of Rutherford's succession in *Apocalypse Delayed*. Rutherford fortified his position, forcing four of his competitors out of the leadership of the organization. As Stark and Iannaccone noted, "In the power struggle that followed Russell's death, Judge J.F. Rutherford quickly took control of the Watch Tower Society through legal maneuvers that included the ouster of dissident board directors." Stark and Iannaccone, "Why the Jehovah's Witnesses Grow So Rapidly," 134.

[48] "Harvest Siftings," and "Light After Darkness, A Message to the Watchers, Being a Refutation of 'Harvest Siftings'." Notably, these detractors presented the power grab as a case, "'Let There Be Light!': J.F. Rutherford, W.E. Van Amburgh, vs. A.N. Pierson, I.F. Hoskins, R.H. Hirsh, J.D. Wright, A.I. Ritchie."

[49] Macmillan, *Faith on the March*, 72.

[50] This take on Rutherford's thought is emphasized by Barbara Grizutti Harrison, *Visions of Glory: A History and a Memory of Jehovah's Witnesses* (New York: Simon and Schuster, 1978).

In 1909, Rutherford had applied for and been admitted to the Bar of the United States Supreme Court. James H. McKenney, Clerk of the Supreme Court, Washington, D.C., 14 February 1910.

[51] Rutherford, *A Great Battle in the Ecclesiastical Heavens, as Seen by a Lawyer*, 1915.

Students rented the town's opera house to exhibit the Photo-Drama, a Methodist minister found this out and attempted to intimidate the Bible Students, including inducing the police to threaten them, and the electric company to shut off the power to the opera house. "The Photo-Drama Manager then went to Judge Beavours," Rutherford continued, "the leading attorney of the city, and appealed to him for assistance. He is a 'Lawyer of the Old School,' who is willing to fight for the right. He at once informed the Electric Light Company and the city officials that he would apply to the courts for an injunction against them, and have them restrained from unlawfully exercising their power. This frightened the city officials and the Electric Light Company, and the preachers weakened. They decided to not further attempt to prevent the exhibition of the Photo-Drama." Although this dispute was eventually resolved extra-judicially, events of its type were not uncommon during the Bible Students' early history, and may help to explain why they sought broader legal remedies to enable their religious practice.

Rutherford's assumption of the IBSA presidency was auspicious, and he pushed Russell's message even further. "The papal system is the mother of all harlots," Rutherford explained.

> The term 'mother of harlots' signifies her daughters are likewise harlots. In the larger sense, then, the word applies to ecclesiasticism as a whole—the Catholic and Protestant systems—not the people. Harlotry means the unlawful relationship between ecclesiastical and civil powers.[52]

Condemning attempts to quash the Bible Students' work, Rutherford complained that if "our forefathers, who laid the foundation of the American Government as a land of religious freedom, could see the religious intolerance manifested by this combine of ministers, they would turn over in their graves. The methods adopted in their frantic

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[52] *Kingdom News* I, no. 3, May 1918.

endeavor to crush Pastor Russell and his philanthropic work are shocking to every fair-minded, liberty-loving person."[53]

'The Finished Mystery': Religious Neutrality and the First World War

Russell had died before releasing his promised seventh and final volume in the *Studies in the Scriptures* series. In mid-1917, Rutherford announced that the book was ready.[54] The book, however, was immediately the subject of criticism.[55] *The Finished Mystery* contained the most aggressive and substantial attacks on both Protestant and Catholic churches to date, as well as condemnation of civil governments.[56] Published at the beginning of the United States' military involvement in the First World War, the book seemed to constitute a direct challenge to the authorities. Beginning in 1917, the Bible Students, with Rutherford at their helm, were to be subjected to the most significant test of their principles. Events would force the group to determine and articulate their positions on war, government, and the law. Although the Bible Students—and Russell himself—had had earlier brushes with the law, the First World War brought them into direct conflict with authorities.[57]

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[53] Rutherford, *A Great Battle in the Ecclesiastical Heavens, as Seen by a Lawyer*, 12.

[54] The title of the book was a reference to Russell's earlier works in the *Studies in the Scriptures* series. In the first volume of the series, Russell had written, "In point of time, the mystery of God will be finished during the period of the sounding of the seventh [symbolic] trumpet. (Rev. 10:7) This applies to the mystery in both senses in which it is used: the mystery or secret features of God's *plan* will then be made known and will be clearly seen; and also the 'mystery of God,' the Church, the embodiment of that plan. Both will then be finished." Russell, *The Plan of the Ages*, 87.

[55] While Rutherford asserted that he had merely assembled Russell's writings and published them, there was much controversy over whether Rutherford had actually written the book himself, as it was something of a departure from previous Watch Tower teachings.

[56] *The Finished Mystery* was, in fact, banned in Canada as a result of these attacks. See Andrew Holden, *Jehovah's Witnesses: Portrait of a Contemporary Religious Movement* (London: Routledge, 2002), 8.

[57] For example, in 1911, Russell had sued the *Brooklyn Daily Eagle*, a New York newspaper, for libel. Russell had been promoting a product called "Miracle Wheat," so named because it was purported to grow "to biblical proportions." The newspaper had ridiculed the product and the Watch Tower, running a cartoon titled "Easy Money Puzzle." When rebuffed in the lower courts, in 1915, Russell had pursued the case to the Supreme Court of New York, which also ruled against him. See also *State v. Morris*, 28 Idaho

In the months leading up to the United States' declaration of war in April, 1917, the Bible Students had repeatedly denounced the conflict. They had articulated their position of neutrality, with an appeal to constitutional rights of religious liberty, in the *Watch Tower* of May 15, 1917:

> Good men differ as to the meaning of God's law, and herein is where the law of the land justly recognizes that each man shall be granted liberty to exercise his conscientious religious convictions. Let every man who can with a clear conscience go to war, do so. Thank God for the privilege of living in the United States. While we all recognize that it is not a perfect government, yet it is the best of all earthly governments. Every one who lives under the flag of the United States should be loyal to that government as against all earthly governments. No citizen of this country should be a Christian and do violence to the government of the United States. To be loyal to the Law of God he must render unto the United States government everything that is not in contravention of the Divine Law.[58]

While they were careful not to advocate noncompliance with the draft, the Watch Tower Society nonetheless asserted their conscientious objections. Yet they took their condemnation of the war much further in *The Finished Mystery*. The war, warned the group, had been orchestrated by the three institutions under Satan's control. For all the talk about democracy and progress, the war was a cover for religionists and wealthy schemers. "To all the truly consecrated who read and appreciate this book," the introduction read, "we believe that the words of the Master, 'THE KINGDOM OF HEAVEN IS AT HAND!' will sound in their ears like clarion notes upon the clear morning air…"[59] Many of the book's six hundred pages, which consisted of exegesis of

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599 (1916), in which the Idaho Supreme Court ruled in favor of the Bible Students' showing the Photo-Drama of Creation on Sundays, in contravention of Sunday statutes, for which they had been arrested.

[58] What is meant by "neutrality" was and remains a subject of some contention within the Watch Tower Society. Several scholars have incorrectly asserted that Rutherford led the Bible Students away from Russell's neutrality principle. However, Rutherford continued to hold to the neutrality principle, albeit with a different emphasis.

[59] Russell, *The Finished Mystery*, 6.

Revelation and Ezekiel, were devoted to exposing the "money-loving, power-loving clergy" and their habit of "fornication (symbolical of union between church and state)."[60]

The Bible Students had been criticizing the churches for years, yet they besmirched the clergy as never before in *The Finished Mystery*. One of a series of elaborately-drawn cartoons depicted a road to the church (symbolized by a large cross in the distance) littered with books whose covers read "creed," with the caption "Hindrances to Christian Progress".[61] "The less Bible," the book declared, "the more Creed, and the thicker and blacker the darkness!"[62] The "monstrous" clergy, the book declared "are the ones directly responsible for the war in Europe."

> They are an entirely unauthorized class—except by themselves; a self-perpetuating fraud. They have brought upon their heads the blood of all the nations of the earth in this world war; and God will require it at their hands.[63]

However, God was preparing for Armageddon, and these clergy as well as the leaders of nations would pay. Soon, the book predicted, it would be "unsafe to tell the lies that have filled Babylon's exchequers as it will be to a king."[64] The Bible Students made dire predictions about the course of the war. "The ecclesiastical kings and princes," they envisaged,

> with their retinue of clergy and faithful adherents, will be gathered in solid phalanx—Protestant and Catholic. The political kings and Kaisers, princes, and all in high places, with their henchmen and retainers, will follow in line on the same side. The financial kings and merchant princes, and all whom they can influence by the most gigantic power ever yet exercised in the world, will join the same side, according to this prophecy. They do not realize, however, that they are coming to Armageddon; yet,

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[60] Ibid., 34.
[61] Ibid., 96.
[62] Ibid., 111.
[63] Ibid., 228.
[64] Ibid.

> strange to say, this is a part of their very cry, 'Come together to Armageddon!'[65]

The Great War, which had already resulted in horrifying bloodshed, said the Watch Tower, was the work of the churches, civil governments, and business interests. The war, however, was but a precursor to the imminent conflict between God and Satan.

All this might, indeed, have been dismissed as fiery, but harmless, rhetoric. However, in the heightened wartime atmosphere, much of what the Bible Students wrote smacked of radicalism. The oppression of ordinary people would have dire consequences, they warned. "The safety-valve will be sat upon," *The Finished Mystery* predicted, "until the great social explosion described in the Revelation as an *earthquake* will take place. In symbolic language an earthquake signifies social revolution, and the Scriptural declaration is that none like it ever before occurred."[66] This battle, which would end with the complete overthrow of earth's present rulers, had already begun.

> The Sword of Truth, already sharpened, is to smite every evil system and custom—civil, social, and ecclesiastical. The internal conflict is already fomenting. It will ere long break forth as a consuming fire; and human systems, and errors, which for centuries have fettered truth and oppressed the groaning creation, must melt before it. Yes, truth—and widespread and increasing knowledge of it—is the Sword which is perplexing and wounding the heads over many countries. Not until great Babylon is utterly overthrown and her influence over the world broken—will the great mass of mankind come to realize the true state of the case.[67]

Rutherford and his directors consistently declared their respect for the United States and its laws. Nonetheless, when Rutherford released *The Finished Mystery* in the summer of 1917, the group was branded as disloyal troublemakers, their actions under suspicion by the federal authorities. In the political atmosphere of 1917, with European countries

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[65] Ibid., 251.
[66] Ibid., 252. (Regarding Revelation 16).
[67] Ibid., 254.

mired in bloody war and radicals marching in the streets, talk of "the trouble and shaking and overturning of society" did not sit well with many. In 1917 to 1918, Rutherford and the Bible Students would weigh the limits of the "liberty to exercise…conscientious religious convictions." In the face of catastrophic battles abroad, the boundaries of the Constitution's Bill of Rights would be tested at home.

The Constitution Tested: Espionage, Sedition, and the Birth of Modern Civil Liberties

In both their denunciation of the war, and the reactions they elicited from the authorities and citizens, the Bible Students were in good company. After the United States had formally entered the war in April of 1917, President Woodrow Wilson had signed a Selective Service Act, requiring men aged 21 to 30 to register for the draft.[68] Pacifists of various stripes had warned against the United States' entry in the war for months; now that the country was committed, these groups shifted their resources to a massive opposition to the draft. Many of the most prominent of these anti-war activists were Socialists, anarchists, trade unionists—political agitators concerned with other causes, particularly those involving the plight of the laboring classes. The anarchists Emma Goldman and Alexander Berkman had formed the No-Conscription League in the spring of 1917, denouncing the "patriotic claptrap now shouted by press, pulpit and the authorities" as a "desperate effort of the ruling class in this country to throw sand in the eyes of the masses and blind them to the real issue confronting them."[69] Socialist leader Eugene V. Debs had crossed the country in the spring of 1917, urging crowds to resist the

[68] Selective Service Act of 1917, P.L. 65-12, 40 Stat. 76, passed by Congress May 18, 1917.

[69] Emma Goldman and Alexander Berkman, "No-Conscription League Manifesto," 1917. Records of the Department of War and Military Intelligence Division, Record Group 165, National Archives.

draft. Berkman and Goldman encouraged a national campaign of draft-opposition, to be coupled with a general strike of all working people.[70]

It was a chaotic time, the culmination of a tumultuous half-century of labor unrest and often violent political struggle. The changes carried forward by America's industrialization had led many to question who was benefiting from the monotonous, often dangerous work which occupied the laboring classes. When the United States entered the war, these movements spilled over into war opposition. Some of the most prominent anti-war agitators believed that those running the United States had pushed the country into war in order to reap huge benefits at the expense of ordinary people. These activists dismissed President Wilson's frequent claim that the purpose of the war was to "make the world safe for democracy" as speechifying, obscuring the real aim of the conflict, which was to line the pockets of the rich. The real struggle, they asserted, was between labor and capital. Berkman and Goldman, for example, maintained that they opposed the draft because they were internationalists, and "opposed to all wars waged by capitalistic governments." The Industrial Workers of the World (I.W.W., or "Wobblies") urged that "There is not a power in the world that can make the working class fight if they refuse."[71] Louis Frana, a nationally known Socialist, echoed the sentiments of many when he announced that the war was not a war to protect democracy, but rather a war to

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[70] "Anarchists Demand Strike to End War," *New York Times*,May 19, 1917, 11; "Move to Block Pacifists," *New York Times*,May 20, 1917, 17; "'Treason' to Oppose Draft," *New York Times*, May 22, 1917, 4.

[71] Although the I.W.W. had initially opposed the war, they in fact backed off after President Wilson signed the draft act; I.W.W. leaders were much apt to advocate draft *resistance* than were their Socialist and anarchist counterparts. Nonetheless, I.W.W. leaders were among the most frequently targeted for government raids and prosecutions. Members were prosecuted under federal and state laws, including "Big Bill" Haywood, the group's outspoken leader. See Melvyn Dubofsky, *We Shall Be All: A History of the Industrial Workers of the World* (Urbana and Chicago: University of Illinois Press, 2000); Peter Carlson, *Roughneck: The Life and Times of Big Bill Haywood* (New York: W.W. Norton, 1983).

protect the war profits of the ruling classes.[72] Eugene V. Debs—whom the *New York Times* called a "veteran Socialist, with all his old time fire"—declared that he would rather be backed against a granite wall and shot as a traitor than "go to war for Wall Street."[73]

Although political and economic agitators were quite vocal, in 1917 it seemed the most credible pacifists—and those most likely legally to avoid being drafted—would be those who opposed the United States' entry into the war on the basis of religious objection. The United States had a long history of respect for those who opposed war, granting them the special status of conscientious objectors, and affording them the ability to avoid military service or be assigned non-combat duties.[74] "The Mennonites of this country," wrote J.W. Kliewer, a Mennonite president from Kansas, to Congress, "are either immigrants or the descendants of immigrants from various countries in Europe which they left to avoid compulsory military service. Assurance was given them by high officials of the United States, including President Grant in 1873, that they need fear no compulsory conscription here." Were a draft to be enacted, the government must "exempt us and other noncombatant Christians from all compulsory military training and service."[75] Despite this history of tolerance for conscientious objection, in 1917 not only did longstanding religious objectors respond, but so did numerous new denominations,

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[72] "Anarchists Demand Strike to End War," *New York Times*, May 19, 1917, 11.

[73] "Debs Urges Strike if Nation Fights," *New York Times*, March 8, 1917, 3.

[74] See Norman Thomas, *The Conscientious Objector in America* (New York: B.W. Huebsch, Inc., 1923); Peter Brock, *Pacifism in the United States: From the Colonial Era to the First World War* (Princeton, New Jersey: Princeton University Press, 1968) and *Liberty and Conscience: A Documentary History of the Experiences of Conscientious Objectors in America Through the Civil War* (New York: Oxford University Press, 2002).

[75] April 21, 1917. 55 Cong. Rec. 921 (1917), 923.

who announced that their tenets, too, opposed participation.[76] And, because large numbers of Socialists, anarchists, and other political agitators opposed the war, there was the additional difficulty of what to do with those who objected to the war on "moral" or "conscientious" grounds, but not religious ones.

Exemption on the basis of conscientious scruples was thought, by some, to be applicable only to the historic "peace churches"—the Society of Friends (Quakers), Dunkers (German Brethren), Mennonites and Amish.[77] Others, however, wondered why members of established religious groups ought to receive benefits denied to those with mere "moral" scruples, unaffiliated with old-line pacifist denominations. In one letter to Congress, for example, the pacifists Elsie Goldsmith and Edith Borg of New York requested a broadening of the definition of conscientious objection. "We strongly urge your support of exemption from military service for those who have conscientious, moral or spiritual objections to warfare," the women wrote. "Why should Quakers be allowed more freedom of conscience than other equally moral and spiritual persons? Freedom of conscience should be the sacred right of each individual. Without it there can be no

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[76] A 1918 list of "Religious Sects and Organizations Whose Creed, Principles or Traditions are Opposed to War," for example, included Christadelphians (1,277); Doukhobours; Dunkards (Brethren) (73,795); Fellowship of Reconciliation (1,267); Friends (Quakers) (108,208); International Apostolic Holiness Church; International Bible Students Association ("Russellites"); Mennonites (29,139); Amish Mennonites (12,139); Molokans; Moravian Church (11,781); Pentecostal Church of the Nazarene; Plymouth Brethren (6,661); Church of God; Holy Rollers (Pentecostal). Civil Liberties Bureau, *The Facts About Conscientious Objectors in the United States (Under the Selective Service Act of May 18, 1917)* (New York: Civil Liberties Bureau, 1918), 30. Papers of the National Civil Liberties Bureau, Peace Collection, Swarthmore College.

[77] The record of the Congressional debates surrounding the exact wording of the draft law indicate that it was thought of by many members of Congress as applying primarily to these historically pacifist denominations. See 55 Cong. Rec. 1610 (1917), 1614ff.

See, for example, Senator Curtis's April 23 petition from the president of the Western District Conference of the Mennonite Church of Newton, Kansas. 55 Cong. Rec. 921 (1917), 923. See also discussion of May 2: 55 Cong. Rec. 1661 (1917), 1667ff.

Regarding Catholics, see petition of Bishop Joseph Chartrand of Indiannapolis, in which he described how loyal the Catholics had always been, and then implored, "Surely, the great, big, broad American Republic will recognize the calling and work of those who devote themselves, in season and out of season, to the things that are above the clamor and the confusion into which the unfortunate world has been cast." 55 Cong. Rec. 1844 (1917), 1844.

progress."[78] In the end, the Selective Service Act had exempted members of "any well-recognized religious sect or organization at present organized and existing and whose existing creed or principles forbid its members to participate in war in any form and whose religious convictions are against the war or participation therein."[79] Yet this phrasing was so vague that local draft boards were never consistent in exempting of conscientious objectors.

This uncertainty was compounded by the fact that, when conscientious objectors were excused from military conscription, they were to perform some unspecified "noncombatant" service. During the first months of the United States' involvement in the war, no one—from the War Department to the pacifist groups themselves—could clarify who would be classified as a conscientious objector, or what service, precisely, would be required of those with moral scruples against the war. As a result of the government's failure to provide clear guidelines, scores of men who claimed conscientious objection failed to receive exemption from local draft boards. In addition, about 20,000 of those who did manage to secure conscientious objector status were inducted and sent to training camps to be held until the meaning of "noncombatant service" could be determined.[80] Occasionally, those running the camps sought to convince the conscientious objectors to agree to fight—often by force.[81] In the end, several hundred of those refusing induction were court-marshaled, and some of these men convicted and sent to military prisons. After many months, in 1918 Secretary of War Newton Baker

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[78] 55 Cong. Rec. 1661 (1917)

[79] Selective Service Act of 1917, P.L. 65-12, 40 Stat. 76, passed by Congress May 18, 1917.

[80] David Kennedy, *Over Here: The First World War and American Society*, Second Edition (New York: Oxford University Press, 2004), 163.

[81] Robert H. Zieger described one case in *America's Great War: World War I and the American Experience* (New York: Rowman & Littlefield, 2001), 63.

eventually broadened the definition of conscientious objection to include not only religious pacifists, but also those with "moral scruples" against war.[82] The draft, however, went on, including "slacker raids" and other measures to force induction.[83]

Those who opposed the war—whether they were political objectors or religious pacifists—had more cause for concern than being drafted. Once war was declared in April, and the draft instituted, citizens were largely expected to refrain from dissent. In the charged wartime atmosphere, a large segment of the population believed that any protest—violent or otherwise—was supremely dangerous to the war effort. "The United States has been singularly patient," a *New York Times* editorial declared in mid-1917, "with plotters and workers of its injury. The hour of patience is past. The hour of punishment, swift, implacable, just, is come."[84] Accusations of treason and sedition were quick to follow the anti-war protests. Numerous organizations were formed to suppress anti-war activism and pro-German sentiments. The American Protective League, with official approval of United States Attorney General Thomas Watt Gregory, operated in close cooperation with the Justice Department. Another vocal opponent of anti-

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[82] Eventually, a Board of Inquiry was formed to look into these conscientious objectors. See Walter Guest Kellogg, *The Conscientious Objector* (New York: Boni and Liverlight, 1919). In the introduction to this pamphlet, Secretary of War Baker described the complete change in his own attitude toward conscientious objectors. By 1919, Baker reported seeing the conscientious objector "in a new light," avowing that he believed "in freedom of thought and expression of that thought." However, his attitude at the start of the war, that they were, "as a class, shirkers and cowards," was what guided him during 1917 and 1918.

[83] In a series of cases argued before the Supreme Court in late 1917, and decided in January of 1918, the Court ruled unanimously that the draft was constitutional and would go on. *Selective Draft Law Cases*, 245 U.S. 366 (1918). The cases were brought when Joseph F. Arver, Alfred F. Grahl, Otto and Walter Wangerin, Morris Becker, and Louis Kramer, of Minnesota, Albert Jones of Georgia, and Meyer Graubard of Kansas, refused to register under the May 1917 Selective Service Act. They argued that the Constitution did not authorize Congress to compel military service, and that the Thirteenth Amendment (which prohibited involuntary servitude) and the Fourteenth Amendment (which assured "equal protection" to all citizens) actually prohibited the draft. In an argument which neatly opposed those of most religious conscientious objectors (that the government was hindering the "free exercise" of their religion by attempting to draft them), the plaintiffs in these draft act suit had argued that the exemptions of theological students and members of pacifist denominations was establishment of religion. The Court rejected all these claims as "absolutely without merit".

[84] "The Anti-Conscriptionists," *New York Times*, May 31, 1917, 10.

conscription was an organization called the National Security League, a nationalistic and zealous body founded for the purpose of promoting American patriotism and supporting the United States' participation in the war.[85] The League sent an open letter to all those who opposed the draft, reflecting widespread sentiments regarding the anti-war agitators. "Under the guise of defending free speech," the group declared, "they encourage unpatriotic gatherings where speeches verging upon treason and sedition are made."[86]

Soon after the United States had entered the war, the government dismissed outright the idea that freedom of speech included the right to oppose the war. In 1917 and 1918, the President and Congress agreed with the Justice Department that the authorities could and must quash dissent. After surprisingly little substantive debate, a mere month after the president had signed the draft law, Congress had passed the Espionage Act, in order to strengthen the authority to suppress anti-war agitation. In broad strokes, the law expressed what was expected of citizens during the war—making it a crime to "willfully cause or attempt to cause insubordination, disloyalty, mutiny, refusal of duty, in the military or naval forces of the United States, or…willfully obstruct the recruiting or enlistment service of the United States."[87] The Espionage Act specified that two or more people could be accused of conspiring to perform the above crime—meaning, essentially, that one could be prosecuted for the seditious actions of one's associates.[88] The law imposed a heavy punishment upon those convicted—fines of up to $10,000, and up to twenty years in prison.

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[85] See *America at War: A Handbook of Patriotic Education References* (New York: National Security League, 1917).

[86] "Appeal to Country to Check Pacifists," *New York Times*, May 28, 1917, 4.

[87] Act of June 15, 1917, ch. 30, title I, Section 3, 40 Stat. 217.

[88] Ibid., Section 4.

After the Espionage and Sedition Acts, nothing was sacred, so to speak. In 1917 and 1918, Justice Department officials investigated hundreds of persons, without discrimination between political and religious motivations. From Dallas to Detroit, Roanoke to Seattle, Boston to Kansas City, authorities searched offices, shut down public demonstrations, and made arrests. Most of the prosecutions involved writing, publishing and other forms of speech—making it a crime to speak or write about opposition to the draft. American society split between those distressed at the limits being placed on free speech and press, and those who saw such limits as necessary to ensure the country's security. The question raised was to what extent the government could and should limit First Amendment freedoms—of speech, press, assembly, religion—in the name of national security.

Some citizens reacted, forming organizations devoted to protecting civil liberties—the largest of which was the National Civil Liberties Bureau, forerunner to the ACLU.[89] The Civil Liberties Bureau tried to show that such severe limits on freedom of expression were contrary to the First Amendment's guarantees. The job of the Bureau in 1917 and 1918 was daunting. First, there was the matter of conscientious objection—both political and religious—to confront. Throughout 1917 and early 1918, Baldwin sent NCLB representatives to the military camps, in order to ascertain whether or not the men there were being mistreated. Baldwin met time and again with Secretary of War Baker and other government officials. Secondly, the Bureau sought to keep track of prosecutions for Espionage Act violations, arguing that such severe limits on freedom of expression and assembly were contrary to the First Amendment's guarantees. As

[89] For a thorough discussion of the formation of the American Civil Liberties Union, see Walker, *In Defense of American Liberties*.

Zechariah Chafee, Jr., would later put it, advocates of free speech suggested the novel idea that the "free speech clauses of the American constitutions are not merely expressions of political faith without binding legal force."[90]

The legal support for this view was, however, almost nonexistent at the time of the First World War; the civil liberties organization was forging new ground in American constitutional interpretation. In fact, as Chafee noticed, there was little precedent in the Supreme Court or other case law for protecting the liberties of speech or press.[91] The notion that the purpose of the Bill of Rights was to protect the rights of minorities—be they political, ideological, or religious—was essentially untested. The July 1917 *New York Times* editorial criticizing the Civil Liberties Bureau "malcontents" echoed a familiar line—while free speech was a fundamental principle, some restrictions on free speech, especially during wartime, were inevitable. "Just where [the line] shall be drawn is and must be determined," the editorial asserted, "by majorities through their voluntarily chosen representatives."[92] Scholars have pointed to the wartime crisis as the portent of modern conceptions of civil liberties. Although the federal Constitution contained explicit guarantees to free speech, press, and assembly, these rights had never been implemented comprehensively. The Bureau argued, however, that in a progressive society, such rights must be given real content.

In the midst of this crisis, civil libertarians' relationship with religious groups, and their attitude toward religious liberty in general, were ambiguous. The Bureau was aware of Quakers and other religious minorities refusing to fight in the war, and sought to protect religious conscientious objectors in the camps. Yet civil liberties agitators were

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[90] Chafee, *Freedom of Speech*, 3.
[91] Ibid.; Murphy, *World War I and the Origins of Civil Liberties*.
[92] "Topics of the Times," *New York Times*, July 4, 1917, 5.

bogged down trying to protect freedoms of speech, press and assembly; during the First World War, these took precedence over the more difficult-to-define freedom of religion. Although the organization and its lawyers bandied about terms like "conscience" and "moral scruples" and "religious liberty," these were secondary to the more concrete freedoms of speech on which the Civil Liberties Bureau focused. Yet a small, oft-maligned religious group insisted that religious freedom could not be separated from the right to preach and practice. In order to fulfill America's promise, this group argued, citizens must be guaranteed the latitude not only to believe, but also to express and act upon their beliefs.

'The Finished Mystery and Why Suppressed': The IBSA and the Espionage Act

Although their role in the conflict is now largely forgotten, members of the International Bible Students Association were among the most prominent objectors to the war. Thousands of Bible Students were imprisoned for refusing to fight, and Rutherford and his associates publicly denounced the government's actions. Their protests were understood to be religious, yet they stood apart from the old-line pacifist denominations. In his pamphlet on conscientious objection, Major Walter Kellogg, the chairman of the Army's Board of Inquiry, devoted an entire chapter to the Bible Students, reporting on the "rabidly pacifist writings of the late 'Pastor' Charles T. Russell."[93] Kellogg wrote that "about six percent of the objectors named were members of this association. Many were above the average in intelligence. Regarded as a class, they impressed one as weak characters, easily molded. The influence of the I.B.S.A. is tremendous; it will breed more and more pacifists."[94] While the Bible Students opposed the war primarily because they

[93] Kellogg, *The Conscientious Objector*, 52.
[94] Ibid.

thought the Bible forbade bloodshed, their objections had much in common with those of Socialists and labor activists. The group had long touted equality—both social and legal—and questioned capitalism and the legal inequalities they saw as rampant in the world and in the United States.

Baldwin and other radicals wrote to the Secretary of War about the treatment of Bible Students. In a letter to Secretary of War Newton Baker regarding conscientious objectors detained at Ford Devens, Baldwin described Carmelo Nicita, a Bible Student, who was

> dragged about, struck and otherwise mistreated, in order to force him to chop wood. Beside other indignities, he was jumped upon and held down in a painful position for some length of time, and his head was finally tied to the ground by stakes. He was later transferred to the company of objectors, when the officers found they could not break his spirit.[95]

The Reverend Abraham Johannes (A.J.) Muste—a famous American radical and rights activist—reported on discussions with the Bible Students Nicita, George Lamassie, and Gerald De Cecca. "If any men have the spirit of the early Christians," he wrote to Baldwin, "these have. They have beautiful fellowship with each other; they have absolute trust in God; they have no fear; and their hearts are filled with good will toward men."[96] In 1918, the Civil Liberties Bureau contacted the Bible Students and offered assistance. Baldwin's staff wrote to the Bible Students Association in February, inquiring whether they had any procedure for keeping in touch with members in the camps. "This bureau exists," Baldwin assured Rutherford, "to serve those whose

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[95] Roger Baldwin to Secretary of War Newton Baker, September 8, 1917, focusing on Bible Students Carmelo Nicita, George Lamassie, and Gerald De Cecca. Correspondence between Baldwin and H.F. Rotzel regarding the situation at Camp Devens in Ayer, Massachusetts, September and October, 1917, ACLU Records, Reel 2.

[96] Reverend A.J. Muste, Central Congregational Church, Newtonville, Mass., "Report on the Conscientious Objector Situation at Camp Devens, Ayer, Mass," November 21, 1917. ACLU Records, Reel 2.

constitutional rights have been violated under stress of wartime conditions. Chief among these have been the conscientious objectors many of whom belong to your organization." The Watch Tower Society replied at the end of February, assuring Baldwin that they had "quite a list" of young men whom they had been trying to assist. Both the Civil Liberties Bureau (on March 13) and Baldwin himself (on April 15) wrote again, asking for a liaison or a list of men holding out as conscientious objectors. In April, Rutherford ultimately declined the organization's help, preferring to pursue the cases himself. "Your very kind letter to hand," he wrote. "We are presenting the cases mentioned to the War Department. Thank you very much for your interest in the matter."[97] He then invited Baldwin to communicate at any time with Rutherford's secretary, Arthur Goux.[98]

Rutherford assumed that he and his associates could control the situation, advocating for their cause in the capitol and in the courts if necessary. The Watch Tower Society had received hundreds of reports of members having difficulty persuading local draft boards of their exempt status as conscientious objectors.[99] Local draft boards were inconsistent in granting Bible Students exemption as preachers, accepting that the association had a creed opposed to war, and even in their recognition of the IBSA as a religious organization at all.[100] In 1917, Rutherford traveled to Washington, D.C. to determine who would be exempted from military service, and what "noncombatant service" would entail.[101] After his meeting with a general's aide in Washington produced little by way of guaranteeing the group's religious beliefs would be respected, Rutherford

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[97] Letters of Roger N. Baldwin, Watch Tower Society, and Joseph F. Rutherford. ACLU Records, Reel 2.

[98] Ibid.

[99] Transcript of Record, *Rutherford, et al. v. United States* (1919), 903. Transcript obtained from New York State Archives.

[100] Ibid., 980.

[101] Ibid., 980.

issued instructions to Bible Students through the group's publications and via memos to local leaders.[102] William Van Amburgh, one of the Watch Tower directors, made up an affidavit attesting to the conscientious objector status of the IBSA. The group prepared 1,800 copies of the affidavit for use by Bible Students.[103] The purpose of the affidavit was to establish the fact that the IBSA was a religious organization whose present creed bore an attitude against war. "We cannot tell," wrote William Van Amburgh, "how great the influence would be for peace, for righteousness, for God, if a few hundred of the Lord's faithful were to follow the course of Shadrack, Meshach and Abdenego, and refuse to bow down to the god of war."[104]

Despite Bible Student claims that they opposed all war, federal law enforcement agencies (including the Bureau of Investigation and the Army's Military Intelligence Bureau) were investigating their publications. Local law enforcement agents and federal officials arrested Bible Students across the country for distributing literature—*The Finished Mystery* and several periodicals.[105] On February 28, 1918, Clarence Converse, the Inspector of Ordnance of the Military Intelligence Bureau, searched the Brooklyn Bethel. On March 1, Converse and other officers entered the Bible Student home,

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[102] Memorandum by J.F. Rutherford, August 8, 1917, "To the Secretary or Clerk of the Local Ecclesia of the International Bible Students Association." The memo stated that, regarding further advice concerning the Selective Draft and claims for discharge therefrom, and the "rules of the Government" for obtaining noncombatant service. FBI Records, obtained via Freedom of Information Act Request by the Author, September 2009. FBI Records 1027468-000---61-HQ-1053---Section 48 (725827).

[103] Van Amburgh later testified that this was done in response to the requests of local boards. See ibid., 984-985, 1208-1209.

[104] Ibid.

[105] These raids and arrests were documented in a July, 1918 pamphlet printed by the National Civil Liberties Bureau, entitled *War-time Prosecutions and Mob Violence, Involving the Rights of Free Speech, Free Press and Peaceful Assemblage, from April 1, 1917 to May 1, 1918*, 21. ACLU Records, Reel 2. The pamphlet was updated periodically; notably, in the March, 1919 version, under the "Search and Seizure" heading there were only three subheadings: I.W.W. cases, the I.B.S.A., and "other cases." Papers of the National Civil Liberties Bureau., Peace Collection, Swarthmore College.

confiscating many materials from the office.[106] On March 25, federal agents showed up at the office of Clayton Woodworth, a close associate of Rutherford, in Scranton, Pennsylvania. They confiscated copies of *The Finished Mystery*, as well as several files containing personal correspondence, arguing that the letters from Rutherford, Woodworth, and other Bible Student leaders to Bible Students, as well as the affidavit prepared by Van Amburgh, were evidence that the group was attempting to evade the law. These communications, the government asserted, in combination with other Bible Student publications, were indicative of a conspiracy to obstruct the draft under the Espionage Act.[107]

The Bible Students raised a hue and cry about the confiscation of their publications and letters, protesting that these actions violated their constitutional rights. The right to religious belief embodied in the First Amendment, they maintained, was inexorably connected with the other rights contained therein. In 1918, the Bible Students published a broadsheet entitled the *Kingdom News*, devoted to "the Principles of Religious Tolerance and Christian Liberty." The April-May 1918 issue, which followed the raids on Bible Student headquarters and a rash of local arrests, was headlined "The FINISHED MYSTERY and WHY SUPPRESSED." The Bible Students pleaded that the "Constitution guarantees the right of petition and redress, the right of freedom of speech in the interest of humankind. We hold that all order-loving and law-abiding people

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[106] The federal investigators took 27 letter files (boxes); a wire basket of letters; two directors minute books; one annual report book; one People's Pulpit Association book; one special temporary account book; one trial balance book; four ledgers; three check books; 29 copies of different pamphlets; two bundles of Italian files; one bundle of German files; seven books of Russell's works; and seven books by various authors. *Rutherford v. United States*, 86-89.

[107] Publications were confiscated from ordinary Bible Students as well as the Society's leadership. See references to Weatherly, Pennsylvania incidents of March 1918, where police were on orders "to seize all 'The Finished Mysteries' I could lay my hands on"—even at people's homes, and without warrants. *Rutherford v. United States*, 205-213. As the NCLB steadily documented, these actions occurred across the country.

would protest against this unholy persecution of innocent men and women…"[108] Their rights, they insisted, had been violated. "The suppression of 'The Finished Mystery'," the paper implored,

> is clearly in contravention of the First Amendment of the Constitution (Article 1), because it prohibits the free exercise of the religion of Jesus Christ, believed and taught by thousands of people. In many places, officers of the law have, without even a warrant, seized great quantities of the books, have intimidated many and interrupted their peacelike study of the Word of God, which is clearly contrary to the fundamental law of the land. (Article IV, Constitution).

The paper contained a petition to President Wilson, asking that "all lovers of religious liberty" protest against the suppression of *The Finished Mystery* "in the interest of liberty and freedom." Readers were encouraged to obtain as many signatures as they could, and to mail it back to the Society's Brooklyn office. "DO IT NOW!" the paper entreated.[109]

The petition, and the *Kingdom News*, quickly came to the attention of federal authorities. The Bible Students and their publications were targeted by the Justice Department. The Chief of Police of Weatherly, Pennsylvania, for example, testified that he had seized 24 copies of *The Finished Mystery* from a man on the street, and arrested him, all without a warrant—on orders from the United States Attorney at Scranton, which he said came directly from the Justice Department. His instructions, the Captain testified, were to "seize all 'The Finished Mysteries' I could lay my hands on'."[110] John Lord O'Brian, the special assistant to the Attorney General for war work, singled out the Bible Students in a series of memos to Congress. In April 1918, O'Brian had advised that any

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[108] *Kingdom News* I, 2-3, April-May 1918. It is unclear how many signatures the Bible Students garnered during this 1918 drive, but when a similar petition was circulated in March 1919, they obtained 700,000 signatures in two weeks. *Jehovah's Witnesses: Proclaimers of God's Kingdom*, 75.

[109] It is unclear how many signatures the Bible Students obtained during this 1918 drive. However, according to their own literature, when a similar petition was circulated in March of 1919, the Bible Students obtained 700,000 signatures in the space of two weeks. *Jehovah's Witnesses: Proclaimers of God's Kingdom*, 75.

[110] *Rutherford v. United States*, 205-213.

amendment to the Espionage laws exempting religious speech would render the act useless, as religious speech was mere cover for seditious activity:

> One of the most dangerous examples of this sort of propaganda is the book called 'The Finished Mystery,'—a work written in extremely religious language and distributed in enormous numbers. The only effect of it is to lead soldiers to discredit our cause and to inspire a feeling at home of resistance to the draft. The Kingdom News, of Brooklyn, prints a petition demanding that restrictions on 'The Finished Mystery' and similar works should be removed….The International Bible Students' Association pretends to the most religious motives, yet we have found that its headquarters have long been reported as the resort of German agents.[111]

No leniency, O'Brian argued, should be granted to persons with religious motives.

The Bible Students had predicted that the war would have grim consequences for civil liberties. "For a brief time, the combined forces of Armageddon will triumph. Free speech, free mails, and other liberties which have come to be the very breath of the masses in our day, will be ruthlessly shut off…"[112] On May 8, 1918, federal authorities returned to Brooklyn and arrested Judge Rutherford and five other Bible Student leaders. The next day, Clayton J. Woodworth and George H. Fisher, who had been in Scranton, Pennsylvania, were also taken into custody.[113] The Bible Student directors were charged with violating the Selective Service and Espionage Acts, of "willfully causing insubordination, disloyalty and refusal of duty."[114] The indictment was based on letters, speeches, and *The Finished Mystery*, the *Bible Students' Monthly*, and the *Kingdom News*. Released on bail, Rutherford and his associates remained in Brooklyn, awaiting trial.

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[111] Cong. Rec.—Senate, May 4, 1918, 6052.
[112] Russell, *The Finished Mystery*, 252.
[113] "Arrest More Russellites," *New York Times*, May 10, 1918, 7.
[114] *Rutherford v. United States*, 11-12.

Despite the severity of the situation, Rutherford did not look to the Civil Liberties Union for help. Just before the trial was to begin, a group of men came to Bethel and asked to see Rutherford. When Macmillan inquired what they wanted, one said, "We represent an organization that is interested in civil liberties and we want to know something about this prosecution. We read in the paper about your arrest." Macmillan answered that the trial was the work of a powerful religious organization, working against the Bible Students because they had exposed false religious teachings. "Don't fool yourself, sir," replied the civil liberties representative, "it isn't just one organization that is active against you. There is a definite campaign to stop your work….We are interested in such things and this kind of activity is rampant just now. There are a large number of minority groups that are not popular and those in certain places of authority are pouncing on them, trying to wipe them out, and that is what they are going to do to you if they can."[115]

However, appreciating the gravity of the situation was quite a different matter from having any legal recourse. Although civil libertarians were interested in the plight of the Bible Students, defending their actions on religious liberty grounds would, if anything, have more difficult than using free speech or press arguments. Any inclination early civil libertarians had to include religious liberty within their panoply of civil liberties—and the records of the Civil Liberties Bureau and the New York Bureau for Legal Aid indicate that they did—was severely curtailed by the Supreme Court's nineteenth century reading of the First Amendment's religious liberty clauses. Indeed, the legal understanding of religious liberty was more established—and far more rigid—than were precedents regarding speech or press. It is perhaps indicative that in its July

[115] Alexander H. Macmillan, *Faith on the March*, 91-92.

1917 condemnation of the National Civil Liberties Bureau, the *New York Times* had supported restrictions on free speech on the *basis* of the historically narrow definition of religious liberty. "'Freedom of speech' is a fine thing, well worth fighting for, and even dying for, in case of need," read the editorial,

> but sensible people of good will do not make the mistake of believing that speech can be literally and completely free in any civilized country. Inevitably, there must be restrictions on speech, as on the 'exercise of religion,' even in lands with constitutions guaranteeing both, for between liberty and license there is a distinction.[116]

The Bible Students encountered the problem of all dissenters during this period. The notion that the purpose of the Bill of Rights was to protect minorities—be they political, ideological, or religious—was largely untested. Although the federal Constitution contained explicit guarantees to free speech, press, and assembly, these rights had never been broadly defined.[117]

The Limits of Liberty: The Bible Students on Trial

During the civil liberties crisis of the First World War, in fact, the legal understanding of the extent of religious liberty was still based on doctrine established half a century before.[118] In the 1850s through the 1870s, the Church of Jesus Christ of Latter-Day Saints—the Mormons—had challenged local, and then federal, authorities. Their brand of piety had inspired alarm in the northeast, and the Utah Mormons had, while

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[116] "Topics of the Times," *New York Times*, July 4, 1917, 8.

[117] State constitutions, of course, also had civil liberties guarantees as comprehensive—or more so—than those contained in the federal Constitution. Many of these state Bills of Rights were modeled directly after the First Amendment's text. Jehovah's Witnesses refered to both state and federal civil liberties guarantees simultaneously in their arguments. Nonetheless, from very early on, the group placed more stock in challenges under federal constitutional guarantees. Under Rutherford's direction, the Jehovah's Witnesses' legal strategy seems to have involved reinterpreting the First Amendment to apply more broadly—even though there was virtually no existent legal basis for these claims.

[118] In previous nineteenth century cases, the Court had ruled that it had no jurisdiction over state and local regulations which infringed upon civil liberties. See *Barron v. Baltimore*, 32 U.S. 243 (1833) (in which the Court ruled that the Bill of Rights did not apply to state governments); *Permoli v.Municipality No. 1 of the City of New Orleans*, 44 U.S. 589 (1845) (in which the Court ruled that it had no jurisdiction to protect the religious liberty of citizens against state laws).

living in Illinois, established a practice of plural marriage, arguing that they should be granted autonomy to practice this tenet of their religion. Congress, in its capacity as governor of the territories, had passed laws criminalizing polygamy. The Mormons had flouted these laws, citing religious liberty. Ultimately, several cases involving Mormon polygamy had been brought before the United States Supreme Court in the 1870s and 1880s.[119] The upshot was that the Supreme Court had held that citizens could not claim religious belief as justification for criminal actions.

The rulings in the Mormon cases went far beyond the polygamy issue in their legal implications. They established the first broad precedent regarding the scope of the First Amendment's free exercise clause—making that scope extremely limited. The Court had declared that the right to religious liberty was absolute only in the sense that it entailed an unqualified right to *belief*. *Actions*, however—even those justified on the basis of religious beliefs—were subject to regulation and prohibition by the government. "Laws are made for the government of actions," wrote Chief Justice Waite, "and while they cannot interfere with mere religious belief and opinions, they may with practices."[120] Although the Mormons continued to challenge the federal government, claiming that their right to free exercise was being violated, the Court held to this distinction. Lower courts absorbed this precedent, institutionalizing these limits on free exercise. By the time the Bible Students came along, this belief-action distinction was firmly entrenched in readings of the First Amendment religious liberty clauses.

The Bible Students' trial began on June 5, 1918. They had retained a Brooklyn firm, Sparks, Fuller & Stricker, to represent them. The presiding judge was United States

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[119] *Reynolds v. United States*, 98 U.S. 145 (1878); *Davis v. Beason*, 133 US. 333 (1890); *The Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1 (1890).

[120] *Reynolds v. United States*, 98 U.S. 145 (1878).

District Judge Harlan B. Howe, of Vermont. Unbeknownst to the Bible Students, Judge Howe had previously stated his position that religious beliefs, no matter how genuinely held, were no defense for illegal behavior.[121] The trial was contentious from the start. Rutherford and Macmillan viewed the trial, combined with John Lord O'Brian's statements to Congress, as evidence that "our Society was then definitely marked for prosecution."[122] Judge Howe denied all of the attorneys' motions to force the government to list specific names, dates, and other information regarding the conspiracy charges.[123] The Bible Students' lawyer Sparks insisted that he be allowed to ask potential jurors whether they believed "that a person has the right to express disapproval of the Government's action in entering the war," but Judge Howe would not allow this question during jury selection. At times, in fact, the judge urged the government's lawyers, Special Prosecutor Isaac Oeland and Assistant District Attorney Charles Buchner, to object.[124]

Judge Howe expressed aggravation with the Bible Student witnesses and lawyers throughout the trial. He complained repeatedly, for example, that "I do not remember" was not a sufficient answer to questioning. In the examination of Mabel Campbell and William and Agnes Hudgings, who worked for the International Bible Students Association doing clerical work, the judge became irate, calling the witnesses hostile, and accusing them of answering evasively.[125] William Hudgings was eventually jailed for

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[121] In fact, John Lord O'Brian had commended Howe's position on the Espionage and Sedition laws. (Cong. Rec.—Senate, May 4, 1918, 6043, 6051) Charging the jury in the case of Clarence Waldron for attempting to cause insubordination, Howe had announced that "the defendant's intention to serve God does not excuse him, if you find that he also intended to cause insubordination, disloyalty, or refusal of duty." Waldron had been sentenced to 15 years in prison.

[122] Macmillan, *Faith on the March*, 89.

[123] *Rutherford v. United States*, 112-116.

[124] Ibid., 326.

[125] Ibid., 263.

contempt of court, for refusing to identify the signatures of Rutherford and Van Amburgh, after a rather maddening exchange:

> The Court: You have been there how many years?
> The Witness: About nine years.
> The Court: Continuously?
> The Witness: Yes sir.
> The Court: And both these gentlemen have been there in that place of business almost nine years?
> The Witness: Almost continuously; yes sir.
> The Court: And you tell us that you have never seen either of them write with a pen or a pencil; never seen them in the act of writing?
> The Witness: No, sir; I never stood over their shoulder.
> The Court: I did not ask you where you stood. I asked during that nine years you tell us whether, upon your oath, that you never saw either of these gentlemen in the act of writing. That is what the Court asks you, sir.
> The Witness: I do not remember that I ever saw either of these gentlemen in the act of writing.[126]

Judge Howe's interruption of the lawyers in order to question witnesses himself, along with other judicial irregularities, led the Bible Students to argue that they had not received a fair trial.

The Bible Students argued that much of the government's evidence against them came from the letters and the records of the Society, in which they said they were merely attempting to determine what their rights were opposite the draft. As the law clearly stated that conscientious objectors would be assigned noncombatant service, the Bible Students argued that the Selective Service Act was not being enforced properly under its own terms. Rutherford complained that the IBSA "comes clearly within the spirit and letter of this law, and anyone making proper affidavits should have the benefit of it. In some places the exemption boards are recognizing this and exempting the brethren; other

[126] Ibid., 440.

places, no."[127] Above all, and in light of this confusion, Rutherford maintained that advising brethren about their rights was legal. "Being a lawyer by profession," Rutherford said, "and glad to serve the brethren in any way I can, I have had considerable work in advising the brethren…in all parts of the country and abroad."[128] Using communications wherein members of the group discussed their rights to convict them, Rutherford argued, ran contrary to the fundamental rights of the Constitution.[129] The attorney Sparks objected to the introduction of a letter from Giovanni De Cecca to his brother Jerry, for example, "on the ground that the person writing it, under the Selective Service Law, had a perfect right to write it. It is written from one blood relative to another, and in answer to an inquiry as to certain rights under the Selective Service Law."[130]

The prosecution argued that the Bible Students were actually dangerous subversives—that Rutherford and his associates were attempting to use a "test case" strategy to challenge the draft law. "We think," Van Amburgh had advised a Bible Student in a letter, that "your decision to go as a prisoner rather than as a soldier will be the proper one."[131] To a Bible Student whose application for conscientious objector status had been rejected by his local and district boards, Watch Tower officials had written that he should refuse to respond to the call, and should submit to arrest if necessary. "The suggestion came up in this way," Van Amburgh testified,

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[127] Ibid., 240.
[128] Ibid., 466.
[129] The District Attorney had, for example, introduced into evidence a minute book from the Brooklyn Bethel, containing the details of a July 17, 1917 meeting of the board of directors. Rutherford had addressed the issue of the great increase in correspondence from brethren wondering what to do in the face of the draft law.
[130] *Rutherford v. United States*, 363.
[131] Watch Tower Society to Paul Dondor, Ibid., 1235.

> that possibly if somebody were arrested it might be necessary to proceed to what we call a habeas corpus…in order that it might be decided legally as to their stand…some cases had come in and Mr. Rutherford had said it might be possible some of them are arrested and we still proceed with the habeas corpus to come up before the Court and then we will have a legal decision to go by.[132]

Although Rutherford testified that they had abandoned this plan, the mere fact that the Watch Tower Society directors had discussed such a strategy was indicative of Rutherford's legal thinking. The organization's legal edifice was relatively primitive in 1917, yet Rutherford's idea that rectified readings of the law—taking into account his group's rights—could be coaxed out of the legal system was, perhaps, conceived during this period of duress.

In the course of their Espionage Act trial, the Bible Students made broader rights claims than most religious conscientious objectors, arguing that free speech and press were necessary components of religious liberty. In the Defendants' Requests to Charge (a document filed at the end of the trial), they wrote,

> It is the constitutional right of every citizen to express his religious beliefs even though they are opposed to the opinions or policies of the administration….It is likewise the right of any group of citizens associated together for the expression of their religious beliefs in their official papers and books, to express such beliefs in the pages of such official papers and books…[133]

Because they were being prosecuted largely on the basis of their publications—like Goldman, Debs, and other political agitators—the Bible Students had a free speech, rather than merely a conscientious objection issue. *The Finished Mystery*, they testified, did not encourage sedition or interfere with the war effort. It merely condemned war in

[132] Ibid., 702-703.
[133] Ibid., 1141ff.

general, and the United States' involvement in this war.[134] Although Bible Student leaders testified that they knew nothing of the United States government's problem with the book until it was too late, they certainly knew of its contentious nature. The book and other Watch Tower publications were banned in Canada on February 12, 1918.[135] While he was distressed over this censorship, Rutherford seemed rather pleased at the impact the book was having—particularly against the perceived "conspiracy of religionists." In a letter to Woodworth in February 1918, he had described the effect of the book both within and outside the United States:

> The Seventh volume is putting the juice under the hides of the clergy and the gall jades are wincing. Their howls are bringing to them the aid of the civil powers of Canada but the little members of Gideon's band are standing firmly in line and boldly telling the ecclesiastical and civil powers that they will seal their testimony with their blood before they will be driven to silence concerning the message of the Kingdom. Several of them are under arrest, and I have wired them to employ the best lawyers and fight to a finish, and we will stay with them, by the Lord's grace. I also wired several points asking the brethren to give the matter as wide publicity as possible. I enclose you a paper which shows that they have the courage of their convictions.[136]

Certainly, the material contained in *The Finished Mystery* was incendiary. However, the question of whether such speech ought to be allowed if it was not a direct incitement to violence was a matter which was far from settled, either in the United States, in Canada, or abroad.

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[134] Watch Tower directors had contacted a representative of the Army Intelligence Section's Censor Committee, Charles Buchner at the Department of Justice (later one of the prosecuting attorneys in their case), and the Attorney General's office, but had received little information. Ibid., 757. On March 15, John Lord O'Brian himself wrote to the Watch Tower Society; yet he declined to give any opinion as to whether *The Finished Mystery* could be circulated with the offensive pages torn out, stating that it was Justice Department policy not to comment on materials deemed offensive. John Lord O'Brian to Watch Tower Society, March 11, 1918, ibid., 967. See also Ibid., 1310.

[135] The Canadian government had passed even stricter laws limiting free speech during the war than the United States had. In fact, some of the United States senators used Canadian law as an example during the debates over the Sedition Act in Congress in 1918.

[136] *Rutherford v. United States*, 1221.

Despite the intentionally provocative nature of their publications, the Bible Students argued at trial, their speech was protected by the Constitution's free speech, free press, and free exercise guarantees. When questioned by the Court regarding his opinion on the conscription issue, for example, Bible Student director Fischer stated, "Your Honor, I believe in allowing every man the freedom of his own conscience. If he believes it is right for him, I don't say for him what he shall or shall not do, any more than I could for you. We believe in complete liberty of conscience for other people as well as for ourselves." Echoing O'Brian's energetic condemnation of the "Finished Mystery group" to Congress, prosecuting attorneys Buchner and Oeland argued that the Bible Students' position as a religious group, rather than being a defense for their actions, made them even more culpable. "Don't you know," Oeland replied to Fischer, "that if an anarchist had promulgated that kind of stuff on the street, nobody would have paid any attention to him, but coming in the covers surrounded by religious teachings that it would reach thousands of people and aggravate that sentiment that you say was very strong?"[137]

Judge Howe was openly hostile to assertions that the group's religious liberty had been violated. During Bible Student director Robert Martin's testimony, for example, the judge argued with the lawyer Sparks:

Sparks:	…if in preaching his religion with perfectly worthy motive it might infringe upon any act passed by the Government that would not make him guilty of any violation, or a crime…
The Court:	…you say if in preaching his religion he violates an Act of Congress, he is not guilty?
Mr. Sparks:	I think he has a right to honestly preach his religion.
The Court:	In violation of the law of the land?
Mr. Sparks:	I cannot see, where religion is guaranteed to every man under the Constitution, how you can pass any law which will show that the belief of it, how then, prevent him from

[137] Ibid., 572.

> teaching and believing in his religion. I have never seen any cause that will go to the extent that Congress can pass a law that will infringe upon religious freedom.[138]

In another exchange, the attorney Oeland questioned Bible Student Woodworth. "If I am to live anywhere," Woodworth announced, "I want to live in the United States, where hitherto we had religious liberty." Judge Howe, exasperated, eventually snapped. "Will you ask him," the judge replied angrily, "what he thinks would become of this nation and people if we didn't do something in this war?"[139] During the trial, moreover, Judge Howe cited the *Reynolds* precedent in disagreeing with the Bible Students' assertions that this was about religious liberty. "A man may understand such religious beliefs as he desires," Judge Howe insisted, "but he must not go out and preach those religious beliefs, if in doing that he is violating an Act of Congress….I think the law is well settled and has been well settled for a great many years that religious belief is not defense for a crime."[140] Calling attention to the *Reynolds* rule, and the question of "whether religious belief can be accepted as a justification for an overt act made criminal by the law of the land," Judge Howe challenged the lawyers to provide briefs indication that there was some precedent that religious belief could be used as a justification for actions; the Bible Students' attorneys had to admit that there was none.[141]

On June 20, 1918, at 10:30 pm, after convening for five hours, the jury found the eight Watch Tower leaders guilty on each of the four counts of the indictment. "The courtroom was crowded with friends of the convicted men," the *New York Times* reported, "but there was no demonstration, the accused accepting the verdict, which was

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[138] Ibid., 887-907.
[139] Ibid., 658.
[140] Ibid., 907-908.
[141] Ibid., 947.

totally unexpected, in a daze."[142] The marshal handcuffed the convicted men and took them to the Raymond Street Jail in Brooklyn, to await sentencing. The newspaper reported that "Rutherford appeared to be completely dazed. He passed his hand across his forehead as if trying to comprehend what had taken place and then followed the Marshal out of the room, the other defendants trailing after him." The next day, in a courtroom packed with supporters and onlookers, Judge Howe sentenced seven of the defendants, who "showed plainly the effects of their first night in prison," to twenty years imprisonment for each of the counts against them, to run concurrently.[143] In his remarks explaining the hefty sentences, Judge Howe proclaimed that, far from being a justification for their actions, their status as a religious organization subjected the Bible Students to increased scrutiny. "In the opinion of the Court," he announced, "the religious propaganda which these defendants have rigorously advocated and spread throughout the nation as well as among our own allies, is a greater danger than a division of the German Army. If they had taken guns and swords and joined the German Army, the harm they could have done would have been insignificant compared with the results of their propaganda. A person preaching religion usually has much influence, and if he is sincere, he is all the more effective. This aggravates rather than mitigates the wrong they have done."[144]

"The length of the sentence was a great surprise to the prisoners and their followers," reported the *New York Times*. "The eight men sank into their chairs. Rutherford was the most affected of all. His body and hands twitched convulsively and

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[142] "Russellites Guilty of Hindering Draft," *New York Times*, June 21, 1918, 7.

[143] Giovanni De Cecca's sentence was reserved for later because, according to Judge Howe, he had been a follower, rather than a leader. A month later, he was sentenced to ten years in prison on each of the four counts.

[144] *Rutherford v. United States*, 1165.

his face grew red. A buzz of comment passed over the courtroom."[145] After these proceedings were dispensed with, the convicted men were taken back to the Raymond Street Jail to await transportation to the federal penitentiary in Atlanta, and Judge Howe expressed gratitude to the clerk of the court and his deputies, and thanked counsel, "excepting Mr. Sparks," for their "dignified and lawyerlike attitudes." The eight Bible Student directors were transported to the Atlanta Federal Penitentiary from Brooklyn the next week, to begin serving sentences of two decades. The remaining believers were faced with grave decisions about the future of the movement.

Bible Student Thomas (Bud) Sullivan later recalled that the, "'brothers in charge of the work at Bethel were in no wise fearful or downhearted. In fact, the reverse was true. They were optimistic and confident that Jehovah would give his people the victory ultimately'."[146] However, shortages in supplies such as coal and paper, combined with the animosity they perceived after the trial, led the Bible Students to decide to move out of New York, at least for the time being. In July 1918, they sold their Tabernacle (part of their Brooklyn headquarters) and closed the Brooklyn Bethel, though they vowed to continue the work and "keep 'the home fires burning' until the brethren got out of prison." In August, the rest of the Bethel family retreated to Pittsburgh.[147]

To "Tan the Old Lady's Hide": The First World War as a Catalyst to Legal Action

In all, nearly 1,900 people were prosecuted for violations of the Espionage and Sedition Acts. Two hundred of these people were convicted and imprisoned; additionally 150 I.W.W. leaders were convicted under various statutes. In March 1919, the *New York Times* reported that President Wilson was granting clemency to 52 of those convicted

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[145] "20 Years in Prison for 7 Russellites," *New York Times*, June 22, 1918, 18.
[146] *Jehovah's Witnesses: Proclaimers of God's Kingdom*, 71.
[147] Ibid.

under the Acts, and that the Department of Justice was reviewing the other 150 cases. Justice Department officials admitted that many of those convicted had been "the victims of wartime passion or prejudice, and had received long sentences not commensurate with their offenses."[148] Among these, the Bible Student cases were prominent, noted the newspaper: "[t]housands of letters have been received at the Department of Justice…asking Executive clemency for J.F. Rutherford…and seven associates." The remaining dedicated Bible Students had moved back to Western Pennsylvania in the wake of their leaders' imprisonment, abandoning their Brooklyn headquarters for the duration of the war. Yet the group's members had attempted to maintain the operations of the Society. They circulated several petitions, gaining hundreds of thousands of signatures, to President Wilson and various congressmen, urging the release of their leaders.

The Bible Students also sought the appropriate legal avenues to appeal, trusting, for instance, that Supreme Court Justice Louis Brandeis was most likely to grant the directors a new trial, because he saw the law "as a social instrument for the service of all classes."[149] Justice Brandeis granted the Bible Students' request, and in late March, 1919, after serving nine months in the Atlanta Federal Penitentiary, Rutherford and the others were brought back to Brooklyn on $10,000 bail, pending a decision on their appeal.[150] In May, the eight were granted a new trial.[151] The group, assisted by Sparks

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[148] "Wilson Commutes Espionage Terms," *New York Times*, March 6, 1919, 9.

[149] Murphy, *World War I and the Origin of Civil Liberties*, 188.

[150] In some quarters, Brandeis' willingness to grant bail to those convicted under the Espionage and Sedition Acts was considered tantamount to treason. An Indiana newspaper wrote in mid-1918 of Rose Pastor Stokes, convicted under the Espionage Act and given ten years in prison, out on bail pending appeal. "We must not forget that Comrades Brandeis and Clark now sit as justices." "Not in Prison," *The Fort Wayne News and Sentinel*, July 18, 1918, 12.

[151] "High Court Annuls Russellite Verdict," *New York Times* (16 May 1919), 24; "'Russellites' to be Retried in April," *New York Times*, January 8, 1920, 12.

and Fuller, got as far as preparing briefs in the case, in which they argued that the convictions were unsound, among other reasons, because of errors at trial "with respect to the rights of the defendants in the free exercise of their religion, as guaranteed by the First Amendment of the Constitution of the United States."[152] The new trial never happened, however; on May 5, 1920, the indictments against the eight men and the obstinate William Hudgings (who had been jailed during the trial for contempt) were dismissed.

Rutherford and his associates would never forget their experiences during the war. Indeed, the Bible Student leaders had been in the same Atlanta prison as the Socialist leader Eugene Debs, as well as other radicals imprisoned for the same reasons.[153] Although they had been released and exonerated, Rutherford was galvanized by his experiences in prison, and the defense the group had mounted in court. From 1918 on, Rutherford and the Bible Students would call increasing attention to what they viewed as the central problem in American society: an aberrant—and unconstitutional—alliance between church and state. Recalling such advocates for religious freedom as Roger Williams, Rutherford contended that the imprisonment of Bible Students during the First World War was an example of a corrupt, prejudiced religious system influencing the government. Lowell Yeatts, a lifelong Jehovah's Witness who lived at Bethel for several years and remembered Rutherford and his associates, believed that the First World War experience shaped Rutherford's subsequent leadership. "I can remember him talking

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[152] *Rutherford et al. v. United States*, 68-69.

[153] While there is no direct evidence of communication between Rutherford and Debs , given that they were housed for the better part of a year in the same Atlanta penitentiary, it is not unlikely that Rutherford and the other Bible Students associated with these political radicals—and the groups may even have influenced one another. Indeed, the Bible Student leaders were in prison in Atlanta with scores of others jailed for violation of the Espionage and Sedition Acts. It is therefore reasonable to suspect that they recognized the similarity of their cases and the reasons for their imprisonment.

about it, and he said he was going to 'tan the old lady's hide'—talking about Babylon. Well, they were only there [in prison] for about nine months, but it was enough to anger him. And at the same time he was still directing things, from prison. And then after they were released he was elected president, and that gave him more determination than ever. And he was vigorous in his attack on the religious prejudices that existed in the United States. And he never let up."[154]

Rutherford would spend the remainder of his life trying to ensure that the system would never again catch the group unaware. In the coming years, the Bible Students, with Rutherford's instruction, would challenge the dichotomy between belief and action entrenched in Supreme Court precedent, opposing laws which limited their religious practices. The group would use civil disobedience as a springboard for calculated legal action, portraying religious liberty as a civil rights issue. Their argument, formed during the First World War, had at its core the idea that the rights to preach and to publish freely were inseparable from the right to believe.

[154] Interview with Lowell Yeatts at his home in Cumming, Georgia, September 20, 2008. In possession of the author.

Chapter II: Judge Rutherford and the Origins of a Legal Strategy

Rutherford and his associates emerged from the war with renewed energy for publicizing the Watch Tower message, especially if they encountered opposition. "For Many Years It Has Thrived on Persecution and Is No Stranger Before the Courts of the Land," boasted the Watch Tower Society in a newly-launched magazine, *The Golden Age*.[1] Rutherford urged his followers to battle, maintaining that religious intolerance lay behind persecution of the group, and members of the clergy had incited discrimination during the war.[2] "This little band of Christians are fighting the greatest fight of all times. There will never be another like it," he stated in the August, 1919 issue of *The Watchtower*.[3] The group took any opposition to their door-to-door work or their writings as evidence of intolerance; Bible Students were defensive, wrote a contributor to *The Golden Age* "[o]n account of past and prospective persecutions."[4] Individual Bible Students had been harassed during the war, and their leaders imprisoned; in 1919, the group seemed to anticipate an onslaught of opposition. Watch Tower Society leadership indicated that, while their mission was to spread the gospel, the movement's followers should not be afraid to fight in the worldly courts. Conflicts over their aggressive proselytizing did increase in the 1920s. As if they had been waiting for this fight, the group moved toward a legal strategy designed to guarantee the liberty to practice and to preach in America, combining Scriptural references with sophisticated constitutional

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[1] G.C. Driscoll, "Russellism Will Not Down," *The Golden Age*, March 17, 1920, 409-411.

[2] Rutherford's claim that there was a conspiracy against the Bible Students, orchestrated by well-connected members of the clergy (especially Catholic), was not necessarily entirely without basis. The clergy were well-organized, and were not shy about using their influence. For example, Roger Baldwin noted that in 1921, "New York Police, instigated by Catholic clergy, break up First Amendment Birth Control Conference at Town Hall. Margaret Sanger and Mary Winsor arrested." Roger Nash Baldwin Papers, Box 16, Folder 30, "Correspondence/Subject Files, ACLU: Chronology, Dates: 1917-1945"; Public Policy Papers, Department of Rare Books and Special Collections, Princeton University Library.

[3] "Blessed Are the Fearless," *The Watch Tower*, August 15, 1919, 249.

[4] G.C. Driscoll, "Russellism Will Not Down," *The Golden Age*, March 17, 1920, 409-411.

claims. Rutherford's strategy involved civil disobedience, education of Bible Students in court and legal proceedings, and legal advocacy.

Bible Student activities had, at first, been severely curtailed after the trial of their leaders; the Bethel family had sold the printing presses and plates, and the publishing work had been reduced to nearly nothing. The remaining members of the group had set up a small operation outside of Pittsburgh. After they were released from prison, Alexander Macmillan and R.J. Martin, another of Rutherford's associates, went to Pennsylvania to assess the situation. "We were buried on the top floor of a new building on federal Street in Pittsburgh," Macmillan later remembered, "and few people knew we were there."[5] The group decided to move from this out-of-the-way location back to Brooklyn in 1919—provided they could find the funds. Macmillan described looking up from his desk in the Pittsburgh office to see a wealthy Bible Student. After asking after Rutherford and his associates, the man then told Macmillan he wanted to speak with him privately. "He began to take his shirt off as I talked to him," Macmillan remembered.

> I thought he had gone crazy. He looked a little dirty and travel-worn, whereas ordinarily he was a tidy and well-kept man. When he got down to undershirt he wanted a knife. Then he cut out a little patch he had on there and took out a bundle of money. It was about $10,000 in bills. He put it down and said, 'That'll help you to get this work started. I wouldn't send a check because I didn't know who was here. I didn't travel in a sleeper because I didn't want anybody to come and take this money away from me if they suspected I had it, so I sat up all night. I didn't know who was in charge of the work. But now I see you brothers here whom I know and trust, I am glad that I came![6]

[5] Macmillan, *Faith on the March*, 110.
[6] Macmillan, *Faith on the March*, 111.

With this large donation as well as other money they raised, the Bible Students returned to Brooklyn, securing a factory space in addition to Bethel.[7] They purchased a mammoth secondhand press, which they nicknamed the "old battleship," and began to issue the Society's publications anew.

Rutherford had not been present in Pittsburgh because he had gone to California almost immediately after the group's release from prison. On Sunday, May 4, 1919, Rutherford gave a talk, called "The Hope for Distressed Humanity," in Clune's Auditorium in Los Angeles. As Alexander Macmillan remembered, the speech was to be something of a test. "Newspaper advertising called attention to our illegal conviction with the promise that the reason for it would be explained. This was a test case. If nobody came to the meeting, we were done."[8] Twenty minutes after the doors opened, the hall was filled to its capacity of 3,000—with another 600 having been turned away. It is not clear whether those who attended were dedicated Bible Students, or whether they came because they were interested in Rutherford's prison experience (both elements were included in the advertisements for the talk). 1,500 people showed up for an overflow

[7] The question of who funded the Jehovah's Witnesses' evangelical enterprises, and how they eventually bankrolled their legal expenses, is one for which no good answer has been established. The Society maintains that all of their expenses are covered by donations by devoted Jehovah's Witnesses. Additionally, the Society soon began to cover almost all legal expenses by retaining lawyers in-house, in the Watch Tower Society Legal Department. Nonetheless, the question of where the money has come from has perpetually vexed detractors from the Society, as especially did some of Rutherford's more extravagant practices. In the mid-1920s, for instance, Rutherford and the Society began construction on a ten-bedroom mansion near San Diego, California, called "Beth Sarim" (Hebrew for "House of Princes," completed in 1929); Rutherford spent several months there each winter in the 1930s, because, he said, a lung condition contracted during his wartime imprisonment left him susceptible to cold. Some critics claimed that he had used the Society's money to build the house; he and his associates, including W.E. Van Amburgh, countered that the house had been built with gifts from friends. See "Why Salter Lost His Job," *Golden Age*, May 2, 1937; "San Diego's Officials Line Up Against Earth's New Princes," *Consolation*, May 27, 1942, 5-6. For the claims against Rutherford, see Tony Wills, *A People for His Name* (Morrisville, North Carolina: Lulu Enterprises, Inc., 1967, 2006.) and Penton, *Apocalypse Delayed*.

[8] Macmillan, *Faith on the March*, 112.

meeting scheduled that Monday.[9] When the Society held their convention at Cedar Point, Ohio, in September, 6,000 people attended. "So the idea began to take hold," Macmillan recalled. "'Now we have something to do.' We were not going to stand around any more and wait to go to heaven; we were going to go to work."[10]

As a sign of the leadership's new vigor, at the Cedar Point convention Rutherford announced the creation of *The Golden Age,* a new Bible Student magazine.[11] Intended to appeal to a wider audience, the periodical contained articles of general interest and news (with headings such as such as Labor and Economics, Political—Domestic and Foreign, Science and Husbandry, and Housewifery and Hygiene)[12], as a companion to the more doctrinally focused *Watchtower*. The chatty tone of the new magazine, however, was combined with an aggressive message. For one thing, the magazine's editor, Clayton J. Woodworth, had extremely strong views on a number of issues. Extraordinarily suspicious of medicine, Woodworth constantly decried the American Medical Association and the smallpox vaccine, as well as claiming for years that aluminum cookware was poisonous.

The Golden Age also contained comprehensive descriptions of Bible Student activities in the 1920s, and was intended from the outset to constitute a challenge to the establishment. As Rutherford had announced in 1919, the introduction of a new magazine was a response to the "war against the truth," and the fact that "due to new

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[9] Ibid., 113. Macmillan also noted that Rutherford became so ill after an hour of this meeting that an associate had to complete the lecture. He was later determined to have pneumonia. Macmillan recalled, "The doctors said his trouble was due to the poisons in his system from impure air and poor food while in the Atlanta penitentiary. He and Van Amburgh were in a cell that had no circulation of air. There was something wrong with the fan and, not getting enough oxygen, their systems became filled with poisons. At any rate he was seriously ill and never fully recovered."

[10] Ibid., 116.

[11] Penton, *Apocalypse Delayed*, 56.

[12] Other topics included Social and Educational, Manufacturing and Mining, Finance, Commerce, Transportation, Agriculture and Husbandry, and Religion and Philosophy.

ordinances that were being passed, there was increasing difficulty in many communities to distribute papers except to subscribers."[13] The first issue of *The Golden Age* proclaimed that the magazine's purpose was to be a "house-to-house canvass with the kingdom message, proclaiming the day of vengeance of our God and comforting them that mourn. In addition to the canvass, a copy of THE GOLDEN AGE is to be left at each home, whether a subscription is taken or not."[14] The Society used old battleship to print millions of copies of *The Golden Age*, as well as their other literature.[15] In their canvassing work, Bible Students distributed this bi-weekly publication as well as copies of *The Watchtower*, and the latest full-length book titles from Judge Rutherford.

In addition to the new magazine, beginning in 1919 Rutherford transformed the organization itself, intensifying the group's work. Rutherford emphasized the importance of proselytizing (called "service") for all members, and he managed the Watch Tower Society with exacting control. *The Golden Age* listed "Opportunities for Service," detailing the organization's expectations of individual members. The Society revived pioneer and colporteur service, each of which entailed traveling to perform full-time door-to-door work. They also instituted "pilgrim" service, in which special representatives were sent from congregation to congregation for the purpose of gathering those who had been scattered by the war "to stimulate new enthusiasm through this close contact with the headquarters organization."[16] Moving toward increasing centralization, additionally, beginning in 1920, each Bible Student was required to give account of his or

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[13] *Jehovah's Witnesses in the Divine Purpose*, 89.

[14] Watch Tower Society, *To Whom the Work is Entrusted* (1919), 1; quoted in *Jehovah's Witnesses in the Diving Purpose*, 95.

[15] In 1920, for example, 38 carloads of paper were used to produce 4,000,000 copies of *The Golden Age*. Ibid., 97.

[16] *Jehovah's Witnesses in the Divine Purpose*, 90. In the spring of 1919, there were 150 Bible Students in full-time active service; by the fall of that year, that number had grown to 507.

her witnessing (proselytizing) work to the Watch Tower Society, via weekly report.[17] Soon, the Society assigned specific territories which each congregation was responsible to canvass.[18] The Bible Students' chief purpose was to preach the message of Jehovah; most of Rutherford's efforts during these years were directed at advancing the evangelizing work.[19] All this gave rise to a proselytizing movement of extraordinary scale and control.[20]

As Rutherford enlarged the demands made upon ordinary Bible Students, it is remarkable that so many people persisted in the service work—even as the group encountered local opposition. The reasons ordinary Bible Students joined the movement and embarked on this work are, of course, complex.[21] Despite scattered stories of big

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[17] Prior to this time, only full-time pioneers and traveling colporteurs had reported their service directly to the organization.

[18] *Jehovah's Witnesses in the Divine Purpose*, 95-97. "For the first year of reporting, 1920, there were 8,052 "class workers" (those who placed literature) and 350 pioneers."

[19] Penton, *Apocalypse Delayed*, 60.

[20] The Watch Tower Society kept careful statistics on membership and preaching activities. "Membership," in this case, tends to include only those actively involved in the preaching work, and thus is not directly comparable with membership statistics for other religious groups. Nonetheless, the statistics available are useful in gaining some understanding of the group's numbers and growth. In 1914, 5,155 Bible Students were actively preaching in 43 "lands," and 18,243 attended the Memorial (a commemoration of Christ's death as a ransom, observed on the Passover with the Lord's Evening Meal). In 1919, 5,793 Bible Students preached in 43 lands, and 21,411 attended the Memorial.

Members actively engaged in field service are called "congregation publishers". In 1935, there were 56.153 publishers; 96,418 in 1940, 156,299 in 1945, 373,430 in 1950, 642,929 in 1955, 916,332 in 1960, and 1,109,906 in 1965. The group also collected statistics on number of "lands" where they engaged in preaching work: 46 in 1920, 83 in 1925, 87 in 1930, 115 in 1935, 112 in 1940, 107 in 1945, 147 in 1950, 164 in 1955, 187 in 1960, and 201 in 1965. Finally, they kept numbers of pioneers (formerly "colporteurs")—those devoting significant time to the field work. There were 480 in 1920, 1,435 in 1925, 2,897 in 1930, 4,655 in 1935, 5,251 in 1940, 6,721 in 1945, 14,093 in 1950, 17,011 in 1955, 30,584 in 1960, and 47,853 in 1965. See *Jehovah's Witnesses: Proclaimers of God's Kingdom*, 717-722,

The sociologist Rodney Stark and the economist Laurence Iannaccone studied the scale and growth of the Jehovah's Witness movement from 1928 onward. Stark and Iannaccone call the group "extremely statistically-minded," and state that the group's own statistics are reliable. Stark and Iannaccone reported that the average number of active publishers were as follows: 44,080 in 1928, 56,153 in 1935, 96,418 in 1940, 127,478 in 1945, 328,572 in 1950, 570,694 in 1955, 851,378 in 1960, and 1,034,268 in 1965. Rodney Stark and Laurence R. Iannaccone, "Why the Jehovah's Witnesses Grow So Rapidly: A Theoretical Application," *Journal of Contemporary Religion* 12, no. 2 (1997): 133-157.

[21] In the first half of the twentieth century, most Jehovah's Witnesses came from North America. Even as the Bible Students expanded their work overseas, the majority of converts came from locations where the majority of people were of Protestant background, or from non-Christian backgrounds (such as in some parts of Africa). Although they were a homegrown American religious group, with roots in

donors and wealthy adherents, most Bible Students seem to have been of modest means. While the social class of the group's members is difficult to determine, scholars have suggested that members of the group between the two world wars were "humble folk"—farmers and laborers, as well as immigrants and blacks.[22] Many were likely attracted by Rutherford's message of equality, attacks on powerful business interests, and advocacy for the poor and disenfranchised members of society.[23] In contrast to Russell's time, one scholar reflected, "Rutherford's approach appealed far more to the emotions of the lower classes," and thus more members who joined "in his day did so from a perceived lack of socio-economic privilege."[24] The organization encouraged aspiration toward a middle class attitude, with few members from either extreme of the social spectrum. The Jehovah's Witness society has had "small numbers of the very rich or very poor; it has tended to develop a body of believers who are *and must remain* 'average'—in everything except their religion."[25] It is perhaps the strength of their allegiance, formed on social grounds as well as the Bible message, which encouraged fierce commitment to the organization. It must be noted, however, that Bible Students themselves described joining the movement with the simple fact that they had been convinced by the Bible truths. Their own explanations for their actions, then, may best account for the group's steadfastness—that Bible Students simply believed.[26]

American culture and law, Russell and then Rutherford had consistently declared Bible Students to be "internationalists"—without regard for national boundaries.

[22] Penton, *Apocalypse Delayed*, 255; Stroup, *The Jehovah's Witnesses*.

[23] In the era after the First World War, Jehovah's Witnesses did not come primarily from Catholic backgrounds. Penton, *Apocalypse Delayed*, 254. It must be noted, however, that after 1950, this situation seems to have reversed: the largest proportion of Jehovah's Witnesses (according to their own numbers) are ex-Catholics.

[24] Penton, *Apocalypse Delayed*, 255.

[25] Ibid., 258-259.

[26] Penton and Rogerson both acknowledge that becoming convinced of the group's doctrines was the most common explanation for Jehovah's Witnesses' conversions. Most scholars, even when they make

Church and State: A Dangerous Union

The Watch Tower claimed that the strength of these beliefs was behind local opposition to the group—set in motion, they maintained, by a conspiracy of clergy and governmental authority. In 1920, *The Golden Age* declared that "Church-State Destroys Religious Liberty"—"Against the rights guaranteed under the Constitution of the United States, namely, the selling of Bible study textbooks not under ban of any kind."[27] Rutherford attributed any opposition to the group—whether legal or ideological—to prejudice. From the end of the war onward, he consistently painted the Bible Students as a beleaguered and persecuted minority—even though they only occasionally encountered arrests in the early 1920s. His contention was based on his view that dangerous cooperation between church and state was rife; he warned against this situation constantly. In the group's first major promotion of the 1920s, the "Millions Now Living Will Never Die" campaign, Rutherford suggested that the clergy, and the politicians he felt certain they influenced, were attempting to stifle his campaign, and the Bible truths he promoted.[28] "It is to be deeply regretted," he wrote, "that the clergymen would oppose an effort to teach the Bible truths; nevertheless, we find much opposition everywhere, and many clergymen will attempt to prevent the people from reading what is here written."[29] Assisted by an extensive publicity campaign involving large newspaper

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mention of this explanation, attempt to rationalize this allegiance with other factors, such as socio-economic appeal.

[27] *The Golden Age* 27, September 29, 1920, 712.

[28] Shortly before going to prison in 1918, Rutherford had given a speech entitled "Millions Now Living May Never Die," which became the basis for a Watch Tower Society speaking tour beginning in September 1920. In 1920, the I.B.S.A. published a booklet entitled *Millions Now Living Will Never Die*, continuing the group's practice of producing publications directly reflecting the themes of their speaking tours. The booklet predicted that the Jubilee Year, in which "wars, revolution, and anarchy will cease," would occur in 1925.

[29] J.F. Rutherford, *Millions Now Living Will Never Die* (Brooklyn, New York: International Bible Students Association, 1920), 7.

ads and billboards, the lectures drew crowds in the thousands in cities throughout the United States and Canada.[30] In these speeches and writings, Rutherford depicted an infiltration of the political realm by denominations and churches. The United States was continually in peril of falling prey to the same dangerous union of church and state as had existed in England of yore.[31]

Rutherford decried any kind of establishment; the church-state union was treacherous because the official condoning of any one church necessarily excluded others. Recent evidence of this truth, asserted Rutherford, could be found in the treatment of religious objectors during the First World War. The stigma attached to Bible Student "slackers" during the war was but the most visible component of systematic discrimination under the Selective Service Act. The fact that the International Bible Students Association had not been treated the same way as other religious groups—they were forced to formally apply for the noncombatant service automatically given to clergy of other denominations, for example—constituted an illegal preference for one faith over another, akin to an establishment a state church. Bible Students "throughout the United States and Canada were arrested, thrown into jail, held without bail, many of them never tried, many tarred and fathered and otherwise ill-treated, advantage being taken of the condition of war to do so." Prejudice and intolerance had perverted political institutions, as well as the people's means of redress in the courts. Likening the group's situation to

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[30] For example, 3,000 people turned out to hear Rutherford speak at the Auditorium in Atlanta, Georgia. "Millions to Live Forever, Asserts Judge Rutherford," *The Atlanta Constitution*, January 17, 1921, 5. Rutherford's associates, among them C.A. Wise and Grover C. Powell, traveled simultaneously, giving lectures on this theme in other cities. See Powell's account of a talk at Cable Hall in Atlanta. "Millions Will Never Die, Claims Powell," *The Atlanta Constitution*, October 31, 1921, 7.

[31] Ibid., 82.

Jesus' trial for sedition by the Romans, Rutherford encouraged his followers to fight inequality and the dangerous union between church and state.[32]

Rutherford and the Watch Tower leadership were remarkably consistent in this separationist view, condemning all laws inspired by religious denominations. For example, Rutherford denounced Prohibition, citing the law as an example of legislation which fostered an association between church and state. Although the Bible Students were encouraged to abstain from alcoholic drink, Rutherford bitterly condemned the law as an insidious injection of religious beliefs into politics. "I am not in favor of the use of liquor," he explained, "but I believe that man should have the liberties with which Jehovah endowed him. I do not believe in men getting drunk, but it is not my business to tell them that they can't have liquor."[33] Limiting personal freedom was but a first step toward the feared intertwining of church and state. "The matter has developed into a clear-cut religious issue," wrote one of Rutherford's associates. "Thus has Protestantism been enticed under the guise of doing good with political tools, into what amounts to the same kind of union of church with state that they so loudly denounce in their Romanist brethren."[34] Caution was necessary, although the motives behind the law may have been perfectly noble. "Very likely the men in back of it mean well, and most of them seem sincerely desirous of doing great good. But anything approaching a union of church and state, such, for example, as a church in politics, has invariably created worse evils than it cured."[35] The Bible Students were particularly sensitive to restrictions on the freedoms

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[32] "Are we to think it strange that such fiery trials come to the Lord's people?" asked one of Rutherford's associates, reflecting this view. "Not if we believe in the Scriptures." G.C. Driscoll, "Russellism Will Not Down," *The Golden Age*, March 17, 1920, 409-411.

[33] "Dry Law is Scheme of Devil, Declares World Bible Head," *The Washington Post*, July 22, 1924, 3.

[34] *Golden Age*, May 12, 1920, 521.

[35] Ibid., 522.

of those not in the religious mainstream, because of their minority status and unconventional practices; they warned that more laws in this vein would follow. "Protestant Church politicians were responsible for the passage of the prohibition law without an expression of the will of the vast majority of the people. Church politicians have been responsible for the passage of several kinds of blue laws, and are still engaged in angling for the passage of other blue laws to restrict the liberties of non-church-goers on Sunday."[36]

Sunday laws, like Prohibition, codified the beliefs of one particular religious group at the expense of others. Often quite strict, and having been on the books in many states since colonial times, Sunday laws (or "blue laws") prohibited work on Sundays—including operating businesses, peddling goods, operating movie houses, and even traveling from town to town. While many of these ordinances lay dormant by the 1920s, they had led to numerous prosecutions throughout the nineteenth century, and were resurfacing.[37] The Bible Students themselves had been arrested several times for violations of Sunday laws; in 1914, a group had been arrested for showing Russell's "Photo-Drama of Creation" on a Sunday. They had taken their case to the Idaho Supreme Court—and won.[38] However, most state courts refused to grant allowances for Sunday work, even to Jews and other groups who did not observe the Sunday Sabbath. The legislation, the Bible Students claimed, violated their constitutional rights to free assembly and free speech, as well as their constitutional guarantee of religious liberty.

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[36] *Golden Age*, May 26, 1920, 569.

[37] See David N. Laband, *Blue Laws: The History, Economics, and Politics of Sunday Closing Laws* (Lexington, Mass.: Lexington Books, 1987); Peter Wallenstein, *Blue Laws and Black Codes: Conflict, Courts, and Change in Twentieth-Century Virginia* (Charlottesville, Virginia: University of Virginia Press, 2004).

[38] *State v. Morris*, 28 Idaho 599 (1916).

Although they saw themselves as more genuinely religious than any other group, Bible Students even objected even to the low-level religious instruction common in public schools. "Non-denominational" religious instruction (which, since the late nineteenth century, had usually meant a gentle form of liberal Protestantism) was a misnomer, argued the group, aggravated that that their children attended schools where religion was taught.[39]

> The fundamental proposition underlying the United States Government, and the government of all the states is complete religious liberty, which can be obtained only by an entire separation of the functions of church and state. With over one hundred and sixty different religious organizations in the United States, including Greek and Roman Catholics, Protestants of all shades, Jews, Freethinkers, Spiritists, etc., it is manifestly unjust that the state should favor one of these at the expense of the others.[40]

Disputing the argument that schools were "godless" if they did not teach religion, they argued that the "question of godliness does not enter into spelling, composition, penmanship, reading, grammar, geography, arithmetic, history, civics, hygiene or industrial art, and the attempt to inject either Bible or beads into the matter is hypocritical and against the real interests of the state." While their mission was to spread the gospel of Jesus Christ, the Bible Students were remarkably consistent in their insistence that church and state be kept separate.

The Meaning of Liberty and Due Process

These infiltrations of religious belief into law and government had been the rule, rather than the exception, for most of American history. Slogans aside, there was little common agreement in the United States that the Constitution mandated strict

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[39] Unlike other religious groups (such as Catholics and some conservative Christians), the Bible Students refused simply to start their own schools, insisting that the principles of the American Constitution demanded their inclusion in the public schools.

[40] *The Golden Age*, October 13, 1920, 9.

separationism. Even the members of the American Civil Liberties Union (as the National Civil Liberties Bureau became known after the war) did not see religious liberty as a clearly-defined issue.[41] Only a handful of ACLU lawyers in the 1920s believed that the intent of the First Amendment was strict separation of church and state.[42] Furthermore, most saw religious liberty as separate from other liberties—not necessarily a "civil liberties" issue at all, and certainly not intertwined with other civil liberties. The notion that government and religion should be kept separate at the state level, moreover, was quite foreign to American civic culture.[43] It was difficult to find a basis to challenge state laws and local practices on religious liberty grounds. While the Fourteenth Amendment ostensibly protected against encroachment of rights by the states, this liberty guarantee was ill-defined and narrow.

Trying to get an angle on their arguments, civil libertarians began after the war to argue that "due process" guarantees might conceivably be construed to include the fundamental rights contained in the First Amendment. The notion that concepts of liberty could be used to counter state laws was quite new. The Fourteenth Amendment read in

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[41] Walker, *In Defense of American Liberties*, 69-76. Walker has documented, for example, that there was no agreement among ACLU lawyers in the 1920s on the issue of religion in the schools. Several of the founders of the ACLU were Protestant ministers, many of whom supported some religious instruction in the schools. Furthermore, few of the ACLU lawyers actually saw this as a civil liberties issue at all.

[42] The First Amendment was by no means universally understood to mean strict separation of church and state. See Philip Hamburger, *Separation of Church and State* (Cambridge, Massachusetts: Harvard University Press, 2002). See also Leonard Levy, *The Establishment Clause: Religion and the First Amendment* (Chapel Hill, North Carolina: University of North Carolina Press, 1994); Leo Pfeffer, *Religious Freedom* (Skokie, Illinois: National Textbook Company, 1977).

[43] The Establishment Clause was originally understood merely to prohibit federally-funded, exclusive establishments (like that which existed in England at the time of the Revolution). However, there were established state churches in several states well after the Revolution (in Massachusetts until 1833, and Connecticut until 1818). See Chester J. Antieu, Arthur T. Downey, and Edward C. Roberts, *Freedom from Federal Establishment: Formation and Early History of the First Amendment Religion Clauses* (Milwaukee. Wisconsin: Bruce Pub. Co., 1964). Even after the state establishments were abolished, examples of "gentle religion" in the states, such as Bible reading in the schools and similar practices, persisted.

part, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Defining national and state citizenship, the framers of the Fourteenth Amendment had sought to guarantee civil rights for recently freed slaves against infringement by the states. However, the Fourteenth Amendment's guarantees had been defanged almost immediately after its passage by several Supreme Court rulings.[44] Certainly, none of the civil liberties guaranteed by the First Amendment (speech, press, assembly and religion) had been applied against state laws; even the notion that a person or group might invoke the First Amendment against a state or local ordinance seemed questionable. The First Amendment still applied only to the federal government ("*Congress* shall make no law…"); states were largely free to legislate as they chose—including regarding religion.[45]

Like those of the radical members of the ACLU, Rutherford's arguments were significantly broader than those of other religious groups. In his interest in defending religious liberty, Rutherford considered not only his group's rights claim, but also the American judicial system as a whole. The denial of civil liberties was but a part of the massive inequalities he saw in the American judicial system. In the early 1920s, Bible Student publications emphasized the importance not only of religious liberty, but also of equality before the law. In 1920, for example, *The Golden Age* reprinted a series of

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[44] *Slaughterhouse Cases*, 83 U.S. 36 (1873); *Civil Rights Cases*, 109 U.S. 3 (1883), which invalidated the Civil Rights Act of 1875 and stating that the Fourteenth Amendment did not apply to private individuals and organizations.

[45] Officially sponsored state churches persisted well into the early years of the republic, for example in Connecticut (until 1818) and Massachusetts (until 1833). Less official yet still pervasive expressions of state condoned religion in the public square have been allowed, and encouraged, throughout American history—including prayer in public schools, oaths in court, etc.

articles entitled "Justice and the Poor," written by Reginald Heber Smith of the Boston Bar—the architect of what would later be known as "legal aid" in the United States.[46] Smith, a partner at one of Boston's oldest law firms, had written prolifically on the divergence between rhetoric and reality regarding equal treatment before the law. Smith traced the theory of equal rights under the law, asserting that this concept was vitally connected to the Fourteenth Amendment. "Not only was the right to freedom and equality of justice set apart with those cardinal rights of liberty and of conscience which were deemed sacred and inalienable," he wrote, "but it was made the most important of all because on it all the other rights…were made to depend. In a word, it became the cornerstone of the Republic." This fundamental principle of equality before the law, codified in the Fourteenth Amendment, was threatened by inequalities in the American justice system—unfairness based, Smith suggested, on social class. "It must be possible for the humblest to invoke the protection of the law," he urged, "through proper proceedings in the courts for any invasion of his rights…" Otherwise, "freedom and equality vanish into nothingness." The Watch Tower leadership solicited examples of inequality from among their own ranks. "Letters are welcome," advised the editor of *The Golden Age* after the second installment of the series, "from readers giving an account of their experiences with the administration of justice."[47]

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[46] Smith eventually established the first Legal Aid organization in the United States. He had published the articles the previous year in a book entitled *Justice and the Poor: A Study of the Present Denial of Justice to the Poor and of the Agencies Making More Equal Their Position Before the Law with Particular Reference to Legal Aid Work in the United States* (Boston: The Merrymount Press, 1919). The six essays were published serially in the *Golden Age* in 1920-21: "Freedom and Equality of Justice: The Ideal," March 3 1920; "Denial of Justice: The Fact," March 17, 1920; "Defects in the Administration of Justice," March 31, 1920; "The First Defect: Delay," April 28, 1920; "The Second Defect: Court Costs and Fees," June 23, 1920 & November 24, 1920; and "The Third Defect: Expense of Counsel," Holiday 1920-21.

[47] Ibid.

Although he eschewed worldly systems, political and religious, Rutherford simultaneously implored his followers to work within these very systems to redress the inequalities of class and power. This stance appeared to present no contradiction to the Watch Tower leadership. Governments had been corrupted by false religion; American democracy and justice, however, were virtuous—and worth saving. Recalling his wartime lamentations about the vanishing of American founding freedoms, Rutherford suggested that these liberties, and along with them the greatness of American democracy, could be restored. The Bible Students had proclaimed their rights to free speech, religion and press during the First World War; in the 1920s, they began to assert the importance of equality and civil liberties beyond defending the right to express dissent. As federal sedition laws no longer constituted a threat, Rutherford turned his attention to state laws and local ordinances which he thought opposed civil liberties.[48]

The Bible Students, Organized Labor, and Test Cases

"All nations are marching to Armageddon," Rutherford had proclaimed since the war. There was hope, for "millions now living will never die."[49] Worldly systems were increasingly corrupted by selfish men. The war

> did not make the world safe for democracy. The very foundations of civilization are now shaken by revolution, labor strikes, official lawlessness, profiteers, bolshevism and anarchy. Both capital and labor are resorting to extreme measures. The common people have lost their leaders. The clergy have abandoned the Word of God and joined hands with big business and big politicians in an attempt to control the world; and these are opposed by radical forces.[50]

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[48] Although there was some discussion of a peacetime sedition law during the early 1920s, none was ever passed. The Bible Students mentioned such proposals in their literature, but became more focused on ordinances and laws which threatened their routine religious practice, on the streets and in the schools.

[49] "Display Ad 11," *New York Times*, October 20, 1923, 10.

[50] Ibid.

Rutherford reiterated and strengthened Russell's admonitions against the power of industry and money capital, yet he had equally little use for radicals on the left—for they, too, neglected the message of God. Official attempts to stifle radical views, however, ran contrary to the rights guaranteed to all in the United States, granting Rutherford an affinity with members of organized labor groups and other dissenters. He criticized not only laws aimed at religious practice, but, more broadly, attempts by the authorities to control speech, assembly, and press—religious or otherwise. Furthermore, Rutherford and his associates found some of the tactics of the era's dissidents to be instructive. Bible Student leaders observed the most visible practitioners of "civil disobedience" in the 1920s—organized labor, socialists, anarchists, and communists.

Although the Justice Department had reviewed the cases of supposed radicals in 1919, releasing many from prison, the 1920s did not alleviate the limited tolerance for differing economic and political views. The threat of radicalism led to official confrontations with organized labor and suspected anarchists, socialists and communists—a red scare which mushroomed rather than dissipating after the war had ended. Fear of foreign and radical views intensified after several violent incidents; most famously, in 1919, more than thirty bombs had been mailed to various officials, one of which exploded on the doorstep of Attorney General Mitchell Palmer, killing its deliverer.[51] The Justice Department had responded immediately with the notorious Palmer Raids, in which the homes and offices of hundreds of leftist radicals were searched, and several hundred people were arrested. J. Edgar Hoover and the Federal Bureau of Investigation had conducted surveillance on thousands of Americans who had

[51] Walker, *In Defense of American Liberties*, 42.

criticized the government.[52] State legislatures had passed new criminal syndicalism laws and strengthened existing ones, outlawing membership in radical organizations and the teaching of radical views. Between 1919 and 1921, nearly 2,000 people were arrested for violating such laws.[53] Official action, ostensibly to protect Americans from violence, was also extended to labor protests; judges often issued strike-breaking injunctions. Legal recourse was difficult: none of the actions prohibited by laws and injunction—strikes, public assemblies, membership in radical organizations—were definitively protected by First Amendment guarantees.

While Rutherford criticized capitalists and left-leaning radicals alike, in the 1920s the Watch Tower Society explicitly identified with the plight of organized labor. Proposing that the right to strike was implied by the Thirteenth Amendment, the Bible Students did not confine their discussion of civil liberties to actions involving religious beliefs.[54] In a series of *The Golden Age* articles discussing "America's Lost Liberties," for example, the Bible Students quoted an 1856 article in a South Carolina newspaper which condoned slavery as "the natural and normal condition of the laboring man, whether white or black."[55] Likening the laws enforcing slavery to strike-breaking injunctions, they lamented the fact that, "in the mad rush to suppress thought twenty-seven states have passed measures providing punishment for the peaceful advocacy of

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[52] As the historian Robert Murray characterized it, "Americans were far less concerned with making the world safe for democracy than with making America safe for themselves." Robert K. Murray, *Red Scare: A Study of National Hysteria, 1919-1921* (New York: McGraw-Hill Book Company, 1955), 11.

[53] Famously, two Communists arrested in November 1919—Benjamin Gitlow and Charlotte Whitney—eventually took their (separate) cases to the Supreme Court (in 1925 and 1927), asserting that such laws had violated their First Amendment rights. *Gitlow v. New York*, 268 U.S. 652 (1925); *Whitney v. California*, 247 U.S. 357 (1927).

[54] *The Golden Age*, November 10, 1920, 70.

[55] Beginning with several pages of quotations from such American luminaries as Benjamin Franklin, Daniel Webster, Wendell Phillips, and Woodrow Wilson, the articles presented a historically grounded critique of official attempts to quash free speech and democratic government. "America's Lost Liberties—A Symposium," *The Golden Age*, September 1, 1920, 674.

certain economic and political beliefs. How far this country has departed from its moorings…"[56] Along with perceived threats to fundamental liberties of speech, assembly and press, the Watch Tower criticized illegal arrests, denial of counsel, denial of habeas corpus, and the lack of a right to a speedy trial.[57] Rutherford saw similarities between labor's assertion of the right to strike and the Bible Students' own actions.[58] While the Bible Students continued to criticize worldly agencies, they simultaneously defended the rights of those groups to free speech and assembly.

Rutherford and his group were by no means the most vocal association to contend that the civil rights of labor radicals were being violated. Roger Baldwin, who in January of 1920 had agreed to head the newly-named American Civil Liberties Union, distinguished labor as the ACLU's most important cause. Baldwin advocated "civil disobedience" in the form of direct action, encouraging such exploits as sending well-known liberals into the coalfields of Pennsylvania to be arrested. Baldwin, however, having spent a year in prison himself, emerged from the war with little hope that the courts would uphold the civil liberties of labor organizers or anyone else. The ACLU leader "put little stock in litigation as a means of securing civil liberties," seeing the struggle as first essentially one for public opinion, rather than the possibility of

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[56] *The Golden Age*. September 15, 1920, 690.

[57] Ibid., 694.

[58] The Fourteenth Amendment's applicability to the rights of labor to organize had been raised in the early 1920s at the state court level, but to little avail. While the issue was far from settled, both state and federal appeals courts often rejected the assertion that equal protection and due process entitlements justified the right the right to strike. See, for example, *Truax v. Corrigan*, 257 U.S. 312 (1921), mentioned in the ACLU's *Weekly Reports on Civil Liberty Situation*, September 1920 – December 1921. In April 1921, the group reported on "The Persecution of the I.W.W.": the State Supreme Court upheld the constitutionality of the ordinances prohibiting strikes. Civil liberties advocates protested that "All the I.W.W. trials have been essentially free speech cases. Not a single act of violence has been proved save the defense of the Centralia Hall. In every case the issue is the right of men to organize, speak, meet, and circulate the propaganda of industrial unionism. Papers of the National Civil Liberties Bureau, Peace Collection, Swarthmore College.

significant legal change.[59] In the early 1920s, this emphasis on public opinion rather than litigation held true for a number of ACLU attorneys, including Norman Thomas, Scott Nearing, and Arthur Garfield Hays, who is described as having been "simultaneously idealistic about the Bill of Rights and cynical about the courts."[60]

The principles of the Constitution, some feared, were simply too abstract to be comprehensively defined jurisprudentially; civil liberties advocates must act primarily through literature and public demonstrations. While some attorneys disagreed with this approach, and believed in patiently pursuing cases to the Supreme Court (including, for example, the lawyers who crafted the 1925 *Scopes* test case, among others), litigation was by no means the central mission of the ACLU at this juncture. Baldwin, for one, "wore his contempt for the legal process like a badge."[61] All of the attorneys at the ACLU, however, appealed to the Bill of Rights and the freedoms contained therein, whether to muster patriotic sentiment or to argue that substantive rights were contained therein. It was an era in which the ACLU perpetuated "an exercise in mythmaking, an effort to capture the symbols of Americanism for the cause of civil liberties."[62]

Bible Students observed the arrests of speakers and spectators at labor assemblies, suggesting the possibility of test cases. In May 1920, for example, the police broke up a meeting of the National Committee of Iron and Steel Workers in Duquesne, Pennsylvania (on the outskirts of Pittsburgh). The organizers, clearly intending to make a point regarding their liberty of assembly, had sent four notices to the mayor, "telling him of the

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[59] Walker, in fact, suggested that many of the early ACLU activists, led by Baldwin, "disdained litigation." Walker, *In Defense of American Liberties*, 47-48.

[60] Ibid., 53. Hays, Walker argued, "was cynical about the legal process and saw court proceedings as a platform for broad political and philosophical statements, an opportunity to educate both the judges and the public."

[61] Walker, *In Defense of American Liberties*, 53.

[62] Ibid.

time and place where the test could be made." Despite these warnings, the police arrived to break up the rally; six speakers were arrested, as well as seven spectators, and the newspaper reporter who arrived on the scene had his camera and plates confiscated. J.H. Brown, the national secretary of the Committee of Iron and Steel Workers, also evidenced an inclination toward test cases, saying that the prisoners would refuse to pay fines, serving jail terms if necessary. "We propose to test the law," he declared, "and, if necessary, carry it to the highest courts."[63] In the Pennsylvania Supreme Court, the labor group's lawyers asserted that the ordinance violated the Fourteenth Amendment.[64] *The Golden Age* editors, edified by this example of testing a law, reported on the group's legal arguments and the subsequent upholding of the labor agitators' convictions.

In its ruling against the labor group, the court cited *Reynolds* and other precedents, deciding that the mayor was using his police power to keep order. The Bible Students complained that although "the Constitution of Pennsylvania, in harmony with the Constitution of the United States, provides that 'the citizens have a right in a peaceful manner to assemble together for the common good,' the mayor has the power to decide whether such meetings are 'detrimental to the public interest' and has made the boast that 'Jesus Christ could not speak in Duquesne under the auspices of the American Federation of Labor'."[65] After imposing a $25 fine on each of the six organizers, the judge stated in

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[63] "Labor Agitators are Sent to Jail," *Baltimore American*, May 11, 1920, 2.

[64] In challenging this city ordinance, Fincke invoked both federal and state constitutional provisions—even though there was virtually no precedent for the application of the federal amenements against local ordinances. Fincke argued that he had been denied equal protection, violating the Fourteenth Amendment, and also that he had been denied freedom of speech and the right of peacable assemblage guaranteed by the Pennsylvania Bill of Rights. The Pennsylvania Supreme Court dispensed with Fincke's Fourteenth Amendment claims in the usual way, by citing the state's police power. The court also dismissed Fincke's appeals to the Pennsylvania constitution. It is significant, although his Fourteenth Amendment claims were dismissed, that he made them at all—and the Bible Students took note. *City of Duquesne v. Fincke*, 269 Pa. 112 A. 130. Pa. 1920, (Dec. 31, 1920).

[65] *The Golden Age*, September 1, 1920, 680.

his opinion that "'[i]t is not the cause of organized labor to which the mayor objects; it is the discussion of such a subject'." Adding their own commentary, the Bible Students wrote, "[w]e hope that everyone understands just what the judge meant by this remark. It is certainly a very illuminating one, but probably not illuminating in the way he meant it to be."[66]

Developed through his own experience and through observing such cases, Rutherford's view of the law was an instrumental one—he and his Watch Tower staff analyzed the court system and his expectations of judges. The Society's publications emphasized changes to First Amendment jurisprudence, rather than relying on lofty, nebulous concepts like natural rights. The Bible Students advanced the "liberal" view that the Constitution must be read in light of present conditions. "The Revolutionary fathers did not intend that the document which they drafted should be fixed and unchangeable forever—that it should not be added to, broadened and extended as need arose." In the United States, they explained to readers,

> the final law-making power is the Supreme Court at Washington. Any court is a law-making body, because its decisions are taken as precedents of weight. As precedents are innumerable, and on any side of any question the personal bias of the court, whether engendered by environment, beliefs, or the spirit of the hour, cannot but influence the kind of precedent selected out of the variety to choose from. It is humanly impossible for any judge, however conscientious, not to act in this manner consciously or unconsciously. Hence courts in different jurisdictions decide in an opposite manner upon the same question, until the decision of some court, higher than they, hands down a precedent governing all lower courts. Some control of the tendencies of the courts is possible through the existence of judges holding certain beliefs, economic, political, or religious….over a period of time the law drifts in a given direction, in favor of some classes and against others. Reactionary judges decide one way, and liberty-loving and progressive judges another way. On the existing bench of the Supreme Court of the United States are two judges of undoubted liberal views—Justice Holmes and Brandeis. Of the seven

[66] Ibid.

> others some are quite reactionary. Justice McReynolds is reactionary and more than once has left the court room when a minority decision was being read by the progressive Justice Brandeis. Justice McReynolds is a Roman Catholic. So was the late Chief Justice White.[67]

The opinions of judges, and thus the law itself, were not derived from "natural" phenomena but from their own ideas, biases, and inclinations. Judges did not find the law, they made law, and Rutherford never urged his followers to turn away from the law or the courts.[68]

While Rutherford expressed contempt for politics, his dissatisfaction did not lead him to dismiss the legal process. During the war, when scores of Bible Students had been prosecuted for violating federal and state laws, Rutherford had attempted to assist members of his group (providing legal advice and distributing Van Amburgh's affidavit); yet the Bible Student defense had been hasty and confused, organized under pressure. After the war, Rutherford began to craft a more considered philosophy regarding fundamental rights in America, and their constitutional defense. Moreover, he translated his legal philosophy into definitive action. As Reginald Heber Smith, the Boston jurist, had written, "law is not self-enforcing; only through application in the courts does the

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[67] "Laws to 'Protect' Religion," *The Golden Age*, June 22 – July 6, 1921, 570.

[68] Rutherford's assessment was close to a very simplified version of a "Legal Realist" view. Judges were assumed to make law, rather than simply clarifying what was already there. Their biases, backgrounds, and intentions all played into their decisions. According to this framework, judges did not find law—they made law. See James Willard Hurst, *The Growth of American Law: The Law Makers* (Boston: Little, Brown and Company, 1950); Kermit Hall, *The Magic Mirror: Law in American History* (New York: Oxford University Press, 1989). Although the views and decisions of judges have often been the focus of such analysis, litigants were as critical as jurists to this process. As one legal scholar put it, judges are not "roving Robin Hoods in search of justice, nor are they constitutional draftsmen in pursuit of constitutional ambiguity or anomaly. They are, above all, prisoners of the cases brought to them, trapped in the facts and the arguments of the litigants who bring the cases." Frank Sorauf, *The Wall of Separation: The Constitutional Politics of Church and State* (Princeton, New Jersey: Princeton University Press, 1976), 3. Some of these litigants, including the Jehovah's Witnesses, organized, seekingto capitalize on this realist view of judges' work.

law have life and force. The most fundamental rights remain idle abstractions unless the courts are able to give them efficacy through enforcement."[69]

Advertising the King and His Kingdom

Although Bible Student literature from the 1920s contained discussions of legal issues, the group's primary purpose was not to make constitutional arguments, but to proselytize. After the Watch Tower Society printed a "stirring call to action" under the heading "Work for All," Bible Students spent as much time as possible spreading the word of Jehovah.[70] The group encountered increasing problems with preaching, particularly the literature distribution. Alexander Macmillan later asserted that Rutherford's

> plain unvarnished speech made him many enemies, and when his slogan, 'Religion is a snare and a racket,' began to appear their teeth were bared in earnest. What our enemies had failed to accomplish in 1918 some of them now determined must be done. A well-organized campaign was set in motion to discredit, undermine and completely destroy our work of preaching the good news of the Kingdom.[71]

Authorities invoked Sunday laws in order to stop preaching and canvassing on that day. In addition, many localities passed new canvassing ordinances, either prohibiting the practice, or requiring that a permit or license be obtained. Rutherford countered that such requirements were entirely outside local governments' purview.

Watch Tower literature had always been fiery; however, in 1920, "the Society printed and distributed a special issue of *The Golden Age* that was so 'hot' a few of the brothers refused to take part in its distribution. It was called by the brothers 'GA No.

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[69] Reginald Heber Smith, "Defects in the Administration of Justice," *The Golden Age*, March 31, 1920, 430.

[70] *Jehovah's Witnesses in the Divine Purpose*, 100.

[71] Macmillan, *Faith on the March*, 151.

27'…"[72] The issue described the May 1920 arrests of four Bible Students in Los Angeles on draft dodging charges (arrests which occurred twelve days after the federal government dropped its case against Rutherford and his associates). The magazine lamented a "loss of rights," stating that there was "something wrong. It is the duty of every law-abiding citizen to ascertain the cause and if a remedy is available, help to apply it."[73] Warning against the "unholy trinity" of politicians, financiers, and clergy, the magazine stated that blame for the world war and widespread labor discontent "lies at the door of the clergy class, including the Catholic hierarchy and its Protestant allies…"[74] The article listed several "indictments" against the clergy, alleging that the Catholic church had engaged in "Spiritual fornication," and had formed an "illicit relationship between church and state." To wit, when

> the church nominal began to flirt with the civil powers, and for selfish purposes adopted the heathen doctrines and ceremonies of worldly governments, she became the 'whore', 'mother of harlots,' and when she allied herself with civil authorities and exercised that power or rule by violence THIS JOINT RULE BY VIOLENCE became the beast.[75]

Furthermore, the article accused the clergy of "[h]ating the light that exposes them and their disloyalty to God," having "persecuted the light-bearers (Matthew 5:14), and by and through their wicked spy system they have sought out, arrested, persecuted, imprisoned, and killed the loyal servants of the Lord."[76] Listing arrests of Bible Students during the First World War, the article asserted that these prosecutions were encouraged by ministers of various denominations. These examples were catalogued under headings

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[72] Ibid., 92. Rutherford evidently authored Golden Age 27 in its entirety. See "Golden Age Number Twenty-Seven," *The Golden Age*, December 10, 1930, 163.
[73] *The Golden Age* 27, September 29, 1920, 705.
[74] Ibid., 707.
[75] Ibid., 729.
[76] Ibid., 708.

such as 'The Right of Petition'; 'Secure in Their Persons, Houses, Papers, and Effects'; 'The Right of the People Peaceably to Assemble'—direct quotations from the Constitution.

In 1920, two Bible Students, James J. Carroll and Joseph Tinnaro, were arrested in New York for distributing "G.A. No. 27" to a Catholic man named William Wallace, who said that he had found it so offensive that he called the police. Carroll and Tinnaro defended themselves by asserting their freedom of conscience and the freedom of the press. The prosecuting attorneys argued that some sections of the publication, "wherein the church is described as a whore and the mother of harlots…so outrages the public decency in general that it clearly tends to a breach of the peace." Carroll and Tinnaro were released, yet the Bible Students were unsatisfied. They published the opinion of Judge McGeehan, declaring that the ruling "will be treasured by the discerning as one of the most curious minglings of the law and of religion in the history of American jurisprudence."[77] The judge had suggested that the defendants stop using the language of the Old Testament, declaring it "unfit to be used in our day and time. If you read St. Paul carefully perhaps you will change your language. The complaint is dismissed and the defendants are discharged, and I warn you not to go around in that neighborhood with that again." The fact that the Bible Students had been released was no solace to Rutherford, who was irritated that his followers had been given religious instruction by a Catholic judge. Even at the local court level, the Bible Students argued that the First Amendment freedom of religion applied to a city ordinance—which had nothing to do

[77] In publishing the opinion, they noted that the judge, prosecuting attorney, and counsel for the defendants were all Catholics. *The Golden Age*, Easter, 1921, 353.

with federal law or Congress—at a time when the First Amendment guarantees were not thought to apply to states or municipalities.

Rutherford challenged his followers to continue their preaching work. At the 1922 Bible Student convention at Cedar Point, Ohio, Rutherford urged the assembled group to "advertise the King and the Kingdom."[78] While this message had, of course, been present since Russell's time, Rutherford now made it central to the group's existence. "You are his publicity agents," he intoned. "Therefore advertise, advertise, advertise, the King and his kingdom!" This line, the culmination of Rutherford's convention speech, created quite a stir at the convention; Alexander Macmillan later recalled that, "as these words filled the auditorium, a platform-length banner was unfurled that echoed the stirring phrase: 'Advertise, the King and Kingdom.'."[79] In addition to giving public lectures, Rutherford took steps to standardize the preaching work even further. In October 1922, Bible Students began to use Society-prepared testimonies, called "canvasses," in their house-to-house work. Additionally, the group's leadership began to produce a "Bulletin" of instructions monthly, encouraging all "'valiant warriors' to memorize these testimonies and thereby unify the Kingdom message worldwide."[80] Also instituted were monthly meetings of class workers with the director in field service, appointed by the Society. The Bible Students used half the time at their Wednesday night service meetings to relate stories of their field work. Canvassing and other proselytizing activities, thus, became increasingly central to the Bible Students' religious practice, and were managed by the group's headquarters.

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[78] *Jehovah's Witnesses: Proclaimers of God's Kingdom*, 77.
[79] Macmillan, *Faith on the March*, 119.
[80] *Jehovah's Witnesses in the Divine Purpose*, 104.

Some members of the public took great offense at the group's activities. The files of the Federal Bureau of Investigation from the 1920s contain many letters urging investigation of Rutherford and his group. A number, though by no means all, of these letters came from members of the clergy. In 1923, when between twenty and twenty-five thousand people came to hear Rutherford give his "Millions Now Living Will Never Die" lecture at the Los Angeles Coliseum," he suspected that the FBI responded to these complaints. "Several times in his address," the newspaper reported, "he said that 'secret service men' were following him around the country to take notes on his speeches, and that the 'big preachers' had put the government up to this, declaring that he and his followers were in league with the Bolshevists."[81] In fact, FBI records reveal that the organization *had* been conducting surveillance on Rutherford, the "Alleged Radical," since his release from prison. Beginning with the "Millions Now Living Will Never Die" campaign, FBI agents had attended Rutherford's speeches, issuing field reports about his criticism of the United States government and Big Business. Much of the FBI's coverage of Rutherford suggested that he was a "red," spreading communist or socialist ideas. One such FBI dispatch, for example, made from Pittsburgh, Pennsylvania and looking forward to the 1922 Cedar Point Convention, predicted that 7,000 delegates from the United States and Canada would attend. "There will be many ex-socialists and different hues of reds among these people, and radical agitation will be in order. This outfit will stand checking by the government while their convention is in session."[82]

The Bible Students faced scattered arrests in the early 1920s, mainly for their canvassing activities—and the inflammatory nature of their published rhetoric. In

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[81] "Thousands Hear Judge Rutherford," *The Los Angeles Times*, August 27, 1923, 118.
[82] FBI Records, 1027468---61-HQ-1053---Section 1 (724593), 4.

addition, FBI documents from the 1920s reveal that agents were, in fact, observing Rutherford's activities, confirming what may have seemed to be his paranoid suspicions. However, although many religious (particularly Catholic) leaders disliked Rutherford, officials argued that the treatment of Bible Students was in some ways consistent with the unconventionality, and downright disruptiveness, of their actions. The state of legal recognition for non-traditional practices, defended on the basis of religious liberty guarantees, was virtually nonexistent at the time. Nonetheless, Rutherford and his associates complained that this use of the law was unfair. The more publicity they could achieve for these indignities, they thought, the better. Indeed, Rutherford and the Bible Students would soon take on the United States government once again—in a very public forum.

The Greatest Radio Hook-Up in History

While canvassing and literature distribution were paramount, Rutherford looked also to technological innovation, turning to radio broadcasting. Radio programs would reach thousands of people, who would then be more prepared when Bible Students visited them and invited them to study the Bible. As Alexander Macmillan explained, "our numbers at that time were so few, he [Rutherford] thought that our personal house-to-house calls should be augmented. The use of the radio was the obvious answer."[83] In 1922, Rutherford had delivered his first radio address from California; the Watch Tower Society inaugurated its own station, WBBR of Staten Island, in February 1924, with Rutherford's speech "Radio and Divine Prophecy"[84] The Bible Students combined tract

[83] Macmillan, *Faith on the March*, 163.

[84] According to Macmillan, by 1928 the Watch Tower Society had a weekly radio network of thirty stations throughout the United States and Canada; by 1933, they operated 408 stations, on six continents. Ibid. See also *Jehovah's Witnesses in the Divine Purpose*, 120.

publishing with radio broadcasts; Rutherford would make a speech over the radio, and shortly thereafter a book or pamphlet would be distributed.

Rutherford's radio broadcasts focused on Bible interpretations and conveyed religious messages; however, he also painted the Bible Students as a beleaguered minority, continuing their fight for religious freedom. The Watch Tower Society published "Liberty for the People" in their magazine in 1925, for example, recapping a Rutherford speech which had been broadcast on WBBR. Rutherford connected George Washington and American Independence with the Bible Students. "More than 150 years ago," he wrote

> the population of the American colonies was less than one-half of the present population of the city of New York. That little company of three million people, and their ancestors, had come up through great adversity. More than 150 years before the memorable Independence Day their ancestors had begun to seek a home in the wilds of the Western Hemisphere. And what was the moving cause? I answer: It was a sincere desire for liberty where they might have freedom of speech and exercise the right to worship God according to the dictates of their own conscience.[85]

The Watch Tower Society integrated their use of press, assemblies, and public speeches, eventually using the radio to broadcast the IBSA's convention for 1927 in Toronto, July 18 – 25. "Because of the attitude of the public press it was decided not to use any paid display advertising. Instead, the Society printed 100,000 handbills, which were enthusiastically distributed on the streets by the brothers."[86] 15,000 people attended in person, filling the Coliseum, and some of the convention was broadcast over a chain of some 78 radio stations, in what the New York daily newspapers called "the greatest hook-up in radio history."

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[85] "Liberty for the People," *The Golden Age*, December 25, 1925, 154.
[86] *Jehovah's Witnesses in the Divine Purpose*, 117.

Unsurprisingly, Rutherford asserted that the right to broadcast over the radio was fundamental to free speech. In the 1920s, however, control of the airwaves was moving away from the inclusive model which had prevailed in the technology's early years. Prior to the 1920s, radio communications had been under the authority of the Department of Commerce, whose regulatory power was limited: they had no authority to deny licenses to anyone who applied. Under the Radio Act, signed into law on February 23, 1927, by contrast, the Federal Radio Commission was tasked with regulating radio use, with the only guidance being that they were to do so "as the public convenience, interest, or necessity requires." For the first time, radio licenses were to be granted or withheld by a federal commission, which also assigned frequencies.[87] Given the power to grant and to deny licenses, the establishment of the Federal Radio Commission transformed the business of radio transmission in the United States. Many people, including the Bible Students, worried that this increased management would favor the large networks, giving them control over the airwaves.[88]

These fears proved to be well founded. In 1927, the Radio Commission reallocated WBBR's wavelength to WJZ, a subsidiary of the National Broadcasting Company, and refused to assign any wavelength at all to WBBR, now considered an "unessential station."[89] Rutherford repeatedly petitioned the Radio Commission to reassign WBBR. At June, 1927 hearings on these petitions in Washington, Rutherford warned about the encroaching power of Big Business, expressing concern that control of

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[87] Some Bible Student stations simply operated without licenses. "Jail and Fine Faced by Bible Students," *The Washington Post*, March 13, 1927, F7.

[88] Several groups and individuals, in fact, began to raise First Amendment objections, arguing that freedom of speech was threatened by the new system. See Robert Landry, "Radio and Government," *The Public Opinion Quarterly* 2, no. 4 (October 1938): 557-569.

[89] "Judge Rutherford," *Time*, August 1, 1927.

the airwaves was being given over to the networks.[90] Confronting Merlin Hall Aylesworth, the president of NBC, he declared that the exclusion of the Watch Tower Society from radio broadcasting was "another frame-up," along the same lines as his imprisonment in 1918. In cahoots with the preachers of the "regular" churches, Rutherford asserted, President Aylesworth was attempting to shut the Bible Students down. "I dare you to let me speak from your station," Rutherford challenged. In response, Ayelsworth agreed to let him speak for an hour, whenever he chose—and kept this promise, letting Rutherford and the Bible Students use all his radio facilities on the appointed day and time.[91]

The Bible Students used the July 24, 1927 radio "hookup" to broadcast Rutherford's speech from the Bible Student convention.[92] Introducing Rutherford, Robert Martin, a Watch Tower director, read a "resolution" containing several points regarding the Society's stance on war, and asserting that "God made of one blood all peoples and nations of men to dwell on the earth, and granted to all peoples equal rights."[93] Martin went on to say that

> the masses of the people of the nations are entitled to self-government exercised by the people for the general welfare of all; but instead of enjoying such rights a small minority rules…the money power of the world has been concentrated into the hands of a few men called high financiers, and these in turn have corrupted the men who make and execute the laws of the nations, and the faithless clergy had voluntarily

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[90] *The Golden Age*, October 3, 1928, 3.

[91] "Ruling of Radio Commission is Taken to Federal Court," *New York Times* July 31, 1927, X8.

[92] The speech, from the Coliseum in Toronto, was broadcast across the United States and Canada over a chain of fifty-three stations. The broadcast displaced the interdenominational service and "Sunday Forum" ordinarily aired during that time by the Greater New York Federation of Churches; that group later publicly disavowed Rutherford's message. "Church Federation Loses Sunday Radio," *New York Times*, July 20, 1927, 20.

[93] Joseph Franklin Rutherford, *Freedom for the Peoples* (Brooklyn, New York: International Bible Students Association, 1927), 17.

> joined forces with the high financiers and professional politicians…said unholy alliance constitutes the governing powers that rule the peoples…[94]

Then Rutherford spoke, attacking the "agents of Satan"—politicians and businessmen. After NBC received a rash of complaints about the speech, the company denied Rutherford further airtime.[95] The Radio Commission denied Rutherford's petition for more desirable wavelengths, ruling that WBBR was not a station of public necessity or convenience.[96] In July 1927, the People's Pulpit Association (the Bible Students' legal department) filed suit in federal court against the Radio Commission's decision. While the newspapers reported that this suit was not intended to test the constitutionality of the Radio Act, one journalist speculated that "there is every reason to believe that if the case is finally heard in court there will be a battle royal. The bone of contention will be over the exact meaning or interpretation of what has become the commission's favorite alibi, 'public convenience, interest and necessity'."[97] The case never reached trial in the 1920s, however, leaving the issue unresolved.[98]

Asserting the right to free speech, Rutherford bought air time on hundreds of individual stations to broadcast the "Watchtower Hour." The Society continued to arrange record-setting "radio hookups," often choosing an hour on Sunday morning

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[94] Ibid.

[95] Elizabeth McLeod, "Jehovah's Witnesses and Radio," in ed. Christopher H. Sterling, *Encyclopedia of Radio*, vol. 2 (London: Fitzroy Dearborn, 2004).

[96] "Church Federation Loses Sunday Radio," *New York Times*, July 20, 1927, 20.

[97] "Radio Suit to Attack Alibi of Commission," *Chicago Daily Tribune*, July 31, 1927, F5.

[98] As a result, the "battle for the airwaves" continued into the 1930s. As Elizabeth McLeod summarized, when radio stations acceded to pressure to discontinue Watch Tower broadcasts, in 1933 the Society circulated a petition regarding "freedom of broadcasting," amassing and presenting over 2 million signatures to the FRC. A Pennsylvania congressman introduced the McFadden Bill, requiring broadcasters to guarantee "free and equal use of air time" to nonprofit organizations. Watch Tower Society representatives, including Rutherford himself, testified at the hearings for the bill in March 1934, yet the bill died in committee (in part because of opposition from the National Association of Broadcasters, the networks, and the Federal Council of Churches of Christ). Elizabeth McLeod, "Jehovah's Witnesses and Radio."

which would conflict with regular church services.[99] Claiming that he had had difficulty arranging the broadcasts, Rutherford often declared that "Satan and the devil tried to prevent this hook-up, but were unable to do it."[100] In addition to purposefully arranging the radio hookups for Sunday mornings, in the late 1920s, the addresses themselves grew more incendiary, attacking clergy and politicians. "Why is the organized clergy opposed to those who tell the truth?" he asked in mid-1928. "Why do they throw up the smoke screen for politicians and the devil? I answer because Satan the Devil is their god."[101] As the Bible Students' case awaited hearing, in early 1928 the Radio Commission began another sweep of reallocation, cutting 170 radio stations, most of them educational and religious in nature. Rutherford addressed a letter to the Federal Radio Commission on September 6, 1928.[102] Thinking that it was "hardly to be expected that this letter will accomplish any immediate good," he said that he was writing to "be on record to bear witness in the future." Rutherford objected particularly to NBC's plans to air a series of programs entitled "Great Messages of Religion." This outrage, Rutherford insisted, was an indication of just how far the religious liberty guaranteed in the Constitution had fallen.

> No longer can America boast of being the land of religious freedom as the Constitution guarantees. The fact that Big Business now controls the air and causes clergymen in the name of the Lord to hypocritically serve up a

[99] According to contemporary newspaper coverage, these radio networks exceeded even those set up for the President's speeches and other news events. "Rutherford Gets Biggest Radio Net," *New York Times*, July 31, 1928, 28. By way of comparison, the article reported that "previous hook-ups and the number of stations linked include the Fourth Annual Radio Industries dinner on Sept. 21, 1927, eighty-five stations; reception to Colonel Lindbergh on June 11, 1927, fifty stations; Dempsey-Sharkey fight on July 21, 1927, in the Yankee Stadium, fifty-two stations; Washington's Birthday speech by President Coolidge in 1927, forty-two stations; Buick broadcast on July 23, forty-eight stations; Tunney-Heeney battle, forty-three stations."

[100] "Bible Radio Chain With 100 Stations Sets New Record," *The Washington Post*, August 6, 1928, 14.

[101] Ibid.

[102] *The Golden Age*, October 3, 1928, 3.

> 'Great Message of Religion' that has the approval of the Power Trust and which ignores the Word of God, is but another proof that freedom of thought is done.[103]

In a book produced from radio lectures, *Freedom for the Peoples*, Rutherford lamented that "There was a time when America was said to be an asylum for the oppressed. That day has gone! To what country could the common people now flee and find protection, aid, peace, freedom of speech and freedom of action? There is none under the sun!"[104]

The group's difficulties with the Radio Commission, according to Rutherford, were but a piece of the growing inequality in American society. Big Business and the clergy threatened free speech, religious liberty, and the very foundations on which the country was built. In the late 1920s, Rutherford asserted that there was no recourse, not even in the courts. "Even the courts are corrupted by Big Business," he wrote. "When Big Business is pitted against the common people the people have no show in the courts." He quoted a 1910 statement of Samuel Untermeyer, an early twentieth-century lawyer who fought the "money trust" and advocated business regulation. "Nowhere in our social fabric," mourned Untermeyer, "is the discrimination between the rich and the poor so emphasized to the average citizen as at the bar of justice. Nowhere should it be less….Money secures the ablest and most adroit counsel….Evidence can be gathered from every source. The poor must be content to forego all these advantages."[105] Denied his own radio frequency on which to broadcast, Rutherford continued to purchase air time from different stations. In many of the lectures he aired, he protested the Radio Commission's deprivation of designated forum to air his views.

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[103] Ibid.

[104] Rutherford, *Freedom for the Peoples*, 5.

[105] Samuel Untermeyer, "Evils and Remedies in the Administration of the Criminal Law," *The Annals of the American Academy of Political and Social Science* XXXVI, no. 1 (July 1910), 145-160. Quoted in Rutherford, *Freedom for the Peoples*, 25.

Organizing Resistance: The Battle of New Jersey

The Bible Students' difficulties with the authorities were enhanced when, after 1927, Rutherford encouraged spending part of each Sunday in concentrated door-to-door canvassing. As Alexander Macmillan recalled, "we began to realize that each of us had a responsibility to go from house to house and preach….In 1927 we were shown that the way each individual was to serve was to go from door to door. Sunday especially was stressed as the most opportune day to find people at home."[106] This Sunday canvass provoked ire in many communities, particularly in New Jersey and Pennsylvania. "What a furor that started!" wrote Macmillan. "The majority, though, recognized it was the way Jesus and the apostles did the work and took it up gladly."[107] Not everyone saw it this way, however. Rutherford's followers were arrested, accused of selling without licenses, canvassing without permits, disturbing the peace, and violating Sunday statutes. Although Bible Students had occasionally been arrested on similar charges before, as the 1920s drew to a close, they encountered large-scale round-ups by police. In response, Rutherford and his associates began to organize local resistance. Through civil disobedience, made possible by the centralized organization Rutherford had formed in the preceding years, the Bible Students protested limitations on their activities, summoning the legal arguments they had honed after the First World War regarding religious and civil liberties.

In early June 1928, for example, a number of Bible Students were arrested in South Amboy, New Jersey. The group had been canvassing door-to-door with Watch

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[106] Macmillan, *Faith on the March*, 152. "Rutherford wanted to unify the preaching work and, instead of having each individual give his own opinion and tell what he thought was right and do what was in his own mind, gradually Rutherford himself began to be the main spokesman for the organization. That was the way he thought the message could best be given without contradiction."

[107] Ibid.

Tower literature, offering printed copies of Rutherford's sermons. They were charged with disturbing the peace and violating Sunday laws. Rutherford attended the hearing. When the magistrate declared that the charges would be dropped—provided that the group agreed not to sell any more books and leave town—Rutherford challenged him to cite the law that prevented "preaching the Gospel." He informed the judge that the next Sunday "the entire town would be canvassed." The Bible Students mustered their forces, and eighty-four people showed up the following Sunday to canvass. Their instructions from Rutherford included door-to-door work with Watch Tower literature, making calls even at the homes of Protestant ministers and the Catholic priest. According to *The Golden Age*, the work "had hardly begun before arrests began, accompanied in several instances by the stoning of the messengers of the truth, both men and women." Fifty-nine Bible Students were arrested. One of those not apprehended "sallied forth upon his motorcycle and succeeded in finding Judge Rutherford, and because South Amboy is near WBBR, Judge Rutherford decided to attend the hearing. The Bible Students engaged capable counsel, a Hebrew named Karkus."[108]

Although Rutherford was a lawyer, and orchestrated the group's strategy, he did not argue many cases in court.[109] He did not serve as lead counsel until the group began to take cases to the Supreme Court nearly ten years later. The lawyer who defended the Bible Students in New Jersey in 1928, and whose services the Bible Students would continue to use in their New Jersey cases well into the 1930s, was Jacob S. Karkus, of Perth Amboy. In the first South Amboy case, when the hearing was delayed on request of the prosecution, the Bible Students used this time to publicize the situation over the

[108] "Preaching the Gospel at South Amboy," *The Golden Age*, September 22, 1928, 760.

[109] He had been a public prosecutor in Missouri for four years, and was called "Judge" because of his sometime stint as a substitute judge there.

radio. As Alexander Macmillan later recalled, "in the meantime [while waiting for the trial to begin], R.H. Barber gave the accompanying discourse over the radio from WBBR, telling the people of South Amboy and of all New Jersey and most of New York state and other states what the arrests were about and by whom, manifestly, they were instigated."[110] After hearing both sides of the case, the judge deferred ruling indefinitely. Although he released the jailed Bible Students, this was not a satisfactory result for Rutherford, as his followers had not been exonerated—and they had not had their rights to preach the Gospel without interference confirmed.

The Watch Tower Society used these arrests to make broad claims for religious liberty; although they denounced all religion as a "snare and a racket," the group maintained that they approved of and would even advocate religious liberty for all groups—not only their own. Other religious groups had come into conflict with authorities before the Bible Students, most often because of their own unorthodox practices. The Mormon cases, of course, had shaped First Amendment jurisprudence; smaller groups, such as the Salvation Army, had faced arrests and fines because of their practices (such as holding parades or loud displays on Sundays). In 1928, the Bible Students defended the rights of groups with whom they disagreed to preach their own religious views. "International Bible Students," they wrote, "believe that the doctrines and methods of all the denominations and of the Salvation Army also, are wrong."

> But we should not try to stop them. We would not be a party to any effort to stop them. We would not help enact a law to stop them. We would not make a riot and throw stones at them for doing what they conscientiously think to be right. We would not persecute them in any way. Bible students believe intolerance is of the Devil.

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[110] Ibid., 758.

"The question might be asked, Since you think their doctrines and methods are wrong, why would you not try to stop them?" The answer, according to *The Golden Age*, was

> (1) That it would be a violation of the fundamental law of the land, the Constitution of the United States, which constitution the state of New Jersey adopted in 1789. This constitution says that congress shall not make any law that shall interfere with the religious liberty of the citizens of the United States.
> (2) Our Lord Jesus did not try to stop those who taught false doctrines in His day, and did not instruct his followers to do so.
> (3) Bible Students desire to give to others the same liberty that they claim for themselves. To require liberty of thought and expression for ourselves and deny the same thing to others would be inconsistent, selfish and hypocritical.[111]

By the same token, the Bible Students should not be arrested for canvassing, because

> in doing this they are violating neither the laws of God nor those of man, for the State of New Jersey does not specify just how the Gospel shall be preached….Moreover, those city ordinances requiring that canvassers shall secure licenses and that no canvassing shall be done on Sundays were never intended to interfere with the preaching of the Gospel, and these laws are misused when invoked to stop such preaching.[112]

Arrests of Bible Students for conducting their preaching work, the group argued, were contrary to the freedoms embodied in the Constitution. Moreover, such official discrimination reflected either misuse of statutes already on the books, or the passing of new, distorted ordinances aimed at victimizing Bible Students. Law and religion must be kept separate, or all liberty of conscience was in peril.

Accordingly, there was no love lost between the Bible Students and a religious group rising to prominence in the 1920s: the Fundamentalists. Both groups were generally anti-modernist, premillennial dispensationalists (believing that human history was divided into dispensations, and developed according to a divine plan). Yet the Bible Students held the Fundamentalists in deep contempt—in part for doctrinal reasons, but

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[111] "Preaching the Gospel at South Amboy," *The Golden Age*, September 22, 1928, 760.
[112] Ibid., 761.

more because of their views regarding church and state. Rutherford and his associates saw early Fundamentalist forays into the public arena as rife with hypocrisy, and extremely dangerous. When, in 1932, the Fundamentalist Reverend Billy Sunday advocated passing a law assuring that the kidnappers of the Lindbergh baby would face a firing squad when caught, for example, *The Golden Age* editors printed the story with outrage, noting that they were glad that the rule of no *ex post facto* laws existed. "We are glad that is in the Constitution, for with people like Billy wanting to run amuck with a gun, and wanting to get laws passed so that he could shoot to kill, for this crime or that, he might take the notion to want to get a law passed killing everybody that disagreed with him. That would be good for the undertakers, but bad on the insurance companies." Bible Students considered themselves guardians of the Constitution. "Billy should eat less meat and more fruits and vegetables, and should read the Bible and the Constitution."[113] They accused fundamentalists of lazy thinking, lacking the intellectual rigor to think through the consequences of their actions. This kind of intellectual laziness could only lead to contradiction and hypocrisy in the legal system. Cooperation between church and state might seem harmless, Rutherford argued, until the two had combined and fundamental liberties were compromised.

Fundamentalists and Bible Students had essentially different ideas about the relationship between church and state. Rutherford urged that "The true Christian cannot participate in politics in any form. He must be a witness to Jehovah and therefore hold himself aloof from political matters."[114] In contrast, Fundamentalists were not willing to retreat from politics altogether; civilization itself was at stake, and thus "the political

[113] "Billy Sunday Lame on the Constitution," *The Golden Age*, May 11, 1932, 490.
[114] "Frost in the Air," *The Golden Age*, February 14, 1934, 316.

battle to defend God's kingdom could not be entirely postponed until a coming era."[115] After the First World War, Fundamentalists moved from concerns about "higher criticism" and the importance of social reform, to more overtly political issues such as the teaching of evolution. The Bible Students took the opposite view.[116] The Fundamentalists have been described as being of "divided mind"—on the one hand, they were otherworldly, focusing on the apocalypse and the world to come; on the other, they became extremely concerned with worldly politics and society.[117] In the process, "the theological crisis came to be inextricably wedded to the very survival of Christian civilization—by which they meant a Bible-based civilization."[118] The Bible Students had long criticized the Evangelical Alliance (formed in 1846), citing it as an example of a dangerous establishment of religion; as Fundamentalists became increasingly involved in politics, Rutherford pointed to this as evidence of their hypocrisy.[119] Although they professed to be other-worldly, Rutherford argued, Fundamentalists had always condoned political involvement: temperance, Sabbath legislation, anti-slavery, and other evangelical causes.[120] When many Fundamentalists "dramatically politicized" after the First World War, they argued that the United States should be an overtly Christian nation, injecting religion into public life.[121] Though deeply invested in the Scriptures, Bible Students didn't want the preservation of Christian civilization, and in fact in their publications repeatedly refuted the claim that America was a "Christian nation" at all. Instead, the group advocated a system in which all religious groups had their say. What

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[115] Marsden, *Fundamentalism and American Culture*, 211.
[116] Ferenc Morton Szasz chronicled this shift in *The Divided Mind of Protestant America, 1880-1930* (University, Alabama: The University of Alabama Press, 1982).
[117] Ibid., 117.
[118] Marsden, *Fundamentalism and American Culture*, 207.
[119] Ibid.
[120] Ibid.
[121] Ibid.

they did share with the Fundamentalists, however, was the central paradox of the "tension felt throughout the fundamentalist movement between an otherworldly profession and the lingering conviction that God's kingdom could indeed be found in America itself."[122]

The Campaign against the Devil

Asserting always that they were law-abiding American citizens, Rutherford and his group never advocated breaking the law. However, Rutherford urged that, when the law was being used to discriminate, the people must fight back, using the Constitution as their guide. "The firing of the opening gun against the Witnesses," the Watch Tower group asserted, "opened a decade-long fight often referred to by the Witnesses as 'the battle of New Jersey.' But soon the front line of opposition spread until it extended to almost every part of the earth."[123] Rutherford argued that many of the peddling and canvassing ordinances were never intended to be used against sincere Christians attempting to spread their message. Moreover, ordinances and laws aimed specifically at curbing the activities of one group were contrary to the principles of equality embodied in the First Amendment's religion clauses and other Constitutional provisions. Years before Martin Luther King and civil rights lawyers would make similar arguments, the Bible Students focused on the inequality inherent in these laws and their enforcement.[124] "The fundamental laws of the land," Rutherford wrote in 1928, "declare that the people shall have the freedom of speech, the right of peaceable assembly, the liberty of conscience without coercion, and the privilege to worship God according to the dictates of each

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[122] Ibid., 211.

[123] *Jehovah's Witnesses in the Divine Purpose*, 123.

[124] Others, including the communists and Socialists, made similar arguments. However, the Jehovah's Witnesses were the first group to raise these arguments for the protection of religious liberty. They were also the first to connect religious liberty with the rights to free speech and freedom of the press. Moreover, their arguments eventually provided important precedents regarding free speech and press and the reach of the Fourteenth Amendment—not only religious liberty. Jehovah's Witnesses were an important precedessor to the NAACP's organized litigation strategy, although they were not the only one.

one's conscience. These rules of action are ideal, but they are denied daily by those who have and exercise the power of government."[125] The Constitution protected against discriminatory use of the laws, and the Bible Students sought to secure this protection.

A Vigorous Campaign

By 1928 and 1929, the Bible Students were moving toward an offensive strategy to protest what they saw as unfairly restrictive police and government practices—rather than merely going to court when arrested and attempting to have the charges against them dropped. "Bible Students in New Jersey are waging a vigorous campaign against the Devil," *The Golden Age* proclaimed, "and the Devil does not seem to like it, not a little bit."[126] On Sunday, December 20, 1928, a hundred Bible Students made their witness door-to-door in Englewood, New Jersey; twenty of them were arrested.

> Patrolman Corrigan drew a billy on I. Newman, of Paterson, and threatened viciously to break his head. This was after his prisoner had been placed in a cell for exercising his Constitutional prerogative of preaching the gospel in the way that seems to him best. When his prisoner explained his mission Corrigan interrupted him to say, 'Jehovah? We don't want any Jehovah God around here'; which is doubtless true.[127]

The group continued to protest, refusing to plead guilty in court and then using the radio to criticize police practices. In the two weeks before the hearing, the Bible Students covered Englewood with literature urging residents to listen to WBBR at 11 o'clock Sunday morning, January 6. An explanation, they promised, would be made for the arrests—one focusing on "classes of so-called 'religionists'…opposed to the message of present truth." In his radio address, T.J. Sullivan, one of Rutherford's associates, insisted

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[125] Joseph Franklin Rutherford, *Government: The Indisputable Evidence Showing that the Peoples of Earth Shall Have a Righteous Government and Explaining the Manner of its Establishment* (Brooklyn, New York: International Bible Students Association, 1928), 14.

[126] "More Arrests in New Jersey," *The Golden Age*, March 6, 1929, 367.

[127] Ibid.

that he had "no desire to unduly criticize the people or officials of South Amboy." However, he continued, "when the Constitutional rights of the people are being taken away, and when officials, appointed by the people to enforce the law and protect the interests of law-abiding citizens, use their office and power to intimidate and abuse law-abiding Christians while they permit the law-breakers to go free, it is time the people knew about it…"[128]

At the January 1929 hearing, all the Bible Students except two were dismissed; Isaac Newman and Charles Nicita were fined $10 each. "The fines were paid under protest and preparation made to appeal the case. It appeared at the trial that the arrests started with the arrest of Newman when he called at the home of patrolman Bernard Corrigan. This shows the great advantage of having all your 'cops' of one nationality and one religion." This did not put an end to the arrests, or to the Bible Students' protests. Although the judge was still meditating over the Perth Amboy case of the previous June, more Bible Students were arrested on January 20. This time, the Recorder ruled that they had been unlawfully arrested, and released them. "When interviewed last night," the *Perth Amboy Evening News* of January 22 reported, "the Recorder stated that no city ordinance on record provided for the arrest or punishment of this particular offense."[129] Thus, in the space of less than a year, several dozen Bible Students had been arrested in the same town in New Jersey for the same offense; yet their treatment had been wholly inconsistent. Karkus, with much input from Rutherford and his Watch Tower associates, focused on this inconsistency as they prepared their appeals.

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[128] Ibid., 368.
[129] *Perth Amboy Evening News*, January 22, 1929, quoted in ibid.

When Rutherford argued that such local ordinances were contrary to the United States Constitution, the belief-action dichotomy established in the Mormon cases held as a matter of precedent.[130] In 1929, however, Rutherford urged that this distinction was fallacious, and First Amendment rights should be more broadly construed. In an article entitled "Liberty to Preach," he stated,

> Because of the repeated attempts made by clergymen, and by police officers acting under instruction, to prevent the preaching of the Gospel of God's kingdom under Christ as earth's rightful Ruler, it is deemed advisable to set out the following….In the United States every Christian has full liberty to preach the Gospel in any manner he may choose, because the fundamental law of the land guarantees that right. The first amendment to the Constitution of the United States reads:
>
> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of people peaceably to assemble, and to petition the Government for a redress of grievances.
>
> No one has the right or legal authority to interfere with or interrupt the exercise of one's religion or the worship of God according to the dictates of his own conscience. No state, city, town, village, or other municipality or body corporate has any legal power or authority to enact and enforce a law or an ordinance that is contrary to the provision of the Constitution of the United States as above set forth.[131]

Local ordinances and state laws, Rutherford asserted, must not interfere with the rights to religious liberty, or free speech, press and assembly found in the First Amendment.

This argument was, as Rutherford surely understood, a legal stretch. The Bill of Rights, applied only to the federal government; the states followed a different set of rules—particularly when it came to religious liberty.[132] However, "the language of the

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[130] These arguments came up in state courts first, because the cases made it into court in the first place as defneses to prosecutions. However, in almost every case, despite the Mormon rulings, the Bible Students invoked the First Amendment as well as whatever state constitutional provisions existed—indicating their intentions to extend their strategy to federal claims.

[131] "Liberty to Preach," *The Golden Age*, March 20, 1929, 387.

[132] The Constitutional Scholar Leonard Levy pointed out that, in fact, the framers of the Constitution had rejected a more expansive amendment (proposed by James Madison) which would have

Fourteenth Amendment—no state denials of liberty—allowed for the possibility that the Constitution prevented the states, as well as the United States, from violating the First Amendment."[133] In the 1925 case *Gitlow v. New York*, the Supreme Court had indicated the possibility that the free speech clause of the First Amendment applied to state laws.[134] Benjamin Gitlow, an American Communist, had been convicted of violating a 1902 criminal anarchy law in New York, which made it a crime to encourage the violent overthrow of the government. In his defense, Gitlow argued that the law violated the Fourteenth Amendment because the state statute limited his free speech rights. In a dictum to their ruling in the case, the Court counted the rights of free speech and freedom of the press "among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the states." Gitlow lost his case, and the criminal anarchy law was upheld; in fact, the Supreme Court would not

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explicitly protected certain rights (including religious freedom) from infringement by the states. The fact that this amendment was rejected, Levy argued, indicates that the framers of the Constitution had consciously intended the Bill of Rights to apply only to the federal government. This was true until the Fourteenth Amendment addressed the issue of the states and citizens' rights. Leonard Levy, *The Establishment Clause: Religion and the First Amendment* (Chapel Hill, North Carolina: University of North Carolina Press, 1994), 147. As the historian Leo Pfeffer wrote, "What about the states? Could they establish religion and prohibit its free exercise? For over a century the answer was yes." Leo Pfeffer, *Religious Freedom* (Skokie, Illinois: National Textbook Company, 1977), 23.

[133] Levy, *The Establishment Clause*, 148.

[134] Leonard Levy suggested that the importance assigned to *Gitlow* has been overstated, and that the process of incorporation actually began much earlier than 1925—in the late nineteenth century, to protect property rights, with the inclusion of the eminent domain clause of the Fifth Amendment in the Fourteenth Amendment's guarantee of equal protection (1894) and then due process (1897). However, most Constitutional scholars still agree that *Gitlow* and the 1920s through the 1940s were the critical era in which "civil liberties," particularly those contained in the First Amendment, were incorporated and applied to the states. Levy's point facilitates his larger argument refuting the contention of those whom he calls "reactionaries" that the incorporation of the First Amendment's religious liberty clauses rested on "shaky foundations. Levy, *The Establishment Clause*, 226. For example, the legal scholars Charles Fairman and Stanley Morrison were early proponents of the view that the intent of the Fourteenth Amendment was never to incorporate the Bill of Rights against state laws. Charles Fairman and Stanley Morrison, *The Fourteenth Amendment and the Bill of Rights: The Incorporation Theory* (New York: Da Capo Press, 1970).

overturn a state statute on First Amendment grounds until 1931.[135] However, the Court's pronouncement in *Gitlow* indicated that free speech and freedom of the press were fundamental rights, protected from abridgment by state governments.[136]

Despite the lack of definitive Supreme Court precedent, other than the dictum in *Gitlow*, Rutherford wrote extensively about the problems with local ordinances being used against the Bible Students. He argued that the fact that some state courts had ruled in favor of religious justification for actions, and some against, necessitated an overarching definition of religious liberty. This was important because of the growing inclination to legislate at the local level against Bible Student activities. "Many towns and cities have enacted ordinances," he complained, "to regulate the selling of goods, wares and merchandise from door to door, defining and regulating soliciting, peddling, etc. Some of these ordinances are made specifically applicable to Sunday."[137] Rutherford provided a "memorandum of authorities"—a long list of precedents concerning Sunday laws and door-to-door solicitation ordinances—which he suggested that brothers and sisters present to their lawyers. "Whether the exercise of his religion or of serving God be by a person's going from house to house on Sunday or any other day, to prohibit him from doing so would be a violation of the Constitution of the United States, because it would be a denial of religious liberty."[138] Including another list of state court precedents and quotations from legal scholars, Rutherford cited cases in which the accused party had been exonerated because of sincere religious belief. Rutherford cited

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[135] Two momentous 1931 cases, in which the Court held that free speech and press rights were applicable to state statutes through the Fourteenth Amendment, were *Near v. Minnesota*, 283 U.S. 697 (1931), and *Stromberg v. California*, 283 U.S. 359 (1931). For a discussion of the importance of these cases, see Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* (Durham, North Carolina: Duke University Press, 1986), 197.

[136] Ibid.

[137] "Liberty to Preach," *The Golden Age*, March 20, 1929, 388.

[138] Ibid., 391.

the Bible Students' own precedent, the 1916 case involving Sunday laws and the Photo-Drama of Creation.[139] "The Supreme Court of Idaho," Rutherford reminded his readers, "has held that the use of moving pictures to illustrate a sermon or religious lecture on Sunday is not a violation of the law." Quoting Justice Cooley on Constitutional Limitations, Rutherford reminded his readers that they were not merely looking for religious "toleration." What they sought lay, Rutherford advised, at the very heart of American society—not religious toleration, but religious equality.

The Strategy Deployed

As they believed themselves to be fully in the right, Rutherford advised the Bible Students always to challenge their arrests in court. "The Bible Students who go from door to door preaching the Gospel," he instructed,

> on Sunday or weekdays, and who preach it by the method above set forth are clearly within their rights under the law of man and under the law of God. Any interference therewith by police officers or anyone else is entirely unlawful.
>
> It follows that no town, city or other municipality has any power or authority to require a Christian to first obtain a license before he can go from house to house and preach the Gospel, as herein set forth. Any attempt to compel a Christian first to obtain a license is in violation of the fundamental law of the land. It is the duty and privilege of any Christian who is arrested for exercising his religious belief to appear in court, employ counsel, demand a fair trial and the full protection of the law.[140]

Rutherford charged Bible Students with protecting their rights. "All Bible Students, including colporteurs, Sunday workers or those who occasionally call at the homes of the people, are advised as follows," he wrote.

> If while canvassing you are accosted by police officers, state to them that you are clearly within your legal rights and insist on protection. If clergymen or any one else objects and you are taken before the police

[139] *State v. Morris*, 28 Idaho 599 (1916).
[140] *The Golden Age*, March 20, 1929, 392.

> officers, insist that under the law it is the duty of the police officers to afford you protection from interference with the exercise of your legal rights.
>
> In the event that you are arrested and charged with a violation of some ordinance or law by going from house to house and selling books, employ a lawyer, exhibit to him this memorandum of authorities, have the case set down for trial, have the record preserved in proper form for an appeal, and in the event of a conviction appeal the case to the higher court. In so doing you will be acting strictly according to the law of the land and in harmony with the Word of God.[141]

Much as they had during the First World War, the Watch Tower directors soon began to distribute not only instructions, but also documentation to attempt to assist their members. By 1930, Bible Students carried a letter signed by Rutherford, headed "Permit and Authorization." The permit read:

> This is to certify that the bearer, _____ , is an accredited representative of the undersigned Society, and is sent out by the Society to preach the gospel of God's Kingdom, and is authorized to do so by calling at the homes and exhibiting to the people the gospel message in book and booklet form, and to place the same with the people, and to receive a consideration therefore, which amount is used to print other like books and booklets.
>
> We recommend the bearer to your good graces and are sure the Lord will reward you for any kindness or favor shown.
>
> Very respectfully,
>
> WATCH TOWER BIBLE & TRACT SOCIETY
>
> JF Rutherford, President
>
> Dated _____[142]

Rutherford did not simply present legal theories to his followers; when they began to encounter difficulties with their preaching work, he also provided advice on how to mount a challenge to the authorities.

The Bible Students were the only religious group in the 1920s and 1930s to pursue strategic litigation. Alexander Macmillan later characterized this period as "A

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[141] Ibid.
[142] FBI Records, 1027468---61-HQ-1053---Section 1 (724593), 44.

Second Struggle to Survive." After 1928, "we began to encounter a stiffening legal barrier to our work. Objections were based, not on the fact that we were itinerant preachers, but on the message itself that we were proclaiming to the world. As the years progressed this fact became quite obvious in the almost unbelievable variety of laws that were enacted or brought to bear against us."[143] There was one significant difference from their situation during the war: although the group encountered extensive public opposition, the federal government did not prosecute them. "Pressure was brought to bear on those in public office, as we had experienced in 1918," he wrote, "and many times during those turbulent decades we saw 'mischief framed by law.' This time, however, I am happy to relate, the federal government of the United States refused to be drawn in." While the 1920s and 1930s witnessed growing opposition to Bible Student methods, and while there was by no means a consensus regarding the meaning of "civil liberties," the Bible Students found budding support from civil libertarians and judges alike. Even J. Edgar Hoover (rarely considered to be a bastion of protection for individual rights) responded to the many letters written to the FBI complaining about the Bible Students that quashing such activities was not the provenance of the Bureau. In the coming decades, the Bible Students would muster their forces to challenge state laws and local ordinances which they saw as obstructing their religious liberty. They would take this fight all the way to the Supreme Court.

[143] Macmillan, *Faith on the March*, 161.

Chapter III: Defending Civil Liberties: The Streets and the Courts

"You are my witnesses," declares the LORD, "that I am God."[1] Throughout the 1920s, Rutherford had emphasized the necessity of "witnessing"—spreading the word of Jehovah through door-to-door visits and preaching on the public streets.[2] In July, 1931, he presented a resolution entitled "A New Name" to the assembled Bible Students at the Cedar Point, Ohio convention. "We desire," he declared, "to be known as and to be called by the name…Jehovah's witnesses." And so, after an enthusiastic assent from the crowd of 4,000, the Bible Students became known as Jehovah's Witnesses—"Witnesses" for short.[3] It is likely that Rutherford had the legal—as well as the evangelistic—meaning of the word in mind.[4]

Alexander Macmillan's observation that, after the First World War, the source of the group's conflicts was increasingly with local authorities (rather than with the federal government) was astute. Since "kingdom publishers" had begun preaching door-to-door on Sundays, Jehovah's Witnesses clashed progressively more with local police and citizens. As the group escalated its canvassing activities, distaste for their persistent and aggressive proselytizing tactics grew in many areas. In the early 1930s, members of the

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[1] Isaiah 43: 10-12.

[2] The Jehovah's Witnesses also justified their work with the verse Isaiah 61: 1-2: "The Spirit of the Lord God is upon me, because the Lord has appointed me to bring good things to the afflicted; he ahs sent me to bind up the brokenhearted, to proclaim liberty to the captives, and the opening of the prison to those who are bound; to proclaim the year of the Lord's favor, and the day of vengeance of our God; to comfort all who mourn."

[3] *Jehovah's Witnesses: Proclaimers of God's Kingdom*, 82.

[4] The group's own account of the name change acknowledges that the legal, as well as the religious, meaning of the word "witness" was important. Watch Tower Bible & Tract Society literature states: "The Scriptural account that Jehovah's Witnesses draw on for their name is the 43rd chapter of Isaiah. There the world scene is viewed as a courtroom drama: The gods of the nations are invited to bring forth their witnesses to prove their claimed cases of righteousness or to hear the witnesses for Jehovah's side and acknowledge the truth. Jehovah there declares to this people: 'Ye are my witnesses, saith Jehovah, and my servant whom I have chosen; 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 am Jehovah; and besides me there is no savior.'—Isaiah 43: 10, 11. *American Standard Version*." See http://www.watchtower.org/e/jt/index.htm?article=article_01.htm.

group were arrested for violating "hawking and peddling" or soliciting ordinances and Sunday laws, and for the blanket charge of "disturbing the peace." As usual, Jehovah's Witnesses viewed any opposition as evidence of a conspiracy against the truth. "Satan the Devil and all his agents," declared the group's magazine, "violently oppose those who represent Jehovah God and His kingdom, and for this reason Jehovah's witnesses are being thrown into prison."[5] Local authorities countered that, when they arrested Jehovah's Witnesses for pamphleteering, they were trying to keep the streets clean; when they apprehended members of the group going door-to-door, their objective was to ensure that citizens were secure in their homes. Needless to say, Rutherford and his followers dismissed these justifications as deceit. While they continued to voice opposition to federal laws such as Prohibition and other perceived alliances between church and state, in the 1930s Rutherford and Jehovah's Witnesses became preoccupied with growing local antagonism toward their practices.

When they encountered opposition, members of the group asserted that they were merely obeying their Scriptural requirement to spread the message of Jehovah. "My responsibility ends," Rutherford wrote in a 1931 letter to a Pennsylvania judge, "when I have told the truth to the people. Those who willingly oppose the spread of the Truth, God will duly recompense."[6] Although proselytism was central to their worship, Jehovah's Witnesses differentiated themselves from other evangelical Christian groups by claiming that their sole purpose was to "spread the message of the Kingdom"—not to gain converts. Many Christians, Rutherford insisted, had been fooled into thinking that

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[5] "Debate by Radio," *The Golden Age*, May 25, 1932, 515-516.

[6] Joseph F. Rutherford to Hon. William A. Valentine, judge of the Common Pleas Court of Luzerne County, Pennsylvania, July 17, 1931. Reprinted in "American Rights and Liberties at Swoyersville," *The Golden Age*, September 16, 1931, 803-810.

their duty was to "convert the world" and to "carry on a propaganda to bring the people into the churches." In Rutherford's opinion, this was "entirely wrong. Jesus did not teach anyone to attempt to convert the world. He did say that the gospel of the kingdom would be preached as a witness."[7] Gaining "members," therefore, was never a Watch Tower objective; yet preaching the Kingdom Message was all-important.

Insisting that because of its Biblical motivation, their preaching work (rather than any kind of traditional church service or worship) was central to their religious practice, Rutherford and the Jehovah's Witnesses argued that their work was protected by the civil liberty guarantees of both state and federal constitutions. As the Jehovah's Witnesses themselves would later characterize the period, "We took a position that…our door-to-door distribution of literature and our oral sermons were a way of worship, yes, preaching….Therefore, the work in which we were engaged was not an *abuse* of this exercise of right as guaranteed by the First Amendment but, rather, an *exercise* of the right and therefore not subject to abridgment."[8] What they wrote and said, argued members of the group, were integral parts of their religion—and thus fell under the auspices of the First Amendment's religious liberty protection. Neither legislatures nor courts, however, offered reliable protection for religious activities deemed by the mainstream to be "unconventional." In the 1930s, Jehovah's Witnesses, under Rutherford's direction, implemented an inventive legal strategy, using civil disobedience as a springboard for legal action. In the process, they forced the redefinition of religious liberty in the courts, fostering the association of religious freedom with other civil liberties.

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[7] Joseph Franklin Rutherford, *Liberty, Explained in Seven Bible Treatises* (Brooklyn, New York: Watch Tower Bible & Tract Society, 1932), 33.

[8] *Jehovah's Witnesses in the Divine Purpose*, 177-178.

The Limits of the First Amendment: Meyer and Pierce

Other groups, of course, had sought the protection of the courts based upon religious liberty guarantees—perhaps most notably the nineteenth century Mormons. As late as the 1920s, however, the Supreme Court indicated that it would not apply First Amendment religious guarantees to state and local laws. The Court had decided two cases, both of which had challenged restrictive state laws (passed following the First World War), whose stated purpose was to ensure that a common American culture was instilled among schoolchildren. These laws had targeted Catholic parochial schools, alleging that such institutions allowed a sense of foreignness in children, inhibiting assimilation. In the first case, a 1919 Nebraska law had made it a crime to teach in any language other than English. Robert Meyer, a teacher at a Nebraska parochial school who had been convicted of speaking German as he taught a child to read, had appealed his case to the Supreme Court, which had struck down the statute in 1923.[9] In a similar case, a 1922 Oregon education act required that state's children to attend public schools, without exception. The Society of Sisters in the Holy Names of Jesus and Mary, a religious private school, had sued the governor of Oregon; after the governor appealed, the Supreme Court had declared the law unconstitutional in 1925.[10] The Court struck down the ordinances in both these cases. Yet, while both Meyer and the Society of Sisters had invoked the religious liberty guarantees as their primary reasoning, the Court bypassed First Amendment arguments, declaring the ordinances unconstitutional on the basis of the Fourteenth Amendment's "due process" clause. Thus the belief-action

[9] *Meyer v. Nebraska*, 262 U.S. 390 (1923).
[10] *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925).

distinction, and the narrow reading of the First Amendment religious liberty guarantees, remained in force.[11]

The *Meyer* and *Pierce* rulings pointed to a major fault line in civil liberties jurisprudence—and one that was particularly troubling to religious groups. The extent to which the majority view could dictate acceptable modes of behavior to minorities would become a significant battle in the arena of civil liberties during the twentieth century. Already, the First World War had prompted discussions of the rights of political, economic, and religious dissidents—people holding minority views—to express their views publicly. In the notorious 1926 *Scopes* trial (dubbed the "Monkey Trial"), William Jennings Bryan had argued that a majority of the citizens of Tennessee had been democratically justified when they passed the Butler Act, a law banning the teaching of evolution in the public schools.[12] The American Civil Liberties Union lawyer Clarence Darrow had countered that this majoritarian view was essentially the embodiment of a single group's religious views—thus violating the minority's civil liberties. Scopes was found guilty, and the statute ruled constitutional by the Tennessee Supreme Court; yet Scopes' conviction was set aside based on a legal technicality. Arguments regarding the relation of minority religious groups to the state, moreover, were becoming increasingly important. Civil libertarians argued that the Bill of Rights was there specifically to

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[11] These cases did expand the Fourteenth Amendment's liberty guarantees, as part of what legal scholars have termed the era of "substantive due process" in civil liberties, which enforced rights not explicitly stated, but implied, in the Constitution. While these rulings indicated a steadily expanding view of the unspecified "liberties" contained in the Fourteenth Amendment, the Court did not use this opportunity to broaden the First Amendment's application (although it was only the next year, 1926, that the Court indicated a willingness to consider free speech claims against state laws in *Gitlow*).

Samuel Walker argued that the *Meyer* and *Pierce* precedents "languished in doctrinal obscurity for forty years but suddenly resurfaced in the 1960s as important precedents for a constitutional right to privacy." Walker, *In Defense of American Liberties*, 81. While this is true, in terms of religious liberty cases, *Meyer* and *Pierce* were actually not so obscure, as they emerged in most of the cases which the Jehovah's Witnesses pursued, and won, regarding civil liberties in the 1930s and 1940s—from speech to press to religion.

[12] *Scopes v. State*, 152 Tenn. 424, 278 S.W. 57 (1926); *Scopes v. State*, 154 Tenn. 105 (1927).

protect the rights of minorities whose opinions were out of step with the mainstream. It was easy to protect the rights of people to speak and publish uncontroversial views; legal and constitutional protections were in place for those whose opinions and beliefs were unpopular.

The Jehovah's Witnesses, for their part, endorsed the non-majoritarian view, especially with regard to religion. Perhaps because of their confidence that, if only they were allowed to hear the Bible truths, people would see the light, Jehovah's Witnesses argued not for favored status, but for equal treatment. In keeping with their emphasis on equality, Rutherford and his followers urged that all religious groups be treated the same way. Jehovah's Witnesses pointed out that, in a country with "some two hundred kinds of churches, everybody is supposed to be free to teach what he believes, without hindrance from the one hundred and ninety nine that differ." Referring to the recent opposition to their door-to-door and Sunday evangelism, they continued:

> Some people…seem to think that because there are Roman Catholic churches and Roman Catholic officials…the rest of us here in the United States must keep out and keep still, and allow a rule without law and in disregard of the Constitution. Nix! The attempt to rule in defiance of the law is ruining the country; it must stop, and it is going to stop….This is a legal notice.[13]

Jehovah's Witnesses pointed to the growing religious pluralism in the United States, arguing for a more expansive definition of "religion." Ironic as it was that a group which opposed all religious denominations should make claims based on pluralism, the Jehovah's Witnesses pushed for a more modern view of religious worship:

> Everything changes with the times. Things that were thought right and just years ago, have disappeared, and new ideas have taken their place.

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[13] "On the Roman Catholic Front—Illegalities at Pittston and Swoyersville," *The Golden Age*, April 27, 1932, 461-467.

> The religion of puritanical New England has undergone a great change. So with religion everywhere.[14]

These changes necessitated new readings of constitutional liberties.

> There is no provision in any of these constitutional provisions that prevents one person from calling at the home of another person and reading or verbally presenting the Word of God as now interpreted. It is not necessary in order that a person comply with the constitution, that all devotional exercises take place in a church edifice, or in a public hall or behind the doors of some ecclesiastical building.[15]

In a pluralistic society such as the United States, Jehovah's Witnesses argued, respect for differing religious practices necessitated that the Courts and legislators not succumb to majoritarian impulses, but, rather, "Give everybody a fair deal everywhere."[16]

Authorized by Jehovah's Word

Jehovah's Witnesses thought it was their basic right to canvass door-to-door and in the streets, presenting their message to the people. Members of the group used Sunday as a proselytizing day because they knew many people would be at home from work. However, Jehovah's Witnesses were encouraged to spend as much of their time on the work as they could, and thus members of the group went door-to-door any day of the week to place the literature and discuss the Bible.[17] Authorities seeking to manage their communities asserted that they needed to limit such activities in the interests of public safety and well-being. Confronted with droves of Jehovah's Witnesses preaching in their towns, local authorities sought to exert control, particularly when citizens called the police regarding these uninvited, and persistent, visitors. Many of the group's techniques

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[14] "All May Observe the Sabbath Without Hindrance, by Attorney H. Willard Griffiths (New York)," *The Golden Age*, May 11, 1932, 507.

[15] Ibid.

[16] "Insulting God in Elgin, Illinois," *The Golden Age*, July 19, 1933, 661-667.

[17] Depending on their jobs, individual Jehovah's Witnesses did everything from full-time service to occasional Sunday canvassing.

were annoying—at least to those who had no interest in the Watch Tower message. For example, Anton Koerber, a service director and close associate to Rutherford,[18] mentioned in a letter to Rutherford having "amplifiers mounted on a car driving through the streets of Washington….On the sides of the car were scriptures proclaiming Jehovah's name and referring to the books."[19] Additionally, although the organization was incredibly centralized and organized, education of individual Jehovah's Witnesses in proselytizing techniques was rather primitive. Witnessing to various members of the community, members of the group occasionally stepped out of line in language or behavior, occasionally leading to confrontations.

Not all citizens were opposed to hearing the Kingdom Message, of course, and the Jehovah's Witnesses persisted in spreading the word. In June 1932, for example, Anton Koerber's group witnessed to a camp of war veterans—the famous Bonus Army who, suffering during the Great Depression, marched to Washington, demanding that the government pay them a promised bonus. The Jehovah's Witnesses' mission among the Bonus Army camps involved 300 Jehovah's Witnesses, 24,278 books and pamphlets placed, and 2,140 hours of witnessing reported. After the group broadcast one of Judge Rutherford's speeches over loudspeakers, Koerber described, "the men in the camp gave several rousing cheers…"[20] Although there were many people who were receptive, or merely neutral, to Jehovah's Witness activities, however, the combination of abrasive message and intrusion on people's doorsteps and in public led to increasing opposition.

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[18] Koerber's signature, for example, is first on the 1935 agreement to form the "Jehovah's Kingdom Corporation." Watch Tower Society Archives, Legal Department, Patterson, New York.

[19] Anton Koerber to J.F. Rutherford, June 27, 1932. Reprinted in *The Golden Age*, July 20, 1932, 654-655, 669.

[20] Ibid.

Police ordered Jehovah's Witnesses to cease their door-to-door work, referring to ordinances which prohibited selling or soliciting and Sunday statutes, and accusing Jehovah's Witnesses of disturbing the peace. In the hope of stemming these arrests, Rutherford contacted the International Association of Police Chiefs in September 1930, flattering the group as "a body of men trying to keep order and help the people."[21] Pointing to the benevolent nature of the Watch Tower Society's work, Rutherford complained that police officers "not being acquainted with the facts, frequently…arrest harmless men and women who are preaching the gospel of God's kingdom." Avowing that he was simply trying to acquaint police officials with the facts, he requested that the organization instruct officers "not to interfere with these humble preachers of the gospel by the method of books." Rutherford emphasized his view that the "Constitution of the United States and the constitutions of the various states guarantee to all the right to preach the gospel and serve God according to the dictates of one's own conscience." Finally, he asked, "May we have the assurance that your splendid law-enforcing body of men will give these Bible witnesses the protection which the fundamental law of the land guarantees?" Despite the cogency of this plea, a representative of the organization replied that "due to the different laws and ordinances covering the above matter in the various places throughout the country, I would suggest that you instruct your members that before beginning work in a locality to stop and make arrangements with the Chief of Police…in that particular community and I feel sure you will receive their utmost cooperation."

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[21] Joseph F. Rutherford to George Black, Secretary, The International Association of Police Chiefs, September 9, 1930. Reply, George Black to Joseph F. Rutherford, September 10, 1930. Watch Tower Society Archives, Legal Department, Patterson, New York. Folder: "Neutrality USA."

Rutherford did, in fact, attempt to do just that. Writing to his Service Directors, he described this communication, saying that "it might be well to follow the advice therein, when a canvassing party goes into a town," to visit the Chief of Police.[22] When meeting with the police chief, Service Directors were advised to say, "We are here to preach the gospel, which we are advised we have a right to do under the law. Acting upon the advice of the International Association, we are coming to tell you about it, and hope we may have cooperation and full protection." Additionally, Service Directors were instructed to carry copies of the correspondence between Rutherford and the Police Chiefs Association. "I am inclined to think," Rutherford wrote,

> that much trouble has resulted because of the unwise way some of the brethren act. There is no use to abuse the preachers or anybody else in canvassing. What is stated over the radio and in public lectures is not stated against individuals, but is stating the truth as it appears in the Scriptures. The duty of the canvassers is to go quietly about putting the message in the hands of the people, and always to be kind and considerate. Where one deports himself in an abusive or ugly way, he arouses the antagonism of the officers and it is difficult to get on.[23]

Rutherford insisted that Jehovah's Witnesses comport themselves in a non-violent and non-confrontational manner—notwithstanding the severity of their message. Only in this way, he insisted, did they have any hope of protesting the opposition to their work.

In fact, after the initial spate of arrests in the late 1920s, Jehovah's Witnesses did attempt to smooth their relations with law enforcement, just as the police chief had suggested. As preaching operations in a particular town were to begin, two members of the group would go to the police department to report what they were doing, and to present a list of canvassers' names to the police. "We didn't go in there to ask a permit to

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[22] Memorandum from J.F. Rutherford to Service Directors, September 24, 1930. Watch Tower Society Archives, Legal Department, Patterson, New York. Folder, "Witnessing Diff."

[23] Ibid.

do the work," Alexander Macmillan remembered. "We had the right by virtue of the Constitution and as a God-given commission. We went in there to inform them that we had a number of our Christian workers in the community, presenting the Kingdom message from door-to-door, and if there were any people calling up, telling them about it, they would know exactly what was going on."[24] At the same time, Rutherford instructed his followers on what to do if questioned about their preaching work. In mid-1930, *The Golden Age* printed advice from a police officer about any encounter. When approached by an officer, a canvasser should "be polite in his statement that he is preaching the Gospel according to his rights under the Constitution of the United States."[25] Furthermore, "should an officer request the canvasser to go to the station house not under arrest, but simply as a request, the canvasser can politely refuse this request and even the request of the police chief under the constitutional rights." Above all, Jehovah's Witnesses were not to lose their tempers, or to refuse arrest. Rutherford and Watch Tower leadership emphasized the necessity of remaining calm and speaking quietly, "in ordinary conversational tone."[26]

Despite attempts to gain the cooperation of law enforcement, local rules regarding canvassing did vary widely, as did the treatment of Jehovah's Witnesses. When citizens or clergy complained about Jehovah's Witnesses, the authorities often arrested them, using solicitation and vagrancy ordinances which, while still on the books, had rarely been invoked. Municipalities also used regulations pertaining to itinerant commerce

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[24] Macmillan, *Faith on the March*, 165-167. This does, in fact, seem to have been a regular practice. See "Records of Opposition, Dec. 13, 1932 to Sept. 5, 1934," typewritten pages bound in green Watch Tower and Herald of Christ's Presence binder. Watch Tower Society Archives, Legal Department, Patterson, New York.

[25] "Sunday Canvassing, By a New York Police Officer," *The Golden Age*, June 11, 1930, 606.

[26] Ibid.

("hawking and peddling" ordinances), rules requiring permits for public meetings, and ordinances prohibiting disturbing the peace. The Jehovah's Witnesses' protests were often based on their perception that the authorities were using laws and ordinances specifically to target the group's practices:[27]

> In the various states, cities, towns and other municipalities laws have been enacted to govern the peddling of goods, wares and merchandise. It is well known that it was never the intention or purpose of the lawmakers in framing such laws to interfere in any wise with the preaching of the gospel of God's kingdom. It is only in recent years, and particularly since the close of the World War, that the enemy has seized upon these laws long ago on the statute books and uses them as an instrument for the persecution of Jehovah's witnesses.[28]

Even if only asked by the police to desist and leave town (which was often the case), Jehovah's Witnesses refused to stop their work; arrests and police round-ups for such insolence quickly followed.

The quick escalation of the Jehovah's Witnesses' commitment to challenge the police was due not only to some vague impression of discrimination, but to their view that they were being treated differently from other, more established religious groups doing the same things. Jehovah's Witnesses complained that "if you are a Catholic you can distribute all the literature you please…All the police department needs to know is that you take your orders, not from Jehovah God or His word, but from the little 'king' that rules at Vatican City, and it goes 100% with the department." The group reprinted a letter from J. Stokes, describing what had happened when she was picked up by the

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[27] To the overtly discriminatory nature of these ordinances—even if only in their enforcement—there are numerous parallels. Perhaps the most well-known comparison is to the civil rights movement protests against laws (such as restrictive covenants and segregated schools) aimed specifically at blacks. See Vose, *Caucasians Only*; Greenberg, *Crusaders in the Courts*; Kluger, *Simple Justice*.

[28] "Proclaiming on the Housetops," *The Golden Age*, February 14, 1934, 314-319.

police in Plainfield, New Jersey, in 1933, and the police circled around town with her in the car, trying to round up more Jehovah's Witnesses.

> When [the police] saw two ladies with circulars or printed matter over their arm, they pulled up to the curb, motioned to the ladies to come to the car and asked them if they were distributing printed matter. They answered, 'Yes.' They then asked them if they were connected with the Watch Tower works, and they answered, 'No.' They then asked the ladies who they were, and they replied, 'We are Catholics'; then the police said, 'That is all right. You can go on'.

One can only imagine Mrs. Stokes sitting in the back of the patrol car, fuming. Police were, then, occasionally blatantly discriminatory in the enforcement of these hawking and peddling ordinances; this inequity, according to Jehovah's Witnesses, violated their constitutional rights.[29]

Jehovah's Witnesses recognized that, unless they challenged these laws broadly, they would be arrested. From New Jersey to Georgia to Texas and Maine, even in towns which allowed door-to-door visits or public preaching, police often required that canvassers obtain a permit or license. Jehovah's Witnesses refused to obtain such documents, asserting that their witnessing had been authorized by the word of God—and this was the only permit they needed. Moreover, the group insisted that this was but one more element of the conspiracy against them, as members of the Catholic hierarchy and other "religionists" were the ones at whose discretion permits were granted:

> The clergy are actually trying to make it seem to the people that…before anybody can teach the Scriptures they must come to them, through the custodians of the law, and obtain their consent before they can go ahead with their work.[30]

"Nix on that kind of liberty," they pronounced. The only authorization Jehovah's Witnesses needed, Rutherford argued time and again, was that of God—and that

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[29] "Insulting Jehovah at Plainfield, New Jersey," *The Golden Age*, July 19, 1933, 643-660.
[30] "Insulting God in Elgin, Illinois," *The Golden Age*, July 19, 1933. 661-667.

particular permit was in plain view in the Scriptures. "Are Jehovah's Witnesses actually violating the commercial laws of the land?" asked the Watch Tower. "They are not in the slightest degree. They are going from house to house preaching the gospel of God's kingdom, even as they have been commanded by Jehovah to do so."[31] Attempts to require religious proselytizers to obtain permits to do their work were misguided, they argued, interfering with the group's religious liberty.

Because of the growing volume of arrests—which reached hundreds in the early 1930s, and thousands by 1941—the group insisted on the necessity of overturning these ordinances.[32] When arrested, members followed specific procedures engineered by Rutherford and his associates, adopting a policy of appeal to challenge the validity of ordinances (or at the very least the application of such laws to religious workers). Jehovah's Witnesses implemented an organized plan of public resistance, using the courts and the streets as their theaters. In protesting, Rutherford continued to argue that religious liberty was an empty guarantee if it was not connected to rights of free speech and press. "We still have preserved under glass at Washington," Rutherford entreated over the radio in 1932, "a document providing that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press."[33] The purpose of Rutherford's strategy was not constitutional change for its own sake; yet he viewed the Constitution as a codification of the "fundamental rights" guaranteed to Americans—and an instrument by which to ensure his group's ability to preach. Although Jehovah's Witnesses argued that

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[31] "Conspiracy Against the Nation," *The Golden Age*, June 7, 1933, 571-574.

[32] Undated letter from 1951 or 1952 from A.D. Schroeder to Hayden Cooper Covington. Watch Tower Legal Department Archives, Patterson, New York. Folder: "Violence/Harassment, Mob Action."

[33] "What is Wrong at Bergenfield, New Jersey," (transcript of lecture given by Judge Rutherford, broadcast over WBBR on Wednesday, January 26, 1932). *The Golden Age*, March 16, 1932, 355-358.

they resorted to the Constitution only in order to be able to continue their work, they certainly did not shy away from resistance to bear out its guarantees.[34]

Taking to the Streets

Jehovah's Witnesses combined civil disobedience with calculated legal action, attempting to test ordinances in the courts—a strategy ordinarily associated with later civil rights movement activities.[35] In March 1931, for example, a Wilmington, Ohio company of 25 Jehovah's Witnesses going door-to-door got into a confrontation with police.[36] The city's mayor (who, according to the Jehovah's Witnesses, "apparently wished to favor his ecclesiastical and political friends") warned the workers that they were required to apply for licenses costing a dollar apiece—or leave town. The

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[34] Although they often denied this practice, this resistance extended to purposefully provoking arrests. For example, Jehovah's Witness Olin Moyle described a September 1932 campaign whose very purpose was to distribute *Golden Age* no. 363 among Catholics. Olin Moyle Papers, Box 2, red diary, 9; Princeton University Rare Books and Special Collections. For accounts of Jehovah's Witnesses deliberately going into neighborhoods they knew were Catholic ("Roman") see "Frost on the Air," *The Golden Age*, February 14, 1934, 316.

[35] There is a significant literature on strategic litigation, yet nearly all of it is focused on the NAACP and NAACP Legal Defense & Education Fund. For a forerunning account of strategic litigation in the black civil rights movement, see Clement E. Vose, *Caucasians Only: The Supreme Court, the NAACP, and the Restrictive Covenant Cases* (Berkeley, California: University of California Press, 1967). For the connection of the more familiar civil disobedience with the legal arena, see Jack Greenberg, *Crusaders in the Courts: How a Dedicated Band of Lawyers Fought for the Civil Rights Revolution* (New York: Basic Books, 1994) and Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality, 1925-1950* (Chapel Hill, North Carolina: University of North Carolina Press, 1987).

The literature examining religious groups and strategic litigation is thin, and, almost without exception, focused on the *Brown* era and beyond. For example, Frank Sorauf's excellent examination of religious groups in the Supreme Court begins in 1951. Frank J. Sorauf, *The Wall of Separation: The Constitutional Politics of Church and State* (Princeton, New Jersey: Princeton University Press, 1976).

Regarding Jehovah's Witnesses and the courts, the literature has until recently nearly uniformly neglected the strategic element of the group's legal experience. One exception is Jennifer Jacobs Henderson's "Hayden Covington, The Jehovah's Witnesses and their Plan to Expand First Amendment Freedoms" (Unpublished Doctoral Dissertation, University of Washington, 2002). While Henderson refutes the notion of Jehovah's Witnesses as "hapless litigants," however, Henderson does not explore the pre-Covington (pre-1940) legal strategy of the 1920s and 1930s, and the piece focuses on "mass-media law" implications of the Jehovah's Witnesses' legal battles.

Stephen Wasby recently questioned the concept of "planned" litigation. Stephen L. Wasby, "How Planned is 'Planned Litigation'?," *American Bar Foundation Research Journal* 9, no. 1 (Winter 1984): 83-138.

[36] "Jehovah's Victory at Wilmington," *The Golden Age*, March 16, 1932, 359.

Jehovah's Witnesses told him that "the workers proposed to continue the work as planned and they would be working on a certain street and that if he wished to make a test case of it he would have the opportunity. Two of the workers were selected to proceed with the work and the remainder awaited developments, not wishing to be required to furnish bond for all in the case of arrest." The police took this bait, arresting Jehovah's Witness Forrest Grammar. Watch Tower officials posted bail and retained two attorneys, Frank Krehbiel (a "one-time Socialist who is not afraid to stand for the rights of the under dog and who has had much experience in withstanding the unjust methods of organized politicians") and Edward Wertz (a "personal friend of Judge Rutherford"). At the hearing, a "noble defense was presented by the attorneys, but to no avail. The mayor seemed bent on having his way." No decision was given then, but three weeks later, Grammar was fined fifty dollars and court costs for disturbing the peace. When the Jehovah's Witnesses' attorneys requested a new trial, the case was dismissed; however, the mayor warned that Sunday statutes would be applied to any future work on that day. And, in fact, the next time they went to work in Wilmington, the police pursued them for the same reasons. The Watch Tower let the matter lie until October—when they launched a more concerted campaign.

Rutherford and the Watch Tower leadership had been complaining for years that their group's fundamental rights were being violated. In the 1930s, they went on the offensive, not only advising Jehovah's Witnesses about their rights, but also launching "divisional campaigns" in the locations where they encountered opposition. Rutherford and his associates used the organization already developed for the proselytizing work in these acts of civil disobedience. Rather than shying away from locations where they

encountered police and arrests, the Watch Tower sent special missions to do house-to-house work where trouble had arisen—areas designated as "hot spots" or "hot territories" by the Watch Tower leadership. Of a campaign the next year in New Jersey, for example, *The Golden Age* reported:

> All is not yet quiet on the Methodist front, but will be soon. After the…distribution six more were arrested illegally, and so on the Sunday following, just to show the Devil that his bluff had been called, and that Jehovah's witnesses are sure of their ground, and of the issue of their case, three hundred of them called at every home in Asbury Park and Ocean Grove, and left there two thousand of Judge Rutherford's books, showing that God's kingdom, and that alone, will give the people life, liberty, peace, prosperity, health, happiness and youth eternal right here in this world…One of the '300' was illegally arrested…but that is another chapter.[37]

These campaigns were extraordinarily well-organized. When Jehovah's Witnesses were arrested while canvassing, they were instructed immediately to call a number from the police station. In the "hot" territories, volunteers were on notice, prepared to go into any community within a given radius to preach. These volunteers—from among the ranks already reporting their service work to the Society—had been organized into units, and these units grouped into 78 divisions throughout the United States. When Jehovah's Witnesses phoned the hotline, the Society would send a call for the appropriate number of groups to visit each home in the "trouble spot" within an hour or two. These volunteers would meet, receive instructions on the area to be worked, and drive into town to visit each home.[38]

In this vein, in October of 1931 the Jehovah's Witnesses returned to Wilmington, Ohio. Members of the group from surrounding cities had signed on to help with the work

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[37] "On the Methodist Front—Asbury Park and Jehovah God," *The Golden Age*, April 27, 1932, 467-469, 479.

[38] *Jehovah's Witnesses in the Divine Purpose*, 133.

to try and counter the opposition there; the Watch Tower informed them of the plan, noting that to "return to Wilmington in the face of the mayor's threat and warning that he would jail every one who attempted to disobey his orders required no little courage."[39] In the end, 166 workers showed up, having driven between forty and ninety miles; on October 24, the "three divisions of this little army advanced on Wilmington in three different directions." As *The Golden Age* reported after the campaign, "No army ever advanced to battle with a more carefully planned campaign, or with a more orderly army."[40] The Jehovah's Witnesses approached the city in a line of automobiles; residents evidently mistook the group for a funeral procession. "Indeed," the Watch Tower Society explained, "there was no hearse, for this was not a death procession (except for the Devil and his crowd), but it was a part of that great procession which is now forming; which shall lead the people over the King's highway, away from Satan's kingdom of darkness and confusion, into God's everlasting kingdom of joy, peace and contentment."[41] The group covered the entire city within two hours, including businessmen and bankers, clergymen and public officials, millionaires and beggars. "While every effort was made to be courteous, polite and orderly," the *Golden Age* reported, "and to avoid any cause for offense, this attack was certainly enough to 'disturb the peace and quietude' of the mayor."[42] In the end, no arrests were made, and the mayor seemed to have changed his mind. The Jehovah's Witnesses assumed that he had seen the light of their message; regardless, Rutherford and his group were only heartened by the effectiveness of such an organized display of calm disobedience.

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[39] "Jehovah's Victory at Wilmington," *The Golden Age*, March 16, 1932, 359.
[40] Ibid.
[41] Ibid.
[42] Ibid.

Jehovah's Witnesses demonstrated that they were more than willing to go to jail to protest what they believed to be arbitrary and unconstitutional acts by law enforcement and legislators. In January 1932, four men and six women were arrested in Bergenfield, New Jersey, for handing out radio folders containing a list of radio stations on which Judge Rutherford and a Watch Tower radio program could be heard each week. Rutherford, Clayton Woodward (the editor of *The Golden Age* and one of the officials who had gone to prison in 1918), and other Watch Tower directors expressed their dismay over the situation in the pages of *The Golden Age* and over the radio. "What is wrong with the mental and moral atmosphere of Bergenfield, N.J.," Rutherford asked, "that it is afraid to have these important and common-sense questions presented to the attention of the people of the community?" Far from simply lamenting the situation, Rutherford and his followers backed up their dismay with action. Of the "Bergenfield ten," *The Golden Age* warned that

> We can tell the administration of Bergenfield, N.J., right now that they are endeavoring to combat the march of truth of Jehovah and that they will fail. In the first place, they are going to get nothing from the four noble Christian men and the six noble Christian women that they have locked up in their Hackensack jail. Those men and women know what their rights are and they will rot in jail rather than concede that anyone has the right to dictate to them how they shall serve their God.[43]

"Most certainly," the piece concluded, "the administration at Bergenfield is due for a rude awakening."

Next, Rutherford and his associates engineered campaigns to provide this "rude awakening." In 1932, the Watch Tower Society began to compile careful narrative records of arrests and the legal proceedings which followed. A November 1932 incident

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[43] "What is Wrong at Bergenfield, New Jersey," (transcript of lecture given by Judge Rutherford, broadcast on Wednesday, January 26, 1932). *The Golden Age*, March 16, 1932, 355-358.

in Livingston, New Jersey (twelve miles outside of Newark) was typical. Two brothers, Walter and Louis Schaab, were arrested (by an officer who, they speculated, "evidently was acting under the orders of the Roman Catholic police chief"). The brothers requested an immediate trial, which was granted, but the recorder denied the men's request for a copy of the ordinance under which they were arrested, as well as their request to cross-examine the police officer. When Walter Schaab insisted on his right to question the officer, the recorder cut him off, announced that the men were guilty, and told them that they could pay ten dollars or go to jail for four days. When their request to make out appeal papers was refused, a Watch Tower official called from Brooklyn to protest. The Schaabs were taken to the county jail, and released after three days without explanation.[44] The next Sunday, a company of sixty workers visited every home in Livingston, and were left alone by police.

In many areas, the hot spot volunteers organized car groups, following Rutherford's instructions. In a memo of "Instructions for Car Drivers," Rutherford detailed the process: the "troops" reported at an announced point, detailed instructions were given, and individual car groups assigned.[45] Each car driver was given a number card to place in the window when approaching the contact point at the beginning and end of the work. When the cars went out, everyone was supposed to witness, including the car drivers.

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[44] The incident, especially the judge's frequent denials and the refusal of appeal, indicates the possibility for abandonment of proper procedure in pre-*Miranda* days, as well as the very real possibility that defendants at local trials would not know their rights. Indeed, one of the things which set Jehovah's Witnesses as a group apart was the knowledge, disseminated to ordinary members of the group, of their rights under the law.

[45] Memorandum by J.F. Rutherford, "Instructions for Car Drivers." Watch Tower Society Archives, Legal Department, Patterson, New York. This memo is undated, but likely from 1933, because it instructed Jehovah's Witnesses to bring copies of *Preservation* (1932) and *Preparation* (1933). Almost without exception, the Watch Tower Society encouraged distribution of its newest literature—which was consistently updated, especially during the Rutherford years.

> You work where you can observe the activities of other witnesses, and, if possible, be a witness as to what occurs if interrupted, WITHOUT INTERFERING. When parking, do not violate parking regulations. Also be sure to have your operator's and owner's license with you. If accosted by an officer and asked for your license, show it to him, of course; and, if he asks for ANY information concerning the other workers, simply reply kindly but firmly, 'I am unable to supply any information regarding anyone else.'[46]

After witnessing work was done, workers turned in reports to their drivers, who would compile the day's report on a special report card and turn it in at the contact point. "Your troop may bring luncheon along if they wish," the memo instructed, "but do not go away to dinner or make any other stops before checking at contact point and turning in your report. Further field action may be necessary." Car drivers were responsible to see that each Jehovah's Witness understood the instructions, and was supplied with the necessary equipment: "Complete confidence in JEHOVAH to lead his people," as well as the Bible, an "Identification and Authorization" card, copies of the latest Watch Tower Society booklets, radio folders, and a copy of a statement in a Watch Tower issued memo called the "Order of Trial." That these methods were intended to publicize the Jehovah's Witnesses' resistance to these ordinances, is clear. "The only thing the enemy could do in such circumstances was to arrest twenty or thirty or whatever the local jail could hold and let the rest go."[47]

The Order of Trial

"Satan, by his chief officer Gog, is active at this time in the persecution of Jehovah's witnesses," Rutherford wrote in a 1933 memo to all Watch Tower brethren. "In order that you might be ready for quick action in case you are arrested, we are

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[46] Ibid.
[47] *Jehovah's Witnesses in the Divine Purpose*, 133.

sending you herewith a general outline in the course of procedure."[48] The memo referred to a document called "Order of Trial," which Rutherford had actually been circulating among his followers for some two years by 1933. Produced under Rutherford's "able legal direction," the Order of Trial contained instructions for Jehovah's Witnesses, from first encounter with police to the appeals courts. This information was provided

> to encourage and instruct the brothers in handling their own cases in court. Furthermore, acquainting them with their legal rights as it did, it encouraged them to continue in the work and enabled them to hold their own with those community officials who tried to bluff them out of their legal rights.[49]

The Order of Trial contained step-by-step instructions on what to say when Jehovah's Witnesses were confronted by police officers on their preaching work, and what to do in court. As most of the members of the group were unlikely to be able to afford lawyers at the lower court levels, the Order of Trial specified that they were to follow the instructions printed in that document to the letter. During their trials, Jehovah's Witnesses were to demand names, cross-examining witnesses and police officers. Rutherford even included a statement to be read in court. "Instead of having your testimony printed out," he instructed, "it would be well if you would in spare moments copy in your own handwriting that which would be your testimony or else write it out on the typewriter, and be ready to make your statement before the court when the time comes." For a time, Rutherford even proposed that, if possible—if the trial were delayed

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[48] Memorandum, J.F. Rutherford to Watch Tower Brethren, December 22, 1933. Watch Tower Society Archives, Legal Department, Patterson, New York. Gog is, according to Rutherford, "Satan's chief deputy in his wicked organization,"—incorporating a passage from Ezekiel which describes the attack on Jerusalem by Gog. In Rutherford's estimation, this passage foretold intense persecution of Jehovah's Witnesses, culminating in the battle of Armageddon and destruction of those who were not true Christians. See Joseph Franklin Rutherford, *Enemies* (New York: Watch Tower Bible & Tract Society, 1936), 25.

[49] *Jehovah's Witnesses in the Divine Purpose*, 132. First published in the *Golden Age* for two years running, the Watch Tower Society printed the Order of Trial in a booklet in 1933 and 1939. Joseph Franklin Rutherford, *Order of Trial* (Brooklyn, New York: Watch Tower Bible & Tract Society, 1933).

a good deal, for instance—Jehovah's Witnesses might take a transcription machine into the courtroom.[50] "Take with you Record J-105, saying in the court after the evidence is in: 'Judge Rutherford is of counsel in this case, but is unable to be present. He has made a legal argument, however, which is reproduced by means of electrical transcription, and now I ask to put this transcription record on this machine and have his argument made before the court in my behalf."[51] Over time, Jehovah's Witnesses became remarkably adept at presenting their own defenses in court, without relying on recordings of Rutherford's legal arguments.

At weekly service meetings, Jehovah's Witnesses received training and conducted mock trials, in which they would "take turns defending themselves on this issue of freedom of worship."[52] As they argued for their constitutional rights to do the work, Jehovah's Witnesses also viewed their trials as more opportunity for witnessing—to a captive court audience. The Watch Tower Society commended individuals for following the instructions in the Order of Trial when arrested, and for "giving a good witness" in court. Of an early 1933 trial near Plainfield, New Jersey, for example, the Watch Tower Society recorded that "Vander Plaat followed closely the instructions in 'Order of Trial,' giving an excellent witness."[53] Similarly, of a trial the next month in Bergenfield, New Jersey, the record commended the two dozen Jehovah's Witnesses found guilty. "It was truly thrilling to behold the calm assurance of each of Jehovah's witnesses, as he or she eagerly and happily went 'to the mat' when called. Unquestionably the hand of Jehovah

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[50] Transcription machines were devices used to play recording in the early 1930s, before portable record players were ubiquitously available.

[51] Memorandum, J.F. Rutherford to Watch Tower Brethren, December 22, 1933. Watch Tower Society Archives, Legal Department, Patterson, New York.

[52] *Jehovah's Witnesses in the Divine Purpose*, 132. This extensive practice is, in many ways, comparable to that undertaken by the Freedom Riders and sit-in movement of the 1950s and 1960s.

[53] "Records of Opposition," entry for Dunellen, January 17, 1933. Watch Tower Society Archives, Legal Department, Patterson, New York.

was in the proceeding."[54] Eventually, court officials began to notice that Jehovah's Witnesses had been prepared. Regarding two Jehovah's Witnesses tried before a village magistrate in New Jersey, for example, the Watch Tower Society recorded that "each presented case personally, Sister Swartz being allowed to read entire statement. Policeman demanded of her where she got it; and on being told it was one she had typewritten herself, he snatched it from her, looked at it, and then cried out, 'It's the same thing they used down at Bergenfield'."[55]

In fact, it was the same thing they used everywhere. While Rutherford and his associates expressed outrage at official attempts to curb their work, they simultaneously took solace in the fact that the legal battles brought the group great publicity, affording the opportunity for more public witness. Having recognized that, whatever their claims to civil liberties, Jehovah's Witnesses were going to be arrested, Rutherford put into place strategic elements which could be used in Jehovah's Witness test cases. After discussing the group's options with the International Association of Police Chiefs in 1930, Rutherford advised his followers that each of them should file notice with the police department when they embarked to give testimony in a town.[56] Enclosing a notice with blanks for location and date, Rutherford instructed his followers to give these notices to the officers in charge at police headquarters. "When the paper is filed," he directed, "then proceed to your work of giving testimony." Evidently anticipating arrests despite this measure, he continued, "If you are arrested and brought into court, you have

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[54] Ibid., entry for February 1933.

[55] The two Jehovah's Witnesses were convicted, refused to pay fines, and "gladly" served five days in jail. "Records of Opposition," entry for February 18, 1933. Watch Tower Society Archives, Legal Department, Patterson, New York.

[56] J.F. Rutherford to Jehovah's Witnesses, August 19, 1932. Watch Tower Society Archives, Legal Department, Patterson, New York.

the order of procedure of the trial. Look to the Lord for his protection and preservation. Having promised it, He will do it."

Mischief Framed into Law: Seeking Publicity for Jehovah's Kingdom

Jehovah's Witnesses considered themselves to be victims of a conspiracy of forces against them, a beleaguered minority up against powerful elements out to silence them. This view was occasionally shown to be a reality by the actions of law enforcement. The group's leadership was outraged, for example, when they discovered that the city of Summit, New Jersey had pre-printed arrest warrants with Rutherford's name and a description of the offense of soliciting without a license before it had occurred. Claiming that this indicated a premeditated conspiracy "to arrest witnesses to Jehovah's kingdom," Rutherford addressed an open letter to President Roosevelt to call his attention to "a condition of official lawlessness in Summit, New Jersey, which is well worthy of your attention as the chief magistrate of this country."[57] He opened by detailing the atrocities of the First World War, and related some particularly gruesome experiences of Jehovah's Witness Dan Morgan. "If you want to know what the World War was really like, Mr. President, you should read his book *When the World Went Mad*. Just address him, Dan Morgan, 153 Main Street, Fort Lee, N.J., send $1.75, and he will send you the book as soon as he gets out of prison." Morgan had been arrested in May 1933, and Rutherford realized that the warrant for Morgan's arrest had been pre-printed with the Watch Tower name and offenses. This ordinance, Rutherford declared, was mischief framed into law. "It has a bad motive, an evil motive, an accursed motive back

[57] "Open Letter to President Roosevelt on Conditions at Summit, New Jersey," *The Golden Age*, June 7, 1933, 547-552.

of it. It is intended to bring forth and does bring forth iniquity, which is injustice."[58] Urging the President to champion their cause, Rutherford implored, "Give us the new deal, Mr. President, in this matter of religious persecution. Call a halt on these strong-arm squads that consider the distribution of godless comic sheets on Sunday perfectly proper, but through the pressure from priests and preachers of numerically powerful religious bodies, trespass upon our rights and lock up men like Dan Morgan."[59]

In fact, Jehovah's Witnesses sought publicity for these arrests in any way it could be obtained. During the "Plainfield Campaign," which lasted for most of 1932 and 1933, for example, sixty Jehovah's Witnesses were arrested in late June 1933. The women who had been arrested were held in the basement of the town jail—under astonishingly crude conditions, at least according to Charles Hessler, a Watch Tower official who went to the scene.[60] Hessler decided to get a photographic record of the conditions under which the women were being kept, and called in a commercial photographer at 11 o'clock the night they were arrested. The photographer arrived at the scene, set up his equipment, and took a flash photograph around midnight.[61] As he was preparing to take a second shot, police came out and asked the photographer to come into the station, questioning him while Hessler watched his camera and his car. The officers then returned and jailed Hessler for

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[58] Ibid.

[59] Ibid.

[60] Rutherford often sent Watch Tower officials (usually service directors) to observe the activity in hot spots. In addition to Hessler, Philbrick and Rossier were mentioned frequently as serving in this capacity. In addition, high-ranking Bethelites made rounds of cities and towns in which repeated arrests were reported, attempting to persuade local authorities not to interrupt the work. For example, Hessler, Schieman and Rossier visited the Jersey City, New Jersey chief of police in December 1932, after several rounds of arrests. Similarly, Fisher, the Baltimore service director, attended an Alexandria, Virginia trial on December 23, 1932, and was even put on the stand. "Records of Opposition," entry for January 4, 1933. Watch Tower Society Archives, Legal Department, Patterson, New York. Occasionally (as in these instances) the Watch Tower officials would persuade the town authorities to cease interfering with the door-to-door work. More frequently, however, they were turned away.

[61] The *Golden Age* published this picture over two pages in their July 19, 1933 issue, pp. 656-657.

disorderly conduct. After spending two days in jail, he was charged with peddling, distributing handbills and other literature without a permit, and disorderly conduct.[62]

Especially in places like Plainfield, where a large number of people had been arrested, the proceedings often grew heated. When the eighth defendant was being tried at Plainfield, suddenly the judge became enraged and ordered a spectator in the courtroom to stand. The spectator was Dan Morgan, who had written the book described in the *Golden Age*:[63]

Judge:	Are you interested in this case?
Spectator:	Yes, sir, I certainly am.
Judge:	What's your name?
Spectator:	Daniel E. Morgan.
Judge:	Where do you live?
Spectator:	153 Main Street, Fort Lee.
Judge:	What's your official position?
Spectator:	I am a spectator, and not on trial.
Judge:	What do you mean by your conduct?
Spectator:	Haven't I a right to smile?
Judge:	(Fierce) I will order you from the court if I see any more of such actions! I am looking around and my eyes are open!

At trial on this particular day in court, as in so many other cases, the judge tried with each Jehovah's Witness to extract a promise that he or she would not return to Plainfield to witness. "Every one emphatically refused to give such a promise," the Watch Tower proudly related, "except one. She did so promise…as she was repeatedly asked the same

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[62] "Records of Opposition," entry on Plainfield Campaign, June 1933. Watch Tower Society Archives, Legal Department, Patterson, New York.

[63] Very little information can be found regarding Dan Morgan, other than these scraps found in the pages of the group's publications. He seems to have been a dedicated Jehovah's Witness. In the late 1930s, he lost his job at the Pittsburgh Plate Glass Company of Clarksburg, West Virginia, because his two sons refused to salute the flag. Tony Wills, *A People for His Name: A History of Jehovah's Witnesses and an Evaluation*, Second Edition (Morrisville, North Carolina: Lulu Enterprises, Inc., 2006). See Chuck Smith, "War Fever and Religious Fervor: The Firing of Jehovah's Witnesses Glassworkers in West Virginia and Administrative Protection of Religious Liberty," *The American Journal of Legal History* 43, no. 2 (April 1999): 133-151. The 1975 *Yearbook of Jehovah's Witnesses* stated that Dan Morgan died in October, 1951, after refusing blood transfusions, in line with the Watch Tower policies on that issue after 1945.

question during a long, flattering speech to her by the judge, commending her on her 'good sense'. This one was released and when she went out she was found by some weeping bitterly. She excused herself by saying she 'had housework to do'…" The rest were taken to the county jail for ten days. Hessler and Henri Rossier, another Watch Tower official present, were tried and convicted of disorderly conduct and given sixty days in jail—Hessler for having the photograph of the jail basement taken, and Rossier because he threw a copy of *The Golden Age* (with Rutherford's "Open Letter to President Roosevelt") to the judge at one point in the proceedings. Hessler, not being given much leeway to speak in his own defense, shouted as he left the courtroom, "This court has absolutely no regard of the fundamental law of the state and the nation."[64]

In the Courts

"Even a child should know this—It goes without saying that when it comes to a municipal ordinance it must not, of course, contain anything conflicting with either the divine law, the United States' Constitution, or the constitution of the State of New Jersey."[65] Hessler's frustration reflected a common sentiment for Rutherford and the Jehovah's Witnesses in these days—that they were obviously within their rights, and could not understand why they were arrested and taken to court. Jehovah's Witnesses were not committing illegal acts, they maintained—the ordinances themselves ran contrary to the law.[66] Rather than being new and non-traditional, Jehovah's Witnesses argued, the group's practices were as old as Christianity itself. The purpose of such

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[64] "Insulting Jehovah at Plainfield, New Jersey," *The Golden Age*, July 19, 1933, 643-660.

[65] Ibid.

[66] In the 1960s, Archibald Cox made the important distinction that "Disobedience of a local statute that violates the Constitution of the United States is altogether different from defiance of a plainly valid law." Archibald Cox, "Direct Action, Civil Disobedience, and the Constitution," *Proceedings of the Massachusetts Historical Society* Third Series, vol. 78 (1966), 105-119.

campaigns as were staged in Bergenfield, Wilmington, Summit, Plainfield and scores of other cities was to make these points in court.

Magistrates and city courts often imposed sentences of either ten dollars or five days in jail. Once convicted, Jehovah's Witnesses were to refuse to pay fines, accepting jail instead.[67] It became a point of pride for Jehovah's Witnesses to take a stand while taking the stand. As the Watch Tower Society explained, "Persecution Spreads the Truth":

> While it is inconvenient and unpleasant for clean, neat men and women to exchange the comforts of a refined Christian home for the discomforts and inexcusable filth and dirt of prison life, yet the angels of God would gladly leave their places in heavenly courts for the privilege of thus bearing testimony to the honor of Jehovah's name. The way it works out is that over the radio and by the printed page the full proceedings of such infamies as occurred at Plainfield are made known to all. Thus the Plainfield trials were dramatized and widely broadcast. At the conclusion of the broadcast, words of explanation and warning were included for the benefit of those who have ears to hear.[68]

Internal Watch Tower Society communications spoke of instructing Divisional Leaders regarding the "privilege of each witness now to follow instruction in Order of Trial and to go straight forward in bearing testimony accordingly before rulers, regardless of consequences, rather than to consent to efforts by fellow witnesses or lawyers to persuade rulers merely to 'release' them when arrested."[69]

Regardless of whether they had lawyers or represented themselves, the arguments were always based on the same principles, which the Watch Tower Society articulated repeatedly:

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[67] For example, "Records of Opposition," entry for April 14, 1933. "Records of Opposition," entry for Barnesville, Ohio incident, January 1933. Watch Tower Society Archives, Legal Department, Patterson, New York.Watch Tower Society Archives, Legal Department, Patterson, New York.

[68] "Insulting God at Plainfield, New Jersey," *The Golden Age*, July 19, 1933, 643-667.

[69] Ibid.

(a) These witnesses were exercising their God-given right to preach the gospel;
(b) The town and city, state and nation are precluded from interfering by reason of the provisions of the constitution;
(c) Every man may worship God according to the dictates of his own conscience;
(d) To ask permission to preach the gospel which Jehovah God has commanded shall be preached *would be an insult to Jehovah God and contrary to the fundamental law of the land*;
(e) The people…should inform themselves as to whether the clergymen who are persecuting Jehovah's witnesses and using the strong-arm squads and the magistrates to throttle religious liberty in America represent the Devil, as we are prepared that they do, or represent Jehovah God.[70]

Indeed, in addition to their legal purpose, part of the reason for the publicity Rutherford and the Jehovah's Witnesses sought was to be able to make direct appeals to the people. "In any event," they wrote in 1933, "when the people have informed themselves, they must make their stand on one side or another….Awake, all sleeping ones! Decide! Decide!"[71]

Jehovah's Witnesses, then, prepared to defend themselves in court, at least at the first level of city, magistrates or recorders courts, and then to appeal their cases if anything but a "not guilty" judgment was returned. Occasionally, angry judges would tell them to "get a lawyer!" in court. In Plainfield, for example, Anna Behlau, after being found guilty, told the judge that she would "appeal from the decision of this court to a higher court and ask that appeal papers be made out for me." The magistrate told her to "get a lawyer!," to which she replied, "I'm not able to hire a lawyer, but I am entitled to the protection of the law."[72] When the cases were appealed, particularly in "hot spots," the Watch Tower Society retained local lawyers, whom they expected to proceed as

[70] Ibid.
[71] Ibid.
[72] Description of Plainfield trials, *Golden Age*, July 19, 1933.

instructed to build appeals (rather than simply attempting to get the Jehovah's Witnesses out of jail time).[73] Frequently, Rutherford would send one or more of his associates from the Brooklyn Bethel to help with the cases in court.[74]

From the outset, the Jehovah's Witnesses adopted a policy of appeal. This was not entirely ordinary—in fact, much of their difficulty during the early 1930s seems to have been convincing local officials (city magistrates and recorders) to provide papers for appeals of small infractions of local ordinances.[75] Perhaps because they did not trust the local courts, the Watch Tower Society began to send their own stenographers to the trials, to take down a "good record" for purposes of appeal.[76] Evidence of the clarity of the Jehovah's Witnesses' legal strategy—even in the early 1930s—may be found not only in the importance which they attached to these appeal papers, but also in the fact that members appealed their cases even when they received suspended sentences—because

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[73] The record of a February 1933 trial in Donora, Pennsylvania, for example, presented the minutiae of paying these local lawyers. "Inasmuch as the Pittsburgh company was put to a considerable expense aside from the attorney's fee, it was the consensus of the service committee that the Society should bear the expense of the Donora case, as you will note from our correspondence with Brother Rutherford he was personally directing our activities in this case." "Records of Opposition," entry for February 15, 1933. Watch Tower Society Archives, Legal Department, Patterson, New York.

[74] For example, Anton Koerber, regional service director, was sent by Judge Rutherford to "look after the matter" of the case of 74-year-old colporteur M.O. Zeliff, arrested in Brantley County, GA, in which the "attorney engaged had become despondent over the case." "The Lord's Victory in Brantley County, Georgia," *The Golden Age*, February 4, 1931, 312. Koerber went to instruct a local attorney, Garrett, how to handle the trial and also testified in court on Zeliff's behalf.

[75] Whether these matters could be appealed, of course, was a matter governed by state law. Nonetheless, this was an example where the law on the books did not always match the practice of judges. Rutherford and the Jehovah's Witnesses were infuriated, for example, by incidents in which judges argued with Jehovah's Witnesses over appealing their cases. This happened especially in cases in which the punishment for infractions was very small—a fine of a few dollars, for example. The Jehovah's Witnesses sought to appeal these cases not to avoid fines, but to build their arsenal of appeals and bolster their constitutional claims. Some judges, however, did not understand the necessity of filing such appeals for relatively small infractions—which virtually nobody had appealed before.

There are many descriptions of incidents of this type. For example, "Records of Opposition," entry for Clearfield, Pennsylvania, December 25, 1933; also, description of Plainfield trials in *Golden Age*, July 19, 1933, "Records of Opposition," entry for January 2, 1933, recording an incident in Fanwood, near Plainfield, New Jersey, on Christmas Day 1932, in which the magistrate became flustered and released the arrested Jehovah's Witnesses when they told him they planned to appeal. Watch Tower Society Archives, Legal Department, Patterson, New York.

[76] The record of the Bergenfield trials, for example, included the detail that there were four stenographers sent by the Watch Tower Society.

the decisions rendered in such cases were still "guilty," and the Jehovah's Witnesses insisted that they had done nothing wrong.[77] Similarly, when judges tried to exchange suspended sentences for promises not to return, the Jehovah's Witnesses refused—and went to jail.[78] In one instance of an arrest in Clearfield, Pennsylvania, for example, a Jehovah's Witness "was refused opportunity to read his prepared statement; also was refused appeal papers for which he asked, being told to 'get a lawyer'. They offered to release him if he would cease work and leave town. This he refused to do."[79]

That Jehovah's Witnesses did manage to bring many cases in court, and appeal their guilty convictions, did not do much to clarify their rights under state and federal constitutions in the early 1930s. Judges' opinions of the Jehovah's Witnesses' legal rights ran the gamut, from those who believed their actions were protected, to those who considered it quite within the state's police power to prohibit or require permission for proselytizing activities.[80] At a hearing in Bergenfield, New Jersey, for example, the

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[77] For example, "Records of Oppression," entry for January 17, 1933. Watch Tower Society Archives, Legal Department, Patterson, New York.

[78] For example, "Records of Opposition," entry for April 13, 1933. Watch Tower Society Archives, Legal Department, Patterson, New York.

[79] "Records of Opposition," entry for December 25, 1933. Watch Tower Society Archives, Legal Department, Patterson, New York.

[80] Even after they had been rounded up by police, Jehovah's Witnesses were sometimes dismissed by local magistrates for various reasons. See, for example: case of M.O. Zeliff, Brantley County, Georgia. "The Lord's Victory in Brantley County, Georgia," *Golden Age*, February 4, 1931, 312-313; case of William Evers, Town of Hempstead, New York. "Religious Liberty in Hempstead, N.Y.," *The Golden Age*, June 10, 1931, 606; case of Nicholas Belekon, Mike Wargo, John Wargo, and Mike Hubal, Swoyersville, Pa., *Swoyersville Borough vs. John Wargo et al.* "American Rights and Liberties at Swoyersville," *The Golden Age*, September 16, 1931, 303; cases of Witnesses arrested at Wilmington, Ohio, March 8 1931. "Jehovah's Victory at Wilmington," *The Golden Age*, March 16, 1932, 359; case of "John Doe," released from Court of Chancery at Newark, New Jersey, when the judge ruled that he "had been illegally restrained of his liberty because at the time of his arrest he was disseminating Bible truths, and, furthermore, that the trial was unconstitutional because the 'due process' clauses of both the federal and state constitutions had been grossly violated." "'John Doe' at Asbury Park," *The Golden Age*, May 25, 1923, 531; case of Jehovah's Witnesses held overnight in bad conditions and then released in Putnam, Connecticut. "Civilization in Putnam, Connecticut," *The Golden Age*, August 1, 1934, 690.

Once the cases reached the state supreme courts or the appellate courts, however, the convictions were nearly always affirmed, or the cases were not heard for lack of a constitutional question. *Mayor and Council of Borough of Bergenfield v. Peterson et al.*, 7 N.J. 1019, 147 A. 774 (1929) (Supreme Court of

magistrate apparently paused to say, "We are going to thrash this thing out; we want a showdown on this ordinance."[81] Although the arrests of Jehovah's Witnesses increased, in the city and magistrates' courts, members of the group were often dismissed.[82] The group even won occasional victories at the appeals court and state supreme court level. For example, the Bergenfield, New Jersey ordinance requiring permission for handbill distribution was declared unconstitutional in 1934; a similar ordinance from Nutley, New Jersey was also struck down. This prompted the editors of *The Golden Age* to declare triumphantly that "Bergenfield officials are gradually awakening to the fact that New Jersey is a part of the United States."[83] However, by the time the cases got to the higher courts, most of them were thrown out for lack of a constitutional question—the simple

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New Jersey); *Mayor and Council of City of Englewood v. C.F.* Nicita, 7 N.J. Misc. 1034, 147 A. 774 (1929) (Supreme Court of New Jersey); *Cook v. City of* Harrison, 180 Ark. 546, S.W.2d 966 (1929) (Supreme Court of Arkansas); *Commonwealth v. Anderson, Commonwealth v. Royal*, 272 Mass. 100, 172 N.E. 114 (1930) (Supreme Judicial Court of Massachusetts); *Armstrong v. Bettman*, 124 Ohio St. 650, 181 N.W. 886 (1931) (Supreme Court of Idaho); *State v. George F W Thomson and Olga Thomson* (In Superior Court, Tolland County, Connecticut) (Not Reported; account in *The Golden Age* 25 May 1932); *Town of Westfield v. Stein*, 113 N.J.L. 1, 28 Gummere 1, 172 A. 522 (1934) (Supreme Court of New Jersey); *Shaw v. Lindstrom et al.*, 71 F.2d 686 (1934) (Circuit Court of Appeals, Third Circuit); *City of Wheaton v. Edward Howard*, Nor Reported in N.E., 279 Ill.App. 649, 1935 WL 7774 (Ill.App. 2 Dist.) (Appellate Courts of Illinois, Second District); *Maplewood Tp. V. Albright*, 13 N.J. Misc. 46, 176 A. 194 (1934) (Court of Common Pleas of New Jersey, Essex County); *Dziatkewicz v. Township of Maplewood, and three other cases*, 115 N.J.L. 37, 30 Gummere 37, 178 A.205 (1935) (Supreme Court of New Jersey); *Semansky v. Common Pleas Court of Essex County et al., and three other cases*, 13 N.J. Misc. 589, 180 A. 214 (1935) (Supreme Court of New Jersey).

There were several instances of Watch Tower Society wins at the high court level, for example *Town of Nutley v. Brandt, and eight other cases*, 12 N.J. Misc. 670, 174 A. 244 (1934) (Supreme Court of New Jersey); the Summit, New Jersey cases (New Jersey Supreme Court).

[81] "Records of Opposition," entry about incident in Bergenfield, New Jersey, February, 1933..

[82] "Records of Opposition," entries about incidents in Fanwood, New Jersey, February 2, 1933; Alexandria, Virginia, January 4, 1933; Dunellen, New Jersey, January 17, 1933; Kinston, North Carolina, January 30, 1933; and at Bergenfield, New Jersey, Februady 2, 1933, where all but 23 people were dismissed.

[83] "Light Dawns Gradually in Bergenfield," *The Golden Age*, May 9, 1934, 484. The case, originating in 1932, was one in which Fred Shaw, one of Jehovah's Witnesses, was arrested and convicted of violating a Bergenfield ordinance prohibiting handbill distribution without prior permission. Shaw had appealed his conviction, and it was reversed in the state appeals court. The city had appealed, but the Third Circuit Court of Appeals had affirmed that the judgment was to be reversed. *Shaw v. Lindstrom, et al.*, 71 F.2d 686 (1934) (Circuit Court of Appeals, Third Circuit). The New Jersey Supreme Court case to which Rutherford referred was *Town of Nutley v. Brandt, and eight other cases*, 12 N.J. Misc. 670 (1934) (Supreme Court of New Jersey).

fact that states and municipalities were considered well within their legal power to regulate door-to-door solicitation and disorderly conduct. It was in part the inconsistency the group faced in the rulings of local courts and even at the appeals level, as well as their defeats, which led to the broadening of the Jehovah's Witnesses' legal strategy to include the United States Supreme Court.

Battle for the Airwaves

It is difficult to say to what extent the opinion pieces, speeches, and letters—such as Rutherford's appeal to the Police Chiefs association—were sincere attempts to improve the situation, or whether their purpose was to lay the groundwork for a serious challenge of the authorities. There was, of course, an element of theatricality to most of these protests. Rutherford continued to broadcast his speeches over the radio, even after the FRC denied the group their own frequency.[84] Beginning in 1933, the Watch Tower Society produced a program called the "King's Theater" over WBBR. The stenographers who attended the trials of Jehovah's Witnesses recorded the proceedings; older brothers, "trained performers," would also attend the trials in order to impersonate the voices and intonations of those involved. The group then duplicated the trials over the air. For example, the King's Theater players presented a radio drama entitled "Hypocrisy," dramatizing a March 1933 hearing in New Jersey.[85] The Jehovah's Witnesses informed people of this program during their door-to-door visits by handing out radio folders—the

[84] By 1934, at the height of Watch Tower Society use of the airwaves, the group utilized a network of 400 stations.

[85] "Records of Opposition," entry for March 13, 1933. Watch Tower Society Archives, Legal Department, Patterson, New York.

programming was intended, they said, to reveal the "corruption of justice that was going on in these Catholic towns in New Jersey."[86]

Use of the airwaves continued to be a subject of contention, however, with the radio controversy of 1927 persisting into the 1930s. The Federal Radio Commission (the Federal Communications Commission as of 1934), charged with regulating the airwaves, denied licenses or desirable frequencies to those stations they deemed not to serve the "public interest."[87] The message broadcast over WBBR was offensive, to be sure, and individual stations received letters complaining about Rutherford's sermons. For example, in language reminiscent of the late-nineteenth century Populist rhetoric of William Jennings Bryan, Rutherford had criticized "Satan's organization":

> For many centuries Satan has been the invisible ruler of this world. He has blinded men to the truth and has subtly influenced others to do his bidding. Satan is the author and organizer of the cruel and oppressive commercial Big Business system that rules the world. He has used commerce, politics and religion that he might get complete control of the human race and defame the name and word of Jehovah God….The defamation of God's name has been brought about by Satan and his great commercial organization, aided and abetted by the political power, acting in conjunction with the false and hypocritical religious leaders who falsely charge Jehovah God with responsibility for human suffering. Satan's organization oppresses the people…[88]

While members of the clergy and citizens complained to the radio stations, Rutherford stood firm in his insistence that he be allowed to reach people over the airwaves. Rutherford dismissed the argument that private businesses (such as the National Broadcasting Corporation) should be allowed to make decisions in their own interests;

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[86] *Jehovah's Witnesses in the Divine Purpose*, 134.

[87] Limits on radio frequencies for religious groups also became an issue for fundamentalists, who ended up buying radio time. Rutherford, however, was under the impression that the fundamentalists actually received an unfair advantage from the Radio Commission and NBC in particular, and thus never sought cooperation.

[88] Speech "Can the Government Endure," broadcast on June 26, 1932. Reprinted in *The Golden Age*, July 10, 1932, 649.

since the government had undertaken to regulate the radio (by creating regulatory agencies like the Radio Commission), he asserted, this was an issue of free speech. In a line of reasoning similar to that put forth by the American Civil Liberties Union, Rutherford sought the protection of unpopular speech from censorship. "It seems not to have occurred to some of the judiciary," Rutherford quipped, "that a simple and certain remedy for any sensitive listener who begins to hear something which to him may be unpalatable is to reach for the dial knob and gently turn it."[89]

There had, of course, been no radio when the constitutional provisions protecting free speech and press were written; yet the Jehovah's Witnesses argued that by the 1930s, the radio was so crucial that it rivaled the influence of the print press. The radio issue was one of free speech and press, as well as religious liberty, and the Jehovah's Witnesses repeated this claim:

> The assurances of liberty of speech and of the press, as well as of religion and the right of the people peaceably to assemble, have constituted bulwarks of liberty unequaled in other lands, and it has been pointed out that as a result of these foundation principles the United States has grown to be a great nation. It is unquestionably true that these fundamental provisions for personal liberty have played an important part in the progress of the nation.[90]

In 1933 and 1934, the Jehovah's Witnesses' difficulties with the Radio Commission came to a head. Claiming that they had been deprived of the most desirable frequency by the Radio Commission, and that NBC had denied them the use of its frequencies, in January 1934 the Watch Tower Society presented another petition to Congress. *The Golden Age* stated that the petition held 2,416,141 signatures, collected in the space of six weeks; they described the fifty-foot high pile of signature sheets, which came to 1,247

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[89] "Is this Strangling Free Speech?," *The Golden Age*, March 1, 1933, 329-330.
[90] "'Congress Shall Make No Law—'," *The Golden Age*, May 9, 1934, 493-495.

pounds when wrapped for shipment. "A careful search of records of the Brooklyn Public Library," the article noted, "fails to reveal that any petition remotely approaching this magnitude was ever before presented to the American Congress." By way of comparison, a 1910 petition by the National Woman Suffrage Association, the largest previous petition on record, had garnered half a million signatures. The Jehovah's Witnesses presented each congressman with the petitions from his own district. "Exercising the right guaranteed to us by the Constitution of the United States," they wrote, "we…respectfully petition the Congress to set at once to safeguard the inherent rights of the American people relative to the radio."

Jehovah's Witnesses were by no means the only group to complain about the Federal Communications Commission's power over radio regulation; nor were they the only ones to call it censorship. Labor groups in particular were often excluded from the airwaves; they protested, albeit ordinarily on the pages of the country's print press. The difficulty of defining "public interest, convenience and necessity" was recognized almost immediately.[91] The ACLU and other civil liberties groups protested what they viewed as censorship of the airwaves, forming a Radio Committee and protesting what they saw as institutionalized censorship in the very structure of the FCC, via Congressional lobbying and pamphlets.[92] In 1934, two sets of hearings explored the issue of radio censorship. From March 15 to 20, 1934, the House of Representatives Committee on Merchant Marine, Radio and Fisheries held hearings on the ill-fated McFadden Bill, which would

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[91] See, for example, "Radio Censorship and the Federal Communications Commission," *Columbia Law Review* 39, no. 3 (March 1939): 447-459.

[92] See Robert Waterman McChesney, *Telecommunications, Mass Media and Democracy: The Battle for the Control of U.S. Broadcasting, 1928-1935* (New York: Oxford University Press, 1995). The sociologists Vincent Roscigno and William F. Danaher examined the importance of radio in worker mobilization efforts. Vincent J. Roscigno and William F. Danaher, "Media and Mobilization: The Case of Radio and Southern Textile Worker Insurgency, 1929 to 1934," *American Sociological Review* 66, no. 1 (February 2001): 21-48.

have provided for the free expression by radio of minority political, educational, and religious groups' opinions.[93] Rutherford, in California because of his failing health, sent an affidavit in support of the bill, and instructed the lawyer Edward Wertz to speak at the hearings and represent the organization's interests. Oddly, although the Jehovah's Witnesses were certainly not the only group to have complained about radio censorship, they were evidently the only religious, educational, or charitable group to send a representative in support of the McFadden Bill.[94]

In October, the Broadcast Division of the Federal Communications Commission held another set of hearings, at which Rutherford himself appeared.[95] He complained that the FCC had denied the Watch Tower Society prime frequencies, and had rejected their appeals.[96] "Radio Station WBBR," he asserted, "was originally assigned a very desirable frequency. At the insistence of others that channel was taken away from it and a far less desirable channel assigned. Since then WBBR has operated under a handicap to the disappointment of many."[97] Rutherford argued that the issue was one of free speech and religion—speaking of "equal opportunity" and "discrimination," and asserting that other religious groups were trying to use the regulatory agencies and the threat of boycott.[98] "Religionists should not be denied an opportunity to express their views by

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[93] H.R. 7986, 73rd Congress, 2d session, p. 3543.

[94] As Hadley Cantril and Gordon Willard Allport (dismissively) wrote, "Despite the wide publicity given in advance to these hearings, it is significant that not a single representative of any political, charitable, or educational group or organization appeared in support of the bill, and the only testimony in behalf of it from any religious group came from a single propagandist organization which, by its own showing, was making extensive use of radio but had been refused certain network privileges." Hadly Cantril and Gordon Willard Allport, *The Psychology of Radio* (New York: Ayer Publishing, 1971), 58-60. See also "Other Items of Interest at the Hearings on the McFadden Bill," *Golden Age*, April 11, 1934, 429.

[95] H.R. 8301; Rutherford spoke on October 5.

[96] Watch Tower Society, *Complete Text of Testimony and Brief Before Federal Communications Commission Broadcast Division, Presented on behalf of Jehovah's Witnesses by the People's Pulpit Association.* Watch Tower Society Archives, Legal Department, Patterson, New York.

[97] Ibid., 7.

[98] Ibid., 27.

means of radio, nor should they be permitted to interfere with others' expressing themselves. Let all have a fair and equal show."[99] American constitutional liberties, he argued, required that "all organizations have an equal opportunity to employ the use of the radio and that none be excluded by reason of the views they hold…That every organization be free to give expression to its views without being subjected to censorship."[100]

Despite this performance, the 1934 Congressional hearings confirmed that regulation would remain in force, even in the face of censorship objections from the Jehovah's Witnesses and other groups. Perhaps because he recognized that the situation would not improve, and in part because he had developed an interest in other, newer technologies than radio (such as public amplification devices and portable phonographs), in 1934 Rutherford (rather uncharacteristically) announced that the Jehovah's Witnesses were voluntarily withdrawing from the airwaves. Alexander Macmillan later posited that Rutherford "felt by that time our purpose in using radio had reached its climax, and now a closer contact with the public was being sought."[101] It is likely that the invention and affordability of portable phonographs had something to do with this decision; these devices enabled individual Jehovah's Witnesses to present Bible lectures during their door-to-door work and "had decided advantages over the more impersonal method of reaching the homes through radio loudspeakers. Now we were able to answer questions that arose in the minds of the listeners and a much more effective presentation of our message was accomplished."[102]

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[99] Ibid., 29.
[100] Ibid.
[101] Macmillan, *Faith on the March*, 169.
[102] Ibid.

Out Nazi-ing the Nazis

The Jehovah's Witnesses, under Rutherford's instruction, were remarkably consistent in their insistence that even unpopular speech should be protected. They demonstrated their fidelity to this concept in the early 1930s by protesting so-called "anti-Nazi" legislation. Bills of this ilk were introduced in New York and New Jersey in 1934, and then in Massachusetts, Pennsylvania, and elsewhere. Perhaps the most well-known law of this type was one introduced in the New Jersey legislature by Assemblyman John Rafferty, who declared that the purpose of the law was to "prohibit the spread of propaganda inciting religious or racial hatred."[103] The laws were dubbed "anti-Nazi" laws or "gag laws." Introducing the bill, Rafferty spoke of religious liberty and freedom of worship, and asserted that the purpose of the bill was to protect religious people by preventing criticisms and assaults upon them. While civil libertarians opposed it, considering it dangerously misguided, it is likely that such legislation was created in good faith, and for good purposes—Nazi rhetoric seemed ever more menacing, and Assemblyman Rafferty was probably responding to his constituents' distaste for it. The bills were, however, vigorously protested by civil libertarians and other groups because of concerns that they might be used against labor groups, communists, and others whose views were unpopular.[104] Gresham Machen, the conservative Presbyterian theologian, wrote to the *New York Times* in 1934:

> This particular measure has been rushed through by being called an 'anti-Nazi bill.' It is rather to be called pro-Nazi, because it adopts the Nazi policy of denying freedom of speech. Certainly it is anti-American. Ought racial or religious groups to be protected from criticism or even

[103] For an account of the 1934 debates on the Rafferty Bill in the New Jersey Assembly, see Warren Grover, *Nazis in Newark* (Piscataway, New Jersey: Transaction Publishers, 2003), 88.

[104] "Reds Voice Fears of Anti-Nazi Bill," *New York Times*, April 24, 1934, 11; "Anti-Nazi Bill Held in Assembly," *New York Times*, April 25, 1934, 3.

> ridicule? We Protestant believers in the truth of the Bible have been subjected in recent years to about as much abuse and ridicule and misrepresentation as any other group in this country. But we certainly do not want legislative protection against such abuse. Truth flourishes in the long run not in the darkness but in the light.[105]

The Jehovah's Witnesses, for their part, declared that "The 'Anti-Nazi bill' out-Nazis the Nazis."[106]

Discussing the New York version of Anti-Nazi legislation, the Watch Tower Society accused, "If anything can exceed this for stupidity, short-sightedness and intolerance (under the guise of tolerance) it is the additional provision made in the New Jersey statute, aimed at the same thing, which makes it an offense to *possess* pamphlets, books or papers which may tend to subject persons or groups to shame, hatred, ridicule, etc."[107] Jehovah's Witnesses perhaps had special cause for concern—more than most civil libertarians and other religious groups, criticism of churches and creeds was central to their literature. Convinced that the Rafferty Bill was mere cover for the Catholic conspiracy against them, the Watch Tower sent their lawyer Karkus to a State Assembly meeting in Trenton to investigate, accompanied by Watch Tower director Hessler. "It is hard to find words to describe the scene in the Assembly chamber," Hessler wrote to Rutherford. "I'm wrong; it only requires one word to describe the scene perfectly: 'Babylon'."[108]

On the face of it, the Jehovah's Witnesses' opposition to such legislation was all the more remarkable because, by 1934, the group had encountered growing difficulty in Nazi Germany. Because ofto the Jehovah's Witnesses' overseas proselytizing, by 1933,

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[105] J. Gresham Machen, "The Joseph Bill," *New York Times*, April 27, 1934, 20.
[106] "'Why Burn Your House to Rid it of Rats?'," *The Golden Age*, May 23, 1934, 529.
[107] Ibid.
[108] "Records of Opposition," entry for April 13, 1934. Watch Tower Society Archives, Legal Department, Patterson, New York.

there were almost as many Jehovah's Witnesses in Germany as in the United States.[109] Several sociologists have demonstrated that the majority of Jehovah's Witnesses in Germany in the 1930s were working class people and peasants.[110] For reasons including their refusal to acquiesce to Hitler's demands, and their obstinate criticism of both state and churches, they were charged with being "subversive."[111] In February 1933, the Nazis had declared the Jehovah's Witnesses to be enemies of the state.[112] In April, police had occupied the Watch Tower Society's factory and Bethel in Magdeburg, Germany. "These so-called 'Earnest Bible Students' are trouble-makers," Hitler himself reportedly had said,

> they disturb the harmonious life among the Germans; I consider them quacks; I do not tolerate that the German Catholics be besmirched in such

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[109] *Jehovah's Witnesses in the Divine Purpose*, 128.

[110] M. James Penton, *Apocalypse Delayed*, 252ff. See Penton's note regarding the work of Bruno Bettelheim, Rudolph Hoess, and John S. Conway in determining the social origins of German Jehovah's Witnesses, p. 354. Penton pointed out that a "rather clear picture of the nature of the Witness community between 1933 and 1945 has been obtained from the documents of the Nazi concentration camps." Penton, *Apocalypse Delayed*, 255.

[111] Some critics of the movement, including ex-Jehovah's Witnesses, have suggested that the Jehovah's Witnesses' position in Germany in the early 1930s was not so clear cut. The former Jehovah's Witness James Penton, for example, asserted that the Jehovah's Witnesses tried compromising with the Nazis before standing up to them. James Penton, *Jehovah's Witnesses and the Third Reich: Sectarian Politic Under Persecution* (Toronto: University of Toronto, 2004). For a refutation of this argument, see Hans Hesse, ed., *Persecution and Resistance of Jehovah's Witnesses during the Nazi Regime 1933-1945* (Bemen: Edition Temmen, 2001). These arguments touch also on the question of Jehovah's Witnesses support for the Jews in Germany. Jolene Chu, an archivist for the Watch Tower Society, argued that, far from abandoning the Jews, the Watch Tower Society argued with the Hitler government in the early 1930s, stating that the Jehovah's Witnesses were politically neutral. Jolene Chu, "Purple Triangles: A Story of Spiritual Resistance," in *Judaism Today* 12 (Spring 1999): 15-19.

Over the years, the position of the Watch Tower regarding the Jews has certainly been variable, particularly regarding the place of the Jews, and Palestine, in the Armageddon and Kingdom of Heaven on Earth. See Charles Taze Russell, "Jews Not to Be Converted to Christianity," *Overland Monthly* 58 (August 1911): 171-5, quoted in Penton, *Jehovah's Witnesses and the Third Reich*, 7; Joseph Franklin Rutherford, *Comfort for the Jews*, 1925; Joseph Franklin Rutherford, *Restoration*, 1926; Joseph Franklin Rutherford, *Life*, 1929. Rutherford seems to have reversed his position in 1932 in *Vindication*, leaving him open to criticism for not supporting the Jews. In fact, Rutherford publicly equated Jewish businessmen with the disdained Big Business, shunning their practices and their collaboration with earthly governments. By the late 1930s, however, Rutherford expressed kinship with the Jews, "once Jehovah's covenant people," condemning Hitler's persecution of the Jews over the radio. See Chu, "Purple Triangles: A Story of Spiritual Resistance," 15-19. Chu also described Jehovah's Witnesses assisting Jews in Germany, and in the camps, to the extent they were able.

[112] Decree for Protection of the People and the State, February 28, 1933. See Chu, "Purple Triangles: A Story of Spiritual Resistance," 15-19.

> a manner by this American 'Judge' Rutherford. I dissolve the 'Earnest Bible Students' in Germany; their property I dedicate to the people's welfare; I will have all their literature confiscated.[113]

Alerted about the increasingly dire situation of their brethren in Germany, the Watch Tower Society appealed to the State Department (on the basis of what they called "international property rights") and for a time the German government returned the Society's property to the brothers there. The ban on preaching, however, was not lifted, and penalties for such activities were between a year and five years in prison.[114] At the June 1934 convention in the United States, a Declaration of Facts was read in protest of the Hitler government; in keeping with Rutherford's style, this Declaration was mailed to every high officer of the German government and publicly distributed there. In retaliation, the Gestapo again seized the Society's property, seizing the Jehovah's Witnesses' printing plant there and burning 25 truckloads of Bibles and Watch Tower literature.[115]

Despite the worsening situation for Jehovah's Witnesses in Germany, the Watch Tower leadership's condemnation of Anti-Nazi legislation was entirely consistent. During this era, the necessity of defending religious and civil liberties took on an added urgency for the Jehovah's Witnesses; increasingly, as the world situation deteriorated, they employed the rhetoric of America as a beacon of hope, the proverbial city on a hill to be an example of religious liberty for the rest of the world. When the Rafferty Bill was halted in 1934—thanks in large part to a vigorous letter-writing campaign by the ACLU—the Jehovah's Witnesses rejoiced. "'Eternal vigilance is the price of liberty,' will be true as long as the Devil is still rampant in the world. When he is bound and put

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[113] Ibid., 130.
[114] Beckford, *Trumpet of Prophecy*, 33.
[115] Chu, "Purple Triangles," 16.

out of business the people will no longer need to fear that their most elemental liberties will be taken from them."[116] The Watch Tower Society demonstrated their commitment to the ideals of free speech and press—and their understanding that, if civil liberties were curtailed for one group, they might easily be restricted for others. Indeed, Rutherford and his associates proved strangely prescient regarding Anti-Nazi legislation. When the New Jersey State Assembly did pass a newly-proposed Anti-Nazi bill in 1935, for years the sole prosecutions under the law were not Nazis at all, but Jehovah's Witnesses.[117]

Aside from religious and civil liberties groups' protests, the melee over the Anti-Nazi bills was perhaps less indicative of a Catholic or capitalist conspiracy than of two vastly differing visions of civil liberties—be they religious, speech, or press rights. American Civil Liberties Union lawyers expressed fear that such Anti-Nazi legislation would open the floodgates, leading not to a curtailment of Nazi propaganda, but to prosecution of labor and economic radicals. Regarding the Rafferty bill, the Watch Tower's Charles Hessler wrote that it "is destructive of the freedom of speech, freedom of press, and freedom of action. It is…hypocritical."[118] On the other hand, it is nearly certain that lawmakers introduced such legislation in good faith; it was necessary to restrain the speech of one group, so the argument went, in order to guarantee the rights of others. The Jehovah's Witnesses' characterization of such legislation as "stupid, short-sighted, and intolerant" pointed to the expansive view of civil liberties they professed. In the 1930s, the American Civil Liberties Union also grappled with the idea that all speech—no matter how obscene, provocative, or hate-filled—should be protected.

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[116] "'Why Burn Your House to Rid it of Rats?'," *The Golden Age*, May 23, 1934, 529.

[117] Grover, *Nazis in Newark*, 90. Arthur Garfield Hays, the ACLU attorney, also alluded to this.

[118] "Protest Against Enactment of Committee Substitute for Assembly Bill No. 272," *The Golden Age*, June 20, 1934, 579.

Similarly, the Jehovah's Witnesses argued that any attempt to curb the rights of one group in order to assist others was bound to create more problems than it solved. As the success of Anti-Nazi legislation in several states shows, this was not a generally accepted view a mere decade and a half after the First World War. Thanks to groups like the ACLU and the Watch Tower, however, this expansive view of civil and religious liberties would become increasingly acceptable to the mainstream—and the courts.

The consistency of the Jehovah's Witnesses' position on civil liberties is perhaps not surprising, given their frequent warnings about hypocrisy. It was easy, the Jehovah's Witnesses argued, to protect speech with which one agreed. Much more difficult—but perhaps more essential—was the protection of minorities and unpopular groups from the opinions of the majority. Just as in the First World War, they protested, their publications and speech were being used against them. "In effect, *The Golden Age* was on trial," the group had written during the Plainfield campaign.[119] In the early 1930s, Rutherford and his group were far more autonomous and self-directed than most people and organizations supported by civil liberties organizations such as the ACLU and the NAACP. They formed their own legal defenses and strategies, after careful consideration of their goals and rights. The association between Rutherford and the Jehovah's Witnesses, and the newly-formed civil liberties advocacy groups, had yet to be forged. To some extent, the pattern of Rutherford's refusal of other groups' help persisted until the mid-1930s. The Jehovah's Witnesses thought they themselves could best advocate for their own religious liberty—and for the rights of others to the same freedoms. To a remarkable extent, as the next ten years would show, they were right.

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[119] "Insulting Jehovah at Plainfield, New Jersey," *The Golden Age*, July 19, 1933, 643-660.

Chapter IV: Legal Strategy: The Involvement of the ACLU

Another group had, since the First World War, endorsed the rights of unpopular minorities to voice their opinions. The American Civil Liberties Union, founded in 1920 by a tenuous coalition of liberal Protestants, Socialist sympathizers, and "damned Jew lawyers," had pursued a generous definition of civil liberties.[1] Founder Roger Baldwin, reminiscing about his long career, recalled an encounter with Jehovah's Witnesses (then still called Bible Students) just after the ACLU's establishment. "One day I got a telephone call—this must have been in the early or mid-1920s," remembered Baldwin, "from the Brooklyn headquarters of the Witnesses, advising me that their head, Judge Joseph Rutherford, would like to call on me."

> An appointment was arranged. Judge Rutherford appeared at my office with a retinue of women followers—the very picture, I presume, of Jehovah Himself to his faithful—tall, benign, courteous, dressed in spats and a cutaway with wing collar, and carrying a goldheaded cane.[2]

Judge Rutherford, Baldwin related, took over the office as if it were his own, wasting no time. "He made his mission clear at once," Baldwin recalled, saying,

> 'I have come to see you to express our appreciation of what you are doing to help our people,' he said. 'I want you to be able to continue it without cost, and so would like to make a contribution for that purpose.' I explained that it was our business to help anyone get civil rights and that our supporters expected us to use their money for that. 'No, no,' he said. 'I don't want you to tax them for us.' He then turned to his secretary and asked if they had any money in the bank. The secretary thought they had. 'Well, in that case,' he said, 'write out a check for a thousand dollars for Mr. Baldwin, and send him another when he asks for it.' I was somewhat

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[1] Arthur Garfield Hays, for example, was referred to more than once as "that damn Jew lawyer from New York"; see article by the labor journalist McAlister Coleman; Arthur Garfield Hays Papers, Box 1, Folder 13, "Correspondence"; Department of Rare Books and Special Collections, Princeton University Library.

[2] Baldwin also described (with great relish) having lunch at the Brooklyn Bethel sometime in the early 1930s. Roger Baldwin, Unpublished Autobiography (Galley Proofs); Roger Baldwin Papers, Box 21, Folder 3, "Writings—Autobiography—Galley Proof"; Public Policy Papers, Department of Rare Books and Special Collections, Princeton University Library.

> taken aback, but, not being in the habit of refusing honest money for the cause, I accepted it.[3]

The scene predated an intensive cooperation between the ACLU and the Watch Tower Society. Because the Jehovah's Witnesses had already formulated a strategy of defense and litigation, their association with civil libertarians would be collaborative, rather than being based on simple advocacy. Despite their differing worldviews, this relationship would prove to be momentous.

The ACLU and Bible Student Claims

Civil libertarians, including Baldwin and members of the nascent ACLU, had been impressed by the Bible Students' behavior in the detention camps during the First World War; they had noted the raids on Bible Student headquarters and the seizing of Watch Tower literature. ACLU interest in Jehovah's Witnesses did not end with the cessation of "wartime hysteria." The ACLU wrote to the Watch Tower Society regarding the 1931 Jehovah's Witness arrests in Pennsylvania, for example, assuring the group repeatedly that they were "deeply interested" in the cases. "We read with amazement," the ACLU's Forrest Bailey wrote to *The Golden Age* editor Clayton Woodworth during the Pittston campaign, "of the arrest of yourself and a number of your associates on a charge of distributing seditious literature. We do not understand how sedition can be charged against you on the basis of pamphlets attacking Catholic priests and their Church. Will you please explain this mystery to us?"[4] Woodworth thanked Bailey for a "very fine letter," promising a statement about the arrests "which we are sure will be of interest to the broad-minded, intelligent Americans that constitute your valuable, useful

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[3] Ibid. Evidently, the meeting made enough of an impression on Baldwin that he also remembered it some fifty years later—he related this story to Peggy Lamson, his autobiographer, in a 1973 interview. Interview Transcripts, Peggy Lamson Collection on Roger Baldwin, Box 1, Folder 1, "ACLU, ca. 1973; Public Policy Papers, Department of Rare Books and Special Collections, Princeton University Library.

[4] Forrest Bailey to Clayton Woodworth, September 25, 1931; ACLU Records, Reel 86.

and powerful organization." With complements, however, he declined the ACLU's offers of assistance. "Our legal interests," Woodworth wrote, "are being well looked after and therefore we will not need to take advantage of your exceedingly kind offer."[5]

Woodworth did send a statement describing the arrests in Pittston and Swoyersville to the ACLU, when the Jehovah's Witnesses decided to file suit seeking damages for unlawful arrests. Woodworth and his associates had been apprehended, they contended, for "giving the people an opportunity to obtain at their own doors some of Judge Rutherford's wonderful lectures on the Scriptures," even though the right to do so was "guaranteed by the fundamental law of the United States, as well as of the State of Pennsylvania." The local authorities were, Woodworth asserted, attempting to "rule without law and in disregard of the Constitution." Woodworth enclosed a copy of *The Golden Age* the Jehovah's Witnesses had been distributing, which decried "clerical racketeers," corrupt politicians, and the war. "Now we leave it to the law-abiding public," he concluded, to decide "if there is anything in any of those paragraphs that should seriously disturb anybody except those that are making a living from the rackets named."[6] The ACLU replied that the organization's lawyers "deeply appreciate your letter…and the copy of Mr. Woodworth's report. The story as revealed in the report is even more fantastic than the first information we had indicated that it would be. It is gratifying to know that your twenty-three defendants have turned plaintiffs and are suing

[5] Clayton Woodworth to Forrest Bailey, October 1, 1931; ACLU Records, Reel 86. A representative of the Pennsylvania Civil Liberties Committee eventually headed to Wilkes-Barre for the trial anyway, because of the organization's "interest in the matter"—although Pennsylvania CLC lawyers eventually decided that the case wasn't terribly important. Allan Harper to Forrest Bailey, October 2, 1931; Correspondence between Allan Harper and Forrest Bailey, October, 1931; ACLU Records, Reel 86.

[6] *The Golden Age* to the American Civil Liberties Union, March 30, 1932; "Illegalities at Pittston and Swoyersville," statement submitted to the ACLU in March 1932; ACLU Records, Reel 95.

for the heavy damages that their treatment by the authorities deserves."[7] This was a key development in the group's litigation strategy. It is not clear where they got the idea, but what is certain is that the ACLU was very interested in these tactics.

In early 1933, an ACLU secretary wrote to ask what had happened in the Pittston cases.[8] The trial had been delayed, Woodworth replied, "by the probable treachery of our local counsel of record"—but they had retained a new trial attorney, Harry McCaughey of Philadelphia, to "present one of the most amazing tales of bigotry ever unfolded in this country."[9] Woodworth soon approached the ACLU's Executive Secretary Lucille Milner, tasked with collecting information on civil liberties throughout the country. "Thank God," Woodworth wrote, "there are still a few Americans. We are glad to hail you as such." Describing the situation in New Jersey, Woodworth asked Milner, "Have you been taking notice of what they have been trying to do to us at Bergenfield? Arthur Goux, here in our office, has the full story of the fifteen times our folks have been jugged there, for nothing. The ostensible excuse is that we refuse to ask police permission for the exercise of a right. One of our folks is now suing the entire Bergenfield crowd of conspirators for $10,000 damages."[10] The ACLU, Milner replied, would be happy to assist if Goux came to their offices in New York, or sent a report.[11] A few weeks later, in fact, Milner wrote to Goux himself to ask him to come in or to send a memorandum of the situation. "Perhaps," she suggested, "we can be of some service over there."[12]

Religious Liberty and Civil Liberties

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[7] ACLU Director to the *Golden Age*, April 1, 1932; ACLU Records, Reel 95. The ACLU also continued to collect newspaper clippings about the Jehovah's Witnesses' arrests—as they did about a wide range of issues of civil liberties interest. See, for example, ACLU Records, Reels 101, 103.

[8] ACLU Secretary to *The Golden Age*, March 8, 1933; ACLU Records, Reel 103.

[9] Clayton Woodworth to ACLU Secretary, ACLU Records, Reel 103.

[10] C.J. Woodworth to Lucille Milner, [1933?]; ACLU Records, Reel 103.

[11] Lucille Milner to Clayton Woodworth, March 15, 1933; ACLU Records, Reel 103.

[12] Lucille Milner to Arthur Goux, March 30, 1933; ACLU Records, Reel 103.

The ACLU's interest in the cases, however, is not evidence of a clear policy regarding religious liberty. In fact, the civil liberties organization was much slower to develop a coherent approach to religious liberty than they were to organize their views on free speech. The organization did take the firm position that they would defend free speech, no matter what the contents of that speech. In a battle that spanned several years, for example, the ACLU defended a Reverend Robert Schuler, a well-known anti-Semite, when he was denied renewal of his radio license by the FCC. "The American Civil Liberties Union," they wrote, "is devoted to the maintenance of free speech for all, without regard to race, creed, political or religious beliefs."[13] The hard line in relation to free speech, however, was not matched in the organization's approach to religious liberty. "We had our troubles," Baldwin later wrote, "in defining the limits of religious freedom."[14]

The ongoing debate over religious instruction in the public schools, for example, was by no means resolved even within the ranks of the ACLU in the 1930s.[15] "By the way," Roger Baldwin had written to Lucille Milner in the mid-1920s, "get hold of all the stuff that has been written or printed in opposition to the compulsory Bible reading laws….with a summary of the arguments on both sides. Even our good friends in Calif. aren't sure it isn't a good thing."[16] In the late 1920s, the executive board agreed that the "separation of church and state is a fundamental consideration in determining academic freedom issues related to religious practices in the schools." However, the group did not

[13] ACLU Records, Reel 87.

[14] Roger Baldwin, Unpublished Autobiography (Galley Proofs); Roger Baldwin Papers, Box 21, Folder 3, "Writings—Autobiography—Galley Proof"; Public Policy Papers, Department of Rare Books and Special Collections, Princeton University Library.

[15] "Brief Against Bible-Reading in Schools is Filed," 1931; ACLU Records, Reel 32.

[16] Roger Baldwin to Lucille Milner, July 14, 1926; ACLU Records, Reel 44.

agree that Bible reading for "other than religious purposes," or even sectarian religious instruction under the school time release system (under which public school students were released for religious instruction during the school day) were violations of civil liberties.[17] Even when Baldwin and others asserted that the sectarian religious instruction under the school-time release system was "reprehensible"—as Dr. Harry Ward put it—many agreed that it was "not within the scope of the Union's interests."[18] Several other religious liberty issues concerned the ACLU in the early 1930s, including the disqualification of atheists as court witnesses and laws regarding the teaching of evolution in public schools.[19]

Most often, the ACLU dealt with religious liberty in the arena of academic freedom—rather than confronting the broad free exercise claims the Jehovah's Witnesses sought. In late 1931, the ACLU executive board made the discussion of academic freedom issues a special order of business. While they pronounced that the separation of church and state was "a fundamental consideration," the board affirmed that Bible reading for other than religious ends was not a civil liberties issue unless it was made compulsory, and that sectarian religious instruction under the "school time release" system did not "per se raise civil liberties issues."[20] In 1932, the board had significant arguments over what, exactly, was the intersection of civil and religious liberty. "The

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[17] ACLU Records, Reel 88.

[18] Roger Baldwin to Edward Mills, January 21, 1932; ACLU Records, Reel 88.

[19] B.H. Hartogenesis to Lucille Milner, February, 1931; ACLU Records, Reel 81; Public Policy Papers, Department of Rare Books and Special Collections, Princeton University; See alsoHartogenesis to various ACLU lawyers, 1932; ACLU Records, Reel 90. These concerns are indicated by the clippings kept meticulously by the ACLU during these years. ACLU Records, Reel 89.

The ACLU also compiled a list of Sunday closing laws in each state, although it is not clear that anyone pursued an organized campaign against these statutes before the 1960s. "Sunday Closing Laws"; ACLU Records, Reel 86. There was some evidence that these laws were losing their hold in many areas of the United States without a judicial campaign. "All U.S. Swings to Liberality," *Variety*, June 2, 1931, ACLU Records, Reel 82.

[20] Minutes, Board of Directors, November 30, 1931; December 7, 1931; ACLU Records (Supplementary Series), Reel 3.

effect of these decisions," Lucille Milner wrote, "is to prevent our taking action on the issues involved excepting where, in specific cases, a clear violation of religious freedom is recognized. In other words, we do not take a general position but scrutinize each case on its merits." Moreover, the group rarely discussed extending religious liberty via the Fourteenth Amendment, largely confining their approach to reliance on state constitutional provisions. As late as 1934, a proposed conference on civil liberties issues—titled "Civil Liberties under the New Deal"—did not even mention religious liberty—although free press, radio, and movies, and labor, farmers', negro, Indian, and other group rights were included.[21]

As Harmless as Doves and With the Boldness of the Lion

Perhaps because of their singularity of focus, by the 1930s, Rutherford and the Jehovah's Witnesses had worked out a schema for religious and civil liberties. All that was required, they asserted, was the right to preach—and necessary to this was the range of Jehovah's Witness activities such as door-to-door work, leafleting, and radio broadcasts. "The witnesses of Jehovah have no fight with human creatures," Rutherford declared to a packed Los Angeles auditorium in January 1935.[22] "They are not seeking trouble, but are giving testimony in obedience to God's commandment, and thus they worship the Almighty God." Addressing the opposition to their work, Rutherford stressed that the group expected to be "viciously assaulted by Satan and his agents," in the face of which they "will go on with their work fearing neither man nor devil." He predicted that

[21] Memorandum by American Civil Liberties Union, July 25, 1934, "Civil Liberty Under the New Deal"; Arthur Garfield Hays Papers, Box 2, Folder 11; Department of Rare Books and Special Collections, Princeton University Library.

[22] Joseph Franklin Rutherford, "Universal War Near," speech delivered January 13, 1935, at Shrine Auditorium, Los Angeles, California. Reprinted in *The Golden Age*, February 13, 1935, 291-302.

> The lawmakers of the nations, goaded on by their religious allies, will continue to make laws to suppress the proclamation of the truth, and this they will do at their own peril, because they have been warned. The courts will continue to side-step the issue and render decisions contrary to the fundamental law of the land and in violation of God's holy law, and thus they participate in opposing and suppressing the truth.

"Regardless of this," Rutherford declared, "Jehovah's witnesses will go on in their work, as harmless as doves and with the boldness of the lion."[23]

To supplement the radio broadcasts, in 1934, Rutherford implemented the use of portable phonographs to play his speeches. The use of stationary transcription machines (electrical amplifiers of sorts, used to play lectures to large audiences) continued, and the group attached sound equipment to cars and boats—making "sound cars" and "sound boats" to spread the Kingdom message. The door-to-door work continued. The Watch Tower leadership instructed members exactly what was required of them, in publications such as the *Director for Field Publishers*, published monthly. "The time has come," publishers were instructed, "when unity must exist in all the Lord's organization; and this can come only from strict adherence to organization instructions, which are not discretionary but entirely mandatory."[24]

Although there is no doubt that Jehovah's Witnesses sought to spread the good news of God's Kingdom on Earth amongst their fellow men, Watch Tower publications also spoke in adversarial terms, emphasizing the proximity of Armageddon. "Everywhere the enemy is girding for battle," the Watch Tower leadership wrote,

> desperately striving to stem the onward march of the Kingdom. The answer of the anointed to this challenge is to push the battle to the gate with ever greater determination than ever before, not by looking for

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[23] Ibid.

[24] *Director for Field Publishers*, Special October Issue [1935], 1; Watch Tower Society Archives, Writing Department, Brooklyn, New York.

> something new, but by taking the message the Lord has supplied us, which, at the present time, is the *Government* booklet.[25]

The battle referred to, of course, was the last battle on earth. Yet the Jehovah's Witnesses were also girding for battle in the earthly courts.

Despite his influence on their tactics of civil disobedience and understanding of their rights, Rutherford's larger agenda precluded his managing Jehovah's Witnesses' legal strategy directly. For years, as the number of arrests had grown, Rutherford had corresponded with local lawyers (both Jehovah's Witnesses and "worldly" lawyers) about cases in the "hot" territories.[26] In 1935, Rutherford created a Legal Department in Brooklyn; he recruited Olin Moyle, an energetic lawyer from Wisconsin, as its head. "I hope," Rutherford wrote to Moyle, "we will not have to fight law suits much longer but we never can tell."[27] In fact, during the 1930s the legal campaign would play a significant role in the operations and trajectory of the Society—and in understandings of civil liberties under the Constitution as well.

Establishing the Good News

Olin Moyle, who would lead the Watch Tower Society's legal department during its crucial formative years, was a lawyer who practiced in southern Wisconsin. Born in 1887, Moyle had become a Bible Student sometime before the First World War.[28] He

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[25] *Director for Field Publishers*, November, 1935, 1.

[26] While few of these letters survive, Rutherford's 1935 correspondence indicates that he had been conversing with local lawyers for some time. See, for example, Rutherford's reference to having coordinated several trials with Illinois attorney Edward Wertz. In another context, Rutherford referred also to having made suggestions to "one of our attorneys in the east." Correspondence between J.F. Rutherford and Olin Moyle, February and March, 1935; Olin R. Moyle Papers, Box 1, Folder 15; Department of Rare Books and Special Collections, Princeton University Library.

[27] J.F. Rutherford to Olin Moyle, February 9, 1935; Olin R. Moyle Papers, Box 1, Folder 15.

[28] Very little is known about Moyle's life before he moved to New York. He published no biography, and his papers consist almost entirely of legal and Watch Tower service related materials. While his character as a lawyer and as a servant of the organization is easier to flesh out, then, of his personal life, little but the basics is currently known.

was living in Wauwatosa, Wisconsin, with his wife and son, when Rutherford called him to service at the Brooklyn Bethel, to head the newly-formed Legal Department. Moyle had felt called to service while living in Wisconsin, and had approached his work for the Kingdom with zeal. His wife, Phoebe, and his son, Peter, joined him in the canvassing work, despite the apparent difficulty of finding people with interest in the Bible Student message. Beginning his "Diary of Kingdom Service," Moyle summarized the previous decade's experience for his family:

> The year 1922 was a high spot for us in Kingdom Service. We returned from the Cedar Point Convention enthused and stirred to wide activity. The nine years following were long ones. We did our part in various campaigns but visible results were not noticeable. In 1931 there came a change. Results began to appear. It was a noticeable year. A remarkable one.[29]

In addition to the heartening response to the Kingdom message, Moyle simultaneously noted increasing confrontations with the authorities over the door-to-door canvass and the transcription machine work.[30] As in New Jersey and Pennsylvania, Jehovah's Witnesses gathered at contact points and proceeded to assigned territories in a quick and orderly fashion. Moyle described a 1933 "special campaign" in a small Wisconsin town "where police had been annoying a pioneer worker….The police called but retired without making arrests. We can feel somewhat proud over this."[31] The year 1933, he recalled, "marked a rising tide of opposition to the truth. Arrests and persecution in many cases."[32]

Although Moyle's previous work had mainly been in transactional law, the fact that he was an attorney at all meant that, when the trouble started, he was in a position to

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[29] "Kingdom Journal of O.R. Moyle"; Olin R. Moyle Papers, Box 2, first volume, p. 1.
[30] See entry for October 1933, ibid.
[31] Entry for "Resume of 1932-1933," ibid.
[32] Ibid.

assist Jehovah's Witnesses who had been arrested. "And so it happened," Moyle's son Peter later recorded, "that the legal talents of Olin R. Moyle were called upon in various communities of northern Illinois and southeastern Wisconsin, to defend Witnesses caught up in sundry municipal ordinances."[33] Moyle assisted scores of Jehovah's Witnesses in Wisconsin and Illinois courtrooms.[34] In an Oak County (Illinois) Criminal Court case in 1933, for instance, a Sister Sakelson had been charged with peddling the *Golden Age* on a Sunday. When the city attorney passed up the magazine, the judge said, "That isn't peddling," and dismissed the suit on the spot. The city attorney continued to argue, until the judge "got more excited. Jumped out of his chair. Repeated 'suit dismissed' several times. Said 'Peddling religious literature in holy city of Oak Park. Humph.' Also: 'We haven't any blue laws anymore'."[35] Such affirmations must have heartened Moyle, who was taking on more and more of these cases. When Jehovah's Witnesses were convicted, Moyle urged the necessity of appealing. "Another court battle fought in the interests of the truth," Moyle reported in March 1934. "The judge did fairly well in the rulings," he wrote. "Most of our testimony went in." Yet the verdict was guilty, and Jehovah's Witness Edward Howard was fined $25 for distributing handbills. Moyle went to Chicago to prepare appeal papers, vowing, "We go to the Supreme Court on this job."[36]

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[33] Peter Moyle, "Moyle v. Theocracy: The Tarnished Armour of Jehovah's Witnesses." Unpublished Manuscript; Olin R. Moyle Papers, Box 1, Folder 10.

[34] As Moyle himself remembered these years, "I appeared in defense of the brethren before courts at Phillips, Wisconsin; Oshkosh, Wisconsin; Wheaton, Ill.; River Forest, Illinois, and Oak Perch, Ill. Learned much about the lawlessness of events in the area of Chicago." Resume of 1932-1933, "Kingdom Journal of Olin Moyle"; Olin R. Moyle Papers, Box 2, first volume, p. 2. Moyle's arguments were, evidently, persuasive enough to free some defendants. Additionally, judges occasionally dismissed cases against Jehovah's Witnesses for want of proper ordinances, or because peddling ordinances had been improperly applied.

[35] Entry for November 10, 1933, "Kingdom Journal of Olin Moyle"; Olin R. Moyle Papers, Box 2, first volume, p. 2.

[36] The Supreme Court of Illinois transferred the case to the Appellate Court in December 1934, saying that they had no jurisdiction in the case. *City of Wheaton v. Howard*, 358 Ill. 432, 193 N.W. 536.

Accounts of arrests and legal proceedings dominated Moyle's journal by 1935. "Trials were a farce and a travesty," he wrote of proceedings involving fifty-three Jehovah's Witnesses arrested outside Chicago in January 1935. "There was a complete lack of evidence of disorderly conduct on the part of the J.W.'s."[37] It was likely Moyle's zeal in defending Jehovah's Witnesses that brought him to Rutherford's attention. In June 1935, Moyle recorded in his journal that "Judge R. again suggested coming to Brooklyn to take charge of legal affairs. There was much discussion and correspondence, + some fear over breaking up the home ties. The wrench was finally made and things moved with remarkable swiftness."[38] The Moyles sold the Wisconsin law practice and their house, getting rid of most of their personal property "ridiculously cheap." Olin and Phoebe spent May in Illinois with Peter; the three attended the Washington convention of Jehovah's Witnesses, and then moved into the Brooklyn Bethel on June 4th. After agreeing that Moyle could best serve the organization by moving to Brooklyn, Rutherford and Moyle had discussed positions for Phoebe and Peter at Bethel. Peter eventually continued in the Kingdom Service, with which he was pleased, but Phoebe was assigned to housekeeping work, about which she became increasingly unhappy. Peter Moyle later speculated that, because Rutherford and Moyle had already been corresponding closely about legal cases, Moyle's transition to Bethel was "a minor thing." In contrast, "[f]or the family…it was quite an adventure and for the wife it was quite an adjustment."[39]

The Appellate Court of Illinois (Second District) affirmed the conviction in March 1935. *City of Wheaton v. Edward Howard*, Not Reported, in N.E. 279 Ill.App. 648 (1935).

[37] Entry for January 7, 1935, "Kingdom Journal of Olin Moyle"; Olin R. Moyle Papers, Box 2, first volume.

[38] Entry for June 4, 1935, ibid. Letters, February-March, 1935, between J.F. Rutherford and Olin Moyle; Olin R. Moyle Papers, Box 1, Folder 15.

[39] Peter Moyle, "Moyle v. Theocracy"; Olin R. Moyle Papers, Box 1, Folder 10.

Moyle was dedicated to the Watch Tower, however, and to Rutherford; he attempted to smooth his family's misgivings while maintaining a rigorous work schedule at the legal department. Rutherford had expressed optimism that opposition would subside, assuring Moyle before he had even moved that, "Of course, all your time will not be occupied in legal matters and I will find something else for you to do between times."[40] This expectation, however, proved to be erroneous. The day after he arrived in New York, June 5, Moyle began work, attending a trial in Jersey City. Karkus, the "Hebrew lawyer" who had been retained by the Jehovah's Witnesses since the arrests in 1928, argued the case; his performance did not impress Moyle. "Not a good statement of defense made," Moyle complained. "Karkus aroused needless antagonism in needless cross examination of a small girl. [The defendant] was evasive in answers and did not create a favorable impression. Much needless argument over whether he had attended a theological school."[41] Throughout June and July, Moyle attended trials in New York, New Jersey, and Pennsylvania, involving sound cars, door-to-door work and disorderly conduct charges. Describing cases in Jersey City, Edgewater, Cape May, Roseland, White Plains, Plainfield, and Coatesville, Moyle repeatedly noted the need to "make up a good record" for the appeals he intended to pursue.

Indicating a legal strategy of some breadth, Moyle informed Rutherford of court cases state by state. There was, indeed, little to support Rutherford's professed hope that the legal battle might soon be over. "Of all persons on earth," Rutherford began an August 1935 memo to all publishers, "it is your special privilege to make known the name and kingdom of Jehovah God." Acknowledging that in "performing this service

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[40] J.F. Rutherford to Olin Moyle, March 13, 1935; Olin R. Moyle Papers, Box 1, Folder 15.

[41] Entry for June 5, 1935, "Kingdom Journal of Olin Moyle"; Olin R. Moyle Papers, Box 2, first volume.

you may be required to suffer some inconvenience and persecution at the hands of the enemy and his agents," Rutherford reminded his followers that "Armageddon is near, and we must bestir ourselves in the interest of the King's business. Fully united under the leadership of Christ Jesus you are invulnerable to the attacks of the enemy." Concluding this missive with a note of encouragement, he urged his followers to "Be very courageous, and may the blessings of the Lord attend you richly."[42] As conflicts with authorities continued, Rutherford dedicated the organization to fighting these battles vigorously, not only on the streets, but in the courts as well.

Perhaps because of Moyle and Rutherford's knowledge of the law, the relationship between the Watch Tower Society and other lawyers was never a simple one. When Moyle complained that one hired attorney's work was substandard, for instance, Rutherford explained that he had only hired the lawyer because on "two or three occasions he has been the only worldly lawyer that I could get to even listen to me to prepare a brief the way I thought it should be."[43] Watch Tower lawyers would soon work not only with local "worldly" lawyers, but also with attorneys of the ACLU and other organizations. Far from simply being clients, however, the Jehovah's Witnesses brought to the table their own legal agenda and plans. In the 1930s, Rutherford and Moyle sought an alliance with the ACLU—provided that it was an equal partnership, and that the Jehovah's Witnesses' values were not compromised in the process.

Religious Liberty as a Civil Right

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[42] Memorandum from J.F. Rutherford to Jehovah's Publishers, August 28, 1935. Watch Tower Society Archives, Legal Department, Patterson, New York. Folder: "Federal Government – Senate Subcommittee – Constitutional Rights."

[43] J.F. Rutherford to Olin Moyle, March 24, 1935 and April 1, 1935; Olin Moyle to J.F. Rutherford, March 27, 1935; Olin R. Moyle Papers, Box 1, Folder 15. Regarding the hiring of worldly lawyers, see entry for August 14 + 15, "Kingdom Journal of Olin Moyle"; Olin R. Moyle Papers, Box 2, first volume; Olin Moyle to J.F. Rutherford, August 16, 1935; Olin R. Moyle Papers, Box 1, Folder 15.

"Mr. Roger Baldwin, of the Civil Liberties Union, asked me to remember him to you," Moyle wrote to Rutherford in late 1935. "Said he recalled a very pleasant visit with you about ten years ago."[44] The opportunity for such a partnership emerged with two issues which brought Jehovah's Witnesses to mild national prominence in the mid-1930s. One was the passage, in April 1935, of a revived "Anti-Nazi" law by the New Jersey legislature; the other was the decision by Jehovah's Witnesses to cease saluting the American flag.[45]

The New Jersey law criminalized the distribution and publication of literature "creating or tending to create hatred, violence or hostility against people…by reason of their race, color, religion or manner of worship"—and was widely termed the "Anti-Nazi" bill after the group it was ostensibly intended to target. To the dismay of some civil libertarians, the bill had been supported by some Jewish groups.[46] Distressed, the ACLU (whose vigorous campaign had defeated a similar measure in 1934) condemned the law as "more sweeping in its threat to free speech than any measure ever passed in any state."[47] The ACLU's opposition to such bills had engendered criticism; assuming that this was evidence of Nazis sympathies, hundreds withdrew their support for the

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[44] Olin Moyle to J.F. Rutherford, November 22, 1935; Olin R. Moyle Papers, Box 1, Folder 18.

[45] The Rafferty Anti-Nazi law was the first of several such bills proposed in the states. The ACLU became increasingly concerned the following year over a similar (if not farther reaching) bill proposed by Senator Schwartzwald in New York. See ACLU Records, Reel 132.

[46] The opinions of Jewish organizations on such bills varied. The American Jewish Congress, perhaps the most powerful of the Jewish religious organizations in the mid-1930s, led by Rabbi Stephen Wise, supported Anti-Nazi legislation despite repeated warnings from the ACLU. The American Jewish Committee, on the other hand, had agreed with the ACLU. "As Americans and Jews," Morris Waldman had written, "our first duty is to protect the Constitutional rights of free speech and free press, believing as we do that whenever and wherever these democratic principles are abridged and destroyed the security and safety of society are imperiled." Letter, February 20, 1936, from Morris Waldman to Florina Lasker; ACLU Records, Reel 132.

[47] American Civil Liberties Union, Press Release, April 10, 1935; ACLU Records, Reel 125. In fact, fourteen such bills ("gag laws") were passed that year, of seventy-five odd bills introduced. More than two dozen pieces of federal legislation—mainly aimed at Communists—were introduced, although none was passed by Congress. American Civil Liberties Union, Press Release, September 27, 1935; ACLU Records, Reel 125.

organization.[48] The ACLU countered that anti-Nazi legislation threatened to quash the freedom of speech.[49] Nazis and other fascist sympathizers had attracted a number of followers in New Jersey, and nobody at the ACLU wanted their rhetoric to be distributed widely; yet civil libertarians worried that a "gag law" not only quashed Nazi speech, but could and would be used against other groups. Augmenting their worry, it seems, was the fact that one assemblyman who had helped to push the bill through was quoted saying, "The bill is much more than an anti-Nazi bill. It is a proposal to stop the persecution of anybody on account of his or her religion whether that person be Jew, Catholic or Protestant. It is a law that is badly needed in New Jersey where bigotry and foes of religion have been spreading their propaganda at an alarming rate."[50] The ACLU published a pamphlet (which they would reprint for the next decade) decrying "gag laws," entitled "Shall We Defend Free Speech for Nazis in America?"[51]

The answer, from 1934 on, was yes. "We shall test the constitutionality of the measure as soon as possible," Roger Baldwin vowed, "and are confident that it will be upset as a violation of the New Jersey bill of rights."[52] ACLU lawyers discussed

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[48] ACLU Records, Reel 108.

[49] Long before the Nazis came to Skokie, Illinois, in the late 1970s, the ACLU opposed limits on Nazi or any other speech. See Arthur Garfield Hays' "Memorandum on Group Libel Laws"; Arthur Garfield Hays Papers, Box 1, Folder 2. See also, for example, statements of Professor Jon Bebout of Dana College, "Liberties Union to Test Anti-Nazi Law," *Newark, New Jersey News* (10 April 1935); ACLU Records, Reel 118.

[50] "N.J. House Passes Anti-Nazi Bill," *Editor & Publisher* March 16, 1935; ACLU Records, Reel 118.

[51] "Shall We Defend Free Speech for Nazis in America?," Statement By the Board of Directors of the American Civil Liberties Union, 1934; Arthur Garfield Hays Papers, Box 2, Folder 11; see also, "To the Members of the Board of Directors," January 18, 1937; Arthur Garfield Hays Papers, Box 4, Folder 3.

These arguments were only made more vociferously by the ACLU as the situation in Europe worsened. See *Why We Defend Free Speech for Nazis, Fascists and Communists: An Answer to Critics Who Would Deny Liberty to Those They Characterize as Enemies of Democracy*, By the ACLU Board, April 1939; Arthur Garfield Hays Papers, Box 7, Folder 2; *Libels Against Race and Religion, Memorandum of Law and Policy Prepared by the American Civil Liberties Union, April 1939*; Arthur Garfield Hays Papers, Box 34, Folder 11.

[52] American Civil Liberties Union, Press Release, April 10, 1935; ACLU Records, Reel 125.

privately who should initiate this test case, some advocating a Jewish group to "show what a boomerang this bill could be."[53] Roger Baldwin and Arthur Garfield Hays, another ACLU attorney, agreed that a book containing an attack on Catholics would be best, contacting several professors and even agreeing on a book.[54] However well-laid these plans, the ACLU did not need to instigate a case to contest the "Anti-Nazi law"; Rutherford's group became the first affected by this legislation, providing a ready-made court challenge.

The Jehovah's Witnesses had denounced the New Jersey legislation with typical panache:

> It is now illegal to laugh or sigh, breathe or smile, talk or hum, in the state of New Jersey….Read the 'law' which is now on the statute books of New Jersey, and laugh to your heart's content—provided you are not in New Jersey. If you are so unfortunate as to live in that state, be careful! Beware! Tie Fido at the front gate! Lock the doors, draw the shades! Be sure the roof does not leak! Then go ahead and read the New Jersey anti-smile law, alias 'anti-Nazi' law, which is reproduced here in full for the entertainment of the public.[55]

Lending credence to both groups' concerns, the first person prosecuted under the anti-Nazi law was Jehovah's Witness Wallace Vick, arrested on November 4, 1935 in Union,

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[53] Samuel Paul Puner (of the Protestant Defense League) to Arthur Garfield Hays, April 15, 1935; ACLU Records, Reel 125; Arthur Garfield Hays to Theodore Cliedt, April 26, 1935; ACLU Records, Reel 125.

[54] Samuel Puner to Edward Fuhlbruegge, May 11, 1935; Harvey Watts to Roger Baldwin, October 22, 1935; ACLU Records, Reel 125. The book to be used, by E. Boyd Barrett, was called *Rome Stoops to Conquer*, and was of an anti-Catholic nature. Barrett wrote of how the Catholic Church, once despised and viewed with suspicion, had become rich and immensely powerful in America. In extremely alarmist tones, Barrett warned that, unchecked, the Catholic Church would essentially control America. This was, according to Barrett, part of the Pope's strategy to control the entire Western World. "…[I]n the fight, as she has ever fought when battles were most desperate in the past, Rome will use steel, and gold, and silvery lie. Rome will stoop to conquer." Dr. E. Boyd Barrett, *Rome Stoops to Conquer* (New York: Julian Messner, Inc., 1935).

[55] "Stay Away from New Jersey!," *The Golden Age*, June 5, 1935, 554-556.

New Jersey for attempting to show a drug store clerk some Watch Tower literature.[56] "Get out, you louse," the clerk had told Vick when he approached, which Vick did; however, a police officer standing nearby asked to see the literature. When Vick showed him the pamphlets, the officer placed him under arrest.[57] The Jehovah's Witnesses, like the ACLU, called for a test of the law.[58] On November 9, Abraham Isserman, a civil liberties attorney, wrote to the ACLU about the incident. "In my opinion, this is a perfect case on which to test the constitutionality of this gag law."[59] Rutherford agreed with the idea, instructing Moyle to "test the constitutionality of this act."[60]

Wallace Vick, then, would be the "test case" for the anti-Nazi law. Isserman discussed the matter of representation with Moyle, agreeing that the ACLU would take the lead, and the Watch Tower Society would cover expenses.[61] Moyle reported to Rutherford that the ACLU "was delighted to hear we had a test case under the Nazi law. They have been looking for a chance to test the law for some time and are anxious to go with us on this."[62] Baldwin urged Arthur Garfield Hays to get involved, saying the case

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[56] Entry for November 5, 1935, "Kingdom Journal of Olin Moyle"; Olin R. Moyle Papers, Box 2, first volume. As ACLU attorney Arthur Garfield Hays would later point out, the Jehovah's Witnesses were virtually the only people ever prosecuted under the New Jersey anti-Nazi law.

[57] "Statement by Wallace A. Vick re Arrest in Union N.J. Nov 4th 1935"; ACLU Records, Reel 125.

[58] The group also worried that similar laws would be passed in other states—and protested these bills vigorously when they were proposed. *The Gag on Freedom of Speech, Freedom of Worship, Freedom of Conscience: Statement of Facts Presented to the General Assembly of Pennsylvania by Jehovah's Witnesses*, undated, signed by C.R. Hessler; *Protest Against Enactment of Assembly Bill No. 420 and Senate Bill No. 306*, undated. Watch Tower Society Archives, Legal Department; Patterson, New York. Folder: "Freedom of Worship"; *Beware of Gag Laws: Subversive Attempt to Deceive Lawmakers*, undated; Watch Tower Society Archives, Legal Department; Patterson, New York. Folder: "Freedom of Worship, Part 2."

[59] A.J. Isserman to ACLU, November 9, 1935; ACLU Records, Reel 125.

[60] J.F. Rutherford to Olin Moyle, November 22, 1935; Olin R. Moyle Papers, Box 1, Folder 18.

[61] The agreement made between Isserman and the Jehovah's Witnesses was that the Jehovah's Witnesses would cover all expenses associated with the case. Minutes, November 18, 1935 Board of Directors Meeting; ACLU Records, Reel 119.

[62] Entry for November 5, 1935, "Kingdom Journal of Olin Moyle"; Olin R. Moyle Papers, Box 2, first volume.

"fortunately has come up in exactly the fashion we desire."[63] Not everyone was as enamored of the case. Many people simply did not like the Jehovah's Witnesses—and did not think they would be sympathetic in court. The ACLU's Harvey Watts, who had suggested Boyd Barrett's anti-Catholic book to challenge the law, told Baldwin now, "I could wish you had better clients to defend than this curious group of evangelical fanatics, Jehovah's Witnesses." The ACLU leadership disagreed with the assessment that Jehovah's Witnesses would not be sympathetic defendants. "Religious freedom is always a good issue," Baldwin replied, "particularly when it rests upon Christian Fundamentalism."[64] Moyle discussed the case with ACLU lawyers in New Jersey and New York, especially Isserman, whom he described as "a very keen, wide awake lawyer," with "a large experience in civil liberty cases."[65]

In November, however, Moyle informed Rutherford that "the Nazi case against Wallace Vick is going to flop….This looks like their scheme to avoid a decision declaring the statute void and unconstitutional."[66] The ACLU evidently agreed with this assessment.[67] Indeed, the complaint against Vick was withdrawn—likely for the reason Moyle suggested—thus depriving the ACLU and the Watch Tower of their test case.[68] "Those who advocate gag laws of any sort," Isserman wrote in aggravation, "would do well to consider the case where the first man arrested under an allegedly anti-Nazi law belonged to a religious sect, many of whose members are now in concentration camps in

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[63] Roger Baldwin to Arthur Garfield Hays, November 11, 1935; ACLU Records, Reel 125.
[64] Roger Baldwin to Harvey Watts, November 13, 1935; ACLU Records, Reel 125.
[65] Olin Moyle to J.F. Rutherford, November 14, 1935; Olin R. Moyle Papers, Box 1, Folder 18.
[66] Olin Moyle to J.F. Rutherford, November 22, 1935; Olin R. Moyle Papers, Box 1, Folder 18.
[67] A.J. Isserman to ACLU, December 4, 1935; ACLU Records, Reel 125.
[68] Minutes, Board of Directors, December 9, 1935; ACLU Records (Supplementary Series), Reel 5.

Germany because they refuse to 'Heil Hitler'."[69] For five years after its passage, in fact, but for one person, the only people arrested under the New Jersey anti-Nazi law were Jehovah's Witnesses.[70] The ACLU was not able to test the law until 1941, after the first Nazis had been arrested under the statute, because New Jersey prosecutors prevented an appellate decision, as they did for Vick.[71] The incident, however, had helped to bring the ACLU and the Jehovah's Witnesses to an understanding of their mutual goals. By December 1935, Moyle was conferring with ACLU lawyers regularly, even sitting in on some ACLU directors' meetings—which he deemed "Quite interesting."[72]

"Out of the Mouths of Babes and Sucklings Thou Hast Perfected Praise"

In November 1935, ACLU lawyer Isserman and the Jehovah's Witnesses had been distracted by a second concern, which would occupy the ACLU and the Watch Tower for nearly a decade—and which would eventually help to cement the connections between free speech and religious liberty. On September 21, 1935, 8-year-old Carleton Nichols, Jr. had refused to salute the flag in his Lynn, Massachusetts classroom, claiming that the flag was "the devil's emblem."[73] Nichols' teacher tried to persuade him to

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[69] "New Jersey Ducks Test of Gag Law"; ACLU Records, Reel 125.

[70] Arthur Garfield Hays repeatedly pointed this out in his denunciations of the law. See, for example, *Libels Against Race and Religion, Memorandum of Law and Policy Prepared By the American Civil Liberties Union, April 1939*; Arthur Garfield Hays Papers, Box 34, Folder 11. In 1940, when ten Bund members were tried under the law, the judge threw the cases out. See also American Civil Liberties Union *Memorandum of Law and Policy*, April 1, 1939, which describes the fact that Jehovah's Witnesses, arrested for their anti-Catholic literature, were virtually the only people prosecuted under the Rafferty Act. Arthur Garfield Hays Papers, Box 6, Folder 1, quoted by Grover, *Nazis in Newark*, 108.

Other Jehovah's Witnesses were charged with violation of the Anti-Nazi law in the 1930s, yet none produced a test case.

[71] See Grover, *Nazis in Newark*, 90. The New Jersey Supreme Court struck down the law for being "a statute so vague that it conflicted with the free-speech and religious-freedom guarantees of the Fourteenth Amendment. *State v. Klapprott*, 127 N.J.L. 395 (1941), paraphrased in Victor W. Rotnem and F.G. Folsom, Jr., "Recent Restrictions Upon Religious Liberty," *The American Political Science Review* 36, no. 6 (December 1942): 1053-1068.

[72] Entry for December 30, 1935, "Kingdom Journal of Olin Moyle"; Olin R. Moyle Papers, Box 2, first volume.

[73] "Boy Will Not Salute Flag," *Boston Post*, September 21, 1935, reprinted in *The Golden Age*,October 23, 1935, 40-42.

salute, telling him that she might lose her job if he did not; his expulsion from school for continuing to refuse made the news in Boston and nationally.

By all accounts, Nichols was not a troublemaker; he merely professed that he was attempting to follow his parents' example. Nichols' father, a machinist at the General Electric Company, traced his family's origins back for many generations to the Micmac Indians of Maine. "I guess," he quipped to a newspaper reporter, "when it comes to nationality I'm as much an American as I possibly can be." The family had been hit hard by the Depression, evicted from their tenement, and Carleton Nichols Sr. had peddled vegetables and cleaned out cesspools in an effort to feed his family; yet, he lamented, "I didn't make enough money to keep a bird alive." The Nichols' were Jehovah's Witnesses. "My children," Carleton Nichols, Sr. told a reporter, "are Christian children….They are taught at home to be obedient, kind and meek. They are taught that the law of God is the highest authority governing man, and they are also taught to obey every law as long as it does not conflict with God's law."[74]

Olin Moyle attended a school committee meeting with Nichols' father, on October 8, to explain the boy's actions, yet the school board confirmed the boy's expulsion. Roger Baldwin wrote to Carleton Nichols, Sr. in early October. "The American Civil Liberties Union is following with interest your son's courageous stand against a law contrary to your religious convictions. We offer you our support since we believe that the American right of freedom of conscience and religious belief is at stake."[75] The ACLU initially suggested that conciliation—not a legal battle—would be in the boy's best interests, offering that one of their members, the Lynn attorney James

[74] Ibid.
[75] Roger Baldwin to Carleton Nichols, Sr., October 4, 1935; ACLU Records, Reel 124.

Roberts, knew the Superintendent and some school board members, and might attempt to facilitate Carleton Jr.'s reinstatement without legal redress.[76] When this proved unfruitful, the ACLU urged Moyle to let them take the lead in the case. "The war over the flag is on," Moyle wrote in early October.[77]

Issues involving the flag had occurred before, particularly during the First World War.[78] Yet in the mid-1930s, regulations mandating patriotic exercises in the public schools became commonplace—and stricter than previous laws.[79] In 1936, William Fennell and Edward Friedlander, of the ACLU's Committee on Academic Freedom, prepared a state-by-state study of flag salute laws. "During 1935," reviewed the Fennell-Friedlander study, "one of those recurring waves of professional patriotic zeal which periodically sweeps the United States showed itself in a drive for state laws requiring students in all public schools to salute the American flag."[80] In the absence of state laws mandating patriotic exercises, local school boards often passed similar resolutions. While flag salute laws had existed since the early twentieth century and before, the laws passed in the 1930s were different. Most of the old laws were "permissive," merely

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[76] Roger Baldwin to Olin Moyle, October 10, 1935; ACLU Records, Reel 124.

[77] Entry for October 7-11, 1935, "Kingdom Journal of Olin Moyle"; Olin R. Moyle Papers, Box 2, first volume.

[78] Most common during the First World War era were not laws mandating the flag salute, but rather laws making it a punishable crime to desecrate, defame, or even "talk scurrilously" about the flag of the United States. Such laws were passed in many states. Chafee, *Freedom of Speech*, 45, 171, 358, 396-400.

In addition, "red flag laws," prohibiting the display of any red banner or flag (and sometimes green and black ones as well—emblems of "bolshevism, anarchism, and radical socialism"), had been adopted in twenty-five states during the war and in the red scare which immediately followed it. Chafee, *Freedom of Speech*, 180. The Supreme Court had overturned red flag laws in *Stromberg v. California*, 283 U.S. 359 (1931).

[79] David Manwaring provided an excellent history of statutory patriotic exercise requirements in his study of the flag salute controversy, tracing this transition from looser laws permitting the flag to be displayed in classrooms, to regulations by which the flag salute was made mandatory. David Manwaring, *Render Unto Caesar: The Flag Salute Controversy* (Chicago: University of Chicago Press, 1962).

[80] William Fennell and Edward Friedlander, "Flag-Saluting: Fennell-Friedlander Survey"; ACLU Records, Reel 129.

requiring a flag to be displayed in the classroom, whereas many new laws were "mandatory," making failure to salute a punishable offense.[81] Fennell and Friedlander illustrated this shift, comparing the old Massachusetts law, from 1909, which required that the flag be furnished and displayed in public school classrooms, to the new Massachusetts law, passed in 1935, which added a paragraph requiring that the teacher lead the students in a salute each day.[82] Ironically, mounting national tensions surrounding Fascist Italy and Nazi Germany had led legislators to attempt to mandate patriotism in the United States—making no exception for religious objectors.

Carleton Nichols' refusal to salute seems to have been something of an independent performance—the first of its kind among Jehovah's Witnesses. In June 1935, three months before Carleton refused to salute, Rutherford had indicated, at a Q&A session at the Washington Jehovah's Witness convention, that he himself would not salute any flag. However, he had not urged his followers to stop saluting, nor had this been a point of particular emphasis in the Society's instructions prior to Carleton's stand. Carleton maintained that he had found himself unable to salute due to his conscientious scruples. While the Watch Tower leadership had not previously condemned the flag salute, Rutherford addressed the issue directly on October 6 (about three weeks after Carleton's stand). "To salute the flag means, in effect, that the person saluting ascribes salvation to what the flag represents," he intoned, "whereas salvation is of Jehovah God." Furthermore,

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[81] There had been mandatory flag salute laws passed before, notably a 1907 Kansas statute. Yet, perhaps because no group refused to participate in the ritual, or perhaps because national and international tensions ran less high, the law was not challenged in such measure. See Manwaring, *Render Unto Caesar*, for an excellent description of the history of flag salute laws in the United States.

[82] "United States Flags to be Furnished and Displayed," in Fennell and Friedlander, "Flag Saluting: The Fennel-Friedlander Survey," 3.

> The Hitler government, a stench in the nostrils of all honest 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.

A similar requirement in the United States, Rutherford insisted, was simply ludicrous. "Why the burning zeal now," he asked, "to compel flag-saluting?" For more than 150 years, he pointed out, Americans had not been compelled to salute the flag. "Real American citizens who love the principles of the Bill of Rights and the fundamental law of the land," he suggested, "who believe in freedom of thought and freedom of speech, and, above all, in the right to worship God according to the dictates of their own conscience, will commend the lad."[83]

School officials, however, failed to see it this way. After Carleton Nichols refused to salute, scores of children across several states followed suit. The costs of such behavior were potentially quite high: the children were expelled from school, occasionally placed in reform schools; their parents were threatened with prosecution for encouraging "truancy" by failing to send their (expelled) children to school. With so many children expelled, local divisions of Jehovah's Witnesses (under instructions from Brooklyn) undertook to establish private schools—called Kingdom Schools—in which children could be educated while the courts decided the issue. Hailed by the ACLU as an "unusual development," it was the way in which "parents are freed from the threat of court action against them during the period when the courts are deciding these cases."[84] Unlike some other separatist religious groups, however, the Kingdom Schools were never intended to be more than a temporary fix. When some Jehovah's Witnesses asked why all Jehovah's Witnesses were not simply moved out of the public schools, Rutherford told

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[83] "Saluting the Flag," speech delivered over the radio on October 6, 1935. Reprinted in *The Golden Age*, October 23, 1935, 36-39.

[84] American Civil Liberties Union Press Release, May 11, 1936; ACLU Records, Reel 129.

them that these institutions were only meant as a stop-gap measure.[85] "Where there is still opportunity to send your children to the public schools," Moyle echoed at the height of the flag salute controversy, "that is the place to send them."[86] Rutherford meant to press the point in the courts—just as the group had begun to do with the canvassing ordinances and disorderly conduct charges. "If they try to take the child away from its parents because of refusing to salute the flag," he instructed Moyle, "a test cases should be made in the courts."[87]

There had been several previous cases in which children had faced severe penalties for refusing to perform patriotic exercises in the schools—mainly for religious reasons. In 1925, 9-year-old Russell Tremain had refused to salute the flag in Bellingham, Washington, asserting that this act was akin to idolatry and encouraged a spirit of militarism.[88] Russell was taken from his parents and placed up for permanent adoption with "Christian and patriotic parents."[89] Despite the persistent urging of the ACLU, the boy's parents had refused to press the matter judicially, insisting that they did not recognize earthly courts.[90] Tremain's parents, Baldwin had written to Arthur Garfield Hays, "trust to God. We will have to trust the court. But how to get into the

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[85] J.F. Rutherford to Olin Moyle, December 16, 1935; Olin R. Moyle Papers, Box 1, Folder 18.

[86] O.R. Moyle, "Counsel to Publishers," *Consolation*, November 3, 1937, 5-15.

[87] J.F. Rutherford to Olin Moyle, October 31, 1935; Olin R. Moyle Papers, Box 1, Folder 18.

[88] See the extensive correspondence on the Tremain case in the Sidney Dix Strong Papers, Swarthmore College Peace Collection. The American Civil Liberties Union, with Rev. Strong as their representative, tried mightily to push the case in the courts—to the point where it was suggested that Strong should adopt Russell himself in order to have standing in court. Try as they might, however, the Union was never able to appeal the case without the cooperation of Russell's parents.

[89] *In the Matter of the Welfare of Russell Tremain, a Juvenile*, Superior Court of the State of Washington (J-926) (1926)

[90] The boy's parents were members of the Elijah Voice Society, followers of Pastor Russell who had broken with the movement when Rutherford had assumed the presidency. In fact, J.W. Tremain, Russell's father, had handed the judge a copy of *The Finished Mystery* when asked to explain Russell's refusal to salute. See also Elijah Voice Society, "Open Letter to Thoughtful People," May 15, 1926; ACLU Records, Reel 44.

courts is our problem."[91] After two years and much public outrage and ACLU hand-wringing, Russell had been returned to his parents.[92] In 1926, fifty children from the Jehovite sect (not related to Jehovah's Witnesses) had been expelled from a school in Denver, Colorado. The children had, however, been restored to school without making a test case.[93] In the 1920s, Mennonite children had sporadically refused to salute the flag in rural Delaware. Their parents had also refused to push the cases in court, even at the ACLU's urging; they had avoided the problem by starting a church school to educate their children outside the public schools.[94]

The ACLU had, then, been interested in this sort of case for some time. "The fundamental difficulty," one lawyer had written during the Tremain ordeal, "seems to be that our very structure of government is not designed to protect the rights of people who refuse to do anything to protect themselves. I do not know how we are to get around that difficulty."[95] The fact that Jehovah's Witnesses were willing—even eager—to pursue their cases in the courts, thus, proved to be a boon for the ACLU. When Lillian and Alma Hering refused to salute the flag in their Secaucus, New Jersey classroom soon

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[91] Roger Baldwin to Arthur Garfield Hays, November 6, 1926; ACLU Records, Reel 44. See also Baldwin's communication with Seattle lawyer W.D. Lane, December 6, 1926; ACLU Records, Reel 44. After the boy's return to his parents had been agreed upon in August, Baldwin reported to the ACLU's Executive Board on December 6, 1926 that there was no legal remedy in the Tremain case. Minutes, Board of Directors, August 30, 1926; December 6, 1926; December 5, 1927; ACLU Records (Supplementary Series), Reel 1.

[92] In the summer of 1926, concerned citizens who had read about the plight of Russell Tremain in the newspapers and CLU dispatches wrote to Lucille Milner, Forrest Bailey, Roger Baldwin, and other ACLU representatives to ask for more information on the case. These writers included James Myers, of the Federal Council of the Churches of Christ in America, Fred Clark, the Minister of the First Congregational Church in Eugene, Oregon, and other religious leaders. Several also wrote to the Elijah Voice Society, urging them to see that the Tremains fought this action in court. In a press release, the group wrote that a "legal battle for the ancient American right of freedom of conscience and religious belief may be fought in the courts of the state of Washington when the public schools open in September." American Civil Liberties Union Press Release, August 29, 1926; ACLU Records, Reel 44.

[93] Minutes, Board of Directors, April 26, 1926; October 11, 1926, ACLU Records (Supplementary Series), Reel 1.

[94] Correspondence with Forrest Bailey, March 1928. ACLU Records, Reel 57. See also letter, September 26, 1928, from William B. Harvey to J. Nevin Sayre; ACLU Records, Reel 57.

[95] To Roger Baldwin, October 27, 1926; ACLU Records, Reel 44.

after Carleton Nichols did so, the ACLU Board directed Abraham Isserman to assist in their defense.[96]

"I am wondering," Moyle wrote to the ACLU soon after the Nichols and Hering cases arose, "if your organization would be interested in cooperating in another test case on the subject, this time in Pennsylvania."[97] Baldwin agreed, saying that the ACLU would "be glad to cooperate with you in a test case of any suspension or expulsion of a student for refusing to salute the flag on conscientious grounds."[98] Moyle met with ACLU lawyers on November 9, to discuss the relevance of any prior cases as well as the present strategy. Meanwhile, Lucille Milner and Roger Baldwin assisted in finding counsel and developing the strategy for the cases across many states.[99] When Moyle requested instructions from Rutherford on the flag salute matter, Rutherford told him, "We have to make a test case of this some time and some where and you'd better proceed with it."[100]

In his correspondence with the ACLU, Moyle included information about other problems encountered by Jehovah's Witnesses; the Maplewood, New Jersey, petition circulating cases, for example.[101] However, for several years flag salute cases dominated the legal discussions between the two groups. The Jehovah's Witnesses and the ACLU pursued a state-by-state strategy, with an emphasis on appeal. As Moyle wrote to Ellen Donohue, ACLU secretary, about several Washington State cases, "If an attorney with stick-to-itiveness and fighting ability can be secured, it would be desirable to make at

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[96] Minutes, Board of Directors, November 11, 1935; ACLU Records (Supplementary Series), Reel 5.

[97] Olin Moyle to ACLU, October 22, 1935; ACLU Records, Reel 124.

[98] Roger Baldwin to Olin Moyle, October 24, 1935; ACLU Records, Reel 124.

[99] See correspondence, November 1935; ACLU Records, Reel 126.

[100] J.F. Rutherford to Olin Moyle, November 22, 1935; Olin R. Moyle Papers, Box 1, Folder 18.

[101] Olin Moyle to Roger Baldwin, October 28, 1935; ACLU Records, Reel 124.

least one test case for the state."[102] Regarding more flag salute cases from Secaucus, New Jersey, Moyle wrote to Baldwin, "We have had lots of experience with the New Jersey courts and I am of the opinion it will be difficult to get them to see the light on the matter. I am thinking that it might be a place to make a real big fight; get the most prominent counsel possible and go thru to the United States Supreme Court if necessary. Would like to get your reaction to the suggestion."[103]

The ACLU leadership agreed, looking to the *Meyer* and *Pierce* cases, along with other precedents to make claims that flag salute laws, if they did not exempt Jehovah's Witness children, violated the Fourteenth Amendment. Citing a slew of precedents, ACLU lawyers wrote that "The liberty to direct the education of their children, and more particularly their religious educationw as specifically recognized by the United States Supreme Court."[104] Moreover, to "enforce believers in such doctrines to salute the flag in contravention of religious beliefs," the ACLU said, "doubtless violates Federal and State guarantees of religious liberty."[105] In a "Model Brief for Flag Salute Cases," the ACLU's A.J. Isserman described the successful overturning of the anti-German language law in the *Meyer* case.[106] "The United States Supreme Court held that the statute in interfering with the right of the teachers to teach, and of parents to engage him to instruct their children, infringed the liberty guaranteed by that amendment."[107] The "Model Brief" also cited the *Pierce* case, as another example of the Supreme Court overturning a law which interfered with public education, in contravention of the Fourteenth

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[102] Olin Moyle to Ellen Donohue, October 8, 1936; ACLU Records, Reel 140.
[103] Olin Moyle to Roger Baldwin, November 2, 1935; ACLU Records, Reel 126.
[104] "Model Brief for Flag Salute Cases," 1936; ACLU Records, Reel 129.
[105] "Flag Saluting: Fennell-Friedlander Survey," p. 8; ACLU Records, Reel 129.
[106] *Meyer v. United States*, 272 U.S. 52 (1926).
[107] "Model Brief for Flag Salute Cases," 1936; ACLU Records, Reel 129.

Amendment's guarantees. As they developed the legal strategy, both ACLU and Jehovah's Witnesses seem to have seen the broader free speech implications of such cases.[108] "Compelling words," wrote Isserman, "or a gesture equivalent to words, under penalty, is quite as clear an invasion of the right of free speech as is a prohibition against words or symbols."[109] In addition to legal precedents and model briefs, the ACLU issued press releases and editorials claiming the absurdity of the situation. In response to a battle in Monessen, Pennsylvania—where not only were the children expelled, but the Kingdom School padlocked by the mayor and repeatedly raided—the ACLU wrote, "Mayor 'Jimmie' Gold is wrong legally, worse than that, he is utterly mistaken from a common-sense point of view in his absurd feud with this sincere religious group….Why not allow the school children to refrain from saluting the flag; certainly our government will not crumble before a handful of dissenters."[110]

Significantly, even after the flag salute issue had been in the news for some months, not all lawyers affiliated with the ACLU agreed on the issue. Charles Denby, suggested by Francis Biddle as a good lawyer to handle the Monessen cases, wrote to Baldwin that he doubted that this was an issue of civil liberty at all. "It seems to me that you are going a little bit afield," Denby appraised, "And simply inviting controversy for the sake of controversy (or is it for the sake of taking a little dig at our Chauvinists?)."[111] Even Francis Biddle, the future Attorney General of the United States, asked for more time to consider the case before he became involved. "I am a little doubtful," he wrote.

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[108] See, for example, "Model Brief for Flag Salute Cases," 1936; ACLU Records, Reel 129.
[109] Ibid.
[110] American Civil Liberties Union Press Release, June 1, 1936; ACLU Records, Reel 139. See also letters between Roger Baldwin, Olin Moyle, and Francis Biddle, June 1936; ACLU Records, Reel 139.
[111] Charles Denby to Roger Baldwin, August 20, 1936; ACLU Records, Reel 139.

"This does not seem to me a very extreme regulation, nor to be the beginning of fascism, or anything of the sort."[112]

The local office of the ACLU in Massachusetts, however, did continue to handle the Nichols case as it made its way to the highest court in the state. Civil libertarians and Watch Tower lawyers worked out their roles, particularly since Moyle and Rutherford wanted to play such a large part in crafting briefs and arguing in court. Feeling that they had a good hold on the legal issues at hand and their aims in court, the Jehovah's Witnesses occasionally grumbled about their affiliates, even criticizing the performance of ACLU lawyers. Moyle's letters to Rutherford indicate a certain dissatisfaction with being secondary in the courtroom. When the Nichols case came up for argument, for example, Moyle complained that the ACLU attorney "Roberts did all the arguing on our side. Not a brilliant argument…"[113] In fact, Moyle criticized the performance of the Civil Liberties Union attorneys in this initial flag salute case. "I am not very well satisfied," he wrote to Rutherford," with the way it was handled." Furthermore, Moyle told Rutherford, he had called Roberts' attention "to the fact that it was not entirely his case, that it was a cooperative effort between us and the CLU; and that we wanted better cooperation on his part." Baldwin himself actually agreed, having expressed dismay at the brief prepared by Roberts. The ACLU's Boston counsel, Frank Reel, had noted that Moyle "wonders why we have not cooperated with him, and I am afraid he will be justifiably displeased when he does see Roberts' brief."[114] Rutherford was equally

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[112] Francis Biddle to Alexander Hamilton Frey, December 23, 1936; ACLU Records, Reel 139.

[113] Entry for December 4, 1935, "Kingdom Journal of Olin Moyle"; Olin R. Moyle Papers, Box 2, first volume. Moyle reported that after this Roberts became more cooperative (thanks to Baldwin's urging) and quite interested in the Jehovah's Witnesses' cases, even asking Moyle to come speak to a liberal organization in Massachusetts.

[114] Roger Baldwin to Lucille Milner, November 11, 1935; Letter, November 18, 1935, from Roger Baldwin to Olin Moyle; ACLU Records, Reel 124.

distressed, telling Moyle that he was "not at all satisfied" with the briefs filed in the case. "Worldly lawyers," he complained, "clearly are ashamed to stand by anything in the Bible." In frustration, Moyle agreed. "It seems impossible for these outside attorneys to get our position clear in their own minds, much less get it clear to the court, unless we stand right over them."[115]

Civil liberties attorneys were reluctant to argue, because the courts were reluctant to accept, that flag saluting had anything to do with religion. In April 1937, nearly two years after Carleton had taken his stand, the Massachusetts Supreme Judicial Court ruled that saluting the flag bore no relation to idolatry, and that Nichols' rights had not been violated. Relying heavily on the *Reynolds* case and the Mormon precedents, and stating that no definition of "religion" could be found in either state or federal constitution, the court decided that the pledge was not overreaching that "which is due to government."[116] Nonetheless, Rutherford continued to insist on arguments based on religious liberty guarantees—and their connection with free speech. "In this and similar cases," he instructed Moyle, "if you cannot prepare the Brief…then prepare one as a friend of the court, and have it filed raising the Constitutional question. Stress the point that flag saluting is a religious practice and ceremony, which is violative of God's law and that Jehovah's witnesses cannot submit thereto."[117] Despite their differences of opinion regarding the relative merits of religious liberty and free speech claims, the Jehovah's Witnesses solicited the ACLU's help in all future flag salute cases.

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[115] J.F. Rutherford to Olin Moyle, December 16 and 19, 1935; Olin R. Moyle Papers, Box 1, Folder 18.

[116] *Carleton B. Nicholls, Junior v. Mayor and School Committee of Lynn*, 297 Mass. 65, 7 NE2d 577 (1937).

[117] .F. Rutherford to Olin Moyle, December 25, 1935; Olin R. Moyle Papers, Box 1, Folder 18.

From 1935 through 1937, the Jehovah's Witnesses and the ACLU sought some sympathetic plaintiff to challenge mandatory flag salute laws. Dorothy Leoles had refused to salute in Georgia; Charlotte Gabrielli had done the same in California; Vivian and Alma Hering in New Jersey; Fred, Louise, Walter and Esther Ludke in Maryland; the Shinn children in Brazoria, Texas; Lillian and Billy Gobitas in Pennsylvania; and hundreds of other children across two dozen states. "Flag saluting is forcing religion upon others," Rutherford wrote to Moyle, "which is in direct violation of the Constitution of Pennsylvania and of the United States."[118] This argument, he told his associate, must be included in the legal briefs. The Watch Tower leadership discussed the Leoles, Gabrielli, Hering, Ludke, Shinn, and Gobitas cases intently, assessing which would be most compelling as a test case. On December 30, 1935, Moyle attended the ACLU's Executive Board meeting to report on pending flag-salute cases in Massachusetts, Pennsylvania and New Jersey, in which ACLU lawyers had assisted.[119] The ACLU kept in close touch regarding the growing number of appeals, and the best test cases.[120] Rutherford suggested to Moyle that the Pennsylvania case involving the Gobitas children, "if decided adversely to us, should go to the Supreme Court of the United States because without a doubt it involves a Constitutional question."[121]

The decision to "take a stand" and refuse to salute the flag involved substantial personal risks; not only were there the legal troubles, but families of Jehovah's Witnesses risked rousing the ire of the community in ways which could be highly detrimental to

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[118] J.F. Rutherford to Olin Moyle, January 6, 1936; Olin R. Moyle Papers, Box 1, Folder 1.
[119] Minutes, Board of Directors, December 30, 1935; ACLU Records (Supplementary Series), Reel 5.
[120] See Ernest Besig to Abraham Isserman, January 17, 1936; ACLU Records, Reel 136.
[121] J.F. Rutherford to Olin Moyle, December 25, 1935; Olin R. Moyle Papers, Box 1, Folder 18.

them.[122] For instance, the father of Dorothy Leoles, from LaGrange Georgia, owned a shoeshop and hat cleaning business; after she refused to salute, his business was boycotted and picketed by men in Ku Klux Klan hoods.[123] Leoles eventually sold his business and decided to move the family elsewhere. Jehovah's Witnesses were frequently accused of being communists.[124] In addition, judges connected the flag salute issue with the ongoing canvassing cases, using the failure to salute to explain their rulings against Jehovah's Witnesses.[125] "Any man," a Camden (New Jersey) Police Court judge wrote, "who openly, brazenly, and continuously refuses to salute his country's flag is no man to come before a court and determine what the law is…" Such a person, the judge concluded, "is not fit to be a resident of these United States."[126]

On the other hand, however, the flag salute issue seemed so patently ridiculous to some people that it rallied support for the group. Judges did not always rule against the Jehovah's Witnesses, even in the early cases. A judge in San Francisco, for example, dismissed all charges against a number of Jehovah's Witnesses for refusing to salute. A judge in Washington declared that three children expelled in 1935 were "dependent but not delinquent," returning them to their parents.[127] In April 1936, after three children, Zophie, Anna and Domino Opielouski, were taken from their children in Belchertown,

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[122] See "Fascism (Catholic Action—The Inquisition) in Pennsylvania," *The Golden Age*, December 18, 1935, 163-176.

[123] "Pastor Protests La Grange Arrests," *Golden Age*, May 19, 1937, 535; "Petition for an End of Religious Persecution in Georgia," *The Golden Age*, May 19, 1937, 532-535. See Witherspoon Dodge to Ellen Donohue, October 29, 1936; ACLU Records, Reel 137.

[124] Many of the letters written to J. Edgar Hoover and the Justice Department requested that the group be investigated for their communistic activity. Hoover, ironically (considering his general attitudes regarding civil liberties), refused these requests. FBI letters, November-December 1935; FBI files 1027468-000 --- 61-HQ-1053 --- Section 1 (724593).

[125] See Olin Moyle to J.F. Rutherford, December 23, 1935; Olin R. Moyle Papers, Box 1, Folder 18.

[126] *The State v. William Walters and Rupert Leadly*, November 12, 1935, Camden Police Court, Camden, New Jersey, 6. Watch Tower Society Archives, Legal Department, Patterson, New York. Folder: "Historical Documents."

[127] See Report to the Editor of the *Golden Age*, April 19, 1936,; ACLU Records, Reel 140.

Massachusetts, fifteen "liberty-loving clergymen" from Holyoke issued a statement urging the release of the children. The refusal to salute, they insisted, "is in line with the position of Christians from the first century onward….Those who are attempting to abridge the religious liberties of the followers of the sect of Jehovah's witnesses fail to see that all American religious liberty is tied up inextricably with the liberty of each small group."[128] The children's father, Ignace Opielouski, was a dyer at a manufacturing company plant, who had emigrated from Poland thirty years before; the family lived comfortably on an eighteen-acre farm. The Opielouskis were the first children since Russell Tremain to be taken from their parents and placed in a juvenile institution—which one ACLU correspondent described as "lunacy."[129] (The Opielouskis were recent converts from the Roman Catholic Church, and were "now actively seeking converts in a dominantly Catholic community."[130]) Similarly, after George Leoles' business was picketed in Georgia, the Baptist Reverend C.J. Broome protested against both the flag salute ordinances and the canvassing cases, in the Atlanta *Constitution*. "Do the citizens of Lagrange think they can thus violate the Constitution of the United States? Any jackleg lawyer in the country can tell them that a law against a peddler 'going into the residential section' is unconstitutional. These so-called Jehovah's witnesses should stand strictly on their constitutional rights."[131]

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[128] "The Vomitus of Belchertown, Mass.," *The Golden Age*, May 20, 1936, 534-535. See also American Civil Liberties Union Press Release, April 23, 1936; ACLU Records, Reel 129.

[129] Richard Hale to Nathan Harvey, April 30, 1936; ACLU Records, Reel 138.

[130] "Memorandum on the Jehovah's Witnesses Cases of Belchertown, Massachusetts," prepared at the request of Clifton Reed of the American Civil Liberties Union; ACLU Records, Reel 138. See also ACLU Bulletin #711, April 24, 1936; ACLU Records, Reel 138; Lucille Milner to Frederick Leech, April 27, 1936; ACLU Records, Reel 138.

[131] "Petition for the End of Religious Persecution in Georgia," reprinted in *The Golden Age*, May 19, 1937, 532-535.

The ACLU and the Jehovah's Witnesses were determined to do just this, protesting flag salute bills with arguments similar to those they had used against anti-Nazi laws, on the basis of free speech and religious liberty. The Jehovah's Witnesses explicitly linked flag salute bills to anti-Nazi laws, the analogy being in the fact that the stated purpose of the bills belied their real purposes, paving the way for broad, unconstitutional limits on free speech and religion.[132] Despite opposition, the Watch Tower touted the fact that a number of "worldly" organizations (besides the ACLU) opposed flag salute bills.[133] "There are still men and women," the editors of *The Golden Age* crooned, "who endeavor to keep conditions here so some measure of truth and justice may glimmer through the murky haze of Papal control."[134] The ACLU kept copious records of expulsions, corresponding with Moyle and other attorneys about the cases, and providing assistance where they could. "The Civil Liberties Union cooperates as far as possible," Moyle had written to Rutherford, "but in some of these places they are not well organized and cannot do much."[135] Some cases could not be pushed simply

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[132] *Protest Against Enactment of Assembly Bills Numbered 30, 31 and 32,* (flag salute bills in the New Jersey legislature), undated; Watch Tower Society Archives, Legal Department, Patterson New York. Folder: "Freedom of Worship: Part 2."

[133] Among these were the Newark Teachers Union, the State Teachers Committee, the Society of Friends, the Federation of Women's Clubs, the League of Women Voters, and the Business and Professional Women's Club of Orange.

[134] "Flag Saluting in Theory and Practice," *The Golden Age*, May 6, 1936, 483-494. This fixation on Catholic conspiracy was a common theme in Watch Tower literature through the 1940s. Although Catholics considered themselves to be the ones victimized by prejudice, Rutherford and his associates saw the Catholic Church as the driving force behind much of the persecution of Jehovah's Witnesses. Certainly, Catholics constituted some part of the vocal element opposed to Rutherford and Jehovah's Witnesses—although whether this opposition was organic or in response to Watch Tower attacks on the Catholic Church is up for debate. See, for example, Reverend Richard Felix, *Rutherford Uncovered* (Pilot Grove, Missouri: Our Faith Press, 1937), a vitriolic attack on Rutherford and the Jehovah's Witnesses' message. Rutherford argued from the First World War era that the Catholic Church was sufficiently organized in America to exert pressure over political leaders. While the idea of a widespread "Romish" conspiracy against them was perhaps overblown, there were instances in which local and state authorities were influenced by Catholic arguments that Watch Tower literature was harmful, and the group's activities ought to be banned.

[135] Olin Moyle to J.F. Rutherford, November 25, 1935; Olin R. Moyle Papers, Box 1, Folder 18.

because a sympathetic lawyer could not be found.[136] While he had not been satisfied with the ACLU lawyer who had assisted in the Nichols case, Moyle was impressed by Isserman's understanding of both the Jehovah's Witnesses' position, and the constitutional questions involved. "He has set up the provisions of the state and national constitution," Moyle reported regarding the case of the Hering sisters in New Jersey," so that we can proceed to the Federal courts if necessary."[137]

Both the ACLU and the Jehovah's Witnesses insisted that they pushed the flag salute cases not only because of the narrow issue at hand, but because rights must be extended to everyone. "[T]he liberties of no people are safe," the Jehovah's Witnesses insisted, "when the rights of a few can be trampled upon with impunity."[138] The ACLU actively sought members of other religious groups to assist in these cases. Roger Baldwin, for example, suggested the desirability of getting a Catholic lawyer to participate, arguing that "The issue is of importance to Catholics as a matter of principle."[139] The American Friends Service Committee contributed funds for the defense of the Opielouski case.[140] A Unitarian Church in New Jersey passed a resolution in early 1936 calling flag salute bills "undemocratic…directed at limiting the individual's right to political independence," and betraying a "restriction of civil liberties desirous in America."[141]

Because of the geographic diversity of these flag salute cases, as well as their number, Jehovah's Witness and ACLU lawyers sought to have the issue interrogated at

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[136] See correspondence regarding Montpelier, Vermont situation in 1936, which Moyle called "quite hopeless." ACLU Records, Reel 140.

[137] Olin Moyle to J.F. Rutherford, December 23, 1935; Olin R. Moyle Papers, Box 1, Folder 18.

[138] "Protest and Petition to the City Counsel of Monessen, Pa."; ACLU Records, Reel 139.

[139] Roger Baldwin to Professor Colstone Warne, April 27, 1936; ACLU Records, Reel 138.

[140] ACLU Records, Reel 138.

[141] "Copy of a Resolution Passed at a Meeting of the Peace and Civil Rights League of Ridgewood, New Jersey, April 12th, 1936"; ACLU Records, Reel 138.

the highest court level. A Supreme Court hearing, they felt, would not only help to resolve the issue of mandatory flag salute laws, but would also encourage broader federal protections for civil liberties. "In one of the many cases pending throughout the country," Baldwin wrote to Moyle, "we trust that the federal question has been properly raised on the record so that a case may eventually get to the U.S. Supreme Court. If that has not been done to your satisfaction, we would like to have a conference with you so that it may be properly raised."[142] Supreme Court hearings on civil liberties issues, however, were at this time not a given; the Court cited lack of a "substantial federal question" in these matters. While he and Isserman had done their best to lay the groundwork, Moyle replied, "the main difficulty is that it's a long road. We've been at the job over six months and haven't got within smelling distance of the court yet. But we have hopes."[143]

The Federal Question

In addition to restricted readings of religious liberty, Americans had placed a premium on local autonomy in education. Affirming what Moyle and Rutherford already knew, Isserman wrote to Moyle in early 1936 that "It seems very difficult indeed to bring this matter to issue before an appellate court in such a way as to obtain an opinion."[144] ACLU lawyers—including Isserman and Arthur Garfield Hays—worked to push the cases of the Hering sisters in New Jersey, the Gobitas children in Pennsylvania, and others. In his brief to the New Jersey Court of Errors and Appeals in the Hering case, ACLU lawyer Hays argued that the children had been denied their "civil right" to attend

[142] Roger Baldwin to Olin Moyle, May 6, 1936; ACLU Records, Reel 138.
[143] Olin Moyle to Roger Baldwin, May 7, 1936; ACLU Records, Reel 138.
[144] Abraham Isserman to Olin Moyle, February 3, 1936; ACLU Records, Reel 138.

public school.[145] "If we are to retain our traditional Constitutional rights," Hays wrote, "it is imperative…that 'the humblest and most hated member' in the community must be afforded the fullest protection of American liberty guaranteed by the Bill of Rights. Otherwise, the liberty of no one is safe." Challenging the court to "breathe vitality anew into the principles of religious freedom," Hays urged the justices "to restate it in modern terms, to challenge those who would whittle it down bit by bit, to declare plainly that no group is too small to invoke its sanctions, that the Hering children have been deprived of civil rights for their religious views and that those rights must be restored."[146] Hays and the Jehovah's Witnesses waited to see whether the court would assess the issue as embodying a substantial federal question, because otherwise there was no federal court jurisdiction over these matters, and the issue would not reach the U.S. Supreme Court.

In April 1937, the Massachusetts Supreme Judicial Court ruled against the Jehovah's Witnesses in the Nichols case. "Thus they are closing in on us from all sides," Moyle wrote to Rutherford, under the heading "Wallops from Massachusetts."[147] Rutherford attempted encouragement: "I note what you say about Massachusetts and the enemy closing in on us. These things really bring satisfaction because it indicates that the show-down is much nearer."[148] Moyle replied that the "New York Civil Liberties Committee is beginning to manifest some real cooperation in these matters. It appears that the adverse decision from Massachusetts court woke them up."[149] In mid-1937, Lucille Milner of the ACLU set about soliciting books and publications on the history of

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[145] *Hering v. State Board of Education*, 189 A. 629 (1937).

[146] Brief, *Hering v. State Board of Education*; Arthur Garfield Hays Papers, Box 26, Folder 8; Department of Rare Books and Special Collections, Princeton University Library. The *Hering* appeal was, however, rejected, for lack of a federal question.

[147] Olin Moyle to J.F. Rutherford, April 2, 1937; Olin R. Moyle Papers, Box 1, Folder 17.

[148] J.F. Rutherford to Olin Moyle, April 7, 1937; Olin R. Moyle Papers, Box 1, Folder 17.

[149] Olin Moyle to J.F. Rutherford, May 7, 1937; Olin R. Moyle Papers, Box 1, Folder 17.

religious liberty in the United States and elsewhere.[150] Yet the appeal of Dorothy Leoles' case from the Georgia Supreme Court was also dismissed "for want of a substantial federal question," and this ruling was used subsequent cases.[151] "We have to find some argument to get around that decision," one ACLU attorney wrote to Lucille Milner. "Of course we can always rely upon our own State Constitution, but we would like to continue to argue the case under the Fourteenth Amendment."[152]

Meanwhile, the expulsions continued. On September 30, 1937, when Grace Sandstrom refused to salute in her Long Island classroom, some of her classmates reported her to the teacher. The next day, the principal came into the classroom; when Grace again remained seated, he told the class "that it was a criminal offense for a person not to salute the flag, and that any person so doing could be subject to a fine, arrested or expelled from school."[153] Grace acceded that day, but again refused to salute on October 6. The thirteen-year-old went to school every day from October 7 through October 22, and was sent home each day. On October 22, the flag salute was held up for more than forty minutes while the superintendent of schools and Grace's teacher argued with her, threatening action against her and her parents. In response, Grace lifted her hand with the other children, reciting Psalm 20:5 instead of the Oath of Allegiance. Feeling guilty about this, however, Grace again refused to salute, and was expelled, the next day.

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[150] ACLU Records, Reel 142. See also correspondence between Osmond K. Fraenkel, Jerome Britchey, and others; ACLU Records, Reel 155.

[151] *Leoles v. Landers*, 192 S.E. 218 (1937). The court cited *Hamilton v. Regents* and *Coale v. Pearson* in denying this appeal, cases which involved the right to attend state universities and be exempt from required military training on account of religious objections; the Court ruled that students must comply if they attended the schools. "These cases are not on a par with our flag salute cases," Moyle argued, "for in our cases there is a legal obligation to attend school."

[152] Ernest Besig to Lucille Milner, January 6, 1938; ACLU Records, Reel 155.

[153] "Long Island New York Flag Salute Case," sent October 30, 1937, from Olin Moyle to the ACLU; ACLU Records, Reel 141.

Grace's parents were arrested and tried for contributing to the delinquency of a minor. When the case was heard on November 5, 1937, Hays questioned the superintendent:

Q. You believe in religious freedom?
A. I do when it does not conflict with the rights of the Government.
Q. The guarantee of religious freedom is the first amendment to the Constitution?
A. Correct.
Q. Don't you know that the first ten amendments to the Federal Constitution are limitations upon the power of the federal Government; don't you know that?
A. No.
Q. Don't you know the first amendment of the Constitution is that Congress shall have no power to pass laws that will abridge religious views?
A. When those laws were passed there weren't all these different religions.
Q. Isn't that the way it is worded?
A. I refuse to answer.[154]

The superintendent feared that, with such a liberal interpretation of the First Amendment, "there is nothing to prevent people from starting a religion to keep them from paying taxes. We would have anarchy."[155] The jury found Grace's parents guilty, and they were fined $10 or ten days in jail. Hays' efforts, however, were quite well appreciated by the Watch Tower. "It was a nice, skillful piece of trial work done in the interest of liberty, which you love so well," Moyle admired. "It is a good fight," Hays replied a few days later, "and I am glad to be in it."[156]

Although they sympathized with the Jehovah's Witnesses, the ACLU was also interested in their cases because of legal precedent. In early 1937, one ACLU lawyer prepared a memorandum on original federal jurisdiction. "The memorandum on federal

[154] Testimony of Starling Girardet, President of the Board of Education, taken November 5, 1937 by Arthur Garfield Hays, in *Sandstrom* case. Arthur Garfield Hays Papers, Box 27, Folder 3; Department of Rare Books and Special Collections, Princeton University Library.

[155] Ibid.

[156] Olin R. Moyle to Arthur Garfield Hays, November 6, 1937; Arthur Garfield Hays to Olin R. Moyle, November 8, 1937; Arthur Garfield Hays Papers, Box 27, Folder 2; Department of Rare Books and Special Collections, Princeton University Library.

jurisdiction by Lipsig is very valuable," A.L. Wirin wrote to Lucille Milner. "Some lawyer ought to be secured to make the memorandum apply to any civil liberties case, as distinguished from mere reference to the flag salute situations.[157] Others became interested in these trials; the Harvard Law School professor George K. Gardner wrote to Moyle, for example, advising him that "The issue which your clients are presenting is so vital to everyone who had any children to share in the future of the country that I am venturing to urge upon you a suggestion which otherwise I should not presume to do." Advising Moyle to postpone some of their cases until they had received a favorable ruling, he suggested using the *Meyer* and *Pierce* precedents in their arguments.[158] Acknowledging that they were working against the opinions in Georgia (*Leoles*), New Jersey (*Hering*) and Massachusetts (*Nichols*), Gardner wrote again that "the consequences of this litigation are so far-reaching that I could not refrain from offering such suggestions as I have."[159]

Although Moyle and Rutherford disagreed with the ACLU on some points—most notably the ACLU's objection to arguments about the supremacy of the Divine Law in the briefs—this did not stymie their collaboration. Moyle simply filed separate amicus curiae briefs for the Jehovah's Witnesses, emphasizing this point. When a flag salute bill passed in the Illinois House of Representatives, the Jehovah's Witnesses of Illinois submitted a protest:

> GERMANY is the topnotcher in this matter of salutes. In that benighted country the people 'Heil Hitler' in the early morn, in the dewy eve, and at

[157] A.L. Wirin to Lucille Milner, October 1, 1937; ACLU Records, Reel 142.

[158] In fact, the strategy agreed upon by the Jehovah's Witnesses and the ACLU was to hold off on further cases while several were pending in the Supreme Court. ACLU Records, Reel 141. See also communications regarding the Shinn case in Texas, W.A. Combs to Olin Moyle, October 2, 1937; ACLU Records, Reel 156.

[159] George K. Gardner to Arthur Garfield Hays; Arthur Garfield Hays Papers, Box 26, Folder 13.

> any and all other times they are awake. Woe be unto one who refuses for conscience' sake or otherwise. Three thousand of Jehovah's witnesses are in prison in Germany for refusal to violate the law of God and bow down to a human creature. Unbelievable tortures are inflicted upon them. If compulsory flag saluting is as beneficial as it is claimed to be, Germany should be Utopia for all people – except those who believe in liberty and freedom.[160]

Moyle solicited the Civil Liberties Union's assistance, urging, "There are many of Jehovah's witnesses in the state and if this bill goes thru it will be a repetition of Pennsylvania and Massachusetts." Baldwin sent a telegram to a representative, Ira Latimer, in Chicago: "Understand Compulsory Flag Salute Bill Passed Illinois House. Important to Block in Senate. Please Get Busy."[161]

In late-1937, the tide shifted for Jehovah's Witnesses, though only temporarily. "The case we filed for Brother Gobitis of Minersville," Moyle wrote to Rutherford, "came up for argument last week. The court gave good attention, didn't interrupt or ask many questions, and kept a poker face throughout."[162] The Gobitis case, involving Lillian and Billy Gobitis, was the first to reach the federal courts on the flag salute issue.[163] About a month later, Moyle rejoiced:

> At last: we meet a real judge. You may have seen the press accounts of the decisions of Judge Maris of Philadelphia in the Gobitis flag case. There is a real decision by a judge who thinks clearly and has courage enough to decide in accordance with his convictions….This opens the door for further action….This decision is the brightest piece of sunshine we have had from any court in America since this war began and we surely can make good use of it.[164]

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[160] "Freedom of Worship, Shall It Be Suppressed in Illinois?"; ACLU Records, Reel 151.

[161] Olin Moyle to Ellen Donohue, June 15, 1937; Letter, June 18, 1937, from Ellen Donohue to Roger Baldwin; Telegram, June 21, 1937, from Roger Baldwin to Ira Latimer; ACLU Records, Reel 151.

[162] Olin Moyle to J.F. Rutherford, October 27, 1937; Olin R. Moyle Papers, Box 1, Folder 17.

[163] *Minersville School District v. Gobitis*, 310 U.S. 586 (1940).

[164] Olin Moyle to J.F. Rutherford, December 2, 1937; Olin R. Moyle Papers, Box 1, Folder 17.

Consolation magazine (the new name for *The Golden Age*) exulted, "At last we have found a judge who takes the First Amendment of the Constitution seriously! It is to be hoped that the case will be promptly appealed and finally taken to the Supreme Court, for we need the word of the highest tribunal at this point."[165] The ACLU wrote to Judge Maris, saying, "On behalf of all the members of this Committee and their many friends throughout the country, may we express our warmest satisfaction with the decision you rendered in the 'Flag-Salute' case. Your decision is worthy of a Commonwealth founded on religious liberty. A case involving this issue is on its way to the United States Supreme Court, where I trust the enlightened view expressed by you will be sustained."[166] Rutherford, too, took heart. "The local children seem to be getting somewhere," he wrote to Moyle. "The Court of Appeals at Sacramento decided the Gabrielli Flag Case in our behalf, and I note also the United States District Court at Philadelphia decided for us….These cases ought to be at least sufficient grounds of conflicting decisions in different states on the same constitutional matter."[167] Moyle agreed, writing that he would instruct the California CLU "that in the event an appeal is taken in this case to represent our side vigorously. We must move on now and fight them at every turn of the road."[168]

Judge Maris' ruling in favor of the Jehovah's Witnesses was not, of course, the last word concerning the flag salute issue; yet the opinion, issued in federal court, was contrary to state and federal court rulings on the subject to that time.[169] The

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[165] "Real Patriots of Philadelphia and Jacksonville," *Consolation*, December 29, 1937, 3-11.
[166] ACLU to Albert Maris, December 2, 1937; ACLU Records, Reel 141.
[167] J.F. Rutherford to Olin Moyle, December 4, 1937; Olin R. Moyle Papers, Box 1, Folder 17.
[168] Olin Moyle to J.F. Rutherford, December 6, 1937; Olin R. Moyle Papers, Box 1, Folder 17.
[169] *Nicholls v. Mayor and School Committee of Lynn*, 297 Mass. 65 (1937); *Leoles v. Landers*, 184 Ga. 580 (1937); *Gabrielli v. Knickerbocker*, 74 P.2d. 290 (1937); *Johnson v. Town of Deerfield*, 25

contradictory rulings, thus, meant that the flag salute issue was more likely to be examined by the United States Supreme Court. The Minersville School District appealed the Gobitis case in early 1938, which meant that the case would continue in the courts.[170] Later in December, this reasoning was borne out when another set of cases, this time in New York, were granted appeal because there were conflicting cases on the same point of law.[171] "I do not see why there should be any distinction," the judge wrote, "between a religious group and any other citizens. One set of laws governs them all….There seem, however, to be grave Constitution questions involved, and I feel the higher Courts should pass upon the questions involved."[172] In the brief he prepared, Hays emphasized both freedom of speech and religious liberty. "Compelling words, or a gesture equivalent to words, under penalty, is quite as clearly an invasion of the right of free speech as is the prohibition of words….the constitutional guaranty of freedom of speech protects not only the right of free expression of views, but also the right to decline to express views contrary to religious scruples."[173] Addressing the adverse decisions in *Hering*, *Leoles*, and *Nichols*,[174] in which the courts held that the flag salute held no religious significance, Hays argued that the courts had "overlooked the fundamental principle of religious liberty which was involved, namely, that no man…is empowered to censor another's religious conviction."[175] Although Moyle was optimistic, he wrote to Rutherford that he

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F.Supp. 918 (1939); *State ex rel. Bleich v. Board of Public Instruction for Hillsborough County*, 139 Fla. 43 (1939).

[170] Olin Moyle to J.F. Rutherford, January 7, 1938; ACLU Records, Reel 167.

[171] *Hering v. State Board of Education*, 303 U.S. 624 (1938); *Leoles v. Landers*, 302 U.S. 656 (1937); *Nichols v. Mayor and School Committee of Lynn, Massachusetts*, 197 Mass. 7 NE 2d 577 (1937).

[172] *Fish v. Sandstrom*; Arthur Garfield Hays Papers, Box 27, Folder 2.

[173] Hays' argument involved the Fourteenth Amendment, citing cases of incorporation or partial incorporation like *Gitlow*, *Near* and *Stromberg*.

[174] *Hering v. State Board of Education*, 303 U.S. 624 (1938); *Leoles v. Landers*, 302 U.S. 656 (1937); *Nichols v. Mayor and School Committee of Lynn, Massachusetts*, 197 Mass. 7 NE 2d 577 (1937).

[175] Appeal filed November 1938; Arthur Garfield Hays Papers, Box 27, Folder 3.

feared "we have a Fascist minded Supreme Court." The civil liberties attorneys interested in the cases had, however, persuaded Moyle that "you have to come back and keep hammering at that august body to get an idea through."[176] The Jehovah's Witnesses and the ACLU continued to push flag salute cases through the courts, counting on the inconsistent rulings in the lower federal and state courts to provide them with a Supreme Court review.[177]

The Liberty to Publish

Canvassing ordinances—even more than in the flag salute matter—produced conflicting decisions. It was imperative here as well, argued the Jehovah's Witnesses, that their cases be decided by the Supreme Court. Since the First World War, Watch Tower Society leaders had argued that the guarantee of religious liberty was empty, if this right did not encompass the rights to speak and to publish. In early 1937, during the infamous "court-packing" scandal, Rutherford wrote to Moyle: "I feel certain that we must take action as quickly as we can in everything. If Roosevelt and his Hierarchy gang [meaning the hated "Catholic hierarchy"] succeed in upsetting the present arrangement of the Supreme Court of the United States, we will never get to that Court, and if we get

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[176] Olin Moyle to J.F. Rutherford, December 17, 1937; Olin R. Moyle Papers, Box 1, Folder 17.

[177] The *Gobitis* case has been discussed extensively, with both excellent legal analyses and examinations of the story available. In fact, most studies of the Jehovah's Witnesses' legal battles during the 1930s focus almost exclusively on this case, perhaps because of the wealth of materials available (Billy Gobitas donated his papers to the Library of Congress; Lillian has submitted to interviews well into her eighties). A notable exception is David Manwaring, who discusses many flag salute cases. For discussions of the Gobitis case, see Leonard A. Stevens, *Salute!: The Case of The Bible vs. The Flag* (New York: Coward, McCann & Geoghegan, Inc., 1973); James Van Orden, "'Jehovah Will Provide': Lillian Gobitis and Freedom of Religion," *Journal of Supreme Court History* 29, no. 2 (1992): 136-144. For legal the legal aspects of the case, see Jerry Bergman, "The Modern Religious Objection to Mandatory Flag Salute in America: A History and Evaluation," *Journal of Church and State* 39, no. 2 (March 1997): 215-236. See also Jennifer Jacobs Henderson, "Conditional Liberty: The Flag Salute Before Gobitis and Barnette," in *Journal of Church and State* 47, no. 4 (Autumn 2005): 747-767; William Shepard McAnnich, "A Catalyst for the Evolution of Constitutional Law: Jehovah's Witnesses in the Supreme Court," *University of Cincinnati Law Review* 4 (1987): 997-998. The Gobitis case has made its way into examinations of civil liberties for the popular audience; see Peter Irons, *The Courage of Their Convictions* (New York: Free Press, 1988).

there we would not get anything."[178] Justice Frankfurter and others had previously expressed reluctance to use the Supreme Court in order to "guarantee toleration" or to legislate from the bench.[179] "In the hue and cry," argued the *Golden Age* editors, "many seem to forget that the Supreme Court does not make law; it merely decides in accordance with the law; a vast difference."[180] Regarding a 1935 Illinois case, Moyle had reported that the judge had been "very fair in his rulings on evidence, and even seemed anxious to help us make up a good record in this case. But he just can't decide in our favor without higher court backing."[181]

The Jehovah's Witnesses had been battling to practice and to preach for nearly a decade; yet, aside from scattered rulings in their favor, they had little to show for it. Rutherford complained to Moyle that "There has not been a legal question decided in our favor. We still have the same annoyance that we have always had."[182] The group was encouraged when opposition to their work lessened once officials found that they "had a fight on their hands." Arthur Goux recorded that, by mid-1936, opposition had all but ceased in a dozen New Jersey towns, among them the "hot" territories of Plainfield, Summit, and Bergenfield. "All of these places," Moyle reported, "at one time or another attempted to stop the witness work by means of the determined resistance put up in court and in the field." Yet, Moyle noted, he still had "a list of twenty six places" in New

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[178] J.F. Rutherford to Olin Moyle, February 19, 1937; Olin R. Moyle Papers, Box 1, Folder 17.

[179] Samuel Walker, *In Defense of American Liberties*, 81. See Frankfurter's article "Can the Supreme Court Guarantee Toleration," *The New Republic* (17 June 1925): 86-87; Melvin Urofsky, *The Supreme Court Justices* (New York: Taylor & Francis, 1994). Fraknkfurter had joined Justice Holmes in dissenting to the majority's decision in *Meyer v. Nebraska*, and again in *Pierce v. Society of Sisters*.

[180] "Congress and the Hierarchy (Shall the Supreme Court Be Junked?)," *The Golden Age*, March 24, 1937, 387-411.

[181] Olin Moyle to J.F. Rutherford, May 23, 1935; Olin R. Moyle Papers, Box 1, Folder 15. For examination of similar problems, see also Olin Moyle to J.F. Rutherford, July 2, 1935; Olin R. Moyle Papers, Box 1, Folder 15.

[182] J.F. Rutherford to Olin Moyle, January 6, 1936; Olin R. Moyle Papers, Box 1, Folder 13. See also Olin Moyle to J.F. Rutherford, March 3, 1936; Olin R. Moyle Papers, Box 1, Folder 13. Despite these complaints, the Watch Tower Society continued to work with Karkus into the late 1930s.

Jersey alone "where there is opposition."[183] In terms of the broader picture, Moyle reported to Rutherford that "there are seven states which have localities where there is more or less persistent opposition," as well as states in which pupils had been expelled in "the matter of flag salute opposition." Far from decreasing, Moyle expressed his conviction that these persecutions would undoubtedly increase.[184]

From 1935, Moyle and Rutherford had coordinated a legal strategy in which Jehovah's Witnesses were largely expected to defend their own cases in the lower courts. "We are…taking steps," Moyle had reported soon after he had arrived at Bethel, "to coach all the witnesses in the 'hot areas' of New Jersey so they will be better prepared for trial."[185] Reflecting the pair's not infrequent frustration with other lawyers, Moyle wrote that "…no doubt in many such cases they can get along much better without a lawyer. It's getting so that we have to battle about as much with our own lawyers as we have to with the courts, and even then they will not present a case the way we want them to."[186] Often, additionally, the Jehovah's Witnesses defended themselves in court simply because they were unable to secure counsel—ACLU or otherwise. "The pioneers arrested at LaFayette, Louisiana," Moyle reported in mid-1938, "who had such a hard time securing an attorney defended themselves and were found not guilty by the court."[187]

To supplement the Order of Trial, the Watch Tower printed a nineteen-page "Trial Portfolio, for the use of attorneys and others engaged in the defense of Jehovah's

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[183] Olin Moyle to J.F. Rutherford, July 4, 1936; Olin R. Moyle Papers, Box 1, Folder 13.
[184] Olin Moyle to J.F. Rutherford, April 10, 1936; Olin R. Moyle Papers, Box 1, Folder 13.
[185] Olin Moyle to J.F. Rutherford, July 11, 1935; Olin R. Moyle Papers, Box 15.
[186] Olin Moyle to J.F. Rutherford, April 10, 1936; Olin R. Moyle Papers, Box 1, Folder 13.
[187] Olin Moyle to J.F. Rutherford, July 29, 1938; Olin R. Moyle Papers, Box 1, Folder 19.

Witnesses."[188] Listing the three types of ordinances under which Jehovah's Witnesses were most frequently arrested, the booklet instructed that defense testimony would be "much the same in all cases." Jehovah's Witnesses must demonstrate membership in the Watch Tower Society, introducing the Bible into evidence and citing the reasons why applying for a permit would be an act of disobedience to God. There was a line-by-line rehearsal of "Trial Examination," including questions and answers, and indicating when defendants should introduce each piece of evidence.[189] Finally, the pamphlet listed "Propositions of Law," including quotes from various state constitutions and the federal Bill of Rights."[190] Later, Moyle produced a document entitled "Motions to Dismiss," in which Jehovah's Witnesses acting without counsel merely had to fill pertinent information into blank spaces. "I think it would be well," Moyle wrote, "to have it printed with imitation typewriter type so it looks like a legal document."[191]

The group's legal leadership continued to push for nonviolence and calculated action. In early 1937, Moyle drew up instructions for the brethren in northern New Jersey, urging them to avoid unnecessary arrests. Field workers' responsibility was, he said, to be "as wise as serpents and harmless as doves and thus remain at liberty where your opportunities for service in the King's business are great." Considering the publishers' record in recent years, Moyle asserted, "One of the striking features is that

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[188] This document is undated, but is almost certainly from 1935 or 1936: an advertisement refers to the "three recent booklets" *Government—Hiding the Truth: Why?* (1935) *Universal War Near* (1935) and *Favored People* (1934)—incidentally, the three booklets carried by Wallace Vick in his visit to the New Jersey drug store in 1935. The pamphlet also quotes from Judge Rutherford's 1935 speech at the Washington, D.C. convention. Moyle referred to his efforts in creating a trial portfolio in an April, 1936 letter to Rutherford.

[189] Evidence included the charter of the Watch Tower Bible & Tract Society, the Identification and Authorization Card signed by Rutherford, a Police Card, a Testimony Card, one or more of the Watch Tower Society's books and Booklets, and the Bible.

[190] Quoting the provision in the New Jersey Constitution, the pamphlet advised that "You will no doubt find similar provisions in your state constitution."

[191] Olin Moyle to J.F. Rutherford, June 17, 1937; Olin R. Moyle Papers, Box 1, Folder 17.

some brethren are arrested over and over again, while others do not ever land in the hoosegow." Reasons for this, he suggested, might be

1. It may be just a coincidence. Just one of those things that happen.
2. It may be because such persons are very active, and instant in the Lord's service in or out of season.
3. It may be because such persons are very courageous and always on hand when work is done in the trouble zones.
4. It may be because such persons thru being active in service, and thru their many arrests are well known by officers and thus readily identified and picked up.
5. Those who are overly insistent on their rights, pugnacious and impudent are more apt to be arrested than otherwise.
6. A lack of proper discretion and wisdom will result in unnecessary arrests.
7. Evasiveness in dealing with officers will arouse anger and oftimes (sic) result in being taken in.

Being arrested frequently for any of the first four reasons was "no cause for regret"; however, if the last three reasons pertained, "such person needs to carefully and prayerfully amend his ways." Moyle emphasized the need of "kindly courtesy" when dealing with judges and the police—though not a "servile, cringing or fawning attitude." Moyle urged members of the group to remember that a "calm, dignified response goes much further than a wordy battle with the officials. Recent events prove that they would like to get all of you to become disorderly so that they could convict you on such charge. Don't give them the chance to put that over. Take it with a smile and make them feel sorry they arrested you."[192]

The city of Griffin, Georgia had been a "hot" territory for several years; Jehovah's Witnesses were the subjects of police "round-ups" and hasty trials. "The chief officials of Griffin, Georgia," the *Golden Age* accused, "are not at all satisfied with the American bill of rights. They do not believe in freedom of conscience and freedom of worship.

[192] Olin R. Moyle Papers, Box 1, Folder 17.

They believe in framing mischief by law against the righteous. They think it smart to prostitute the courts for their evil purposes. They would turn the wheels of progress back to the Dark Ages and install themselves as the tycoons and popes of an American city."[193] Through the Society's publications and word-of-mouth, Jehovah's Witnesses across the country heard about these round-ups. Lillian Gobitas, one of the flag salute litigants, remembered hearing about the situation in Griffin as a little girl in Minersville, Pennsylvania.[194] "There was a large group arrested, and Alma Lovell was a pretty little girl, pretty young girl," she recalled. When Lovell (along with dozens of other Jehovah's Witnesses) was tried in the Griffin Recorder's Court, the city attorney chose her to speak for the group:

> They thought, 'Aha, she's going to be an airhead, and she's not going to know what to say. We'll pick her to speak for the group!' They didn't know that she had practiced and practiced that 'Order of Trial.' And she came across like a Philadelphia lawyer!

Nonetheless, Lovell was found guilty of violating a circular distribution ordinance, and sentenced to fifty days in jail in default of a fifty dollar fine.

> Her husband was president of one of the banks in Atlanta. He comes roaring down, 'Babe, I'm getting you out of here, I'm paying the fine.' And she started to cry, she said, 'I want to be with my brothers, don't pay the fine!' And the jailer said, 'Lady, I've seen `em cry to come out but I never saw `em cry to stay in![195]

Lovell filed her own oral demurrer, moving to dismiss the case on the basis that the ordinance was contrary to the First and Fourteenth Amendments.[196] The case was accepted for hearing by the Supreme Court in October 1937; Moyle told Rutherford, "I

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[193] "Obeisance to the Pope in Griffin, Ga.," *The Golden Age*, April 8, 1936, 438.

[194] Interview with Lillian Gobitas Klose, at her home in Fayetteville, Georgia, November 19, 2008. In possession of the author.

[195] Ibid.

[196] *Lovell v. Griffin*, Transcript of Record, Supreme Court of the United States, October Term, 1937, No. 391, 4. Library of Congress.

am not very sure of grounds on this Supreme Court stuff and plan on going to Washington…so as to get the next steps going."[197]

The ACLU assisted in preparing the documents for the Court, and Moyle expressed confidence that the record and the brief were "in fine shape." The Workers Defense League, a national labor organization, asked whether they might file an amicus brief in the case, and Moyle told them he would be glad to have their cooperation.[198] Labor and other activists groups were interested in the case because their members had been arrested for distribution of handbills.[199] In the brief, Moyle and Jehovah's Witness attorney Grover Powell argued that the ordinance violated the freedom of the press and of religion, contrary to the First and Fourteenth Amendments. Stressing the importance of free expression in pamphlets, the brief pointed out that "Such leaflets have, indeed, formed an important part of our history, from colonial days to the present." The ACLU filed an amicus brief "because of its interest in the question of free speech raised herein." Echoing Moyle's emphasis on the Jehovah's Witnesses' prolific pamphlets, the ACLU argued that such pamphlets "are often the only forms open to minorities…the weak, especially if unpopular, are usually unable to have their views brought to public notice through the newspapers."[200] The Workers Defense League urged that "today many municipal officials are attempting to circumscribe and limit the rights of free speech and press through the medium of unconstitutional ordinances as to render those rights

[197] Olin Moyle to J.F. Rutherford, October 12, 1937; Olin R. Moyle Papers, Box 1, Folder 17.
[198] Olin Moyle to J.F. Rutherford, November 2, 1937; Olin R. Moyle Papers, Box 1, Folder 17.
[199] The records of the ACLU are rife with such prosecutions. See, for example, Jersey City cases in 1937; ACLU Records, Reel 153.
[200] Brief submitted by Francis Biddle, Osmond K. Fraenkel, and Lloyd K. Garrison.

unavailable to any but powerful vested property interests." The experience of the group, they said, indicated that such ordinances "are mainly invoked against minorities."[201]

In January 1938, Moyle argued the case before the Supreme Court—his first argument before that body. He described being nervous—until Justice McReynolds asked him whether the case wasn't covered by the *Reynolds* decision. "I was pretty well tensed up to this point," Moyle wrote to Rutherford, "but I knew then that his knowledge concerning the principles of religious freedom were not equal to mine and felt completely at ease." Moyle's argument hinged on a point the Jehovah's Witnesses—and the ACLU—had been attempting to make since the First World War: the notion that the rights of all minorities, not only the Jehovah's Witnesses, were at stake. Justice Butler, the lone Catholic member of the Court, did not ask any questions,

> But sat there with a sardonic grin on his face until near the close when I pointed out under the construction as made by the Georgia court that we could very easily be put in the same situation as Russia or Germany where the children are not permitted to be taught anything concerning the Bible or religion. Butler's face changed expression and he listened very soberly from there on. I guess it dawned upon him that if the court followed the Georgia rule of construction, things might happen in some places to the parochial schools of the holy church.[202]

In March 1938, the Supreme Court handed down a decision in the Jehovah's Witnesses' favor. The tribunal decided the case on free press grounds, declaring that the Griffin ordinance requiring prior written consent for literature distribution constituted an unconstitutional prior censorship of the press. In the first case decided in the Jehovah's Witnesses' favor in the Supreme Court, then, although the Jehovah's Witnesses had won

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[201] Brief submitted by Samuel Slaff and George Slaff.
[202] Olin Moyle to J.F. Rutherford, February 7, 1938; Olin R. Moyle Papers, Box 1, Folder 19.

and the ordinance had been held unconstitutional, the Court declined to deal with the issue on religious liberty grounds. It was a partial victory, but a victory nonetheless.[203]

The Liberty to Preach

Following the *Lovell* decision, Moyle began to prepare a pamphlet entitled "Liberty to Preach, Confirmed and Upheld by the United States Supreme Court." The pamphlet decried the previous construction of ordinances, asking, "Of what advantage is it to have the right to believe a religious principle if you cannot act in accordance with that principle? Where is religious freedom if one entertaining a sincere religious belief may be prohibited by law from teaching such belief?" Citing all the cases in which the courts had construed ordinances in the "proper method" (Jehovah's Witnesses cases and otherwise), the Jehovah's Witnesses cheered the Supreme Court's *Lovell* decision, and urged members of the group and others to continue to push for their Constitutional rights.[204] Shortly after the Court rendered its decision, Rutherford wrote to Moyle from aboard an ocean liner, referring to the mass arrests in Griffin, Georgia:

> The more I think about it the more I am inclined to think we should move against that city….If you conclude that our people were arrested have a

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[203] The *Lovell* case was the first Jehovah's Witness victory in the Supreme Court. The Court found the Griffin ordinance to be unconstitutional on First and Fourteenth Amendment grounds. This case was not the first case in which First Amendment rights were incorporated into the Fourteenth Amendment, but was one of the first. *Near v. Minnesota*, a 1931 case in which the Court had rejected prior restraints on publication as contrary to the First Amendment's free press guarantee, was the first case in which the Court had upheld these claims. *Near v. Minnesota*, 283 U.S. 697 (1931). The *Lovell* case was notable, however, because the Court rejected prior restraints not only on publication, but on distribution as well. The precedents set in the *Near* and in the *Lovell* cases were used later to apply to free speech claims as well. By the time the *Lovell* case was decided, the Court had incorporated the free speech clause (in *Gitlow v. New York*, 268 U.S. 652 (1925)) and the free press clause (in *Near v. Minnesota*) of the First Amendment. The freedom of religion clause had not yet been incorporated, and would not be until the Jehovah's Witness case *Cantwell v. Connecticut*, (310 U.S. 296) decided in 1940.

[204] Olin R. Moyle, *Liberty to Preach, Confirmed and Upheld by the United States Supreme Court. Memorandum and Legal Opinion on Behalf of Jehovah's Witnesses.* Watch Tower Society Archives, Legal Department; Patterson, New York. Cases cited included *State v. Morris*, 28 Idaho 599 (1916), *Meyer v. Nebraska*, 262 U.S. 390 (1923), *Hamilton v. Regents*, 293 U.S. 245 (1934), *Gitlow v. New York*, 268 U.S. 652 (1925), *Stromberg v. California*, 283 U.S. 359 (1931), *Near v. Minnesota*, 283 U.S. 697 (1931), *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), *De Jonge v. Oregon*, 299 U.S. 353 (1937).

> cause of action, file a suit in each and every one of the cases, against the city, against the city manager, the chief of police, against the city attorney, the commissioner, the mayor, and particularly the Catholic priest, and every other SOB, that incited the mob, and see if we can't excite those roosters somewhat.[205]

Moyle agreed, yet cautioned Rutherford that prosecutors were rushing to establish that the *Lovell* decision did not apply to their ordinances. He was, however, confident that the law would be interpreted favorably to minority groups. "The decision is so clear and far reaching," he wrote, "that we should be able to wallop them all along that line."[206]

The pursuit of the group's larger goals, however, did not lie in suing local officials.[207] The group and the ACLU agreed that they must take a case to the Supreme Court on religious liberty grounds in their own right. The aim, after the *Lovell* decision, was to convince the Court to support the group's religious liberty claims, connecting them with free speech and press guarantees. The Jehovah's Witnesses thus continued in their preaching activities, using portable phonograph players in addition to their established canvassing activities. The flag salute cases, too, moved through the courts, with the aim of getting through the federal appeals process to the high court. The ACLU assisted in both, sometimes taking the lead, and sometimes submitting briefs amicus curiae to the court. "Willing to accept us as an ally among the infidels," Baldwin

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[205] J.F. Rutherford to Olin Moyle, March 31, 1938; Olin R. Moyle Papers, Box 1, Folder 1.

[206] Olin Moyle to J.F. Rutherford, April 7, 1938; Olin R. Moyle Papers, Box 1, Folder 19.

[207] Lovell was a direct appeal from conviction, not a damage suit. However, despite Rutherford's rhetoric regarding "suing every…SOB" in the city (presumably meaning pursuing damage suits against the city), he and Moyle agreed that they needed to win a Supreme Court case affirming their rights on religious liberty grounds. Lovell was a victory, certainly, and affirmed the free speech and press rights of the group. Yet the Court had avoided confirming the group's religious liberty claims at the same time, basing their ruling on free speech and press rights. It must be noted that the Court had previously dismissed an appeal in a similar Jehovah's Witness case for want of a substantial federal question, stating that the Jehovah's Witnesses had failed adequately to present free speech and press claims, and had failed to describe adequately the violation of the Fourteenth Amendment which had occurred. *Coleman v. City of Griffin*, 55 Ga.App. 123 (1937).

remembered, initially "they were…a bit skittish about cooperation. But they relented."[208] The alliance between the Jehovah's Witnesses and the ACLU, despite their differing worldviews, was due to their profound agreement on the overarching principle that civil liberties must be guaranteed to all. "One would be a poor egg," Moyle wrote to Rutherford in early 1938, "not to manifest zeal in a good fight like this. Any time I have a tendency to get discouraged or consider the job hard I always consider the publishers who are constantly loyally going thru the lion dens of New Jersey etc. Then I feel all pepped up for another crack at them."[209]

[208] Roger Baldwin, Unpublished Autobiography (Galley Proofs); Roger Baldwin Papers, Box 21, Folder 3, "Writings – Autobiography – Galley Proof".

[209] Olin Moyle to J.F. Rutherford, February 7, 1938; Olin R. Moyle Papers, Box 1, Folder 19.

Chapter V: Civil Liberties as a Federal Question

Jehovah's Witnesses and ACLU lawyers did not share a worldview, yet they held common attitudes toward civil liberties. In the late 1930s and early 1940s, the groups relied on this shared outlook to push hundreds of cases in state and federal courts. In 1939, Moyle requested extra staff, citing "the volume of work coming upon the bald head of the legal desk. I don't think the work is going to decrease. In fact, with the increase of publishers [individual Jehovah's Witnesses doing the service work], and the increasing wrath of the Catholic gang the legal work naturally will increase."[1] A few months later the Watch Tower legal department—and the Brooklyn Bethel—would be shaken by Moyle's angry departure and his replacement by another Jehovah's Witness lawyer, Hayden Covington, who would prove to be the most successful advocate of constitutional rights in Watch Tower history. "Covington," Roger Baldwin later wrote, "won most of his cases in the United States Supreme Court, not only for his clients but for new extensions of the Bill of Rights for everybody." Linking religious liberty to free speech and press had been a conspicuous part of the Jehovah's Witnesses' analysis since the First World War. The late 1930s and 1940s witnessed the culmination of this legal strategy. Nearly all of the Supreme Court decisions from 1938 to 1943 regarding religious liberty were pursued by Jehovah's Witnesses and the ACLU. "Of all the litigants in behalf of those principles," Baldwin would later remark, "I think the Witnesses contributed most in law."[2]

For the most part, ACLU attorneys, including Baldwin, Arthur Garfield Hays, and Jerome Britchey, appreciated Rutherford's obstinacy and the persistence of his group.

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[1] Olin Moyle to J.F. Rutherford, March 22, 1939; Olin R. Moyle Papers, Box 1, Folder 19.

[2] Roger Baldwin, Unpublished Autobiography (Galley Proofs); Roger Baldwin Papers, Box 21, Folder 3, "Writings – Autobiography – Galley Proof."

"Jehovah's Witnesses are stiff-necked, stubborn people," Hays would later write in reference to the Grace Sandstrom flag salute case.[3] "Personally, I think Grace was quite wrong," Hays reflected. "What happens to her at the Battle of Armageddon will probably have little to do with the salute to the flag. But, after all, Grace believed differently." Many groups saw the potential of the Jehovah's Witness cases as tests of civil liberties principles. The American Bar Association's Civil Rights Committee asked if they might file amicus briefs in several cases.[4] Samuel Slaff and the Workers Defense League, who had filed an amicus brief in *Lovell*, continued to be involved in literature-distribution cases, advising Jehovah's Witness lawyers and even discussing the cases with Justice Department lawyers.[5] Religious groups, such as the American Friends Service Committee, offered financial assistance.[6] The Reverend John Haynes Holmes, an early founder of the ACLU, wrote to Baldwin about the possibility of the American Unitarian Association becoming involved in the fight. "This is splendid," Holmes advised, "as there's a chance to get a strong religious influence working with us."[7]

The Jehovah's Witness cases were but a part of civil liberties advocacy before the Supreme Court during the late 1930s, in which ACLU and labor lawyers urged a more expansive definition of civil liberties and challenged practices which quashed organized labor or free speech. Just as Jehovah's Witnesses had long considered New Jersey to be a "hot" territory, in the 1930s civil libertarians had been waging a larger civil liberties battle in that state. Labor and civil liberties organizations wrangled with the entrenched

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[3] Arthur Garfield Hays Papers, Folder 8, p. 26.

[4] Olin Moyle to J.F. Rutherford, January 7, March 4, and March 22, 1939; Olin R. Moyle Papers, Box 1, Folder 19.

[5] Olin Moyle to J.F. Rutherford, April 7, 1939; Olin R. Moyle Papers, Box 1, Folder 19.

[6] American Friends Service Committee to ACLU, August, 1941; ACLU Records, Reel 201.

[7] John Haynes Holmes to Roger Baldwin, July 2, 1940; ACLU Records, Reel 186.

political machine, and a longstanding feud between Jersey City Mayor Frank "Boss" Hague and the CIO eventually led to a landmark Supreme Court decision expanding free speech.[8] Rather than distancing themselves, Jehovah's Witnesses saw themselves as an integral part of this civil liberties debate—and noted its importance in securing their own rights.[9] "Hague and the civil liberties forces," Moyle reported to Rutherford, "are having a knock down drag out fight which has finally brought the U.S. Department of Justice and the LaFollette Civil Liberty Committee into the picture."[10] Moyle assured Rutherford that, because of the increased attention these maneuverings brought to the Jersey City situation, he would prepare materials regarding Jehovah's Witness complaints in the same location, and submit them to the LaFollette Committee as well. The Watch Tower leadership relished any chance to petition for their rights—particularly against an old foe like "Boss" Hague.[11]

As civil liberties talk became more prevalent, Supreme Court justices themselves began to interrogate the meaning of the liberties promised by the Constitution. By mid-decade, the far-reaching programs of Roosevelt's New Deal had inspired politicians and

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[8] *Hague v. Committee for Industrial Organization*, 307 U.S. 496 (1939). The case resulted form Boss Hague's 1937 use of a city ordinance to prevent labor meetings on city property, and to stop labor organizers from distributing pamphlets and literature. In a landmark 1939 decision, the Supreme Court ruled that Hague's use of the ordinance violated CIO First Amendment rights to free speech and assembly. The resemblance to the Jehovah's Witnesses literature distribution cases (for example, *Lovell* and *Schneider*) is evident, and in fact *Hague v. CIO* and the Jehovah's Witness cases have frequently been cited together in discussions of civil liberties, and in later court rulings.

[9] Jehovah's Witnesses considered themselves to be a part of civil liberties battles which had nothing to do with religion. In 1939, for example, after quoting the liberal definition of press freedom dictated by the Court in *Lovell*, Moyle had celebrated that the "United States District Court, District of New Jersey, enjoined Mayor Hague and other Jersey City officials from interfering with the carrying of placards because of the infringement on freedom of the press." Olin Moyle to Lewis Valentine, March 30, 1939; ACLU Records, Reel 172. The decision was upheld by the US Circuit Court of Appeals on January 26, 1939, and by the Supreme Court in *Hague v. CIO*.

[10] Olin Moyle to J.F. Rutherford, May 20, 1938; Olin R. Moyle Papers, Box 1, Folder 19.

[11] Throughout the 1930s, the Watch Tower leadership had decried Boss Hague and his Jersey City political machine frequently in their literature. Not only did Mayor Hague seek to quash public speeches and leafleting using city ordinances, he was also a Catholic—and thus, according to the Jehovah's Witnesses, taking nefarious orders directly from the Vatican.

citizens to ask whether the federal government had overstepped its bounds. Amid court battles challenging federal economic regulation, however, civil libertarians and some judges and lawmakers began to suggest that different standards of judicial review were necessary for different types of cases. In a 1937 opinion, Justice Benjamin Cardozo (in *Palko v. Connecticut*) discussed the concept of "ordered liberty," stating that the Supreme Court could selectively incorporate some of the rights contained in the Bill of Rights to apply to the states. In 1938, Justice Harlan Stone proposed that, while laws imposing economic regulation ought to be approached with the presumption of constitutionality, cases involving civil liberties and individual rights necessitated a stricter scrutiny.[12] His fourth footnote in the *Carolene Products* case has been called the "most famous footnote in constitutional law."[13] *Carolene* was an otherwise unremarkable case in which dairy manufacturers challenged a federal law prohibiting the shipment of "filled milk" (milk which was skimmed and then fortified with cheaper fats so it would taste like whole milk or cream).[14] In his footnote to the ruling, Justice Stone suggested that a higher level of judicial scrutiny was merited by cases involving "statutes directed at particular religious, or national, or racial minorities" due to the fact that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities,

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[12] *Palko v. Connecticut*, 302 U.S. 319 (1937); *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

[13] Peter Linzer, "The Carolene Products Footnote and the Preferred Position of Individual Rights: Louis Lusky and John Hart Ely vs. Harlan Fiske Stone," in *Constitutional Commentary* 12 (Summer 1995): 277. See also William M. Wiecek, *The Birth of the Modern Constitution: The United States Supreme Court, 1941-1953* (New York: Cambridge University Press, 2006), 116.

[14] It is not clear why Justice Stone chose the filled milk case as a forum to air his views on judicial scrutiny. It is likely that he chose an fairly obscure economic regulation case to reflect the fact that, for the better part of a decade, the Court had encountered mainly two types of cases: on the one hand, those dealing with New Deal and other economic regulations, and on the other, civil liberties and civil rights issues, particularly those involving First and Fourteenth Amendment issues.

and which may call for a correspondingly more searching judicial inquiry."[15] Because minority religious or racial groups, lacking clout, might not be able to protect themselves by ordinary political means, Stone, reasoned, laws aimed at these groups should be subjected to stricter scrutiny by the courts in order to assure that civil liberties were not being trammeled. Civil libertarians, labor organizers, and Jehovah's Witnesses lauded Stone's suggestion.

Testing the Supreme Court

Yet there was by no means a consensus as to the Court's place in these matters of civil liberties. In fact, the Court rejected several cases of the Jehovah's Witnesses—mainly flag salute cases—in *per curiam* decisions, for want of a substantial federal question.[16] That is to say, the cases did not implicate a Constitutional right, and thus the Court did not have jurisdiction to decide them. In the 1930s, the Court grappled with the issues of whether it was to approach legislation with activism or restraint. Since the founding of the republic, the Supreme Court had defined its role in protecting civil liberties in a very limited way. A limited amount of scholarship on the justices and their opinions examines why they eventually decided to expand and incorporate civil liberties in the twentieth century.[17] More difficult to answer is why the Supreme Court agreed to

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[15] *United States v. Carolene Products Co*., 304 U.S. 144 (1938); see Walker, *In Defense of American Liberties*, 106.

[16] *Coleman v. City of Griffin*, 302 U.S. 636 (1937) (literature distribution case); *Leoles v. Landers*, 302 U.S. 656 (1937) (flag salute case); *Hering v. State Board of Education*, 303 U.S. 624 (1938) (flag salute case); *Gabrielli v. Knickerbocker*, 306 U.S. 621 (1939) (flag salute case); *Johnson v. Deerfield*, 306 U.S. 621 (1939) (flag salute case).

[17] See, for example, Louis Lusky, "Footnote Redux: A 'Carolene Products' Reminiscence," *Columbia Law Review* 82, no. 6 (October 1982): 1093-1109; Peter Linzer, "The Carolene Products Footnote and the Preferred Position of Individual Rights: Louis Lusky and John Hart Ely vs. Harlan Fiske Stone," *Constitutional Commentary* 12 (Summer 1995): 277; Howard Gillman, "Preferred Freedoms: The Progressive Expansion of State Power and the Rise of Modern Civil Liberties Jurisprudence," *Political Research Quarterly* 47 (1994): 623; Henry J. Abraham and Barbara A. Perry, *Freedom of the Court: Civil Rights and Liberties in the United States* (New York: Oxford University Press, 1998); Bruce A. Ackerman, "Beyond 'Carolene Products'," *Harvard Law Review* 98, no. 4 (February 1985): 713-746; James F. Simon,

hear cases relating to civil liberties in the first place—especially when they had rejected many such appeals as out of their jurisdiction relatively recently. One answer to this question is that, when lower courts handed down rulings expressly opposed to Supreme Court rulings, the Court had to take the issue on to clarify the law.

This was certainly true of the many cases litigated on Jehovah's Witness issues. By the late 1930s, rulings in the circuit courts and state courts were so varied that broader clarification from the Supreme Court seemed necessary. The legal doctrine of "incorporation," wherein First Amendment guarantees were applied to state and local action (rather than merely to federal laws) by the use of the Fourteenth Amendment's due process clause ("No state shall deprive any person of…liberty…without due process of law…") was one avenue toward broadening the protection of civil liberties in the United States. Yet the incorporation of some parts of the Bill of Rights into the Fourteenth Amendment's liberty guarantees was relatively new in 1938, having been confirmed by the Supreme Court regarding some areas of free speech only in the mid-1920s.[18] Hoping for the extension of civil liberties that incorporation would entail, the ACLU and the Jehovah's Witnesses saw it as being imperative to bring cases at the federal level, so that when they lost, they could appeal to the Supreme Court. However, even after its positive ruling in the *Lovell* case, the Supreme Court declined to hear both flag salute and literature distribution cases, asserting that such matters "lacked a substantial federal

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The Antagonists: Hugo Black, Felix Frankfurter and Civil Liberties in Modern America (New York: Simon and Schuster, 1989); Melvin Urofsky, *Division and Discord: The Supreme Court Under Stone and Vinson, 1941-1953* (Columbia, South Carolina: University of South Carolina Press, 1997).

[18] The Court never fully incorporated the Bill of Rights, using instead a process of selective incorporation. Only those rights deemed "fundamental" to "ordered liberty" were incorporated. See Akhil Reed Amar, "The Bill of Rights and the Fourteenth Amendment," *The Yale Law Journal* 101, no. 6 (April 1992): 1193-1284; David Rabban, "The Emergence of Modern First Amendment Doctrine," *University of Chicago Law Review* 50 (Fall 1983): 1205-1135; Paul Murphy, *The Bill of Rights and American Legal History* (New York: Garland Pub., 1990); Michael J. Perry, *We The People: The Fourteenth Amendment and the Supreme Court* (New York: Oxford University Press, 1999).

question" and were the provenance of state courts and legislatures. "Maybe," Moyle wrote crossly to Rutherford after one such defeat, "the Supreme Court keeps its decisions contradictory so it can hop off on either foot as the spirit moves it."[19]

The group continued to advocate civil disobedience and the crafting of good test cases. In their hopes of reaching the highest court for constitutional rulings, Jehovah's Witnesses realized that their cases must be flawless. In Atlantic City, for example, a number of the brethren were arrested in early 1938 for using a transcription machine (a large portable sound system, used to amplify sound recordings before portable phonographs were widely available) to hold a public meeting at the beach. They were charged with disorderly conduct and violating the electrical code.[20] Moyle wanted to push the case (especially because the Salvation Army and the Ministerial Union had been allowed, as he put it, to "spout about" on the beach without interference) but Rutherford deemed this unwise, desiring a clean case to test the law. "I think undoubtedly we would beat them on a question of disorderly conduct," he wrote to Moyle,

> but I am afraid of that charge with reference to violating the electrical code...I am wondering if it wouldn't be better to let the case end where it is and send someone to Atlantic City and put on a transcription meeting in the same place by our own power and announce in advance that it is a meeting for the preaching of the gospel of God's Kingdom and let them arrest them and make a test case of it. You can make up a record of the case as you want it and we would have a better showing in the Supreme Court.[21]

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[19] Olin Moyle to J.F. Rutherford, December 8, 1938; Olin R. Moyle Papers, Box 1, Folder 19.

[20] The charge against the Jehovah's Witnesses for violating the "electrical code" evidently relied on regulation regarding outdoor wiring and using electrical equipment. It was regarded by the group as a sham charge, utilized by their opponents fortify a case against them by making it appear that what they were doing endangered the public safety.

[21] Olin Moyle to J.F. Rutherford, January 1, 1938; J.F. Rutherford to Olin Moyle, January 4, 1938; Olin R. Moyle Papers, Box 1, Folder 19; See also Olin Moyle to Lucille Milner, May 2, 1939; ACLU Records, Reel 167.

Rutherford urged Moyle to craft perfect test cases—those which would be decided on their merits, rather than on technicalities.

Enemies in Connecticut

After their victory in the *Lovell* case, it was of critical importance to the Jehovah's Witnesses that they gain the Supreme Court's approval of their view of religious and other civil liberties. "The battle line, as a result of the Lovell decision," Moyle wrote to Rutherford in mid-1938, "has shifted both as to territory and nature. Connecticut is now the place. Over two hundred arrests in two months, and about 135 appeals pending in the Superior Courts."[22] A state disorderly conduct statute in Connecticut stipulated that no person could "publicly exhibit, post up or advertise any offensive, indecent or abusive matter concerning any persons"—a prohibition similar to the broad New Jersey Anti-Nazi law.[23] Jehovah's Witnesses made clear their ambition "to test the constitutionality of this statute as an infringement upon the freedom of speech and press and as an infringement upon freedom of worship and religion, and freedom of conscience."[24] The ACLU leadership in New York agreed, calling this a "free speech case."[25]

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[22] Olin Moyle to J.F. Rutherford, May 2, 1938; Olin R. Moyle Papers, Box 1, Folder 19.

[23] Jehovah's Witnesses Press Release, April 27, 1938; ACLU Records, Reel 163. Olin Moyle to Lucille B. Milner, April 27, 1938; ACLU Records, Reel 163.

[24] Jehovah's Witnesses Press Release, April 27, 1938; ACLU Records, Reel 163.

[25] Lucille B. Milner to Saul Gamer, April 26, 1938; ACLU Records, Reel 163. Not all ACLU-affiliated lawyers agreed, however—Gamer replied to Milner that he did not want to be involved in the case, opining that the statute "would be held to be valid as an appropriate exercise of police power," and that, rather than being a violation of freedom of worship, "this statute is designed to guarantee such civil liberty." Saul Gamer to Lucille B. Milner, April 30, 1938; ACLU Records, Reel 163. The case was *Watch Tower Society v. City of Bristol*, in which an injunction was sought against interference by Bristol police with Jehovah's Witnesses' religious activities, charging that freedom of speech, press, and religious practice had been denied. ACLU Bulletin #827, July 30, 1938; ACLU Records, Reel 163. See Olin Moyle to Jerome Britchey, August 15, 1938; Arthur Fennell to Olin Moyle, August 22, 1938; Jehovah's Witnesses News Release, October 27, 1938; Jerome Britchey to Arthur Garfield Hays, November 14, 1938; ACLU Records, Reel 163.

The number and frequency of arrests continued to grow. In "hot" territories like Montreal,[26] New Jersey and Connecticut, Jehovah's Witnesses "would go out expecting to get arrested every day. And they would. So they would take their toothbrush, and their overnight needs with them when they went to do the door-to-door work because they'd wind up in jail."[27] A renewed campaign, initiated in 1937 to publicize the book *Enemies,* had only increased opposition to the canvassing work. In 1937, Jehovah's Witnesses had also incorporated the use of portable phonograph players, which were taken door to door.[28] The canvasser would ask a resident whether he or she would listen to a short recording, and would then play a wax-disc recording of Rutherford's speech. Lowell Yeatts remembered that

> Rutherford would record his lectures on big wax discs—they were wax more than plastic the way LP's are now—and we had little portable phonographs…and we would come to a home, and ask them could we play you something on a record? And with their permission, we'd just hold it in our arms, and turn it on, and we'd play the lecture for them.[29]

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[26] Canadian Jehovah's Witnesses were, if anything, in a worse position than those in the United States at this time. While their literature had been censored during the First World War, in the late 1930s, Jehovah's Witnesses were tried for sedition. The Society was banned in Canada in 1940, under the War Measures Act, and remained banned until 1943. See William Kaplan, *State and Salvation* (Toronto: University of Toronto Press, 1989), for a cogent description of Jehovah's Witnesses' struggle for civil liberties in Canada. Additionally, Jehovah's Witnesses engaged in prolonged battles in Quebec, perhaps because of the dominance of the Catholic Church there. Premier Maurice Duplessis argued and established some version of a state church, and Jehovah's Witnesses continually fought against it in the years after the Second World War. Duplessis equated Jehovah's Witnesses with Communists, engaging in a decades-long struggle with them over literature distribution and political dissent. Many cases were fought in the Supreme Court of Canada; similarly to the United States, under Rutherford's leadership and with the work of a legal team, these cases hinged on the connection of free speech and religion. The primary difference between the fight in Canada and that in the United States was that, prior to 1960, Canada did not have a codified Bill of Rights.

[27] Interview with Lowell Yeatts at his home in Cumming, Georgia, September 8, 2008. In possession of the Author.

[28] In late 1937, Rutherford had announced that the group would cease broadcasting over the radio, relying now on portable phonograph machines to bring the message directly to the people. "Worshipping God," broadcast September 26, 1937, by Judge Rutherford. Reprinted in *Consolation*, October 20, 1937, 7-16.

[29] Interview with Lowell Yeatts.

The recording which accompanied *Enemies* was characteristically provocative, suggesting that false religion had "by means of fraud and deception brought untold sorrow and suffering upon the people." The Catholic Church constituted "the greatest racket ever employed amongst men and robs the people of their money and destroys their peace of mind and freedom of action." Churches and governments were the tools of "Satan the Deceiver."[30] Soon after initiating the use of these portable phonographs, Rutherford had noted to Moyle that the "work seems to have aroused the Catholic gang to great heights of fury….In fact the ENEMIES book and the phonographs and the special pioneers are warming the old lady up in great shape."[31]

Using methods of spreading the Kingdom message which did not directly involve literature distribution had a primarily evangelical purpose; yet the group was undoubtedly also searching for new ways to challenge arrests based on "distribution." In theory, local officials could not use peddling or distribution ordinances against Jehovah's Witnesses if they were not actually peddling or distributing anything. The use of purely sound-based canvassing methods—like playing records—provided a way to show that "peddling" ordinances were passed, or were being used, specifically to exclude Jehovah's Witnesses. One way to test these laws and regulations, the Watch Tower leadership reasoned, was to stage canvassing activities aimed at these distribution ordinances. If the laws were really, as their proponents maintained, intended to curb literature distributions or peddling, then local authorities should have no problem with Jehovah's Witnesses' verbal canvassing. "A number of cities," Moyle reported to Rutherford, "are making new ordinances, which the newspapers quite frankly state are aimed at Jehovah's witnesses….The ordinances are

[30] Joseph Franklin Rutherford, "Enemies," Reprinted in *Consolation*m October 20, 1937, 17.

[31] J.F. Rutherford to Olin Moyle, February or March, 1938 (before *Lovell*); Olin R. Moyle Papers, Box 1, Folder 19.

tight ones aimed at distribution of literature. After they get them nicely fixed up the brethren will go in there with the phonographs."[32] As Moyle explained to Jehovah's Witnesses in late 1937:

> Most of the ordinances used to suppress the carrying of the truth to the people are peddling ordinances and ordinances governing the distribution of handbills, pamphlets, circulars, and other papers. The Lord has now graciously provided His people with new means of witnessing in His day; to wit, the phonograph….As the campaign proceeds it often happens that the strong-arm squad sallies forth to make arrests and then finds, after the arrests are made, that it is faced with the problem of charging people with distribution of literature when they had with them no literature whatsoever.[33]

Prosecutions in cases where only the phonograph was used, Moyle and Rutherford hoped, would expose the corrupt and discriminatory motives of local officials.[34]

All of these steps were calculated to bring federal cases. The group was impatient with the state appellate system, and attempted to bring federal cases in order to have the Supreme Court reconcile some of the wildly diverging rulings in state and lower federal appeals courts. Even after *Lovell*, the Jehovah's Witnesses and the ACLU had tired of pushing cases through the state and lower federal courts, whose notions of civil liberties protections differed radically.[35] They insisted that some of these issues must be resolved by the Supreme Court. In 1938 and 1939, thus, the group sought to bring their cases before three-judge federal courts, because the appeals from these tribunals went directly to the Supreme Court. This would enable them to test the constitutionality of

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[32] Olin Moyle to J.F. Rutherford, January 18, 1937; Olin R. Mole Papers, Box 1, Folder 17.

[33] Olin R. Moyle, "Counsel to Publishers," in *Consolation*, November 3, 1937, 5-15.

[34] Olin Moyle to J.F. Rutherford, 1937; Olin R. Moyle Papers, Box 1, Folder 17; Complaint filed by Abraham Waks, Edward Gaulkin, A.P. Singman and O.R. Moyle, September 30, 1937, in United States District Court at Trenton, against the Borough of East Newark; ACLU Records, Reel 153.

[35] The Jehovah's Witnesses had, until this point, proceeded through the state courts, appealing when there was disagreement among states. This had proved a reasonable strategy, if one requiring a good deal of patience, after their case was heard by the Supreme Court (*Lovell*). However, after several years of pursuing this strategy, Moyle and Rutherford had the idea of getting cases into the lower federal courts via injunction action—thereby providing a more direct route to the Supreme Court.

ordinances—a tactic which the ACLU supported.[36] Moyle's outline of the group's strategy in Connecticut, in particular, illustrates a strategic approach to the issue:

1. PROSECUTE APPEALS in all convictions.
2. BRING INJUNCTION proceeding before a Federal three judge court and have the laws ruled unconstitutional. Appeal from such three judge court goes directly to the U.S. Supreme Court.
3. C.L.U. COOPERATION. Civil Liberties Secretary asked what they could do. I suggested they bring an action in the state courts under the declaratory judgment act asking that the statutes be declared unconstitutional.
4. PRIESTLY INTERFERENCE. As soon as the reversals are secured sue every priest and K.C. that has stuck his nose into the affair.

In addition to these a special witness throughout the state may be given.[37]

What remained, then, was to wait for a canvassing case in which these steps could be taken, and the ruling could then be appealed to the Supreme Court. Unlike in their prior attempts in the Supreme Court, Moyle and Rutherford agreed that they must push that tribunal to rule on the religious liberty question, rather than relying on free speech and press.

"The case of the three publishers by the name of Cantwell," Moyle soon reported to Rutherford, "charged with soliciting donations without a permit and committing a common law breach of the peace for distributing 'inflammatory literature,' comes up before the Supreme Court of Errors of Connecticut some day this coming week. This will be quite an important case…"[38] On April 26, 1938, three Jehovah's Witnesses had been arrested and charged with violating two Connecticut statutes: one that required licenses for the distribution of literature, and another (which the ACLU and Jehovah's

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[36] In November 1938, Jerome Britchey wrote to Arthur Garfield Hays that Percy Strauss, another ACLU lawyer, "was very much impressed with the attempt to use the new form of three judge court to test the constitutionality of an ordinance." Jerome Britchey to Arthur Garfield Hays, November 14, 1938; ACLU Records, Reel 163. See also Olin Moyle to Jerome Britchey, November 24, 1938; ACLU Records, Reel 155; Olin Moyle to Jerome Britchey, November 16, 938, ACLU Records, Reel 166.

[37] Olin Moyle to J.F. Rutherford, undated, [May, 1938?]; Olin R. Moyle Papers, Box 1, Folder 19.

[38] Olin Moyle to J.F. Rutherford, April 27, 1939; Olin R. Moyle Papers, Box 1, Folder 19.

Witnesses had already protested in New Haven) that broadly defined breach of the peace to include the offering of "inflammatory literature." Newton Cantwell and his two sons, Jesse (aged 16) and Russell (aged 18), had been going door-to-door on Cassius Street, a neighborhood of New Haven which was ninety percent Catholic. They were playing the record *Enemies*, and were also distributing literature. Jesse had stopped two Catholics—John Ganley and John Cafferty—on the street, and, after asking permission, had played him the "Enemies" recording. Upon hearing the record, Ganley reported, he had "felt like hitting" Jesse Cantwell; Cafferty suggested that they "put him off the street."[39]

Despite Moyle's appearance at the Cantwell's trial, the three were convicted and fined ten dollars apiece; their appeal was rejected in June 1939 by the Supreme Court of Errors of Connecticut. Most of the evidence used against the Cantwells, aside from the straightforward facts of the case, had been gleaned from the book and recording *Enemies* and other Watch Tower publications—large portions of which were read into the record at the trial.[40] Invoking freedoms of speech, press and religion, Moyle and Otto LaMacchia (the Cantwells' other attorney, began to prepare briefs for a United States Supreme Court appeal of the Cantwell case.

A Lawyer's Disillusionment

Soon after the Cantwells were convicted, however, Olin Moyle split with Rutherford and the Watch Tower Society—in dramatic fashion. In July, 1939, Moyle resigned as legal counsel for the Society and sent Rutherford an emphatic letter of protest, indicating his intention to leave the Brooklyn Bethel on September 1. He was

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[39] *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

[40] Transcript of Record, Supreme Court of the United States, October Term, 1939, Jesse Cantwell, Newton Cantwell and Russell Cantwell, Appellants; Jesse Cantwell, Petitioner v. The State of Connecticut, Filed January 11, 1940. Library of Congress.

departing, he wrote, because Rutherford had made a practice of "lambasting and browbeating his fellow workers at Watchtower headquarters" and discriminating against others "in the matter of comforts and convenience"; Rutherford also, Moyle contended, made "too much glorification of alcohol, and too much use of smutty language."[41] Insisting that he was making this protest for the good of the Society, Moyle decried Rutherford's ill treatment of the Bethel family, including "trimmings" (that is, verbal scolding) given by Rutherford to C.J. Woodworth, the lawyer Harry McCaughey, Nathan Knorr and others. "Your action," he wrote to Rutherford, "constituted a violation of the principle for which we are fighting, towit [sic], freedom of speech." Moyle provided Rutherford with the details of the major cases pending on the canvassing, flag salute and other issues. "It would be unreasonable and unfair," he wrote, "to drop these matters into your lap without further assistance or consideration. I am ready and willing to press these issues in the courts just as vigorously and carefully as though I remained at Bethel, and will do that if you so desire."

The parting would not be amicable, however. On August 8, Rutherford read the letter to the Board of Directors, and instructed Woodworth to reply. "Every director in that room," Woodworth wrote to Moyle, "believes that Judge Rutherford is wholly devoted to the Lord and wholly unselfish in his administration of the Lord's work in the earth, of comforting all that mourn and proclaiming the day of vengeance of our God."[42] The board decided that Moyle's connections with the Society must be severed immediately; he was given half a day to pack up and leave Bethel. Moyle moved back to Wisconsin and started a law briefing service; yet within a few months he was

[41] Olin Moyle to J.F. Rutherford, July 28, 1939; Olin R. Moyle Papers, Box 1, Folder 1.
[42] Clayton J. Woodworth to Olin Moyle, August 15, 1939; Olin R. Moyle Papers, Box 1, Folder 1.

excommunicated from the Milwaukee Company of Jehovah's Witnesses. "Only an open enemy of the Lord," wrote W.P. Heath, "could have betrayed his brethren as you did those charged in the courts in a manner in which a worldly lawyer would have been ashamed to so betray his client's interests. My counsel, who are no part of the organization tell me you have jeopardized our cases."[43] Moyle denied that he had sabotaged any cases, protesting to a colleague outside the organization that he had "worked night and day" for four years "battling for the rights of Jehovah's witnesses to exercise freedom of conscience, speech, etc, and then I suddenly find that freedom of conscience, speech etc are not permitted inside the organization." He considered himself to be the victim of "a neat little inquisition, RC model, in efficient style."[44] He had been "branded a religionist," he complained to another, "a member of the evil servant, and in all seriousness it was claimed that I was a Jesuit, presumably in disguise."[45]

The October 1939 issue of the *Watchtower* contained a column of "Information," endorsed by Rutherford and all of the other directors, which labeled Moyle a "Judas," an "evil servant," who "libels the family of God at Bethel" and whose writing was "pleasing only to the Devil and his earthly agents."[46] When, in November 1939, the *Watchtower* published an article called "Snares" publicly deriding him, Moyle wrote to the Milwaukee Society, asserting that he had "worked days, nights and Sundays in the battle to maintain our right to preach the gospel….I have on hold many letters from the Society's President in which he commends me for my zeal and earnestness in handling

[43] W.P. Heath to Olin Moyle, August 24, 1939; Olin R. Moyle Papers, Box 1, Folder 1.
[44] Olin Moyle to Major Joseph Whelless, June 28, 1940; Olin R. Moyle Papers, Box 1, Folder 20.
[45] Olin Moyle to William Hazard, September 6, 1939; Olin R. Moyle Papers, Box 1, Folder 1.
[46] "Information," in the *Watchtower* (15 October 1939): 316-317.

cases of the brethren."[47] Moyle sued Rutherford and the Watch Tower Society for libel; the case was in the courts for four years.[48] It is unclear to what extent Moyle's accusations against Rutherford were true, or what so suddenly soured what had been a communicative and affable relationship between the two men. What is certain is that Rutherford and his remaining associates at the Watch Tower wasted no time in excluding and maligning their former colleague, quickly replacing him in the legal department. Moyle remained in Wisconsin, resuming work as an attorney, yet without the Society in which he had truly believed.

Cantwell and *Gobitis*

After Moyle's departure, a new lawyer took the helm at the Watch Tower legal department. Born and raised in Texas, Hayden Cooper Covington had graduated from law school in Texas in 1934, working first as a trial attorney at a San Antonio law firm and then as counsel for a Maryland insurance company. Covington came "into the Truth" in 1939; he began working at the Watch Tower Society legal department at the end of 1939, where he would stay for thirty years.[49] Covington made an impression on everyone he met. Lowell Yeatts described him as "a Texan…a plain old Texan. Slow drawling, big voice, big man, wore a 10-gallon hat." By all accounts, Covington was a commanding personality and a master lawyer. The ACLU's Roger Baldwin later called him "one of the ablest and most determined lawyers I have ever dealt with."[50] Covington, Baldwin reflected, "was all lawyer, not once did he ever refer to his creed.

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[47] Olin Moyle to Milwaukee company of Jehovah's Witnesses, September 8, 1940; Olin R. Moyle Papers, Box 1, Folder 3.

[48] *Moyle v. Rutherford et al.*, 261 App. Div. 968; 26 N.Y.S. 2d 860; *Moyle v. Franz et al.*, 267 App. Div. 423; 46 N.Y.S. 2d 607; *Moyle v. Franz et al.*, 47 N.Y.S. 484.

[49] Resume of Hayden Covington; Watch Tower Legal Department Archives, Patterson, New York. Folder: "Historical Documents."

[50] Roger Baldwin, Unpublished Autobiography, 33. Box 20, Folder 11. "Autobiography (1884-1920) – Manuscript." Roger Nash Baldwin Papers.

Unlike the Communists, he never mixed propaganda with law. He was tireless, determined, enormously energetic, and resourceful." The Jehovah's Witnesses had been fashioning their legal arguments and carrying out acts of civil disobedience for over two decades; they had collaborated with the ACLU for much of that time. Covington's charge was to push, and to win, cases in the United States Supreme Court—on religious liberty grounds.

Soon after taking his place as the head of the legal department, Covington was faced with a pair of cases which would prove to be momentous. Covington filed a petition for certiorari in the *Cantwell* case with the Supreme Court in October 1939, after he took over from Moyle. A seasoned piece of legal work, the brief relied on both judicial precedent (citing the liberal rulings in *Gitlow*, *Lovell*, *Hague*, and *Schneider*, and differentiating the case from prohibitive rulings, such as those in the Mormon cases) and Scriptural quotations. In their primary Point of Argument, Covington and Rutherford insisted that "The 'imprescriptable right' of freedom to worship ALMIGHTY GOD, Jehovah, in accordance with God-given commands recorded in Holy Writ and with the dictates of one's own conscience is definitely and clearly included within the liberties and rights secured under the 'due process' clause of the Fourteenth Amendment against state invasion."[51] The Court, Rutherford and Covington insisted, must decide this case not only on the basis of speech and press rights, but in reference to the religious liberty that was contingent upon these rights. The Supreme Court decided to take this case.[52]

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[51] Appellant's Brief, *Cantwell v. Connecticut*, 310 U.S. 296 (1940), Library of Congress.

[52] This was not an automatic appeal. There is no direct evidence for why the Supreme Court suddenly decided there was federal jurisdiction for this sort of case, as justices did not justify their decisions to take cases, only their rulings therein. However, it is most likely that the Supreme Court got involved because these sorts of cases were multiplying, and becoming more of a public issue, as the lower courts divided in their opinions.

Covington presented oral arguments in the *Cantwell* case before the Supreme Court on March 29, 1940. The Chief Justice, Charles Evans Hughes, interrupted him several times. From the bench, Justice Hughes suggested that there were vying claims to religious liberty at stake in this case: Catholics had as much a right to be left alone as Jehovah's Witnesses had to worship. Rejecting this argument, Covington asserted that, if such limits could be placed on speech for the sake of peace, Republicans and Democrats would be forbidden to speak ill of each other. Justice Hughes replied, "Do you not recognize that different circumstances should be recognized in practising freedom of religion?"[53] Oddly, when the state's attorney Edwin Pickett argued that the Cantwells' actions had stirred up "strife and discontent," the archconservative Justice McReynolds, remarked that Jesus Christ stirred up a "good deal of trouble in Jerusalem." Pickett replied, "As I remember my Bible, something was done about that."[54] The meaning of freedom of religion was at issue in the *Cantwell* case more clearly than in many of the cases pursued by Jehovah's Witnesses. Chief Justice Hughes made clear the difficulty in granting rights to one group (Jehovah's Witnesses) which might impose on the rights of another (Catholics).[55] Yet on May 20, 1940, the Court reversed the lower court rulings, deciding in favor of the Cantwells. "In the realm of religious faith," wrote Justice Roberts,

> and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained, in the light of history, that, in spite of the

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[53] "Respect Right of All Faiths, Hughes Says," *The Washington Post*, March 30, 1940, 1.
[54] "Hughes in a Clash on Religious Right," *The New York Times*, March 30, 1940, 12.
[55] "Hails High Court Rule as Defense of Free Religion," *Chicago Daily Tribune*, October 21, 1941, 14.

> probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.[56]

The Court held that this prosecution of Jehovah's Witnesses based on the Connecticut statutes was a violation of the religious freedom guaranteed by the First Amendment, and protected by the Fourteenth Amendment from infringement by the states. The statute, wrote Justice Roberts, "as construed and applied to the appellants, deprives them of their liberty without due process of law in contravention of the Fourteenth Amendment. The fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment." In so doing, the Court for the first time incorporated the religion clauses of the First Amendment into the liberty guarantees of the Fourteenth—a momentous expansion of civil liberties.[57]

Although it was unquestionably a momentous victory, the Supreme Court's decision reflected the uncertain meaning of civil liberties in 1940, since so many issues remained unresolved. To this point, the Third Circuit Court of Appeals at Philadelphia had affirmed Judge Maris' ruling in the *Gobitis* case (in favor of the Gobitas children), on the grounds that the Supreme Court had assumed jurisdiction in the famous Jersey City free speech case, *Hague v. CIO*, and thus became involved in at least some civil liberties matters in the states.[58] Jehovah's Witnesses had continued to push flag salute cases in the states. By 1940, conflicting opinions meant that the Supreme Court was likely to rule on

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[56] *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

[57] However, similarly to *Brown v. Board of Education*, even having a major case decided in their favor did not eliminate the Jehovah's Witnesses' problems. "Of course the Lovell cases, the Schneider and the Cantwell case, recently decided by the Supreme Court in our favor, emphasized the right to do what Jehovah's witnesses are doing, yet these law-enforcing officers give no heed to these decisions but go ruthlessly on." J.F. Rutherford to Roger Baldwin, June 8, 1940; ACLU Records, 179.

[58] ACLU Bulletin #896, November 25, 1939; ACLU Records, Reel 167.

the flag salute issue as well—though the justices had denied consideration to previous appeals.

In early 1939, before he left the Watch Tower Society, Moyle had written hopefully that, "With Frankfurter, an avowed advocate of civil liberties, now on the Supreme bench we may get a chance for a hearing."[59] The Supreme Court had indeed agreed to hear oral arguments in the *Gobitis* case, which occurred on April 25, 1940—before the ruling in *Cantwell* was known. Rutherford, Covington and McCaughey had prepared the main Respondent's Brief in the case, as usual citing previous case law and Scripture. "Attention is called," the brief trumpeted,

> to these instances recorded in the Bible for the purpose of showing that respondents have made no attempt to interpret the Scriptures, but have followed the lead of the faithful men of God who have gone before. They are conscientious and are faithful and diligent to obey Almighty God. Only the STATE COURTS HAVE ATTEMPTED TO INTERPRET THE SCRIPTURES IN THIS MATTER, which according to the fundamental law of the state and the supreme law of Almighty God THEY HAVE NO RIGHT TO DO….For the covenant people to obey Almighty God means to them everlasting life. They desire to live, regardless of the suffering it may cost them. This rule is not limited to any sect. It applies to all who have made a covenant with Almighty God whether that person be Catholic, Protestant, Jew or Gentile, bond or free.[60]

When George K. Gardner, of Harvard Law School and affiliated with the ACLU, wrote to the Watch Tower to see what he could add to their brief, Covington urged him to join with either the ABA or the ACLU in their briefs, rather than joining the Watch Tower brief. "In this way," he told Gardner, "the court will see and recognize the fact that you are representing the great mass of liberty-loving American people instead of Jehovah's Witnesses; and in this manner the court will give more weight and effect to your

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[59] Olin Moyle to J.F. Rutherford, January 14, 1939; Olin R. Moyle Papers, Box 1, Folder 19.

[60] Respondents Brief, *Minersville School District v. Gobitis*, 310 U.S. 586 (1940); Library of Congress.

argument…rather than argument made in behalf of the Gobitis children, which, of course, would be presumed to be tainted with interest."[61]

Persuaded that opinions filed as friends of the court would gain more credence with the justices, the ALCU had set about describing the broader civil liberties implications of the flag salute issue. Grenville Clark had followed with a brief on behalf of the Committee on the Bill of Rights of the American Bar Association.[62] Gardner crafted the lengthy brief on behalf of the ACLU. "None of the signers of this brief are members of Jehovah's Witnesses," he began, "nor do they share the religious conviction that saluting the flag violates the law of God."

> But they and the Union consider that the issues raised by the record in this case, and the still graver issues which lie just beyond it, are of vital importance not only to the religious freedom of individual American citizens, but to the sources of that deep affection and confidence from which alone can spring an abiding popular loyalty to the American system of government and the American flag.[63]

The freedom to determine what constituted one's religious belief, Gardner continued, was "a part of the liberty referred to in the Fourteenth Amendment." Gardner also referred to the mounting crisis with Germany. "It was never more important," he concluded, "to reaffirm and give meaning to the principle of religious liberty than today….The principle that religious belief and practice are within the guarantees of the First and Fourteenth Amendments, protected from State interference, should be firmly established."[64] The ABA's Committee on the Bill of Rights argued that the Supreme Court must hand down

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[61] George Gardner to Hayden Covington, March 8, 1940; ACLU Records, Reel 179; Hayden Covington to George Gardner, March 21, 1940; ACLU Records, Reel 179.

[62] Arthur Garfield Hays to Harry McCaughey, February 9, 1940; ACLU Records, Reel 179.

[63] Brief of the American Civil Liberties Union, Amicus Curiae, *Minersville School District v. Gobitis*, 310 U.S. 586 (1940); Library of Congress.

[64] Ibid.

a definitive ruling on the issue, as judicial opinions delivered by the lower courts in had obscured rather than clarifying the issue.

The ACLU lawyer Jerome Britchey, Gardner, Covington and Rutherford had agreed that the time allotted for oral arguments would be split evenly between the civil libertarians and the Jehovah's Witnesses.[65] Lillian Gobitas remembered the arguments before the Supreme Court, on April 25, 1940, vividly. The children had met Rutherford a few days before the case was heard; Lillian recalled him as a formidable figure, but one who was kind to children. The ACLU's Gardner presented the first oral argument in the case. "The justices," as Lillian remembered it, "were still not completely attentive to him." After Gardner, Rutherford spoke for thirty minutes. "He did it a lot from a biblical standpoint," Lillian remembered, "like with Sadrach, Meshach, and Abednego, when they took a stand and wouldn't bow down to the image of Nebuchadnezzar. And of course he discussed legal things too. It was extremely arresting. You could really hear a pin drop! The justices listened so attentively."[66] Rutherford presented the oral argument on behalf of the Gobitas children, focusing on the group's religious objections to the flag salute. The fact that he refused to transform his argument into a purely secular statement about civil liberties, however, did not mean that the Jehovah's Witnesses' oral arguments were devoid of constitutional content. Any rule, Rutherford intoned, "that forces the parent to disregard his own belief in the Word of God and forces him to refrain from teaching his children what the Lord commands him to teach is depriving him of his

[65] Letters and telegrams, April, 1940; ACLU Records, Reel 179.
[66] Irons, *The Courage of Their Convictions*, 30.

liberty guaranteed by the Fourteenth Amendment of the Constitution of the United States and is violative of the Pennsylvania Constitution without any question of doubt."[67]

After the fact, Gardner described the oral arguments to Grenville Clark, who had not been able to attend. "My principle (sic) impression," he wrote, "is that everything turned out differently from what I had foreseen." He told Clark that he had "feared that we would get a harangue from either Mr. Covington or Judge Rutherford." Instead, "Judge Rutherford opened the argument on our side with a very effective religious address lasting about half an hour." In fact, Gardner called Rutherford a "second William Jennings Bryan in essence – inferior, of course, to the original, but still pretty good. No one could have pitched the Bible doctrine to the occasion any more perfectly than did he."[68] To Lillian Gobitas's ears, Rutherford's speech—and the justices' reception of him—made her certain then that they would win the case. "They never interrupted him. We sat through other cases…and they kept interrupting…And I thought, 'Oh, that's good, it's all in our favor.'" In fact, in part because of their perception that their oral arguments seem to have been well received by the justices, both the ACLU and the Jehovah's Witnesses were confident that the Court would rule in their favor. Arguments in *Gobitis* took place against a backdrop of mounting geopolitical tensions in Europe, however—the Nazis had invaded Norway and Denmark weeks before, and in the coming weeks (as the justices considered the case) would invade France, Belgium, Luxembourg and the Netherlands. Jehovah's Witnesses and the ACLU lawyers were apprehensive about the Court's protection of civil liberties in this case which centered on American patriotism.

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[67] "Freedom," *Consolation*, May 29, 1940, 3.
[68] George Gardner to Grenville Clark, April 29, 1940; ACLU Records, Reel 179.

A Second World War

"We can take it for granted," Roger Baldwin remarked cynically in 1940, "that war and democracy are impossible bed fellows. When war comes, democracy goes."[69] Given their experiences during the First World War, Watch Tower leaders were particularly attuned to the status of civil rights during wartime. The entry of the United States into the Second World War "raised serious questions," Alexander Macmillan later remembered:

> How would we fare this time? Would our work at headquarters be violently brought to a standstill again? Or would the closely knit organization under theocratic rule be able to survive? Would our sincere efforts to prove to all men and nations that we were not enemies of the state be recognized? Would we be permitted to provide much-needed comfort and hope to war-ridden and nerve-tattered people of all the nations indiscriminately? Would the position of strict neutrality to which we were dedicated be acceptable and enable us to perform our God-given commission to preach this good news of the Kingdom without serious interference?[70]

Well before the Selective Service Act was passed in September 1940, however, Jehovah's Witnesses encountered violence directed at them because of their court cases and their proselytizing activities. Accused of being Fifth Columnists and spies due to popular misconceptions of their views, Jehovah's Witnesses faced a perilous national landscape in the late 1930s.

In addition to troubles in America, Jehovah's Witnesses had faced persecution in Germany since 1933; by the late 1930s, Watch Tower leaders were corresponding with the State Department about extracting members of the group from that country.[71] Even

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[69] "War and Democracy," Abstract of Remarks of Roger N. Baldwin, Director, American Civil Liberties Union, New York City, 1940; ACLU Records, Reel 180.

[70] Macmillan, *Faith on the March*, 175.

[71] See J.F. Rutherford to Olin Moyle, Freschel and Wagner, December 12, 1938; Olin R. Moyle Papers, Box 1, Folder 19; Watch Tower Society to Brother Harbeck in Central European Office, January 7,

more than during the First World War, Jehovah's Witnesses became known for their rigid pacifism and conscientious objection. The ACLU did its best to help protect the group's interests. "Ancient heresies, intolerance, fundamentalism, first century eschatology—yes!," an ACLU report on conscientious objectors reported. "But a genuine conscientious objection which dared to tell Hitler that the Third Reich was 'the devil's kingdom'. Their radiant spirit in German concentration camps is a clue to the impossibility of crushing them by brutal methods here."[72] Because of their experiences during the previous war, the ACLU and Jehovah's Witnesses prepared to battle the federal government over their beliefs.[73]

The ACLU's position regarding Jehovah's Witnesses was perhaps less surprising than the new sympathy the group found with several federal departments. Before Moyle's split from the organization, he had become increasingly convinced that federal protection would be the only way of securing the group's rights. He had been active in

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1938; Correspondence between Watch Tower Bible & Tract Society and U.S. Department of State, 1937-1942, "concerning the immigration into the United States of Christians known as Jehovah's Witnesses who are living under difficult conditions abroad." Department of State to Watch Tower Bible & Tract Society, October 30, 1937; Watch Tower Legal Department Archives, Patterson, New York.

[72] Donovan Smucker, "Who are the C.O.'s?," prepared for ACLU conference on conscientious objectors, September 26, 1940; ACLU Records, Reel 181.

[73] As in the First World War, the matter of the draft again became an issue for Jehovah's Witnesses and other conscientious objectors. Passed in September, the Selective Training and Service Act of 1940 exempted ordained ministers of religion from training and service. Jehovah's Witnesses insisted that, rather than merely being classed as conscientious objectors, all members of the group deserved to be classed as ordained ministers. When called upon to step forward to salute the flag—thereby being sworn into the military—Jehovah's Witnesses were instructed to step back to register their objection. Jehovah's Witnesses appealed the decisions of local draft boards to the Selective Service throughout 1941 and 1942. Nonetheless, of the roughly six thousand conscientious objectors who were convicted of violating the Selective Service Act of 1940, roughly three quarters were Jehovah's Witnesses. "Sect Members Ask Draft Exemption," *New York Times*, January 10, 1941, 12; "Order First War Objector Sent to Work Camps," *Chicago Daily Tribune*, May 4, 1941, 9; "Evasion of Camp Order Jails Minister of Sect," *Los Angeles Times*, July 10, 1941, 1; "Jury Convicts Fresno Objector," *Los Angeles Times*, November 20, 1941, 41; Herman Griene to National Headquarters, Selective Service System, August 18, 1941; ACLU Records, Reel 201; Vol. III, Opinion No. 14, National Headquarters, Selective Service System, Subject: Ministerial Status of Jehovah's Witnesses; ACLU Records, Reel 197; Interview with Lowell Yeatts; ACLU Records, Reel 203; Claud H. Richards, Jr., "Religion and the Draft: Jehovah's Witnesses Revisited," in ed. Carl Beck, *Law and Justice: Essays in Honor of Robert S. Rankin* (Durham, North Carolina: Duke University Press, 1970), 47-76. Covington continued to pursue cases relating to Jehovah's Witnesses convicted for violating the Selective Service Act in federal courts well after the war had ended.

seeking such protection—both judicially and in other seats of government. In 1939, for example, apparently in response to more general growing complaints of civil liberties violations, the Justice Department had formed a new Civil Rights Unit. Before his departure from the Watch Tower Society, Moyle had met many times and exchanged much correspondence with Assistant Attorney General Henry Schweinhaut, providing him with several lengthy and descriptive documents regarding arrests of Jehovah's Witnesses in the United States. Moyle had developed a list of the different types of ordinances and statutes used against Jehovah's Witnesses, asking that "if there is anything your office can do to eliminate this modern-day inquisition, you will take the necessary steps for that purpose."[74] In signaling even the hope for federal administrative protection of civil liberties, the creation of the Civil Rights Unit at the Justice Department was a profound departure from the federal government's prior hands-off (or actively hostile) approach. Yet, despite promises, small improvements, and a number of historic triumphs, the situation for religious and political minority groups in the states would worsen before it improved.

Although they had been subjected to persecution in peacetime, the ACLU emphasized, "war intensifies the conflict between the Witnesses and the requirements of law and it heightens popular prejudice."[75] Even before either the *Cantwell* or the *Gobitis* Supreme Court decisions, violent attacks on Jehovah's Witnesses had increased in 1940. The ACLU attributed the situation to "the feeling aroused by the Nazi conquests of

[74] Olin Moyle to Henry Schweinhaut, June 1, 1939; Watch Tower Legal Department Archives, Patterson, New York. Folder: "Federal Government Justice Department Civil Rights Section."

[75] American Civil Liberties Union, *Jehovah's Witnesses and the War*, 1943.

Western Europe"—as the draft had not begun yet.[76] As the international situation appeared increasingly threatening, citizens began to look for threats at home. Many Americans suspected that a "Fifth Column" of subversives was poised to undermine the United States from within. Jehovah's Witnesses had been accused of lacking patriotic sentiment before, of course, as their experiences during the First World War attested. Throughout the 1920s and 1930s, complaints filed with the FBI had warned of Rutherford's dangerous views, and the group's supposed communist sympathies. However, complaints about the group took on a new tone in 1939 and 1940. "Since reading how inside forces contributed so largely to the downfall of Norway," one anonymous complainant wrote to J. Edgar Hoover, "I have decided to call your attention to an organization in the U.S. which is working on the same thing."[77] Such grievances often took enormous leaps; one writer, for example, assured Hoover that "It is easy to see that when they refer to Jehovah, Christ King and such names they mean Joe Stalin." Some perceived them as "definitely and brazenly against everything Americanism stands for," and "a real danger to the American system." Writing in the *Washington Post*, Harlan Miller called the *Cantwell* decision a "loophole for enemies." "It appears that the Fifth Column is alert, for the time being at least, to decisions of the United States Supreme Court," warned Miller. "Any Fifth Column can join any sect it chooses, apparently, or create a new religion, and then operate with impunity."[78]

Such sentiments had already led to violence in the spring of 1940. The situation grew particularly bad in Texas, where, in San Antonio on May 25 alone, several different

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[76] American Civil Liberties Union, *Jehovah's Witnesses and the War*, 1943. The draft did not begin until September 1940.

[77] Anonymous to J. Edgar Hoover, May 8, 1940; FBI Records, 1027468-000 --- 61-HQ-1053 --- Section 2 (725717).

[78] Harlan Miller, "Over the Coffee," *The Washington Post*, May 31, 1940, 2.

mobs formed, estimated at 2,000 people. Jehovah's Witnesses were called "low-bred jackasses," accused of calling the flag a "dirty rag," which they denied.[79] In several places, police forced Jehovah's Witnesses to leave town; in Del Rio, Texas, for example, three Jehovah's Witnesses were expelled for allegedly being "Nazi agents."[80] Even when they did not participate in banishing Jehovah's Witnesses, local police were often less than helpful. One onlooker reported that

> Magazine bags were torn off the publishers, magazines jerked out of their hands, torn up and thrown into the streets, brethren assaulted and threatened to be hanged. One brother was knocked down and kicked in his throat and face. Police were slow in responding and finally arrived in various spots where the mobs were, and instead of arresting the mobsters took our brethren into what they called 'protective custody', stating that they could do nothing about the mob, and that the brethren should not do the magazine work because it aroused the anger of the populace of San Antonio.[81]

Brethren were advised to continue with the witness work, studying the booklet 'Advice for Kingdom Publishers' and a *Watchtower* issue on self defense and nonviolence. The best strategy, advised the Watch Tower, was to "use soft words in dealing with the individuals in the mob and make every possible concession and effort to avoid fights and to move away from the mob without compromising or leaving town."[82]

Then, on June 3, 1940 (a mere two weeks after the *Cantwell* decision was announced), Justice Felix Frankfurter delivered the opinion of the Court in *Gobitis* flag salute case. Justice Frankfurter first acknowledged the difficulty the Court had had in deciding the case. "A grave responsibility confronts the Court," he wrote, "whenever in

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[79] Robert Coper to Watch Tower Society, June 27, 1940; Watch Tower Legal Department Archives, Patterson, New York. Folder: "Violence/Harassment Mob Action."

[80] "Sect Active in Del Rio," *New York Times*, May 24, 1940, 13.

[81] Texas Watch Tower representative to J.F. Rutherford, May 30, 1940; Watch Tower Legal Department Archives, Patterson, New York. Folder: "Violence/Harassment Mob Action". There were many letters to the Watch Tower Society describing the situation.

[82] *The Watchtower*, September 15, 1939.

course of litigation it must reconcile the conflicting claims of liberty and authority. But when the liberty invoked is liberty of conscience, and the authority is authority to safeguard the nation's fellowship, judicial conscience is put to its severest test." The decision in *Gobitis*, the Court's majority opinion said, had been reached with consideration of events on the world stage. The necessity of fostering national unity, particularly at a time when violence abroad threatened to spill into the United States' realm, overrode individual objections to saluting the flag—even if these objections were based on religious conviction. "National unity is the basis of national security," and the feeling of national unity created by the flag salute was the "ultimate foundation of a free society." Thus, freedom of conscience still had limits. The enforcement of flag salute laws was completely different from the precedent established in *Cantwell*, the Court said, for to "deny the legislature the right to select appropriate means for its attainment presents a totally different order of problem from that of the propriety of subordinating the possible ugliness of littered streets to the free expression of opinion through distribution of handbills." Without a "unifying sentiment," there "can ultimately be no liberties, civil or religious." Thus, far from being a violation of liberty of conscience, it was well within the purview of localities or states to demand that citizens and their children salute the flag.

Much has been made of Justice Frankfurter's immigrant background, and attention to the escalating world crisis, as the explanation for his lauding of "national unity"; one law clerk characterized *Gobitis* as "Felix's Fall of France Opinion."[83] The

[83] See Shawn Francis Peters, *Judging Jehovah's Witnesses: Religious Persecution and the Dawn of the Rights Revolution* (Lawrence, Kansas: University Press of Kansas, 2000). Frankfurter was opposed to incorporation, and thought the courts should defer to the legislatures on rights issues. Frankfurter voted against free exercise claims, and argued against incorporation of civil liberties against state laws for the

lone dissenter in the 8-1 decision, Justice Harlan Stone, pointed out that compulsory flag salute regulations such as the one in the instant case were a new, and unique, phenomenon in the long reach of the Anglo-American legal tradition.[84] As for the majority argument, crafted by Frankfurter, that the necessity for national unity overrode individual conscientious objections, Justice Stone pointed out that oppression of minorities had many times been justified by arguments appealing to patriotism and unity. "History teaches us," Justice Stone posited in his dissent, "that there have been but few infringements of personal liberty by the state which have not been justified, as they are here, in the name of righteousness and the public good, and few which have not been directed, as they are now, at politically helpless minorities." Finally, Stone concluded, this ruling was "no more than the surrender of the constitutional protection of the liberty of small minorities to the popular will."

The Jehovah's Witnesses called Justice Stone's minority opinion "courageous," suggesting that because of his dissent "the great and good God may permit Mr. Justice Stone to pass through Armageddon and over into the reign of peace and justice and truth and honesty which is the heart's desire of every true child of God."[85] The 8-1 ruling in *Gobitis* was a shock to the ACLU and Jehovah's Witnesses—acutely so because the Gobitases had won in all of the lower courts. Baldwin wrote to Rutherford to express the Union's "keen disappointment" regarding the decision.[86] Rutherford replied, "I have not sufficient language to express my appreciation for the kindness and cooperation of the

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remainder of his career. In the areas of individual liberties, Frankfurter urged, courts should not "second guess" the legislature. Paul Finkelman, *Encyclopedia of Civil Liberties,* vol. 1 (New York: Routledge, 2006). See, for example, *Mapp v. Ohio*, 367 U.S. 643 (1961).

[84] Peters, *Judging Jehovah's Witnesses*, 65.

[85] "Dred Scott and the Flag," *Consolation*, July 24, 1940, 3.

[86] Roger Baldwin to J.F. Rutherford, June 5, 1940; ACLU Records, Reel 179.

Civil Liberties organization in fighting for the principles of freedom in America. I am sure you were shocked by the decision of the Supreme Court in the Gobitis case. I was disappointed, but if you could appreciate the viewpoint I have of such matters you would see that I was not much surprised."[87] The ACLU released a bulletin criticizing the ruling, vowing to continue to fight for the children's reinstatement. "It is something of a shock," Baldwin wrote, "to find the court brushing aside the traditional right of religious conscience in favor of a compulsory conformity to a patriotic ritual. The language of the prevailing opinion unhappily reflects something of the intolerant temper of the moment."[88] Lillian Gobitas remembered hearing about the decision on the radio as she and her mother worked in the kitchen, as Billy and Walter Gobitas worked downstairs in the family's grocery store. "We were astounded! We just were, we couldn't speak. So we ran down, and we told Daddy and Bill, and they were equally aghast."[89]

The decision turned out to be anything but a purely academic question regarding civil liberties. The *Gobitis* ruling touched off a prolonged period of violence against Jehovah's Witnesses—what Lillian Gobitas has called "open season on Jehovah's Witnesses."[90] Recognizing their affinity with a prior moment in history—as well as the civil rights implications of their predicament—the Jehovah's Witnesses quickly compared their case to the Dred Scott slave case of the nineteenth century. In 1940, an article in the *Watch Tower* stated,

> another famous counselor, Judge Joseph F. Rutherford, also from Missouri, appeared before the same tribunal, pleading, this time, on behalf of the free men and women of the future, the boys and girls, children of Jehovah's witnesses, who today are beaten as Dred Scott was beaten,

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[87] J.F. Rutherford to Roger Baldwin, June 8, 1940; ACLU Records, Reel 179.
[88] ACLU Bulletin #925, June 15, 1940; ACLU Records, Reel 188.
[89] Interview with Lillian Gobitas Klose.
[90] See Peter Irons, *A People's History of the Supreme Court* (New York: Viking, 1999): 341.

> choked as perhaps he was choked, kicked as perhaps he was kicked, threatened as perhaps he was threatened, and ostracized as he was certainly ostracized.[91]

Jerome Britchey wrote to Gardner about the unfortunate timing of the *Gobitis* ruling, and its frightening results. "I still get a shock every time I read Frankfurter's opinion," he began, emphasizing that "certainly no worse time in our history could have been picked for such a pronouncement. Its effects can already be seen in the mass rioting against Jehovah's Witnesses all over the country….In a country that is going wild how salutary it would have been to have Justice Stone's opinion the majority one!"[92] In the waves of patriotic fervor that swept across the United States in 1940, the widely-publicized Supreme Court decision in the *Gobitis* case was but confirmation of the belief that Jehovah's Witnesses were reckless and obtuse at best, and scheming turncoats at worst.

Open Season against Jehovah's Witnesses

The Jehovah's Witnesses had undoubtedly hoped that an affirmation of their conscientious scruples from the Supreme Court might lessen opposition to the work. The ruling in *Gobitis*, however, seemed to produce the opposite effect, further ostracizing them as well as bolstering the hostility of citizens and local authorities across the country. Mobs from Maine to Texas confronted Jehovah's Witnesses, often demanding that they salute the flag and beating them when they refused. Even when Jehovah's Witnesses were rescued from the mob by sheriffs or police, it was often the Jehovah's Witnesses who were arrested and arraigned on charges of disturbing the peace.[93] An ACLU representative in Maine, for example, reported that a group of Jehovah's Witnesses had been carrying signs on the main street of a Catholic community on a Saturday night,

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[91] "Dred Scott and the Flag," *Consolation*, July 24, 1940, 3.
[92] George Gardner to Jerome Britchey, June 14, 1940; ACLU Records, Reel 179.
[93] "Jehovah's Witnesses Assaulted During Spring of 1940"; ACLU Records, Reel 186.

when the bars were open. A group of Catholic youngsters "used the occasion to settle matters with the hated sect. The flag came into the picture, thanks to the recently intensified war hysteria. The men were manhandled. The police didn't show itself until some of the crowd began to protest loudly the actions of the mob." Confrontations occurred in nearby communities on subsequent days. Those who defended the Jehovah's Witnesses were themselves called traitors. "Groups would gather and loud arguments would follow. The impression one gets is that the police were slow and prejudiced against the J.W." Six Jehovah's Witnesses in Harlan, Kentucky were mobbed and subsequently charged with sedition—for the offense of distributing a magazine containing a copy of the Gobitis Supreme Court brief.[94] In Kennebunk, Maine, two Watch Tower representatives were "roughed up" by a crowd of several hundred men for refusing to salute the flag. The next day, as several Jehovah's Witnesses barricaded themselves inside the Kingdom Hall in Kennebunk, a car pulled up in front, and shots were fired into the car, wounding two of the men inside.[95] A mob of over 2,000 men gathered, ransacking and then burning the Kingdom Hall. Newspaper accounts contributed to the popular hysteria; reputable papers reported that pictures of Hitler and Stalin had been seized from the Kennebunk Kingdom Hall—although the Jehovah's Witnesses insisted this was a fabrication.[96] Eventually, the Maine Governor threatened to call in the National Guard, and the hysteria died down, albeit briefly.[97]

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[94] Hayden Covington to Francis Biddle, August 24, 1940; ACLU Records, Reel 188.

[95] "Townfolk Fire Sect's Meeting House; 2 Shot," *Chicago Daily Tribune*, June 10, 1940, 1.

[96] "Maine Mob Burns Jehovah Sect Home," *New York Times*, June 10, 1940, 19; "Townfolk Fire Sect's Meeting House; 2 Shot," *Chicago Daily Tribune*, June 10, 1940, 1.

[97] David Einbinder to the ACLU, June 13, 1940; ACLU Records, Reel 186; "Maine Governor Watches Trouble Near Kennebunk," *Christian Science Monitor*, June 11, 1940, 12; "Sect Riots Draw Threat of National Guard Muster," *Los Angeles Times*, June 11, 1940, 9; "Prepared to Call Troops in Maine," *New York Times*, June 11, 1940, 27.

Incidents occurred all over Texas and in Oklahoma, Illinois, Oregon, Tennessee, New Mexico, Florida, and in dozens of other states.[98] In Litchfield, Illinois, as a crowd beat and pushed some fifty Jehovah's Witness, Frank Colombos remembered hearing cries of "lynch them." "I thought if it was God's will that we be lynched, we couldn't do anything about it," Colombos continued. "But there was a Negro standing near me who called out to the mob, 'We're all human. They're human. Let's think this matter over.' And that statement stayed the mob's hands until deputies could get there."[99] One man sympathetic to the Jehovah's Witnesses (although not a member of the group himself) wrote to his aunt on June 27, 1940 that

> one night all hell broke loose here in Rawlins, the patriotic public as the newspaper said, were making a cleanup on the fifth columnists. Every single one of the people that had attended the Bible classes was persecuted. They were dragged out of their homes and unmercilessly beat up, both men and women, their cars and clothes and all their personal belongings burned on the streets. The papers said there was 1000 people in the mob but I think it was more than that. The papers said they found Dictaphones, electric eye machines, code messages and cancelled checks from Germany and all such tommy-rot that they knew was nothing but filthy dirty lies….There was some Jehova's Witnesses traveling thru in a trailer home well they beat them up and burned up their car and trailer house….I know these people have nothing against our government, they have told me many times we had the best government on earth but they are waiting for Gods Government but the dirty papers said that they were contemplating setting up a government of their own and put it on a paying basis like Germany.

Furthermore, the police, when they were called in, were of little or no help. "I can see plain enough," he concluded, "that the law here is on the side of the persecutors instead

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[98] "Spurn Flag; 16 Autos Wrecked and 50 Arrested," *Chicago Daily Tribune*, June 17, 1940, 9; "Rockville Crowd Raids Hall of Sect as Police Look On," *The Washington Post*, June 20, 1940, 1; "Tarred and Feathered," *The Washington Post*, June 23, 1940, 6; "Jehovah's Witnesses Taken to Safety after Flag Clash," *Los Angeles Times*, July 14, 1940, 12.

[99] "Negro Checks Lynching of White Cultist," *The Chicago Defender*, June 29, 1940, 3.

of the poor people being persecuted."[100] In fact, in at least one instance the police themselves were investigated or suspended for their participation in riots against Jehovah's Witnesses.[101]

The Jehovah's Witnesses submitted a state-by-state description of mob action to the ACLU and to the Justice Department. In addition, members of the group habitually sent two- to five-page affidavits to the Justice Department describing incidents of mob violence and the failure of police to intervene on their behalf. In 1940 alone, the ACLU reported mob violence against Jehovah's Witnesses in 335 communities in forty-four states.[102] Rutherford, Goux, and three other Bethelites went to see Baldwin and Jerome Britchey about the situation.[103] The irony of the attacks against Jehovah's Witnesses was not lost on ACLU and Justice Department representatives. As Britchey wrote to Harry Schweinhaut of the Justice Department's Civil Rights Unit, the "most amazing thing about the present wave of lawlessness is that it has not been directed against Communists or Nazis or any of the splinter groups, but rather against Jehovah's Witnesses….one of the first groups outlawed by Hitler in Germany."[104]

Federal officials were far more sympathetic to the group than were state or local authorities. The Ohio Attorney General urged Jehovah's Witnesses to "carefully read the article in the current issue of the Saturday Evening Post regarding the origin and leadership of your group." He regretted, he continued, "that you and your fellow

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[100] FBI Records, 1027468-000 --- 61-HQ-1053 --- Section 7 (725727).

[101] "Rockville's Chief, 3 Aides Suspended," *The Washington Post*, June 23, 1940, 1. Two of the police on trial for the Rockville incident were eventually convicted of failing to prevent a breach of the peace, and fined several hundred dollars between them. "2 Policemen Found Guilty in Rockville," *The Washington Post*, June 12, 1940, 19.

[102] "Curbs on Freedom by States Feared," *New York Times*, January 2, 1941, 8.

[103] Britchey described a scene similar to that Baldwin had encountered in the mid-1920s, in which Rutherford made a sizeable donation to the ACLU. ACLU Records, Reel 186.

[104] Jerome Britchey to Harry Schweinhaut, June 12, 1940; ACLU Records, Reel 186.

believers are so blindly following the interpretation given by your leaders…an interpretation which seems very much distorted and exaggerated to most of us."[105] William Taggart, Chief of Police of Greenville, Mississippi, wrote to J. Edgar Hoover about the activities of the group. "It has been reported to me that at least part of the literature circulated by these people originated in Germany or other Europeian (sic.) countries….I would like to know as much about this organization and its leaders as possible, so that we may at least be able to warn our citizens against receiving the literature circulated."[106] In the margins of Taggart's letter, the recipient at the FBI had written "no!" in response to his questions "whether there is any known connection between this organization and the Communist Party" and "whether any investigation should be conducted concerning Jehovah's Witnesses."[107] The FBI reported officially to the Justice Department that their investigation had established conclusively that there was no connection between German Nazis and Jehovah's Witnesses. In response, the Justice Department sent a circular to all U.S. Attorneys urging them to take every possible step to "prevent interference with freedom of assembly of Jehovah's witnesses and with all their civil liberties." U.S. Attorneys ought not "limit their activities to violations of federal statutes in this matter by co-operate with and encourage co-operation of state and

[105] Attorney General Thomas Herbert to William Schnell, September 14, 1940; Watch Tower Legal Department Archives, Patterson, New York.

[106] William Taggart to J. Edgar Hoover, July 3, 1940; FBI Records, 1027468-000 --- 61-HQ-1053 --- Section 6 (725723).

[107] J.W. Vincent, Special Agent in Charge to Director, Federal Bureau of Investigation, July 1, 1940; FBI Records, 1027468-000 --- 61-HQ-1053 --- Section 6 (725723).

county authorities in every instance."[108] However, requests for FBI investigations of possible violations of individual civil rights were rarely authorized.[109]

Watch Tower representatives contacted Francis Biddle, the Solicitor General, reminding him of his history with the group. "Your personal familiarity with the questions of fundamental personal rights involved in the persistent activities of Jehovah's witnesses," they reminded him, went back "to the time that you joined in signing and filing a 'Brief and Motion on Behalf of the American Civil Liberties Union' as amicus curiae in the case of Lovell v City of Griffin."[110] When Biddle waffled, insisting that these things were properly left to local control, the ACLU reminded him how difficult it was to get local counsel and often even the cooperation of state officials. Although hesitant to step into state situations with regard to civil liberties, Biddle did speak out regarding the violence against Jehovah's Witnesses and other aliens, as well as the necessity for protecting civil liberties in wartime.[111] "We shall not defeat the Nazi evil by emulating its methods," Biddle insisted in a June, 1940 radio address, admonishing Americans be "cool and sane" above all, and not to succumb to hysteria over the fifth column or race hatred. Biddle described Jehovah's Witnesses beaten and mobbed, calling for an end to these "outrages." "There has been considerable improvement in Washington," rejoiced the Watch Tower, "since the days of the late but unlamented Mitchell Palmer."[112] Jehovah's Witnesses had long insisted that "in many, many

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[108] Watch Tower Legal Department Archives, Patterson, New York. Folder: "Violence/Harassment Mob Action."

[109] J. Edgar Hoover to Special Agent in Charge, August 14, 1940; FBI Records, 1027468-000 --- 61-HQ-1053 --- Section 6 (725723).

[110] Watch Tower Society to ACLU, June 7, 1940; Letter, June 8, 1940, from Watch Tower Society to Francis Biddle; ACLU Records, Reel 186.

[111] "Bars Nazi Method in U.S. Spy Hunts," *New York Times*, June 17, 1940, 11.

[112] "U.S.A. Judicial and Legislative Departments," *Consolation*, September 17, 1941, 28. Covington later speculated that the Jehovah's Witnesses were treated differently during the Second World

instances the so-called 'local authorities' are themselves the leaders of the mobs and the perpetrators of un-American conduct against innocent and harmless residents of the very communities involved."[113] The ACLU agreed with this assessment. "The federal government," one ACLU representative wrote to Baldwin, "is the only hope we have."[114]

The Federal Government and Religious Liberty

Both the ACLU and the Watch Tower urged that, because of the extraordinary scale of the mob violence and the reluctance of local officials to curb it, the federal government must step in. One of the questions the Justice Department sought to address was whether the federal government could legally intervene. At issue was Title 18 of the United States Code, whose Section 51 attempted to protect citizens' constitutional rights "under color of State laws," and Section 52, which sought to protect individuals against deprivation of these rights by public officers.[115] This Civil Rights statute made it a crime to conspire to intimidate any citizen because of his exercise of a right guaranteed by the federal constitution (such as the right to vote), and made it a crime for a public officer to abuse his official power by depriving a person of a right secured by the constitution.[116] As was pointed out contemporarily, the statutes were somewhat limited, as the offense

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War partly because of the liberal reading of the First Amendment free speech clauses during the interwar period, which "caused the Department of Justice to change its old reactionary attitude for limitation of freedom of speech of conscientious objectors." Roosevelt and Attorney General Biddle, "were highly in favor of allowing the maximum amount of freedom of speech in the United States, even while the war was being prosecuted." Macmillan, *Faith on the March*, 184-185.

[113] Memorandum, Watch Tower Society to Francis Biddle, June 13, 1940, copied to J.F. Rutherford, Hayden Covington, and ACLU; Watch Tower Legal Department Archives, Patterson, New York.

[114] Francis Biddle to Watch Tower Society, June 10, 1940; ACLU Records, Reel 186; Memorandum, Alexander Blanck to Roger Baldwin, July 22, 1940; ACLU Records, Reel 186.

[115] Title 18, Section 51 and 52, U.S. Code. See John Pratt to Roger Baldwin, October 29, 1940; ACLU Records, Reel 186. These statutes were passed as Sections 51 and 52 of Title 18 of the U.S. Criminal Code during the Roosevelt years.

[116] These two statutes had their origins in the Civil Rights Act of 1866 and the Enforcement Act of 1870. See Victor W. Rotnem, "Criminal Enforcement of Federal Civil Rights," *National Lawyers Guild Review* 2, no. 18 (1941): 18.

could not be committed by one person acting alone. The statutes were initially intended to protect voting rights, and other black civil rights. They were quickly recognized as "virtually the only tools of the federal prosecutor when he is called upon to act in cases of wanton deprivation of civil rights."[117]

In May, 1940, the State Department had instructed all U.S. Attorneys that Sections 51 and 52 indicated an as yet undefined "extension of civil liberties jurisdiction to new fields." Federal jurisdiction in these cases was still quite uncertain, however. As the State Department pointed out, "'Civil liberties' is not a technical term, but a phrase of popular currency applied somewhat indiscriminately to a miscellaneous group of rights, interests and situations." Constitutional rights, a mid-1940 memo suggested, were only enforceable against official action, not private conflicts—yet state inaction in defending these civil liberties was an unresolved issue. The State Department asserted that "ordinary outbreak of ruffian, vigilante or Ku Klux Klan activity, whether directed against reds, Nazis, negroes, soap-box speakers, Jehovah's Witnesses, Jews or Catholics, is not within Section 51."[118] While some lawyers thought this civil rights legislation might be used to good effect to protect members of the group, in reality the meaning of the legislation was uncertain enough as to preclude its widespread use.[119]

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[117] Clark, Tom C., "A Federal Prosecutor Looks at the Civil Rights Statutes," in *Columbia Law Review* 47, no. 2 (March 1947): 175-185.

[118] "Federal Criminal Jurisdiction Over Violation of Civil Liberties," Circular No. 3356, Supplement 1, from State Department to all U.S. Attorneys; Watch Tower Legal Department Archives, Patterson, New York.

[119] The problem with Section 51, of course, was that a conspiracy of two or more persons had to be proven to prosecute for violation of civil rights, an exceedingly difficult task. Section 52 was even more problematic, being worded in excessively general language, and thus not thought to be applicable in many cases. See Raymond H. Geselbracht, *The Civil Rights Legacy of Harry S. Truman* (Kirksville, Missouri: Truman State University Press, 2007), 159. Although the Covington and the ACLU lawyers discussed the possible uses for these statutes extensively in 1940 and 1941, they evidently did not find this federal legislation to be terribly effective—nor, for that matter, did either civil rights activists or labor groups.

Fearing that the federal government would do nothing to assist them, even in the face of mob violence, Rutherford sent Covington to Texas to "observe on the ground the many outrages that are being perpetrated in that state against Jehovah's witnesses."[120] Rutherford and the Watch Tower insisted that the mobs had been organized by the real fifth column—controlled by the Catholic Hierarchy, with the American Legion as its pawn. "Back of recent outbursts of organized violence and mobbing in America is the same diabolical power of the demons, acting under the 'prince of demons,' Satan the Devil," they wrote in the *Kingdom News*. "The demons have always used visible human agents to fight against Jehovah God and the proclamation of His Theocratic Government under Christ Jesus….Religion is demonism."[121] The Watch Tower urged that these were attacks on the "fundamental principles" of "freedom of speech, freedom of assembly, and freedom of worship of Almighty God," guaranteed by the American Constitution. "Good citizens of the United States for 150 years," they wrote, "have obeyed the law of the land without being compelled to violate the law of God. But the Vatican and the Legion would coerce the people into disregarding God's law and obeying man's law."[122]

An ACLU pamphlet called the violence against Jehovah's Witnesses "unparalleled in America since the attacks on the Mormons." Signed by ten of the most prominent clergymen in the country, the pamphlet described 335 incidents of mob violence in 44 states in 1940, involving 1,488 men, women and children: "a shocking episode of intolerance in American life, reflecting a tendency against which both officials and citizens should constantly be on guard." The Watch Tower Society and the ACLU

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[120] Watch Tower Society Memorandum to Francis Biddle, June 13, 1940; ACLU Records, Reel 186.

[121] "Time of Darkness – Isaiah 60:2," *Kingdom News* (July 1940); ACLU Records, Reel 186.

[122] "The American Legion," *Consolation*, October 16, 1939: 16.

began to circulate elaborate descriptions of beatings and grisly photographs of hospitalized victims. The civil rights of minority groups, warned the ACLU, "are a first charge on all those zealous in the defense of democracy." The ACLU repeatedly offered a $500 reward for information leading to the arrest, conviction and imprisonment of anyone who took part in mob disorders resulting in violence against Jehovah's Witnesses, "in the interest of protecting the civil rights of all persons without distinction."[123] Only "vigorous action by the federal government and pressure by public opinion" might "counteract the tendencies to persecution."[124] The ACLU demanded that the federal government investigate after the burning of the Kennebunk Kingdom Hall.[125] Covington met repeatedly with Biddle, John Haynes Holmes and Baldwin about the mob violence against Jehovah's Witnesses and the "depravation (sic) of their civil rights by public officials"—bringing to the Attorney General's attention a number of cases "deserving of prosecution under Federal laws."

Discussing Sections 51 and 52 of Title 18 with Justice Department officials, Covington pointed to the difficulties of Jehovah's Witnesses in finding either police protection, or local counsel, calling attention to the fact that attorneys for Jehovah's Witnesses were routinely threatened with physical harm. He himself was threatened, and two co-counsel lawyers assaulted and injured, in September 1940. One offender declared that, if he showed up at the trial, the mob would "make that big son-of-a-bitch Covington salute the flag or else kill him."[126] Covington argued that, if Jehovah's Witnesses were

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[123] ACLU Press Release, July 2, 1940; ACLU Records, Reel 186.

[124] American Civil Liberties Union, *The Persecution of Jehovah's Witnesses*, January, 1941 ACLU Records, Reel 197.

[125] Telegram, ACLU to Henry Schweinhaut, June 11, 1940; ACLU Records, Reel 188.

[126] Hayden Covington to Francis Biddle, April 8, 1941, describing a Connersville, Indiana trial from September, 1940; ACLU Records, Reel 200.

unable to secure local counsel, this constituted a deprivation of Jehovah's Witnesses' liberty and civil rights, per Sections 51 and 52 of Title 18. "Now it does seem," Covington would write,

> That the United States Government can and ought to do something to protect its citizens from injury as a result of public officials' violating the two federal statutes above described. May I suggest, in the public interest, that to permit such outrageous violations of constitutional rights by public officials to go unnoticed by the Department of Justice is nothing less than encouragement to anarchy. TODAY this Nation prepares to defend democracy against foreign assault….Can democracy be successfully defended without preserving it in our own 'house'?

Federal officials, however, were not persuaded, declining to step in except in the most heinous cases of mob violence.

The worst of the violence occurred in the spring and summer of 1940, although accusations of disloyalty against Jehovah's Witnesses continued well into 1941 and 1942. Most of the perpetrators were never prosecuted, and members of the group who had been beaten and mobbed, and whose property had been destroyed, received little redress. An International Labor Defense (ILD) survey of the first six months of 1941 named Jehovah's Witnesses as one of three groups (along with Jews and the foreign born) whose rights had been violated most. "Though the widespread terror against this religious minority that marked the first six months of 1940 has somewhat diminished," they wrote, "interference with the civil rights of its members continues unabated. For example, in the year ending July 1941, more than 600 arrests of Jehovah's Witnesses occurred in Texas alone." The ILD survey described school expulsions, imprisonment for literature distribution, disorderly conduct charges, anti-Nazi law prosecutions, arrests of door-to-door canvassers, and even a local ordinance in Moscow, Idaho requiring applicants for literature distribution permits to salute the flag. Given the circumstances, there was little

doubt that laws of this type were aimed specifically and boldly at Jehovah's Witnesses. Several dozen people in Indiana, including "infants in arms," had been charged with criminal syndicalism.[127] In January, 1942, the ACLU asserted that the attacks on Jehovah's Witnesses during 1941 had constituted "the largest category of violations of civil liberties in the nation."[128]

After the violence had died down, Jehovah's Witnesses and the ACLU continued to arrange for observation of their acts of civil disobedience. In early 1941, for example, the ACLU's Jerome Britchey wrote to Covington about a proposed test in Cooperstown, New York. The plan, which Covington and Britchey had formulated earlier, was to have Jehovah's Witnesses return to Cooperstown "with an observer" from the ACLU. "Our plan is to notify the Department of Justice that your people are going to distribute literature and ask them to have observers on hand."[129] In 1941, the Watch Tower released *Jehovah's Servants Defended*, a pamphlet which cited some fifty cases in which the Jehovah's Witnesses had won—those decided, they said, by "fair-minded, liberty-loving judges of the land of liberty." These judges, the pamphlet continued, "are holding up the Constitution as a bulwark against the Roman Catholic Hierarchy's movement as a 'fifth column' to sabotage, hamstring, sandbag and destroy American constitutional rights and to suppress freedom of worship and Almighty God."[130] Despite mob violence against them, and the reluctance of both local and federal officials to step in and offer

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[127] "Attacks on Minority Groups II," International Labor Defense Civil Rights Survey, First Six Months, 1941; ACLU Records, Reel 196. Moscow ordinance (Ordinance No. 754) discussed with Jerome Britchey, Blanch Miller, Osmond Fraenkel, March-April 1941, Reel 199.

[128] "Civil Liberties Menaced by Attacks on Witnesses," *Christian Century*, January 7, 1942; ACLU Records, Reel 202.

[129] Jerome Britchey to Hayden Covington, March, 1941; ACLU Records, Reel 201.

[130] Produced in August, 1941, *Jehovah's Servants Defended* was likely a collaboration between Rutherford and Covington. Watch Tower Legal Department Archives, Patterson, New York. Folder: "Freedom of Worship."

practical protection, after the war hysteria had died down, Jehovah's Witnesses and the ACLU continued to pursue the course of civil disobedience and strategic litigation even after defeats in the highest court.

Rutherford's Death and a New Era for Religious Liberty

On January 8, 1942, Rutherford died near San Diego, California. He was 72 years old. At the time of his death, the movement he had led boasted an estimated 2,000,000 followers. Rutherford had suffered for many years from lung and stomach ailments (in treatment of which he had endured several surgeries), which he attributed to the time he spent in the Atlanta Federal Penitentiary during the First World War. Rutherford died at Beth-Sarim, the "House of Princes" the 20-room Spanish style home which he had used in winter for a decade. Having left a "nation-wide political career with the Democratic party" over forty years before, he had "suffered imprisonment, vilification and personal abuse such as has been heaped upon few since the days of the apostles. On the other hand, he had the unspeakable privilege of putting nearly 400,000,000 books and booklets in the hands of the people, feeding them on the Lord's Word, the Bible."[131] Rutherford's followers made plans to bury him in a monument on the grounds of Beth Sarim, yet the local authorities declined to authorize a burial permit. After a three-month legal battle, Rutherford's body was buried on Staten Island, New York. Nathan H. Knorr, Rutherford's close associate and vice president of the Watch Tower Society, took over as president in mid-January.

Despite Rutherford's intense importance to the movement, the Watch Tower Society was not thrown into tumult with his death as it had been after Russell's. The Society, and particularly the legal department, continued to operate on the trajectory

[131] "San Diego Officials Line Up Against New Earth's Princes," in *Consolation*, May 27, 1942, 3.

Rutherford had set for it into the 1940s. If anything, Covington was more insistent and more forceful than Moyle. "My dear Covington," Roger Baldwin wrote to the lawyer in 1942, regarding the brief in the *Barnette* flag salute case, "That's one of the hottest briefs I reckon the Supreme Court ever had before it. If you don't get jailed for contempt you may win."[132] Because of both his legal knowledge and his forceful personality, Covington was a tremendously talented litigator. As several scholars have pointed out, between 1939 and 1955, Covington won thirty-six of the forty-five cases taken by the Jehovah's Witnesses to the Supreme Court—"a record rivaled only by Thurgood Marshall of the NAACP Legal Defense Fund, who won twenty-nine of thirty-two Court cases."[133] Lowell Yeatts recalled being present for several of Covington's arguments before the Supreme Court, and being awed by his presentation and the Justices' reception of his arguments. Other attorneys, Yeatts recalled,

> Would get up there in their tuxedos and their swallow-tail coats…dressed all nice and stand before the bench where all the nine judges were, and they would be talking to one another, turning the pages, drinking water and not paying attention …and they were so nervous, shaking, going through their presentations. Covington would get up there with no notes at all, and his big voice, and they would lean over the bar, and ask him questions, and draw him out, and he would just talk to them, just conversationally, no paper rattling, no nervousness, and he just demanded attention and got it. And they would listen.[134]

After his loss in *Gobitis*, Covington went on to win many definitive victories before the Supreme Court on the licensing and distribution issues in the 1940s.[135]

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[132] Roger Baldwin to Hayden Covington, September 4, 1942; ACLU Records, Reel 208. The brief referred to was in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

[133] Walker, *In Defense of American Liberties*, 107.

[134] Interview with Lowell Yeatts, at his home in Cumming, Georgia, September 8, 2008. In possession of the Author.

[135] *Jamison v. Texas*, 318 U.S. 413 (1943); *Busey v. District of Columbia*, 319 U.S. 579 (1943); *Largent v. Texas*, 318 U.S. 418 (1943); *Jones v. Opelika*, 319 U.S. 103 (1943); *Murdock v. Pennsylvania (City of Jeannette)*, 319 U.S. 105 (1943); *Martin v. Struthers*, 319 U.S. 141 (1943); *Douglas v. City of Jeannette*, 319 U.S. 157 (1943); *Follett v. Town of McCormick*, 321 U.S. 573 (1944); *Marsh v. Alabama*,

In fact, in a rare postscript to a 1942 Jehovah's Witness literature distribution case, three of the judges "confessed error" in the *Gobitis* ruling. "Since we joined in the opinion in the Gobitis case," wrote Justices Black, Douglas and Murphy,

> we think this is an appropriate occasion to state that we now believe that it was also wrongly decided. Certainly our democratic form of government functioning under the historic Bill of Rights has a high responsibility to accommodate itself to the religious views of minorities, however unpopular and unorthodox those views may be. The first amendment does not put the right freely to exercise religion in a subordinate position. We fear however that the opinions in this and in the Gobitis case do exactly that.[136]

The Watch Tower Society picked up on this opinion almost immediately. "The Supreme Court is not a law-making body," they wrote in *Consolation*. "It does decide if national, state or local municipal laws are in harmony with the Bill of Rights. Being human, it makes mistakes, as Justices Murphy, Black and Douglas now courageously admit."[137] State legislatures continued to pass statutes requiring patriotic exercises. One such law, passed in West Virginia, required not only recital of the pledge of allegiance, but also a stiff-armed salute—which several groups pointed out bore a marked resemblance to the "Heil Hitler" salute in Germany.

Walter Barnette, a Jehovah's Witness from West Virginia, had brought suit against the school district which had expelled his daughters, Gathie and Marie, for refusing to salute, and the case reached the Supreme Court in 1943.[138] In an amicus brief, the ACLU pointed to "the expressed opinion of four of the seven justices, now members of this Court, who participated in the *Gobitis* decision." The brief expressed

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326 U.S. 501 (1946); *Tucker v. Texas*, 326 U.S. 517 (1946). The group pursued, but lost, several cases as well. See *Cox v. New Hampshire*, 312 U.S. 569 (1941); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *Jones v. Opelika*, 316 U.S. 584 (1942) (the Court reversed itself the next year); *Prince v. Massachusetts*, 321 U.S. 158 (1944).

[136] *Jones v. City of Opelika*, 316 U.S. 584 (1942).

[137] "Changed Convictions Regarding Enforced Flag-Saluting," *Consolation*, July 23, 1942.

[138] *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

astonishment that any liberty guaranteed by the Bill of Rights could be considered a "local question." The American Bar Association's Committee on the Bill of Rights submitted a separate brief, in which they pointed out that "Such a small group is very unlikely to attain sufficient voting power to overthrow compulsory flag salute laws. It must obtain protection from the Bill of Rights, or nowhere. Surely the First Amendment was not written to put the religious liberty of small groups at the mercy of legislative majorities and school boards." Invoking both *Hague* and *Schneider*, the Committee pointed out that "this court held that, when the fundamental individual liberties are at stake, the government is *restricted in its choice of methods* and may even be required to adopt some relatively inefficient and inconvenient means when it wants to achieve a proper purpose. If this doctrine is applicable to freedom of speech, is it not applicable also to the equally basic guarantee of liberty of conscience?" Religious liberty must be treated in a similarly liberal manner to free speech. In essence, they urged, this meant that policy must be federal—and not left to the whim of local politics and control. By 1943, the results of local control were more obvious due to widespread mob violence. "The ugly picture of the years following the *Gobitis* decision," Covington wrote in the main brief for *Barnette*, "is an eloquent argument in support of the minority contention of Mr. Justice Stone, and of the position taken in June 1942 by Justices Murphy, Douglas and Black that they 'wrongly decided' the *Gobitis* case in 1940."

"Freedom won a decisive victory in the United States this week," proclaimed the New York Times on June 15, 1943.[139] On June 14, Flag Day, the Court handed down its decision in *Barnette*, in favor of the Jehovah's Witnesses and reversing the precedent

[139] W.H. Lawrence, "Civil Liberties Gain by the Flag Decision," *New York Times*, June 20, 1943, E10.

established only three years before in *Gobitis.* "If there is any fixed star in our constitutional constellation," wrote Justice Jackson for the majority, "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." Notably, Justice Frankfurter never changed his mind, siding with the minority in *Barnette* and disagreeing with the reversal of opinion. Also significantly, the Court decided the case primarily on free speech grounds. In fact, some civil libertarians, who thought that a liberal reading of the religious liberty clauses was impossible, rejected the Jehovah's Witnesses' continued urging on this point. "Despite the fact that the Jehovah's Witnesses like to treat their cases as cases on freedom of religion," one ACLU lawyer wrote in 1942, "the courts generally pass over the religious freedom point and discuss the case in terms of free press or speech. The only way in which the issue of freedom of religion gets into the picture is by way of the claim of the Witnesses..."[140]

The Court's continued proclivity to decide cases on other First Amendment grounds is, in part, a statement regarding the success of Jehovah's Witnesses in making the case that free speech, press and assembly were integrally tied to religious liberty. (Covington repeatedly expressed aggravation at this tendency, as had Rutherford before him, at one point asking another attorney to "advise me as to your attitude on the above suggestions concerning preparation of your brief so as to avoid any possible injury to the position of Jehovah's witnesses under the 'freedom of worship' provision of the Constitution."[141]) In all, however, both Jehovah's Witnesses and civil libertarians took the Court's reversal in *Barnette* as a sweeping statement about religious liberty and its

[140] ACLU Records, Reel 206.
[141] Hayden Covington to Elisha Hanson, July 2, 1942; ACLU Records, Reel 208.

connection with other liberties. Lillian Gobitas remembered thinking "It was wonderful," that the Supreme Court justices "expressed that they had made a mistake and that they were now willing to change their minds, and this filtered through to us, you know."[142] The reversal had broad implications for those seeking remedy based on religious liberty. One observer reflected that in the previous "five years the Supreme Court of the United States has added decisions of greater importance to the case law of religious freedom than had been accumulated in all the years since the adoption of the Bill of Rights." Jehovah's Witnesses had "served as the guinea pig for all the important cases in this period."[143] The group had waged a decades-long battle to connect religious and other civil liberties. In the process, they had helped to test traditional notions of local power, and had challenged the federal government to act in situations were civil liberties were being violated.[144] Between 1938 and 1943, because of these groups' cooperation, religious liberty was not only "incorporated" into the Fourteenth Amendment, but free speech and press were also incorporated into religious liberty guarantees—leading to a more expansive definition of First Amendment liberties.

While Jehovah's Witnesses were a protective and somewhat isolated group, bound together for purposes quite apart from worldly liberties, their battles had profound implications for other civil liberties and civil rights agitation. In mid-1943, for example, the Justice Department attorney Victor Rotnem wrote to Covington, requesting a "recommendation as to a good man to go into the Southern parts of the country as a

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[142] Interview with Lillian Gobitas Klose at her home in Georgia.

[143] Victor Rotnem and F.G. Folsom, "Recent Limitations of Religious Liberty," *The American Political Science Review* 36, no. 6 (December 1942), 1053-1068; Watch Tower Legal Department Archives, Patterson, New York. Folder: "Federal Government Justice Department Civil Rights Section."

[144] The extreme rarity of reversing such a recent precedent should be noted. It is likely that the Court's reversal after only three years was in part a reaction to the violence against Jehovah's Witnesses. In addition, however, other factors were likely involved, including the strength of the arguments made by Jehovah's Witnesses and the ACLU.

special prosecutor in civil rights prosecutions." Covington recommended two lawyers, one in Arkansas and one in Oklahoma, "neither of whom are Jehovah's witnesses." He had come into contact with them, he explained, "through cases which we have handled together involving Jehovah's witnesses."[145]

Jehovah's Witnesses' importance to civil liberties battles was no mistake, nor was it an unfortunate side-effect of a selfish quest. The ACLU remarked in 1943 that "the rights which their court contests seek to uphold are rights applicable to all persons; and their success in establishing them has been of immense benefit to the cause of civil liberties generally." For all the apocalyptic language of the organization, the Jehovah's Witness leadership, beginning with Rutherford, embraced an expansive view of civil and religious liberties. They supported the freedom to speak, publish and worship—for their religious "opponents," themselves, and those (such as Socialists and labor organizers) who did not agree with their worldview at all. While they thought that most other groups were fundamentally and catastrophically wrong, they saw the danger to every group of quashing the civil rights of any group. Over the next few years, Covington and the Jehovah's Witnesses, along with their allies at the ACLU and elsewhere, would win decisive battles in the Supreme Court regarding religious and other civil liberties.

By the late 1940s, however, in the Jehovah's Witnesses' legal department, "the cases dwindled, less, fewer, the patriotism frenzy was gone. People cooled down a little bit, and we didn't have the court cases coming up as much. And so the Legal Department was cut down, because Covington was there, Victor Blackwell, and Jackson, and Covington, were about all that were left." Through an astonishing series of court cases at

[145] Hayden Covington to Victor Rotnem, June 16, 1943; Watch Tower Legal Department Archives, Patterson, New York. Folder: "Federal Government Justice Department Civil Rights Section."

the highest levels of the United States judiciary, the group had won many rights to practice and to preach as they saw fit. In so doing, they had helped to reinforce the protections offered by the First and Fourteenth Amendments.

The parallels between the Jehovah's Witnesses and civil rights advocates, who would soon rise to national prominence, can be found in many aspects of their experiences. The danger of mob violence, of course, was one. The Civil Liberties Commission of the American Youth Congress reported on "the alarming effects of war hysteria on our civil liberties," discussing the police murder of a black steel worker in Alabama, Ku Klux Klan vigilante attacks on labor, anti-Semitic crusades, beating of Communists distributing election petitions, and beatings of Jehovah's Witnesses.[146] The NAACP, additionally, spoke of the treatment of Jehovah's Witnesses when pushing for a federal anti-lynching bill.[147] Jehovah's Witnesses encountered such danger because they preached the gospel on public streets and took a stand by refusing to salute the flag. While these acts were primarily evangelical in their aims, for two decades the group's leadership had encouraged public acts of civil disobedience to challenge laws which limited their rights.

Even more compellingly, Jehovah's Witnesses used these strategies of civil disobedience and nonviolent resistance to authorities as a springboard to legal action. In so doing, they demonstrated the power of a minority—however loathed, however seemingly helpless—in expanding legal rights and protections. In the 1940s, at least one observer championed cooperation between racial and religious minorities. "The significance of the problems of Jehovah's Witnesses to Negroes," wrote Marjorie

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[146] "Civil Rights, Compulsory Military Training Discussed at Youth Confab," *The Chicago Defender,* July 14, 1940, 4.

[147] "Barkley Dooms Lynch Bill," *The Chicago Defender,* August 17, 1940, 1.

McKenzie, "is the same meaning that must be attached by us to the problems of any oppressed group, whose rights are safeguarded by Constitutional guarantees….As a minority, hated, feared and persecuted just as the unpopular Witnesses have been, we depend upon a clear and broad interpretation of the Constitution for full recognition of our rights under law."[148] The Jehovah's Witnesses provided a model for strategic litigation which would be implemented widely later in the twentieth century, providing strategies which predated, and helped to anticipate, arguments which were ultimately successful in defining other civil rights. Other groups had, of course, challenged the federal and local authorities before. However, none had so consciously tied religious liberty to other First Amendment rights. Jehovah's Witnesses were, in some ways, pioneers of the twentieth-century "rights revolution."

[148] Marjorie McKenzie, "Pursuit of Democracy," *The Pittsburgh Courier*, June 5, 1943, 7.

Chapter VI: Religious Liberty and the Long Civil Rights Movement

"These cases," Hayden Covington later reflected about the Watch Tower Society's litigation efforts, "were test cases."[1] Through their actions in the United States court system, Jehovah's Witnesses worked strategically to secure their rights to practice and to preach. The cases they argued in the Supreme Court, culled from hundreds brought by members of the group in state and federal courts, were those in which the Watch Tower Society staff deemed their legal points to be unassailable. In the decade and a half after their first Supreme Court case in 1938,[2] the Watch Tower legal department succeeded in having fifty-seven cases ruled upon by the Supreme Court, resulting in thirty-nine separate opinions.[3] The Court ruled in the Jehovah's Witnesses' favor in thirty of these judgments.[4] The Watch Tower Society attained Supreme Court review of a greater number of cases than any other contemporary interest group, secular or religious. In part, this success was due to the leadership and legal acumen of Rutherford, Moyle and Covington. The ACLU's expertise and reach certainly also helped. The ambition and persistence of great numbers of ordinary members of the Jehovah's Witnesses, from arrests to hearings to appeals, were critical as well.[5] Yet the Supreme Court's prolonged attention was also due to the variety of civil liberties issues

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[1] Hayden Covington to the Subcommittee on Constitutional Rights, Committee on the Judiciary, United States Senate, September 1, 1955; Watch Tower Legal Department Archives, Patterson, New York. Folder: "Federal Government, Senate Subcommittee, Constitutional Rights."

[2] *Lovell v. Griffin*, 303 U.S. 444 (1938).

[3] See "Appendix I: Cases Involving Jehovah's Witnesses Decided by the U.S. Supreme Court, 1938-1955."

[4] The Watch Tower Society also filed appeals and petitions with the United States Supreme Court in some sixty-five other cases, in which the Court denied review. See "Appendix III: Additional Cases Filed by Jehovah's Witnesses in the United States Supreme Court, 1938-1955."

[5] For a partial list of cases in lower federal and state courts which either were not appealed, or which were denied review by the United States Supreme Court, see "Appendix II: Select Cases in State and Lower Federal Courts Advocated by Watch Tower Society Legal Department, 1934-1955." These cases are only those which were appealed at least once; hundreds more were heard at the trial and recorder's courts, yet most of these are unreported.

raised by the Jehovah's Witnesses. The group's cases, involving canvassing and literature distribution ordinances, laws relating to public speech and assembly, and regulations mandating patriotic exercises, provided a forum for testing and defining Constitutional liberties. Far from being a footnote to the history of civil liberties and civil rights in the twentieth century, the strategic nature of the Jehovah's Witnesses' litigation, as well as their expansive views of First and Fourteenth Amendment protections, place them squarely at the center of the rapid expansion of civil liberties, as well as the "long civil rights movement" of the twentieth century.

Even after the height of wartime panic died down in the 1940s, and mob violence against Jehovah's Witnesses waned, the group's continued presence in the courts—and on the nation's doorsteps—made them highly visible. While they retained the support of civil liberties advocates, media speculation often returned to distrust of the Jehovah's Witnesses and their motives. Covington and Watch Tower President Nathan H. Knorr bristled at a 1943 *Newsweek* article, for example, regarding Covington's Supreme Court appearances. Calling Covington a "tall, Texas Tornado with sea green eyes," who "erupted into the austere chamber in a bright green suit with padded shoulders and a red plaid tie," the article asserted that, to Covington, "the dignity of the United States Supreme Court is irrelevant to the legal process."[6] As court was adjourned, the article sniped, "the court clerk remarked: 'He may not have done more talking than anyone I've ever heard here, but he did do more calisthenics'." Laying the blame for the recent mob violence and legal action against the group squarely on their own shoulders, the piece stated that Jehovah's Witnesses "engender a kind of high-pressure provocation that tends to drive the most peace-loving to anger, insult, and violence, and to prosecuting them in

[6] "Religion: Witness's Angle," *Newsweek*, March 22, 1943, 68-70.

the courts." The article's nasty tone, Covington speculated to Knorr, was due to his refusal to give an interview after oral arguments in the *Barnette* flag salute case; he had told a reporter that "individuals are not important and I am just a two-legged man like all other men trying to do my duty."[7] Negative media coverage, Knorr reassured his chief legal counsel, showed "how they must resort to imaginary ideas to write a story that the people of this wicked world delight to read."[8] Despite—or perhaps fuelled by—periodic criticism, the Watch Tower Society pressed on with its legal work.

With each subsequent case, the Supreme Court refined the meaning of the First and Fourteenth Amendments. The sparseness of constitutional precedent with regard to First Amendment rights and incorporation gave way to a virtual frenzy of activity in the highest court, after that tribunal had signaled its willingness to hear such cases.[9] In the first three Supreme Court cases involving the Jehovah's Witnesses (1938-1940), the Court had declared that an ordinance restraining Alma Lovell's distribution of literature in Georgia had constituted prior censorship of the press,[10] that Clara Schneider's conviction for canvassing without a permit in New Jersey had abridged her First Amendment press freedom,[11] and that arresting the Cantwell men for going door-to-door with their phonograph in Connecticut had violated both their free speech and their

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[7] Hayden Covington to Nathan H. Knorr, March 19, 1943; Watch Tower Legal Department Archives, Patterson, New York. Folder: "Federal Government, Senate Subcommittee, Constitutional Rights."

[8] Nathan H. Knorr to Hayden Covington, March 22, 1943; Watch Tower Legal Department Archives, Patterson, New York. Folder: "Federal Government Senate Subcommittee, Constitutional Rights."

[9] The question of why the Court began agreeing to hear civil liberties cases, and especially those involving religious liberty, when it had declined to do so before, has not been sufficiently addressed in the literature.

[10] *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

[11] *Schneider v. New Jersey*, 308 U.S. 147 (1939).

religious liberty.[12] The *Lovell* and *Schneider* decisions had bolstered press freedom, and the *Cantwell* ruling had, momentously, incorporated religious liberty into the Fourteenth Amendment for the first time. Each of these rulings was used as precedent in dozens of subsequent cases, both those involving Jehovah's Witnesses, and those in which other speakers and publishers sought protection from the First Amendment. The Court soon built upon these cases, reinforcing the connections between press, speech and religious liberty, and expanding the First Amendment's guarantees. While the Jehovah's Witnesses' record in the highest judicial tribunal was certainly not one of unfettered triumph (the ruling in the *Gobitis* flag salute case (1940) had served as a notable setback, until overturned three years later), the group's cases were of great significance in extending the reach of constitutional rights.

Certainly, the story of the Jehovah's Witnesses in the courts is not one of unfettered progress toward broader civil rights. Yet even when the Court ruled against Jehovah's Witnesses, the cases in question reinforced the expansion of Bill of Rights guarantees. For example, in a 1942 ruling against Jehovah's Witness Walter Chaplinsky, the Court defined clear limits to the First Amendment's free speech guarantee—the so-called "fighting words" doctrine. In the midst of a heated 1940 confrontation on a New Hampshire street, in which he had accused a police officer of failing to protect him from an angry mob, Chaplinsky had called the officer a "God damned racketeer" and a "damned fascist," further asserting that "the whole government of Rochester are Fascists or agents of Fascists." Chaplinsky had been convicted of violating a New Hampshire state law prohibiting the addressing of offensive, derisive or annoying words at others in the public streets, and the Watch Tower Society had appealed his case to the United

[12] *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

States Supreme Court on First Amendment grounds. A unanimous Court ruled that the arrest had not violated Chaplinsky's free speech. "There are certain well-defined and narrowly limited classes of speech," Justice Frank Murphy wrote, "the prevention and punishment of which has never been thought to raise any Constitutional problem….the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[13] Yet, although they ruled against the Watch Tower, in articulating the "fighting words" doctrine for reasonable limits on First Amendment guarantees, the Court reinforced the earlier extension of Constitutional free speech guarantees. Justice Murphy's assertion that the Court "cannot conceive that cursing a public officer is the exercise of religion in any sense of the term" did not negate the more expansive view of free speech previously adopted by the Court.[14] The Watch Tower Society itself eventually used Chaplinsky's case to rearticulate its commitment to nonviolent protest, discouraging such ill-mannered outbursts, and urging Jehovah's Witnesses to approach citizens and authorities calmly and courteously.[15] In order to be effective, Jehovah's Witnesses must be well-versed in "tactfulness and the right use of the tongue."[16] While

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[13] *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

[14] Similarly, in *Cox v. New Hampshire*, 312 U.S. 569 (1941), a group of sixty-eight Jehovah's Witnesses were arrested marching down the sidewalks of Manchester, New Hampshire, holding signs and distributing leaflets advertising a meeting. The Court ruled that cities could place reasonable restrictions on speech for the public safety of the streets. While the government must protect civil liberties, the necessity of controlling travel on the streets overrode these arguments.

[15] This advice had, of course, begun during the 1920s and 1930s, when Rutherford and Moyle encouraged members of the group toward nonviolence and politeness. In later years, when the Watch Tower Society discussed the Chaplinsky case, they later used their defeat to emphasize the importance of politeness in these interactions.

[16] Watch Tower Bible & Tract Society to Ignacio Alvarado, March 18, 1965. This communication, as well as many others like it, was a response to Jehovah's Witnesses' inquiries regarding an account of the *Chaplinsky* case in a textbook called *American Government*. Similarly, in a December 3, 1963 letter to Alfrada Moss, the Watch Tower Society wrote that "There is no justification for one of Jehovah's witnesses using abusive language against an officer of the law and there is no reason why your daughter should try to discuss this case with her teacher….All of this occurred during the time when

the right to free speech was not absolute, the doctrine articulated in the *Chaplinsky* case did not constrict the Jehovah's Witnesses' rights in preaching or literature distribution.[17]

In fact, in the months leading up to the Court's reversal on the flag salute issue, 1943 was a banner year for Jehovah's Witnesses in the legal arena. In addition to the widely-publicized decision in the *Barnette* flag salute case, the Court issued several rulings that reinforced the freedom to canvass and to distribute literature. While the Court had already ruled on issues involving prior restraint of the press and religious liberty, these cases clarified points of law involving the First Amendment. Even after the expansive decisions in *Lovell*, *Schneider*, and *Cantwell*, police had continued to arrest Jehovah's Witnesses for violating city ordinances prohibiting distribution and canvassing. Additionally, states and municipalities had passed laws less broad than the Griffin or Irvington ordinances, hoping to circumvent the Supreme Court's rulings—in the way many Court rulings are tested and re-tested. For example, a Jehovah's Witness had been arrested in Dallas, Texas for distributing leaflets announcing a talk ("Peace, Can it Last?") and advertising Watch Tower publications. The city had argued that the ordinance was constitutional, as it did not prohibit literature distribution outright, merely requiring a permit for the solicitation of orders and the selling of merchandise. In March, 1943, the Supreme Court rejected this argument, stating that the city could not prohibit

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Jehovah's Witnesses were being hounded all over the country and this brother lost his temper, for which there was no excuse." See also Watchtower Bible and Tract Society of New York, Inc, Office of the Secretary and Treasurer to Irene Behnke, September 27, 1968; Watch Tower Bible & Tract Society to David Randall Luce, Associate Professor of Philosophy, University of Wisconsin, December 2, 1976; Watchtower Bible and Tract Society of New York, Inc., Legal Department to Kimberley Newman, April 12, 1993, in which the legal department wrote that there is "no justification for one of Jehovah's Witnesses to use abusive language" but that it must be remembered "that this occurred in a very turbulent time—a riotous year—1940, when there were hundreds of arrests and cases of mob violence against Jehovah's Witnesses." Watch Tower Legal Department Archives, Patterson, New York. Folder: "Name Calling (Chaplinski Case)."

[17] Hayden Covington to Vivian Holews, December 1, 1958; Watch Tower Legal Department Archives, Patterson, New York. Folder: "Name Calling (Chaplinski Case)."

the distribution of handbills "merely…because the handbills seek in lawful fashion to promote the raising of funds for religious purposes."[18] Another Jehovah's Witness had been arrested in Paris, Texas, for offering books for sale without a permit. The Court ruled that it did not matter whether a person asked for contributions or actually made sales; the fact that discretion for issuing a permit was left to the mayor's deeming it "proper or advisable" was "administrative censorship in an extreme form," abridging freedom of religion, speech, and press guaranteed by the Fourteenth Amendment.[19] In these cases, the Court rejected arguments that ordinances regulating Jehovah's Witnesses' activities were acceptable, reinforcing the group's claims that their First Amendment rights should be interpreted expansively.

Later in 1943, the Court issued a series of rulings which were even more important to the Jehovah's Witnesses' cause. A group of Jehovah's Witnesses, including Robert Murdock, Jr., Anna Perisich, Willard L. Mowder, Charles Seders, Robert Lamborn, Anthony Maltezos, Anastasia Tzanes, and Ellaine Tzanes, had been convicted of violating a Jeannette, Pennsylvania ordinance prohibiting the sale of goods within the city without a license, which required a fee and application to the Burgess. The Court held that the ordinance abridged press and religious liberty when applied to the activities of Jehovah's Witnesses. It was unconstitutional, Justice William Douglas wrote for the majority, to lay a tax on the exercise of First Amendment freedoms. Reinforcing the connection of speech and press rights to religious liberty, the Court alluded to the

[18] *Jamison v. Texas*, 318 U.S. 413 (1943). The Court held that the enforcement of the ordinance abridged the appellant's liberty of press and religion, contrary to the First Amendment.

[19] *Largent v. Texas*, 318 U.S. 413 (1943). The Court ruled that the ordinance requiring an application to the Mayor for a permit to sell or canvass constituted prior censorship of the press in violation of the First Amendment.

Jehovah's Witnesses' own arguments about the roots of their practices in traditional Christianity:

> The hand distribution of religious tracts is an age-old form of missionary evangelism—as old as the history of printing presses….Its purpose is as evangelical as the revival meeting. This form of religious activity occupies the same high estate under the First Amendment as to worship in the churches and preaching from the pulpits. It has the same claim to protection as the more orthodox and conventional exercises of religion. It also has the same claim as the others to the guarantees of freedom of speech and freedom of the press.[20]

In light of this ruling, the Court also issued a rare reversal of an opinion they had issued the previous year in a similar literature distribution case.[21] Rosco Jones, Lois Bowden, Zada Sanders, and Charles Jobin had been convicted of violating similar city ordinances in Alabama, Arkansas, and Arizona, requiring permits for pamphleteering. The Court had ruled against them the previous year, but now decided that such laws were, in fact, also unconstitutional when applied to religious workers. "Freed from that controlling precedent" of the first *Opelika* decision, wrote Justice Douglas for the majority, "we can restore to their high, constitutional position the liberties of itinerant evangelists who disseminate their religious beliefs and the tenets of their faith through distribution of literature." In addition to the *Murdock* and *Opelika II* decisions, the Court ruled on several similar Jehovah's Witnesses cases in 1943, affording substantial protections to religious workers against license taxes and literature distribution prohibitions.[22]

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[20] *Murdock v. Pennsylvania, & seven others*, 319 U.S. 105 (1943).

[21] *Jones v. City of Opelika*, 316 U.S. 584 (1942); reversed in *Jones v. City of Opelika (II)*, 319 U.S. 103 (1943).

[22] *Martin v. Struthers*, 319 U.S. 141 (1943). Thelma Martin had been convicted of violating an ordinance of the City of Struthers, Ohio, which made it illegal to ring doorbells to aid in the door-to-door distribution of handbills or other advertising. The Court held that the ordinance was an abridgment of the freedom of the press.

Taylor v. Mississippi, Benoit v. Same, Cummings v. Same, 319 U.S. 583 (1943). R.E. Taylor, Betty Benoit, and Clem Cummings had been convicted of violating a Mississippi anti-sabotage and sedition statute, for distributing literature explaining Jehovah's Witnesses' refusal to salute the flag. The Court

Later the same year, the dramatic reversal of the Court's stand on mandatory flag saluting, issued that June in the *Barnette* case, constituted another piece of this expansion of First Amendment freedoms. Rather than merely being separate issues about which Jehovah's Witnesses had clashed with the authorities, the literature distribution cases and those involving the flag salute were linked, because Jehovah's Witnesses had been arrested for distributing literature about their refusal to salute. The Court acknowledged this connection in another 1943 case, in which a group of Jehovah's Witnesses had been convicted of discussing and distributing literature about their beliefs—characterized by the State of Mississippi as "serving to encourage disloyalty" to the government of the United States. "If the state cannot constrain one to violate his conscientious religious conviction by saluting the national emblem," wrote Justice Roberts, in the opinion overturning the law and the convictions, "then certainly it cannot punish him for imparting his views on the subject to his fellows and exhorting them to accept those views."[23] Not only were members of minority persuasions free to practice their beliefs, thus, but they were also at liberty to express these beliefs and to encourage others to join them. By the end of 1943, a bloc of Jehovah's Witness cases redefined religious liberty, developing it considerably and connecting it with press and speech rights.

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ruled that this statute was unconstitutional in this enforcement, depriving the appellants of their rights to free speech and press specified in the First Amendment.

Busey v. District of Columbia, 319 U.S. 579 (1943). David Busey and Orville J. Richie had been convicted of selling magazines on the streets of the District of Columbia without first procuring a license and paying a license tax. The Court vacated the Appeal's Court decision, ordering a reconsideration in light of the *Murdock* decision.

A similar order for reconsideration was issued In *Matthews v. Hamilton*, 320 U.S. 707 (1943), in which Matthews was enjoined from distributing literature explaining why Jehovah's Witnesses do not salute the flag and bear arms.

However, in *Douglas v. Jeannette*, 319 U.S. 157 (1943), the Court ruled Jehovah's Witnesses could not obtain a federal injunction to enjoin enforcement of a City of Jeannette, Pennsylvania ordinance (the same Pennsylvania license tax law involved in the *Murdock* case) to restrain threatened criminal prosecutions. The Jehovah's Witnesses must, the Court ruled, pursue the judicial channels of review for such laws.

[23] *Taylor v. Mississippi, Benoit v. Same, Cummings v. Same*, 319 U.S. 583 (1943).

Although they were often split decisions, the Supreme Court's 1943 rulings in the Jehovah's Witness cases were, in the end, expansive, touching on issues relating to free speech, press and worship in a variety of practices.[24] The Court's ruling in the *Barnette* case settled the mandatory flag salute question, at least for the time being.[25] In flag salute, literature distribution, and public speech cases, the Court reiterated the idea of "preferred freedoms," those liberties about which the courts had to be most careful, while maintaining that society might nonetheless set reasonable limits on these rights. "A license tax certainly does not acquire constitutional validity because it classifies the privileges protected by the First Amendment along with the wares and merchandise of hucksters and peddlers and treats them all alike," Justice Douglas had written in *Murdock*. "Such equality in treatment does not save the ordinance. Freedom of press, freedom of speech, freedom of religion are in a preferred position." Subsequent cases involved distinctions in the law and other factors. In the 1944 case of Sarah Prince, for example, who had been convicted of allowing her nine-year-old foster child, Betty Simmons, help her to sell Watch Tower literature on the streets of Boston, the Court ruled that Simmons' religious belief was no justification for breaking Massachusetts child labor laws.[26] As in the "fighting words" case, the Court indicated that it was willing to reinforce some limits on First Amendment protections. The details of literature distribution and canvassing ordinances continued to inspire litigation in the 1940s and 1950s.

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[24] See "Appendix IV: United States Supreme Court Cases Involving Jehovah's Witnesses with Vote Alignments."

[25] The issue of mandated flag-saluting was resurrected in the 1990s. *Newdow* case.

[26] *Prince v. Massachusetts*, 321, U.S. 158 (1944).

Mainly, the Court overruled city ordinances and state statutes that placed too onerous a burden on literature distribution, fine-tuning the judicial definition of acceptable limits on the First Amendment. A Jehovah's Witness named Lester Follett, for example, had been convicted of violating an ordinance of the Town of McCormick, South Carolina, requiring a permit to sell books. After Follett had appealed his case, the town had argued that Follett was not an itinerant preacher, but a resident of the town, earning his living selling books. In 1944, the Court rejected this argument, again referring to the kinship between religious proselytism and the dissemination of other unpopular views. "The protection of the First Amendment," wrote Justice Douglas, "is not restricted to Orthodox practices any more than it is to the expression of orthodox economic views." Regardless of the motive, forms of unpopular speech and publication would be protected. In addition, a person "who makes a profession of evangelism is not in a less preferred position than the casual worker."[27] In another case, a Jehovah's Witness named Grace Marsh had been convicted of criminal trespass for violating an Alabama law making it a crime to remain on someone's property after being asked to leave. The Court set aside the trespass conviction on First Amendment grounds. "When we balance the Constitutional rights of owners of property against those of the people who enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position."[28] In a similar case the same year, a town defended its trespassing ordinance on the basis that the federal government owned the municipality in question, which housed workers engaged in producing war materials.

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[27] *Follett v. McCormick*, 321 U.S. 573 (1944).
[28] *Marsh v. Alabama*, 326 U.S. 501 (1946).

The Court dismissed this argument as irrelevant, setting aside this criminal trespass conviction as well.[29]

The Supreme Court treated Jehovah's Witness cases which involved the new technologies utilized by the group to spread the Gospel little differently from ordinary literature distribution and free speech matters. In addition to speaking with people individually through canvassing and door-to-door literature distribution, Jehovah's Witnesses had begun to use phonograph machines and heavy equipment (such as the "transcription machines" used to amplify lectures in parks, sound cars and boats, and other amplifying mechanisms) to present lectures in public places. All of these methods were, at one time or another, causes for arrest of Jehovah's Witnesses, and in the 1940s, the Supreme Court entertained some of the group's arguments regarding the protected nature of these practices. The Watch Tower Society assiduously pursued what they thought to be the best of each sort of case through the appellate process. For example, a Jehovah's Witness named Samuel Saia had been convicted of violating a Niagara, New York municipal ordinance requiring permission from the Chief of Police for the use of sound amplification devices, when he presented lectures in a public park on designated Sundays. The Supreme Court ruled that the ordinance was unconstitutional, because Saia's rights of free speech and assembly had been violated. Here, again, the Court mentioned an analogy to political speech. "Annoyance at ideas," wrote Justice Douglas, "can be cloaked in annoyance at sound."[30] Further, relying on the preferred freedoms doctrine they had developed over the past decade, the Court reasoned, "[u]nless we are to retreat from the firm positions we have taken in the past, we must give freedom of speech

[29] *Tucker v. Texas*, 326 U.S. 517 (1946).
[30] *Saia v. New York*, 334 U.S. 558 (1948).

in this case the same preferred treatment that we gave freedom of religion in the Cantwell case, freedom of the press in the Griffin case, and freedom of speech and assembly in the Hague case." What emerged, then, from the several dozen rulings of the Supreme Court on the Watch Tower Society issues was a detailed body of precedent. The Jehovah's Witnesses' cases were woven into the fabric of civil liberties jurisprudence, becoming a part of the protections afforded both themselves and other minority groups.

While they lost occasional cases in the 1940s and 1950s, the "hawking and peddling" laws, license taxes, and other ordinances limiting proselytizing activities had, by and large, been deemed unconstitutional, and the cloaks of free speech and religious liberty had been stretched significantly. In the 1950s, arrests of Jehovah's Witnesses declined dramatically. Between 1933 and 1951, by their own estimates, about 19,000 Jehovah's Witnesses had been arrested in the United States.[31] In addition, at least 1,500 incidents of mob action had occurred during those years. Yet the late 1940s had shown a "marked decrease in the actual number of arrests," with "fewer arrests and less opposition…than at any other time since trouble broke out." After 1945, many territories stopped reporting the number of arrests to the Watch Tower headquarters, as detentions "began to dwindle down so low that some of the reports do not have figures but just mention a few cases."[32] Covington and the legal department continued to advocate on behalf of Jehovah's Witnesses, but during the early years of the Cold War, the cases shifted to dealing with the hundreds of Jehovah's Witnesses in prison for draft law violations, religious practice and proselytizing within prisons, and other issues which

[31] Albert D. Schroeder to Hayden Covington, December 13, 1951; Watch Tower Legal Department Archives, Patterson, New York. Folder: Violence/Harassment Mob Action."

[32] Ibid.

arose.[33] The everyday right to practice and to preach, however unconventionally, had been tested and strengthened.

Members of the group—Covington, Knorr, and the myriad ordinary Jehovah's Witnesses who persisted in the courts—were encouraged by their lofty mission, yet they were also bolstered by the positive effects of successful litigation. When the Supreme Court began to affirm their rights to unconventional views and practices, official action and mob harassment against members of the group did decline. Looking back, Covington later attributed these improvements to the "publicity given favorable Supreme Court decisions rendered in the year 1943, followed by other favorable decisions." A "change of attitude of the people" and "favorable publicity in the press," he suggested, were "due directly to the many favorable decisions rendered by the Supreme Court, followed by favorable decisions in lower and state courts." Covington proposed that the diminution of virulent criticism and accusations toward the group was due, in part, to these Supreme Court decisions. "The improvement in the attitude of the people and the public press since those decisions has been due to the stoppage of the illegal arrests by local officials and the discontinuance of mob violence flowing from the favorable Supreme Court decisions."[34] Not only did the Supreme Court decisions allow Jehovah's

[33] Hayden Covington, "United States of America, Department of Justice, President's Amnesty Board, Executive Clemency for Jehovah's Witnesses Convicted Under the Selective Training and Service Act of 1940," 1946; Hayden Covington to brethren, as well as to James V. Bennett, Director, Bureau of Prisons, Department of Justice, and to Justice Owen Roberts, January, 1946 – May, 1947; Watch Tower Legal Department Archives, Patterson, New York. Folder: "Jehovah's Witnesses Given Amnesty & Pardon, Dec 1947 (and Amnesty Proclamation)." The Watch Tower legal department also had to deal with legal issues arising from Jehovah's Witnesses' decision not to accept blood transfusions.

[34] Hayden Covington, "Statement Supplementing Questionnaire Answered by Hayden C. Covington, General Counsel for Jehovah's Witnesses on the Religion Clause of the First Amendment," October 10, 1955; Watch Tower Legal Department Archives, Patterson, New York. Folder: "Federal Government, Senate Subcommittee, Constitutional Rights."

Witnesses legally to continue with their work, Covington asserted, but they also assisted with the persecution the group had faced for so many years.

The purpose of the arrests and trials, the jail stays and the appeals, had been to guarantee Jehovah's Witnesses a voice—even if that freedom was used to criticize other groups, as the Watch Tower Society members were wont to do. However important their Supreme Court victories, as well as the confirmation of these precedents in hundreds of lower court decisions, were to religious and civil liberties in the United States, Jehovah's Witnesses saw their legal work mainly in terms of their primary mission of spreading the Gospel. "Jehovah God has commanded us," Covington instructed, "to resist the efforts to interfere with our service to him. The duty of every servant of God is not to be overcome by persecution but to throw back the attempts to misapply and wrongfully enforce the laws."[35] Of course, the Watch Tower's judicial successes informed their exultant mood. "Court decisions in our cases have piled high, as it were," wrote Covington in 1950,

> stone upon stone, to establish a strong buttress against the rushing torrent of oppression. These precedents stand strong and immovable like a mountain of victory raised by Jehovah out of the floods of violence and persecution waged against us by religious bigots and fanatics in many lands. Public-spirited men of honesty, justice and courage among the judiciary and other governmental agencies have seen the righteousness of our fight and need to maintain fundamental liberties and have given us equal protection of the law and shown good administration of government.[36]

Jehovah's Witnesses did not set out to change Constitutional law for its own sake. Their primary motive was gaining the capability to spread the Truth, in the face of prejudice and opposition (caused by Satan, in their estimation). Nonetheless, the group's leaders believed in both the Constitution and its "fundamental liberties"; so convinced were they

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[35] Hayden Covington, *Defending and Legally Establishing the Good News* (Brooklyn, New York: Watch Tower Bible & Tract Society, 1950).

[36] Ibid.

that the laws of the land were being misconstrued, that they saw legal action as entirely compatible with and necessary to the Watch Tower's larger mission.

Although the Jehovah's Witnesses' primary goal was to have the freedom to proselytize as they saw fit, they also acknowledged and embraced the fact that the expansion of the First Amendment's free speech, press and worship guarantees would lead to extensions of rights even for those with whom they disagreed. This thinking applied to political and economic groups, as well as to the religious organizations the Jehovah's Witnesses found so objectionable. Covington and the Watch Tower Legal Department continued to emphasize that they did not seek new laws to protect their interests, but merely the equal enforcement of what they saw as fundamental constitutional principles. "I pointed out that we were not 'begging' for anything," Covington wrote. "That we had a legal right we were fighting for and stood squarely on the Bill of Rights in that fight as American Citizens which legal rights we were claiming and in making this fight we fought for the Bill of Rights and for liberty on the home front for the American people."[37] The Court itself frequently referred to the arguments, made by Jehovah's Witnesses and civil libertarians alike, that prohibitive laws affected the freedoms of all citizens. Discussing the distribution of handbills on the streets and door-to-door, Justice Black wrote that

> Many of our most widely established religious organizations have used this method of disseminating their doctrines, and laboring groups have used it in recruiting their members. The federal government, in its current war bond selling campaign, encourages groups of citizens to distribute advertisements and circulars from house to house. Of course, as every person acquainted with political life knows, door to door campaigning is one of the most accepted techniques of seeking popular support, while the

[37] Hayden Covington to Nathan H. Knorr, March 16, 1943; Watch Tower Legal Department Archives, Patterson, New York; Folder: "Federal Government, Senate Subcommittee, Constitutional Rights."

> circulation of nominating papers would be greatly handicapped if they could not be taken to the citizens in their homes. Door to door distribution of circulars is essential to the poorly financed causes of little people.[38]

The expansion of First Amendment protection for the distribution of controversial literature, then, applied not only to Jehovah's Witnesses, but to all minority groups who used this method—and even, as Justice Black cheekily pointed out, to the federal government's own war bond campaign. Laws and ordinances that were used to limit the civic rights of speech, press, assembly and religion, as well as the broader "liberty" guarantees of the Fourteenth Amendment, were unconscionable—and unconstitutional.

The Jehovah's Witnesses consistently used their own formidable publishing enterprise to circulate the message that their victories in the judicial arena were positive not only for their own mission, but also for other minorities and unpopular groups. Far from expressing distress over the newly expansive readings of the First Amendment—although such liberal interpretations inevitably meant that even those whose ideas they most reviled would have increased latitude—the group connected their fight for freedom of worship with others hoping to secure their liberties. "Jehovah's witnesses," explained a Watch Tower pamphlet, "fought for their liberties, WHICH ARE YOUR LIBERTIES ALSO, guaranteed by the Bill of Rights and the constitutions of all the states. Not only did they get the benefit, but you too get the benefit of their fight. They refused to submit to terrorism and mobster law, but endured the persecution and resorted to the constitutional and legal procedures of the land."[39] The group "resorted to constitutional law" hundreds of times—and the Supreme Court supported the claim that these issues were of broad national importance by agreeing to hear their cases, if not always ruling in

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[38] *Martin v. Struthers*, 319 U.S. 141 (1943).

[39] *Fighting for Liberty on the Home Front* (Brooklyn, New York: Watch Tower Bible & Tract Society, 1943).

their favor. Two lawyers with the Justice Department wrote in 1943 that, since the late 1930s, the Supreme Court "has added decisions of greater importance to the case law of religious freedom than had been accumulated in all the years since the adoption of the Bill of Rights."[40]

To be sure, the rulings of the Supreme Court regarding the meaning of "due process" shifted significantly between the 1920s and the 1960s, for the first time incorporating a focus on civil liberties. The Court's primary concern until the 1930s had been economic—its perceived duty being to "guard the sanctity of property."[41] The "due process" clause of the Fourteenth Amendment, and indeed its "liberty" guarantees, were generally read to refer to economic freedoms, having little relevance to individual liberty. In the late 1930s, some of the "Roosevelt Court" justices had begun to question this commitment to economic rights, and consequent neglect of civil liberties. With a spate of retirements between 1937 and 1942, including those of the so-called conservative "four horsemen" (Justices Devanter, McReynolds, Sutherland and Butler) as well as Justices Cardozo and Brandeis, the Court's composition had changed. Some of the members of the Court, such as Justice Hugo Black (a Roosevelt appointee), insisted that the Court must protect minority rights, maintaining that the Fourteenth Amendment had incorporated the Bill of Rights to apply to the states.[42] The Court had begun to examine

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[40] Victor W. Rotnem and F.G. Folsom, Jr., "Recent Restrictions Upon Religious Liberty," *The American Political Science Review* 36, no. 6 (December 1942): 1053-1068.

[41] Henry J. Abraham and Barbara A. Perry, *Freedom of the Court: Civil Rights and Liberties in the United States* (New York: Oxford University Press, 1998), 8.

[42] Louis Lusky, for example, suggests that the business-protecting bloc on the Supreme Court was broken by Justice Black in 1937. Louis Lusky, "Footnote Redux: A 'Carolene Products' Reminiscence," *Columbia Law Review* 82, no. 6 (October 1982): 1093-1109. Justice Black, favored complete (rather than selective) incorporation of the Bill of Rights, famously stating that "'No law' means no law" about the First Amendment.

what relevance the Fourteenth Amendment had to the liberties contained in the Bill of Rights, and to individual liberties in general.

In the late 1930s, beginning with Justice Stone's footnote in *Carolene Products*—the "filled milk" case—the Court had begun to adopt the idea that cases involving individual rights must be scrutinized more closely than those concerning economic legislation. The Court had begun to embrace the idea of a "double standard," in which "preferred freedoms" (a term of art used by Justice Stone) were more closely guarded than economic freedoms.[43] As one scholar asserted, now "lawyers could dispense with their traditional effort to organize their concern for individual rights through a constitutional rhetoric of glorifying private property and free contract."[44] Individual rights, the Court had suggested in the late 1930s, would be scrutinized alongside—and sometimes beyond—the economic questions of liberty long considered by the Court to be of primary importance. These discussions often focused on the meaning of the due process clause of the Fourteenth Amendment, including how far the rights enumerated in the Bill of Rights extended. Eventually, some justices would argue—and the Court would accept—that not only did the Fourteenth Amendment "incorporate" many of the rights delineated in the Bill of Rights to the states, but certain unenumerated rights (those not specifically described) were also contained in the Fourteenth Amendment's "liberty" guarantees.

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[43] See *Jones v. Opelika*, 316 U.S. 584 (1942). For more discussion of the move away from the "economic substantive due process veto," see ibid. Justice Stone's Footnote Four in *Carolene Products* evolved from Justice Cardozo's opinion in *Palko v. Connecticut*; the distinction between economic freedoms and civil liberties was originally formulated by Justice Cardozo, and the doctrine of a double standard later specifically articulated by Justice Stone.

[44] Bruce A. Ackerman, "Beyond 'Carolene Products'," *Harvard Law Review* 98, no. 4 (February 1985): 713-746.

Yet there had remained fundamental disagreements, among the justices themselves, regarding the role of the Court in protecting civil liberties. As one scholar observed, the dispute was due

> in part from differences in temperament among the justices, in part from the personalities and abilities of the chiefs, and in no small part from the nature of the cases coming before the bench. The Court's agenda had begun a massive shift away from the questions of property rights and governmental regulations that had been so central in the 1920s and 1930s to issues of individual liberties, and the Roosevelt appointees were far from united in their views of these matters.[45]

When President Roosevelt had appointed him to the bench in 1939, for example, the assumption had been that Justice Frankfurter would lead a majority closely guarding civil liberties as well as giving broad scope to New Deal economic legislation.[46] Justice Frankfurter had been seen as a liberal to be sure—even feared as a "radical." However, he had soon insisted that the function of protecting civil liberties did not belong to the Supreme Court, being better served by the elected branches of government.[47] Justice Frankfurter had never changed his opinion on the flag salute issue; writing in the dissent in *Barnette* that the essence of the Constitutional guarantee of religious liberty was merely that "no religion shall either receive the state's support or incur its hostility." According to Justice Frankfurter, it was a waste of time to attempt to enforce the "liberal spirit" by "judicial invalidation of illiberal legislation." Furthermore, he wrote, "the most precious interests of civilization…must be found outside of their vindication in courts of law." Justice Frankfurter consistently maintained that there were no "preferred freedoms" contained in the Constitution; economic legislation and civil liberties cases

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[45] Urofsky, *Division and Discord*, 30.

[46] James F. Simon, *The Antagonists: Hugo Black, Felix Frankfurter and Civil Liberties in Modern America* (New York: Simon and Schuster, 1989).

[47] Ibid.

ought to be viewed with the same level of judicial scrutiny. This view expressly contrasted with those of other justices on the Court—and these differences of opinion were borne out in many civil liberties cases of the 1930s and 1940s.

The "sea change" which occurred in the mere three years between the *Gobitis* and the *Barnette* flag salute decisions—not to mention other contested cases—does not so much indicate a judicial transformation, as it points to the fact that there was scarcely a clear meaning to the constitutional guarantees of liberty. Although their rhetoric was full of certainties regarding fundamental liberties, Jehovah's Witnesses understood this, and aimed to operate strategically within the legal system. "I pointed out that the court were mere men," wrote Covington, "imperfect human flesh who could not help making mistakes in their effort to discharge their responsibilities under the constitution."[48] While they vehemently disagreed with rulings against them (such as *Gobitis*), the Watch Tower Legal Department urged respect for the Supreme Court and the legal system it represented—occasionally to the point of awe. Covington recounted meeting Justice Murphy in the halls of the Supreme Court. "The elevator opens and in steps Justice Murphy," he recalled, "who immediately beamed with delight when our eyes met. I says, 'How do you do Justice Murphy' He says 'I am very glad indeed to see you Mr. Covington' etc etc. The greeting was very friendly and he shook my hand quite warmly and indicated a warmth of feeling. He is apparently sympathetic."[49] Covington, like Rutherford before him, held an instrumental view of the law—he merely needed to convince the justices to rule in the group's favor. Quite apart from appeals to higher

[48] Hayden Covington to Nathan Knorr, March 16, 1943; Watch Tower Legal Department Archives, Patterson, New York. Folder: "Federal Government, Senate Subcommittee, Constitutional Rights."

[49] Ibid.

principles of law or fundamental rights, Watch Tower lawyers insisted that the Constitution contained, and judges must support, their rights. The victories of Jehovah's Witnesses in the 1930s and 1940s, as well as those of other civil liberties litigants, muse be attributed to the legal skill of lawyers and organizations, not only to changes in the composition of the Court and the views of its members—which were often inconsistent.

Yet there remains a lack of clarity as to not only why the Court changed, ruling for stricter scrutiny of laws thought to infringe upon civil liberties, but also why the Court suddenly agreed to hear cases involving these rights at all. In the space of less than a decade, the Court not only stopped dismissing cases as lacking substantial questions, but also reversed itself on both flag salute and literature distribution issues. In the 1930s and 1940s, the Court received thousands of writs of certiorari (requests for review) per year. Law clerks received these requests first, narrowing down the mass to a selection of cases deemed important, and presenting them to the justices with summaries and suggestions. In a closed room, the justices discussed these petitions, voting on which they would agree to hear. A case which received at least four votes would be heard. Although these deliberations were not made public, the assumption was that the Court had begun to hear cases involving Jehovah's Witnesses and other civil liberties questions because of splits (conflicting decisions) in the state and federal courts, as well as the perceived social significance of these issues. "The most plausible reason for why the Court granted certiorari in *Gobitis* is because the lower court's opinion in favor of the Witnesses was contrary to the per curiam dismissals in the earlier cases….It was the first flag salute case in which an appellate court had found for the Witnesses."[50]

[50] Neil M. Richards, "Review: The 'Good War,' the Jehovah's Witnesses, and the First Amendment," *Virginia Law Review* 87, no. 4 (June 2001): 781-811.

The Court's sudden agreement to hear cases on Jehovah's Witnesses issues is accompanied by the difficulty in determining the reason for the Court's abrupt agreement with their arguments. Once the Court agreed to hear these cases, their reasoning for deciding them as they did becomes clearer, or at least easier to examine, due to the publicly available court materials, as well as the statements of the justices themselves. As one scholar questioned, "Why did the Court suddenly reverse itself and overrule the Gobitis and first Jones decisions? Was it change of personnel, or change of individual mind?"[51] Occasionally, of course, Justices publicly confessed to having changed their minds—as did Justices Murphy, Douglas and Black, for example, regarding both literature distribution (*Opelika*) and the flag salute issue (*Barnette*). The tension between the justices, as well as the possibility of changed minds—whether in simple reversals or, more commonly, deciding cases on fine points of law—indicates overall that it is impossible to view Supreme Court decisions as forming a straight line of progression, in any sense. Just a few years before the seminal opinions in *Gitlow* and other free speech cases, after all, the Court had asserted that "neither the Fourteenth Amendment nor any other provisions of the Constitution of the United States imposes upon the States any restrictions about 'freedom of speech'."[52] The abrupt reversal of the Court's position on religious liberty and free speech does, however, indicate the importance of individual and group litigation on these issues—which would become increasingly important in the decades to come.

One of the most enduring results of the Jehovah's Witnesses' litigation efforts was that the Supreme Court nationalized religious liberty, along with a host of other

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[51] Hollis W. Barber, "Religious Liberty v. The Police Power: Jehovah's Witnesses," *The American Political Science Review* 41, no. 2 (April 1947): 226-247.

[52] *Prudential Insurance Company of America v. Cheek*, 259 U.S. 530, 543 (1922).

rights under examination during those decades. Jehovah's Witnesses had long argued that critical rights could not be the provenance of the states, and must be protected by the federal government. Making analogies to both the *Dred Scott* decision and the situation facing blacks in the post-Civil War South, Covington had urged the federal government to step in. By the 1950s, Covington worked to reinforce federal protection of his group's rights, in contact with Justice Department officials. In 1950, for example, Covington contacted the Civil Rights Section of the Justice Department to discuss the possibility of criminal prosecution of those who aggressed against Jehovah's Witnesses, under the federal Civil Rights Act. He asked that the office send him "two copies of each of the briefs filed in civil rights cases that have been handled by the Civil Rights Section in the courts of appeal for any of the circuits or in the Supreme Court of the United States during the last ten years," requesting additionally any "material that may be pertinent to the legal problem presented as to jurisdiction over the private individuals and the officials for non action, such as law review articles and memoranda by the Department of Justice."[53] In 1955, Covington made suggestions for protecting liberties without Constitutional amendment; he urged strengthening the power of the federal courts under the Civil Rights Act. "The citizens of the United States should not be relegated to the responsibility of waiting until the slow and cumbersome machinery of the Department of Justice is put into play in order to be secured in their liberties. The citizens of the United

[53] Hayden Covington to United States Department of Justice, Civil Rights Section, Criminal Division, January 28, 1950; Watch Tower Legal Department Archives, Patterson, New York. Folder: "Federal Government: Justice Department, Civil Rights Section."

States should be guaranteed that they have a civil right that can be enforced in the federal courts to make secure the blessings of liberty written into the First Amendment."[54]

Yet in the context of the escalating Civil Rights Movement, the Jehovah's Witnesses' position grew more complex. The Supreme Court's rulings prior to 1950 had expanded the meaning of the Fourteenth Amendment by incorporating some of the rights contained in the Bill of Rights.[55] The Fourteenth Amendment's liberty guarantees had been used to protect the rights of a wide variety of minority groups, including the Jehovah's Witnesses. Paradoxically, however, although the Fourteenth Amendment had been written to guarantee the post-Civil War rights of former slaves, by the 1950s the amendment had not been used, in any real sense, to protect that group. When civil rights groups and legislators urged an assessment of civil rights in the United States, in fact, the Senate Committee on the Judiciary responded in 1955, by authorizing a Subcommittee on Constitutional Rights.[56] In a move perhaps indicative of legislative inaction on the subject of civil rights, the Subcommittee, charged with conducting a survey of constitutional rights, chose to begin not with the lax enforcement of the Fourteenth Amendment to protect the civil rights of blacks, but to proceed sequentially through the Bill of Rights. That fall, they focused on the First Amendment—a safe place to begin, if the Subcommittee wanted to avoid confronting the contentious question of civil rights in 1955.[57] Under the leadership of southern Democrats, committee chairs could "kill civil

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[54] Hayden Covington to Lon Hocker, Chief Hearings Counsel, Subcommittee on Constitutional Rights, Committee on the Judiciary, United States Senate, September 30, 1955; Watch Tower Legal Department Archives, Patterson, New York. Folder: "Federal Government, Senate Subcommittee, Constitutional Rights."

[55] The expansion was continued by the 1960s Warren Court.

[56] The Subcommittee of the Committee on the Judiciary, Pursuant to Senate Resolution 94, 84th Congress.

[57] "Memorandum of Instructions to Staff of the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, Eighty-Fourth Congress."

rights legislation by keeping it off the agenda, stretching out hearings on civil rights bills, or by not having the committee meet at all."[58] As more than one scholar has pointed out, in the mid-1950s, the Congress was unwilling to confront the issues surrounding black civil rights, choosing instead to divert attention.

While they had had their own difficulties with the Congress, the Jehovah's Witnesses now had the opportunity to speak directly to legislators, putting forth their own case to the Subcommittee. Covington made his familiar arguments connecting the rights to speech and assembly with those of religious worship. When the committee requested completion of a four-page questionnaire about the Jehovah's Witnesses, Covington gladly obliged, appending a thirty-page memo and several appendices as well. "I have personally supervised the civil rights legislation of the Jehovah's Witnesses throughout the past 16 years," Covington wrote to the subcommittee.

> In addition to this I have acted as trial counsel in hundreds of cases involving the denial of civil rights. Also I have handled the appeal of cases involving the denial of religious freedom in over 150 cases in the state courts. These cases were test cases. I have, moreover, argued all except four of the cases involving Jehovah's Witnesses in the Supreme Court of the United States that are listed in the accompanying mimeographed list of cases decided by the Supreme Court of the United States involving freedom of religion.[59]

Covington was invited to appear before the subcommittee's hearings about the religion clauses of the First Amendment.[60] In his deposition, and in his correspondence with

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[58] Julian E. Zelizer ed., *The American Congress: The Building of Democracy* (New York: Houghton Mifflin Company, 2004), 531. For a somewhat more positive view of the committee (in 1955, changed to the Senate Subcommittee on Constitutional Rights), see Robert Sherrill, *First Amendment Felon: The Story of Frank Wilkinson, His 132,000-Page FBI File, and His Epic Fight for Civil Rights and Liberties* (New York: Norton Books, 2005), 131.

[59] Hayden Covington to the Senate Subcommittee on Constitutional Rights, Committee on the Judiciary, United States Senate, September 1, 1955; Watch Tower Legal Department Archives, Patterson, New York. Folder: "Federal Government, Senate Subcommittee, Constitutional Rights."

[60] Lon Hocker, Chief Hearings Counsel, United States Senate, Committee on the Judiciary, Subcommittee on Constitutional Rights to Hayden Covington, September 20, 1955; Watch Tower Legal

members of the Judiciary Committee, Covington emphasized the connection of religious liberty with speech and press rights. He recalled the loss of a 1953 Supreme Court case, in which a group of Jehovah's Witnesses had been convicted for conducting open-air meetings in Portsmouth, New Hampshire, without a license. The Supreme Court had upheld the ordinance requiring a license on the basis that the law was not discriminatory in nature, being a "reasonable nondiscriminatory regulation by governmental authority that preserves peace, order and tranquility without deprivation of the First Amendment guarantees of free speech, press and the exercise of religion."[61] Covington, outraged by the decision and by the fact that the defendants were denied a rehearing, used this case as an example of how quashing free speech could extend to many sorts of speakers. "Not only is the religious speaker hamstrung by this opinion but all political speakers as well," he wrote. "They could be completely forbidden to speak in any area where they were unpopular, which might be throughout an entire state or group of states, if the theory adopted by the Supreme Court is correct."[62]

While the Judiciary Committee's Subcommittee on Civil Rights failed, in the end, to achieve much in the arena of civil rights (or civil liberties in general), the Watch Tower legal department's statements to the committee provides a view of its own assessment of its legal victories over two decades. In his statements, Covington made clear that, looking back, the group's leadership embraced the broader civil liberties implications of their work. "In making the recommendations to the committee," he

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Department Archives, Patterson, New York. Folder: "Federal Government, Senate Subcommittee, Constitutional Rights."

[61] *State v. Poulos*, 97 N.H. 352 (1952); *Poulos v. New Hampshire*, 345 U.S. 395 (1953).

[62] Hayden Covington to Lon Hocker, September 30, 1955; Watch Tower Legal Department Archives, Patterson, New York. Folder: "Federal Government, Senate Subcommittee, Constitutional Rights."

explained, "I want the Committee to know that I am not grinding an ax solely for Jehovah's witnesses, but for all people regardless of religion."

> The fight of Jehovah's Witnesses in this land has been effective only because of the guarantee of the First Amendment and the honesty and fearlessness of the many American judges before whom Jehovah's Witnesses appeared. Jehovah's Witnesses are anxious to see the rights guaranteed by the First Amendment stand in this country as a bulwark against oppression as long as this Government endures—not only for Jehovah's witnesses but for the benefit of all other persons in this country regardless of their religion who love freedom of religion, speech and press and who want to see it last.[63]

Covington repeatedly insisted that the Watch Tower Society's legal team sought not only to protect their own group, but recognized the implications of their legal battles for fundamental rights. Although generally their rhetoric was focused on bringing the message of Jehovah to the people, it does appear that members of the group—or at least its leadership—often took a broader view of religious liberty and civil rights.

Much that has been written regarding the Jehovah's Witnesses' legal battles, however, takes the opposite view, suggesting that the group sought only the protection of their own practices—and even that they resented the expansion of rights for other groups. "It would be naïve to suggest," one scholar wrote, "that the Witnesses were motivated by anything other than self-interest when they defended their rights in courtrooms across the United States in the early and mid-1940s. As they pressed courts to enhance legal protections for civil liberties, Witness litigants were primarily attempting to mitigate their own suffering and ensure that they could propagate their beliefs—and thus ready the

[63] Hayden Covington to Lon Hocker, Chief Hearings Counsel, Subcommittee on Constitutional Rights, Committee on the Judiciary, United States Senate, October 1, 1955; Watch Tower Legal Department Archives, New York. Folder: "Federal Government, Senate Subcommittee, Constitutional Rights."

world for Armageddon—without interference."[64] To the contrary, while it is true that Jehovah's Witnesses held fast to their slogan that religion was "a snare and a racket," and that they disapproved of secular and religious groups alike, they did not merely seek protection for their own practices. Nor did they seek to expand their own rights at the expense of the groups they most despised. What they sought, unfailingly, was open debate. That they anticipated that the result of the freedom to hear all views was that people would be convinced of the Truth does not negate the consistency of the principles for which the group fought. Certainly, the Jehovah's Witnesses began their legal battles in order to protect their rights to practice and to preach. Yet the fact that they approached the legal system strategically, as early as they did, has profound implications for accounts of how civil liberties were expanded in the twentieth century United States. Moreover, their views of the First and Fourteenth Amendments are critical to understanding the wide reach of incorporation and minority rights which resulted.

Religious Liberty, Civil Liberties, and the Long Civil Rights Movement

Watch Tower Society literature was certainly fiery and filled with unfamiliar religious doctrines, and Jehovah's Witnesses were, at base, an organization dedicated to spreading the Gospel. Yet the leadership of the organization was, at a critical time, dominated by lawyers. Even the organization's more general literature was permeated by legalistic matters. Part of the reason the Jehovah's Witnesses were so important to civil liberties and church-state relations in the United States is the fact that, because of this combination of adamant theology and legal proficiency, the group used the court system strategically. The existence of a religious group that practiced organized litigation well before other Christian and Jewish groups became involved in the judicial arena

[64] Peters, *Judging Jehovah's Witnesses*, 14.

challenges the accepted chronology of religious special interest groups. For one thing, studies of church-state relations focusing on strategic litigation by religious groups ordinarily focus the 1950s through the 1970s as the period of inception for organized religious liberties litigation.[65] Even scholars who, in more general projects about the judicial arena, aim to highlight the work of litigants, categorize the activities of the Jehovah's Witnesses as a 1940s phenomenon.[66] Court cases that occurred before this period, the accepted narratives imply, were not intentional, but were merely the result of true believers being dragged into court when their activities conflicted with the law of the land. Such studies certainly neglect the planned nature of Jehovah's Witnesses' litigation, as well as the connections they established between the religious liberty clause and speech and other constitutional rights.

The Supreme Court, civil libertarians, and Jehovah's Witnesses agreed early on that there were broader civil liberties implications to these cases, which would extend to labor activists and political campaigners, as well as other religious individuals. The legal battles of Jehovah's Witnesses had been appealing to civil libertarians from their earliest litigation, because of the larger issues they raised about civil and religious liberty. The ACLU filed amicus briefs in seven of the Jehovah's Witnesses' Supreme Court cases.[67] More importantly, perhaps, than such briefs was the fact that ACLU attorneys from both the New York and branch offices provided legal advice, or actual representation, both in

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[65] The political scientist Frank Sorauf, for example, in his valuable *The Wall of Separation*, focuses on the period from 1951 through 1971.

[66] Peter Irons, *People's History of the Supreme Court: The Men and Women Whose Cases and Decisions Have Shaped Our Constitution* (New York: Penguin, 1999).

[67] *Lovell v. City of Griffin*, 303 U.S. 444 (1938); *Minersville v. Gobitis*, 310 U.S. 586 (1940); *Jones v. City of Opelika (II)*, 319 U.S. 103 (1943); *Taylor v. Mississippi*, *Benoit v. Same*, *Cummings v. Same*, 319 U.S. 583 (1943); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943); *Falbo v. United States*, 320 U.S. 549 (1944); *Follett v. McCormick*, 321 U.S. 573 (1944).

some of the Supreme Court cases, and in several cases decided in the lower courts.[68] Various other organizations also filed amicus briefs, in cases which seemed likely to have wider impact on their interest groups. These included the Workers' Defense League,[69] the Committee on the Bill of Rights of the American Bar Association,[70] the General Conference of Seventh-Day Adventists,[71] and the American Newspaper Publishers Association.[72] Although they were somewhat isolated socially, and quite protective of their own interests, the Jehovah's Witnesses' leadership saw the potential benefits of such allies, both to their own rights and to the broader cause of civil liberties.

The General Conference of Seventh-Day Adventists filed a brief in the reconsideration of the *Opelika* case, arguing that the religious liberty requests of Jehovah's Witnesses had broader implications. Similarly to the Jehovah's Witnesses, the Seventh-Day Adventists began by arguing for the movement's "status as an entirely legitimate and orthodox religious movement."[73] The group had incurred wrath by taking Saturday, rather than Sunday, as the Sabbath. The group seems to have felt an affinity for Jehovah's Witnesses due to their reliance on publishing and proselytizing—using "colporteur evangelists"—which they called "as old as the history of printing itself." The first *Opelika* decision, they argued, was adverse

> In view of the fact that the great bulk of Seventh-Day Adventist literature is, and must be, distributed by the colporteur system, it is obvious that the present decision injuriously affects the spreading of the Gospel by the printed word. The limited means of minority religious groups cannot support the alternative methods of using newspaper space and radio time.

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[68] See Appendix II.
[69] *Lovell v. City of Griffin*, 303 U.S. 444 (1938).
[70] *Minersville v. Gobitis*, 310 U.S. 586 (1940); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).
[71] *Jones v. City of Opelika (II)*, 319 U.S. 103 (1943).
[72] Ibid.
[73] Amicus Brief, Seventh-Day Adventists, in *Jones v. City of Opelika (II)*, 319 U.S. 103 (1943).

> Moreover, no alternative has been discovered which can be substituted effectively for the colporteur system.

While the group seems to have opposed the taxes for practical reasons ("taxes…would exceed, in small and rural areas where colporteurs work, the *gross* sales of religious literature…") rather than on loftier principles, as the Jehovah's Witnesses always had, they supported the group's protests.

Aside from direct legal counsel and briefing, some groups also supported the Jehovah's Witnesses in the press. For example, the *Christian Century*, a liberal religious magazine which had always been relatively sympathetic to the Jehovah's Witnesses' proselytism, had amplified their defense of the group during the flag salute controversy. The magazine had produced several decidedly sympathetic reports and editorials on Jehovah's Witnesses, describing them early and often as champions of religious liberty in America. After a visit with a family of Jehovah's Witnesses, for example, the reporter Marie Miller had written that "it was unbearable to think of these innocents as persecuted."[74] During the height of wartime aggression against the Jehovah's Witnesses, members of the ACLU leadership had written editorials for the newspaper, attempting to sway public opinion in addition to their legal work for the group. The respected Unitarian minister John Haynes Holmes had reflected that "[t]he only way to understand why Jehovah's Witnesses are so unpopular is to go back in history and remind ourselves why the early Christians were so unpopular….As these early Christians were regarded as dangerous, most particularly to the state and its government, so Jehovah's Witnesses are

[74] Marie Miller, "A Witness of Jehovah," *Christian Century*, March 11, 1936, 396-397. See also J.G. St. Clair Drake, "Who Are Jehovah's Witnesses," *Christian Century*, April 15, 1936, 567-570; "Jehovah's Witnesses—Victims or Front?," *Christian Century*, June 26, 1940, 813.

regarded as dangerous today in the same way."[75] Holmes had urged that "[r]eligion and democracy are thus at stake."

Strangely enough, however, given that their mission was so plainly religious, the Jehovah's Witnesses secured far more support, affinity and conversation with civil liberties and labor groups than they did with other religious groups. Although they were, of course, primarily focused on their mission of spreading the Gospel, Jehovah's Witnesses consistently endeavored to weave discourse about American values into their arguments. As a religious group, however, Jehovah's Witnesses were not terribly concerned about being accepted into American society; in fact, in the 1930s and 1940s, Watch Tower leadership even intimated that public disdain for the group meant that they were doing the right thing (likening the group's travails to those of Jesus himself and the Apostles). In contrast, other minority religious groups in the United States, with whom it might be expected the Jehovah's Witnesses would strike an alliance, had quite a different approach. For example, as the political scientist Gregg Ivers demonstrated, before the Second World War, another minority group, the Jews, although organized, feared that forming any kind of legal resistance could raise questions about their loyalty, lending fuel to anti-Semitism in the United States. Jewish advocacy groups, such as the American Jewish Committee (formed in 1906), American Jewish Congress (1918), and Anti-Defamation League of B'nai B'rith (1913), chose to rely on a "social relations" model, focusing on public relations, negotiation and compromise.[76] The first brief filed by the Anti-Defamation League (ADL) was not in any of the Jehovah's Witnesses' (or any other group's) freedom of religion cases, but in a 1948 civil rights case involving restrictive

[75] John Haynes Holmes, "The Case of Jehovah's Witnesses," *Christian Century*, July 17, 1940, 896-898.

[76] Ivers, *To Build a Wall: American Jews and the Separation of Church and State*.

covenants in housing.[77] Other minority religious groups simply did not become involved in religious liberty cases because they chose to remain separate from worldly courts. Both Jewish and evangelical Christian groups eventually utilized the court system to do battle on social and religious issues, but not until after the Jehovah's Witnesses had developed a model for church-state litigation, and had achieved significant victories in the civil liberties arena.

Most accounts of church-state litigation in the twentieth century all but ignore the Jehovah's Witnesses, in favor of the other, more visible, Christian and Jewish groups who followed. Perhaps because the Jehovah's Witnesses' views were so odd, their practices so annoying to other citizens, and their theology seemingly so bellicose, many accounts of the evolution of religious liberty relegate the group to footnotes.[78] One explanation for the neglect of the group's conscious legal strategy is that members other religious groups who had landed in Court prior to the Jehovah's Witnesses had seemingly been unwitting participants—asking only to be left alone, if they agreed to participate in the judicial system at all. Members of the Watch Tower Society have been seen, thus, as belonging to yet another fringe religious group, dragged into court when their practices conflicted with the law of the land—what Jennifer Jacobs Henderson, following Clement Vose, called the "myth of the hapless litigant." Within this framework of unwitting religious litigants, the learned, lucid strategy of the Jehovah's Witnesses comes as something of a shock. The strategic litigation of the Jehovah's Witnesses is often

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[77] *Shelley v. Kraemer*, 334 U.S. 1 (1948).

[78] Robert T. Handy, *Undermined Establishment: Church-State Relations in America, 1880-1920* (Princeton, New Jersey: Princeton University Press, 1991); Leo Pfeffer, "Amici in Church-State Litigation," *Law and Contemporary Problems* 44 (Winter 1981): 83-110; Pfeffer, *God, Caesar and the Constitution* (Boston, Massachusetts: Beacon Press, 1975); Frank J. Sorauf, *The Wall of Separation: The Constitutional Politics of Church and State* (Princeton, New Jersey: Princeton University Press, 1996).

overlooked entirely, as indeed are the connections the group made with speech and press rights and their importance to incorporation and due process debates. The group's place in civil liberties debates, as well as their early advocacy of strategic litigation to ensure religious liberty, has rarely been recognized in scholarly examinations of the subject.[79]

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[79] Many studies of civil liberties neglect to include the Jehovah's Witnesses, or treat religious liberty as an entirely separate issue from other freedoms. While Samuel Walker acknowledged the importance of Jehovah's Witnesses in his exhaustive study of the ACLU, he did not detail their actions, nor did he describe the strategy. Samuel Walker, *In Defense of American Liberties: A History of the ACLU* (New York: Oxford University Press, 1990). Henry J. Abraham, *Freedom and the Court* (New York: Oxford University Press, 1982); Jerold S. Auerbach, *Labor and Liberty: The LaFollette Committee and the New Deal* (Indianapolis: Bobbs-Merrill, 1966); David Rabban, "The Emergence of Modern First Amendment Doctrine," *University of Chicago Law Review* 50 (Fall 1983): 1205-1355; General studies of constitutional law do similar. Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (Indianapolis: Liberty Fund, 1997); William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* (Cambridge: Harvard University Press, 1988); Michael J. Perry, *We the People: The Fourteenth Amendment and the Supreme Court* (New York: Oxford University Press, 1999).

Books about religious history do little better. The sociologist Robert Wuthnow illustrated the importance of "religious special-interest groups" in politics in the twentieth century; yet he placed the development of these groups after the Second World War, excluding the Jehovah's Witnesses from his analysis. Robert Wuthnow, *The Restructuring of American Religion: Society and Faith Since World War II* (Princeton: Princeton University Press, 1988). See also James Fraser, *Between Church and State: Religion and Public Education in a Multicultural America* (New York: St. Martin's Press, 1999); Gregg Ivers, *To Build a Wall: American Jews and the Separation of Church and State* (Charlottesville: Library, 1986); Frank J. Sorauf, *The Wall of Separation: The Constitutional Politics of Church and State* (Princeton, New Jersey: Princeton University Press, 1996).

The early histories of the litigation suggested that the Jehovah's Witnesses simply ended up in court, never exploring their intentions and aims. Claud Henry Richards, Jr., *Jehovah's Witnesses: A Study in Religious Freedom* (Unpublished Doctoral Dissertation, Duke University, 1945); John E. Mulder and Marvin Comisky, "Jehovah's Witnesses Mold Constitutional Law," 2 *Bill of Rights Review* 4 (Summer 1942): 262; Edward F. Waite, "The Debt of Constitutional Law to Jehovah's Witnesses," *Minnesota Law Review* 28 (1944): 246.

Although several excellent studies of Jehovah's Witnesses' legal battles exist, none connects the group with other rights and due process debates, nor putting it within broader civil liberty debates. David Manwaring's monograph about the flag salute cases was an insightful legal study, has been authoritative for five decades, yet he did not place them in a broader context. Similarly, Jennifer Jacobs Henderson recently made a valuable contribution by pointing out that Jehovah's Witnesses used planned litigation, yet her study begins in the late-1930s—far later than important parts of the plan developed. David Manwaring, *Render Unto Caesar: the Flag-Salute Controversy* (Chicago: The University of Chicago Press, 1962); Jennifer Jacobs Henderson, *Hayden Covington, the Jehovah's Witnesses and their Plan to Expand First Amendment Freedoms* (Unpublished Doctoral Dissertation, University of Washington, 2002).

Many legal historians have focused narrowly on the Second World War period, and narrowly on the Supreme Court, thus neglecting the broader issues of this period. For example, Merlin Owen Newton addressed two cases, from 1939 to 1946. Similarly, Shawn Francis Peters did not explore the conscious legal strategy or the broader issues. Merlin Owen Newton, *Armed With the Constitution: Jehovah's Witnesses in Alabama and the U.S. Supreme Court, 1939-1946* (Tuscaloosa: University of Alabama Press, 1994); Shawn Francis Peters, *Judging Jehovah's Witnesses" Religious Persecution and the Dawn of the Rights Revolution* (Lawrence, Kansas: University of Kansas, 2000); William Shepard McAnnich, "A Catalyst for the Evolution of Constitutional Law: Jehovah's Witnesses in the Supreme Court," *University of*

Overall, explanations for this focus include not only underestimation (because of their strange, devout religiosity, the Jehovah's Witnesses are assumed not to be strategic legal operators), but also to classification (the issues raised by the Jehovah's Witnesses are assumed only to involve their own practices, and their protection under the "free exercise" clause). Scholars have not recognized the critical ways in which the Jehovah's Witnesses connected religious liberty to other First Amendment rights of speech and press. In fact, most of the literature confines the Jehovah's Witnesses' legal arguments and impact to free exercise issues alone, excluding them from establishment clause jurisprudence entirely. The two parts of the First Amendment's religion clauses—that Congress shall make no law "respecting an establishment of religion," or "prohibiting the free exercise thereof"—have, in the courts and in the legal literature, often been treated as separate entities. In many cases, this is quite a useful framework, as the "no establishment" and "free exercise" clauses each have separate lines of precedent and meanings. The Court's ruling in the *Cantwell* case in 1940 did make the free exercise clause of the First Amendment applicable to the states, and the Court did not rule explicitly on the incorporation status of the no establishment clause until seven years later.[80] Yet the "free exercise" and "no establishment" clauses of the First Amendment

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Cincinnati Law Review 4 (1987): 997-998; James Van Orden, "'Jehovah Will Provide': Lillian Gobitis and Freedom of Religion," *Journal of Supreme Court History* 29, no. 2 (1992): 136-144.

[80] *Everson v. Board of Education*, 330 U.S. 1 (1947). Some scholars, however, have argued that the *Cantwell* ruling incorporated not only the free exercise, but also the no establishment, clause. See *Cochran v. Louisiana State Board of Education*, 281 U.S. 370 (1930), in which the Court had upheld a Louisiana statute providing textbooks to schools, including parochial ones. Gregg Ivers speculated that the Court had not intended to reverse this decision, and that the ruling in *Cantwell* referred only to the free exercise clause. 16. However, Frank Sorauf argued that *Cantwell* incorporated both free exercise and establishment clauses. Similarly, Melvin Urofsky states that observers had assumed that incorporation of the free exercise clause meant a parallel incorporation of the establishment clause. 231. Leo Pfeffer explicitly stated that "None of the Jehovah's Witnesses decisions intimated that only the exercise prohibition of the First Amendment was incorporated into the Fourteenth. Several contain language indicating a clear contrary intent. Leo Pfeffer, "The Supreme Court as Protector of Civil Rights: Freedom of Religion," *Annals of the American Academy of Political Science* 275 (May 1951): 75-85.

are unmistakably intertwined. While separate lines of jurisprudence may be identified, the two elements of the religion clauses strike a complementary balance.[81]

In fact, the lines between no-establishment and free exercise clause doctrine are less clear than they appear, and the strategic balance these clauses achieve together is more important. The Jehovah's Witnesses' cases touched on issues of equal protection and establishment as well as free exercise—often explicitly veering into establishment clause territory. Inhibiting the free exercise of their beliefs, albeit of unusual nature, Jehovah's Witnesses argued, was akin to establishing more conventional practice of religion—and was thus unconstitutional. In order to avoid such an establishment of religion, they suggested, Jehovah's Witnesses must be treated with parity to other religious groups. "When a duly ordained and qualified minister," the Watch Tower Society asserted, "is carrying on religious activity according to the regular or customary practice of his church, he is a regular minister of it. That the regular or customary practice of his church is not the same as some other churches is not important. The law knows no religion as the orthodox or accepted. All are accepted. All are entitled to protection."[82]

In two early 1950s cases, for example, the Court ruled that ordinances regulating the use of public parks were unconstitutional, because they enabled discrimination against minority groups. In Havre de Grace, Maryland, the Jehovah's Witnesses Daniel Niemotko and Neil W. Kelley were convicted of disorderly conduct for using a public park for Bible talks without obtaining a permit. The Supreme Court ruled that the

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[81] See John Witte, Jr., *Religion and the American Constitutional Experiment: Essential Rights and Liberties, Second Edition* (Bolder, Colorado: Westview Press, 2005).

[82] "A Study of Open-Air Preaching, The Universal Priesthood of Believers and Ordination by Baptism," undated. Watch Tower Legal Department Archives, Patterson, New York. Folder: "Witnessing Diff."

ordinance requiring a permit was discriminatory against the Jehovah's Witnesses—in part due to the fact that, at their hearing, the men were questioned about their refusal to salute the flag, their views on the Bible, "and other issues irrelevant to unencumbered use of the public parks."[83] "The right to equal protection of the laws," wrote Justice Vinson, "in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments, has a firmer foundation than the whims or personal opinions of a local governing body." In the case of another Jehovah's Witness, who had addressed a religious meeting at a public park, the Court ruled that the ordinance discriminated in favor of popular religions, and against Jehovah's Witnesses, as Catholics and Protestants had been permitted to use the park unhindered. The facts of the case, wrote Justice Douglas, showed "that a religious service of Jehovah's Witnesses is treated differently than a religious service of other sects. That amounts to the state preferring some religious groups over this one."[84] Jehovah's Witnesses focused on the free exercise aspects of their work, to be sure; yet separating the two clauses too keenly in studies of strategic litigation and interest group activities obscures their complementary nature.

That Jehovah's Witnesses approached the legal system strategically in the 1930s and 1940s challenges not only prevailing views of the evolution of the religious liberty clauses of the First Amendment, but also broader existing narratives of civil rights, civil liberties and legal change. The transformation of individual rights between 1920 and the 1960s has largely been attributed to changes in the composition of the Court, and the views of its members. In part, this is likely because of the abundance of material available reflecting the Supreme Court's cases and the positions of its justices. However,

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[83] *Niemotko v. Maryland, Kelley v. Maryland, Kunz v. New York, Feiner v. New York*, 340 U.S. 268 (1951).

[84] *Fowler v. Rhode Island*, 348 U.S. 67 (1953).

the incredible divergence in opinions (signified by many 5-4 splits in decisions, and even the quite uncommon outright reversals of opinions from merely a few years previous) indicates that the views of Supreme Court justices are only a partial explanation, at best, for the transformation of individual liberties. Moreover, while the Supreme Court was, of course, the final arbiter for this legal shift, strategic litigation was critical in driving this transformation.

When historians and legal scholars have discussed widespread organized litigation in the arena of civil rights, they are most often talking about the Civil Rights Movement, the NAACP, and the ACLU. The fact that the Watch Tower legal team saw the potential for using the law to their advantage, and the importance of organized litigation to this process, not in the 1940s and 1950s, is in itself a challenge to the traditional chronology of the Civil Rights Movement. Legal scholars often refer to the Jehovah's Witnesses as mere clients of, or imitators of, better-known litigation organizations. The legal scholar Mark Tushnet, for example, wrote that the NAACP and ACLU originated test case strategies, which the Jehovah's Witnesses adopted "a generation later." Tushnet argued that the ACLU had, over Baldwin's skepticism, begun "to develop a proposal for sustained litigation to challenge segregation."[85] Yet the concerted action of the Jehovah's Witnesses, beginning in the early 1930s, demands a different chronology.

The "double standard" in jurisprudence, which required a stricter judicial scrutiny for cases involving certain types of rights and certain groups of people, is a foundation of the "rights revolution" of the twentieth century. Covington, for example, advocated the

[85] Mark Tushnet, "The Rights Revolution in the Twentieth Century," in eds. Michael Grossberg and Christopher L. Tomlins, *The Cambridge History of Law in America*, vol. 3 (New York: Cambridge University Press, 2008), 377-402.

idea of "double standard" jurisprudence, in which civil liberties were afforded greater protection than economic rights. "In the fields of economic welfare of the nation, social welfare, labor and commerce," he wrote, "the people by the vague terms of 'due process' and 'equal protection' in the Constitution, established a rather broad river bed through which the judiciary could fix a channel for the flow of the government regulatory rivers to reach the aims of the government by proper legislation." In contrast, in the fields of civil rights, procedural rights in criminal cases, and fundamental personal liberties, Covington argued,

> all of which are secured to the people in the Constitution by definite, specific and express guarantees, no such broad channel is established….On the contrary, the people, by the specific guarantees in the Constitution, have definitely narrowed the channel of governmental activity and walled it in by high banks of rock on both sides to prevent a change of course.[86]

Like some of the justices, Covington espoused the philosophy that civil rights and fundamental individual liberties must be treated with more scrutiny than economic legislation. While Covington and other Watch Tower Society leaders advocated both strategic litigation and this "preferred freedoms" framework, in fact, other parties interested in civil liberties and civil rights vacillated on the potential for judicial and social change.

Before 1950, civil liberties and civil rights advocates were themselves divided as to the efficacy of using the courts to promote social and legal advancement of minorities. Despite the enormous impact these groups would eventually have on the law, some leaders remained uncertain, and even cynical, about taking the judicial route. The

[86] "Suggestions for Attorneys and Witnesses Use in Interviews in Preparation for Trial of Cases Involving Constitutional Rights of Jehovah's Witnesses," [1944?]; Watch Tower Legal Department Archives, Patterson, New York. Folder: "Freedom of Worship."

NAACP had, since its founding in 1909, been more amenable to the use of legal action than had the ACLU or other groups.[87] Yet in the late 1920s, when NAACP leader and civil rights activist James Weldon Johnson had suggested that Roger Baldwin's American Fund for Public Service (commonly known as the "Garland Fund") support NAACP legal efforts on behalf of southern blacks, Baldwin and Garland had both been skeptical. "Anticipating that litigation successes would be highly qualified, Baldwin had written to a friend that the proposal 'amaze[d]' him, because 'such a legalistic approach will fail of its object because the forces that keep the Negro under subjection will find some way of accomplishing their purposes, law or no law'." Although the Garland Fund Board had offered the NAACP $100,000 to support a coordinated campaign of litigation against Jim Crow laws in transportation, education, voting and jury service, an organized plan to tackle legal segregation was not implemented by the NAACP until the 1940s.[88] In the 1930s, NAACP leader Charles Hamilton Houston sought "public exposure" to "appeal to the conscience of better minded whites," rather than to litigate.[89] Thurgood Marshall arrived in the NAACP offices in New York to begin organizing a legal team and approach in late 1936.

Because they were so unpopular throughout most of the country, in contrast, Rutherford and the Jehovah's Witnesses saw little point in appealing to majority sympathies without legal victories to bolster their points. While Baldwin, the ACLU, and the NAACP had vacillated regarding the use of the courts, Rutherford had seen the potential for test cases before the 1930s. Jehovah's Witnesses, much like the ACLU, had

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[87] Mark Tushnet, *Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936-1961* (New York: Oxford University Press, 2004), 11.

[88] The plan formulated by Nathan Margold to attack segregation directly was not heeded in the mid-1930s.

[89] Mark Tushnet, *Making Civil Rights* Law, 11.

argued that attempts to curb the rights of one group created more problems than they solved. Both groups became increasingly consistent in their argument that it was easy to allow the airing of views with which one agreed; far more difficult, but perhaps more essential, was the effort to protect minorities with unpopular views. By the mid-1930s, the Jehovah's Witnesses had already formed complex legal arguments as well as elements of their strategy. Rutherford assembled the Watch Tower Legal Department in 1935, so that the legal work would not get in the way of his larger mission and agenda.

Later, in what has come to be described as an integral part of the "rights revolution," the NAACP Legal Defense and Education Fund lawyers used "test case" strategies to build their cases against restrictive covenants and school segregation. The legal scholar Clement Vose described this as a new model of political jurisprudence, in which minority groups used litigation to appeal directly to constitutional principles.[90] The NAACP, Vose pointed out, had had little luck in lobbying Congress; that "institution was insulated against Negro claims."[91] Indeed, following the model proposed by Vose, historians have recently begun to include strategic litigation as a vital component in the political activism of the Civil Rights Movement. Examining these strategies, and the groups who came together to pursue a new definition of civil liberties and civil rights, enlarges our understanding of the transformations which occurred in the twentieth century.

By the 1950s, NAACP attorneys were immersed in their own organized litigation, and were aware of the Jehovah's Witness cases, utilizing them in briefs and discussing

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[90] Vose. *Caucasians Only*. See Ivers, *To Build a Wall*, 9.
[91] Vose, *Caucasians Only*, 36.

them in their literature.[92] In their briefs for the restrictive covenant cases in the late 1940s, for instance, NAACP lawyers referenced the due process issues raised by the common law breach of peace conviction in the *Cantwell* case. "The obligation of the state judiciary to comply with the limitations of the Fourteenth Amendment," the attorneys wrote, "is not confined to procedure. On the contrary this Court has frequently tested decisions of state courts on matters of substantive law against the requirements of the federal Constitution and has equally frequently recognized that it was obligated to do so by the Fourteenth Amendment." Regarding another Jehovah's Witness case, *Marsh v. Alabama*, Thurgood Marshall and his NAACP colleagues wrote that "the concern of the state in assisting the owner of land to exclude others from this property and the general interests of the state in peace and good order could not override the right of the individual to exercise his fundamental and constitutionally protected liberty of speech and worship." While the Jehovah's Witnesses' litigation primarily concerned religious speech and publications, the details of their cases were nonetheless important to other due process issues, such as those later raised by the NAACP.

The relationship between the Jehovah's Witnesses' court cases and the African American Civil Rights Movement in some ways moved beyond the purely theoretical. For one thing, an increasing number of Jehovah's Witnesses were African American—indeed, in the second half of the twentieth century, particularly in the cities, Jehovah's Witnesses became known as an organization in which African Americans made up a large proportion—sometimes estimated as high as a third.[93] One sociologist documented

[92] See "NAACP Legal Defense and Educational Fund Inc.: civil rights law institutes, cases and materials," (New York: NAACP Legal Defense and Educational Fund, Inc., 1967).

[93] The Watch Tower Society has never publicly released official proportions of American Jehovah's Witnesses by race, and thus the actual percentage of Jehovah's Witnesses who are African

the fact that, although there were few blacks in positions of leadership within the Watch Tower, city Jehovah's Witnesses believed they belonged to an organization which did not practice racial discrimination.[94] Furthermore, since the Jehovah's Witnesses' work brought them out in public, they were constantly subject to the whims of communities. In the South, black and white Jehovah's Witnesses met at separate Kingdom Halls. Nonetheless, although there had been segregated branches within the Watch Tower, by 1934 the "colored branch" was integrated within the Society's headquarters in Brooklyn. Even scholars critical of the society have allowed that the Watch Tower Society "emphasized the value of ethnic and racial tolerance among its adherents to a greater degree than is the case with most other religious organizations."[95] Even later, canvassing together was a risky endeavor—liable to end in calls to police not only because of literature distribution, but also because of the social aspects of integration.[96] Yet the simple demographics of the Jehovah's Witnesses' cases would seem to imply that, while there were racial issues under the surface, these were not the primary ones. For example, in two important Alabama cases which reached the United States Supreme Court, Rosco

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American is difficult to ascertain with any certainty. Most scholars, however, agree that, by the mid-twentieth century, African Americans were overrepresented within Jehovah's Witness ranks, making up a larger proportion of that organization than they did in the larger population of the United States. Scholars have estimated that the Jehovah's Witnesses range from twenty to thirty percent black. See Anthony Pinn, Stephen C. Finley and Torin Alexander, eds., *African American Religious Cultures* (Santa Barbara, California: ABC-CLIO, 2009), 201-205.

[94] Cooper, 1974, 711.

[95] Penton, *Apocalypse Delayed*, 286.

[96] James Penton wrote that Jehovah's Witnesses "are found throughout the South among all social and racial communities, although they are disproportionately numerous among African Americans. Although official statistics do not break membership figures down by ethnicity or color, Americans of African descent appear to be significantly over represented in the Watchtower Society; estimates in the 1960s placed African-American membership at 20-30 percent of their American constituency. Samuel S. Hill, Charles H. Lippy, and Charles Reagan Wilson, eds., *Encyclopedia of Religion in the South* (Macon, Georgia: Mercer University Press, 2005), 403-404.

Jones, a black man, and Grace Waldrop Marsh, a white woman, were both arrested and charged with violating ordinances.[97]

Indeed, beyond the use of the Jehovah's Witnesses' cases as precedent, the views of fundamental rights presented by the group merit inclusion in the twentieth century "rights revolution." Historians have recently begun to question the chronology of the Civil Rights Movement itself, urging the framework of a "long civil rights movement," whose roots extended back to the early 1900s.[98] Such a model is useful in moving beyond the most famous Civil Rights Movement activities (the Montgomery Bus Boycott in 1955-56, the sit-ins of the early 1960s) to include numerous other social and cultural phenomena. Although scholars have made great strides toward including a broader reach of factors in their work on the rights revolution, much of this scholarship fails to connect the Civil Rights Movement with other sorts of constitutional rights.[99] In addition, most do not see the similarities between the tactics of Jehovah's Witnesses and civil rights workers. Yet any analysis of the rights revolution may benefit from extending the frame of reference, not only chronologically, but also to include other groups whose struggles helped to define Constitutional rights.

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[97] Merlin Owen Newton, *Armed with the Constitution: Jehovah's Witnesses in Alabama and the U.S. Supreme Court, 1939-1946* (Tuscaloosa, Alabama: The University of Alabama Press, 1995).

[98] Jacqueline Dowd Hall, "The Long Civil Rights Movement and the Political Uses of the Past," *Journal of American History* 91, no. 4 (March 2005): 1233-1263.

[99] The lack of association between Civil Rights Movement and NAACP legal battles with other civil liberties is, perhaps, a problem of definition. The concern of many civil rights scholars with differentiating between economic and non-economic concerns, while helping to broaden the historiography of the Civil Rights Movement, tends to obscure other civil liberties claims which contributed to this redefinition. See, for example, Robert Korstad and Nelson Lichtenstein, "Opportunities Found and Lost: Labor, Radicals, and the Early Civil Rights Movement," *Journal of American History* 75 (December 1988): 786-811; Mark Tushnet, *The NAACP's Legal Strategy Against Segregated Education, 1925-1950* (Chapel Hill, North Carolina: University of North Carolina Press, 2004). A notable exception is Glenda Gilmore's recent use of the "long civil rights movement" framework in describing the association of civil rights activists with economic radicals in the interwar period. Glenda Gilmore, *Defying Dixie: The Radical Roots of Civil Rights, 1919-1950* (New York: W.W. Norton & Co., 2008).

All this begs the question of how the Jehovah's Witnesses' legal tests worked within the broader rights revolution of the twentieth century. The legal issues the group presented were well-situated within debates over both incorporation (of rights contained explicitly in the Bill of Rights), and substantive due process—the doctrine broadening fundamental rights under the due process clause of the Fourteenth Amendment (to include those rights not specifically delineated in the Constitution). Beginning after *Carolene Products*, and extending through much of the twentieth century, the courts attributed numerous liberties to the Constitution—even when those rights were not specifically enumerated. In addition to the incorporation cases involving the Fourteenth Amendment, the Jehovah's Witness cases had implications for more expansive rights contests. Some scholars of the Supreme Court have discussed the Court's protection of civil liberties and civil rights as parts of the same trajectory. The historian Melvin Urofsky, for example, wrote that "With the *Carolene Products* footnote, the Court embarked on a major sea change that would climax with the due process revolution and the civil rights decisions of the Warren Court in the 1950s and 1960s."[100] Jehovah's Witnesses were, then, in some ways at the forefront of the twentieth century "rights revolution."

The case of the Jehovah's Witnesses and strategic litigation complicates the accepted narratives of civil liberties and civil rights not only because of their early use of strategic litigation, but also by confounding the use of the liberal-conservative spectrum to describe constitutional jurisprudence and religious liberty litigation.[101] The placement

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[100] Urofsky, *Division and Discord*, 11.

[101] The designations of "liberal" and "conservative" have been used for years to define Protestant churches in twentieth-century America. For example, see Ferenc Morton Szasz, *The Divided Mind of Protestant America, 1880-1930* (University, Alabama: The University of Alabama Press, 1982).

of Jehovah's Witnesses as contemporaries of the NAACP and the ACLU in the development of strategic litigation also indicates that civil liberties and civil rights were not strictly liberal concerns. In the twentieth century, groups and individuals who had little else in common collaborated to reinvent rights in America. These alliances suggest that the categories of "liberal" and "conservative" are, perhaps, not particularly useful in defining the debates over civil rights and civil liberties. The distinction of the Jehovah's Witnesses from other Christian groups, as well as their adoption of seemingly "liberal" views, complicates existing notions of this spectrum. Definitions of liberal and conservative views have often invoked ideas about the role of the Supreme Court, and the legal system in general, with respect to individual rights, the status of minorities, and state power. Must the law follow the inclinations of the majority? Or might the Supreme Court, particularly during times of crisis or upheaval, be used to set in motion social change? Arguments over the role of the judiciary have endured from the founding of the republic, yet as minority groups, including the Jehovah's Witnesses as well as African Americans, began to push for changes to their status, the responsibility of the highest court in resolving these issues—and perhaps in encouraging social change—became critical. The Jehovah's Witnesses took the view, which has been characterized as a liberal one, that the Supreme Court might precede the general public with its decisions, particularly those involving civil liberties and civil rights.

The most feverish era for religious liberty litigation in the United States was after the 1950s; different groups became involved, and the Supreme Court handed down numerous (often conflicting) decisions in subsequent years. As a result, strategic litigation on religious liberty issues is usually described as part of the phenomenon that

sociologist Robert Wuthnow has called "religious special-interest groups."[102] The American Jewish Committee decided after the Second World War to concentrate attention on church-state separation issues, and to place law and litigation at the "center of systematic efforts to promote policy change."[103] One of their first concerted efforts to influence constitutional law of church and state at Supreme Court level through legal model was in *McCollum v. Board of Education* (1948), the case which tested the constitutionality of public schools setting aside class time ("released time") for religious instruction.[104] The Court declared this practice to be unconstitutional. Subsequently, increasingly wide decisions struck down other religious practice in the public schools—including the school prayer decisions of 1962 and 1963—as well as excluding religion from other areas of public life. Christian groups were galvanized to act.[105] An amalgam of groups which collectively belonged to the "New Christian Right" soon utilized the same strategies of test cases and organized litigation as the Jehovah's Witnesses and civil libertarians had—but for very different purposes. As a result of their visibility, their political numbers, or the expansiveness of their key issues, these religious special interest groups have been a major focus of the literature on church-state jurisprudence in the twentieth century. Consequently, strategic litigation on religious issues has largely been described as a post-war phenomenon, and one which skews strictly along liberal-conservative lines.

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[102] Robert Wuthnow, *The Restructuring of American Religion: Society and Faith Since World War II* (Princeton: Princeton University Press, 1988).

[103] Ivers, *To Build a Wall*, 3.

[104] Ibid.

[105] *Zorach v. Clauson*, 343 U.S. 306 (1952), *Engel v. Vitale*, 370 U.S. 421 (1962), *Abington v. Schempp*, 374 U.S. 203 (1963).

The conservative Christian groups involved in the 1960s and after expressed escalating alarm about the "secularizing" of America—at the same time that they condemned many aspects of the broader "rights revolution."[106] Lamenting what they saw as the loss of religious influences over American life, they urged the retention or return of prayer in public schools, as well as other changes to school curricula. They also became involved in a wide variety of issues involving speech, such as pornography debates. Eventually, they drove forward the legal battles over abortion. This religious involvement in the judicial arena was focused and decisive. In the 1970s, groups were created solely for litigation and adjudication—rather than to influence the legislative or executive branches. Subordinate to organizations like the Moral Majority, the Christian Voice, the Religious Roundtable, the National Federation for Decency, and the National Christian Action Coalition, the tactics of these legal strategists were similar to Jehovah's Witness tactics earlier in the century. Major law firms in this class included the Alliance Defense Fund, American Center for Law and Justice, Christian Legal Society's Center for Law and Religious Freedom, Liberty Counsel, and the Rutherford Institute.[107] As Stephen Brown recently illustrated, these groups soon sought out and initiated lawsuits rather than simply reacting to liberal maneuvers. They adopted the rhetoric of rights and freedoms so long the domain of liberals and civil libertarians, yet their arguments regarding religious liberty involved efforts to return religion to a place of prestige within society.

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[106] See Garry Wills, *Under God: Religion and American Politics* (New York: Simon and Schuster, 1990); Mark Noll, *Religion and American Politics: From the Colonial Period to the 1980s* (New York: Oxford University Press, 1990); George Marsden, *Understanding Fundamentalism and Evangelicalism* (Grand Rapids, Michigan: Wm. B. Eerdmans Publishing Co., 1991).

[107] Founded in 1981 by John Whitehead, The Rutherford Institute was named after Samuel Rutherford, the seventeenth century Scottish theologian. Stephen P. Brown, *Trumping Religion: The New Christian Right, the Free Speech Clause, and the Courts* (Tuscaloosa, Alabama: University of Alabama Press, 2002).

The existence of Jehovah's Witnesses, a religious group practicing strategic litigation—earlier and to great effect—for ostensibly "liberal" purposes, muddles the classification of religious special-interest groups along political lines, as does the kinship of this religious group with agitators for civil rights and labor. The recognition that the Jehovah's Witnesses practiced these approaches before the "rights revolution" necessitates a new examination of religious groups' efforts in the judicial arena. While Jehovah's Witnesses shared the premillennial attitudes of fundamentalist Christians, including the belief that evangelism, not social reform, must be the objective of true Christians, their objectives regarding the place of religion in American society were diametrically opposed. These groups have been instrumental in legal and social battles since the 1960s. Particularly notable is the antagonism between these groups and the ACLU, which prompts the question of whether and when the ACLU's mission changed from that of protecting minority speech into an effort to keep religion out of the government-supported parts of the public square. All of these groups, in the twentieth century, have used the courts to guarantee their fundamental rights, and to do battle on these social and constitutional issues.

Some scholars have warned against the easy conflation of conservative politics and reaction against the racial policies of the Civil Rights Movement—the "white backlash" model. Ultimately, the inclusion of religious liberty into discussions of civil rights and civil liberties may help to explain the evolving spectrum of liberalism and conservatism in the twentieth century. As a result of the many cases won by civil libertarians (and Jehovah's Witnesses) in the 1920s through 1940s, religious liberty

became a matter of national policy.[108] Discussions of both civil liberties and the New Right have been concerned with ideas about the place of the state—either in ensuring civil liberties or in dealing with religion. In the interwar period, the Jehovah's Witnesses had disdained the federal government, suggesting that its policies and international conflicts were nefarious. Similarly, as conservative Christian groups became concerned in the 1960s about the "secularizing" of America, they targeted the federal government as imposing secularism, and departing from American tradition. As some, more fundamentalist, evangelicals understood it, the government, if not the arm of Satan, was an aggressively secularizing influence—to society's detriment. Alarm about the government's dangerous direction, then, was shared by Jehovah's Witnesses and civil liberties groups of the 1930s through 1960s, and conservative groups several decades later. This paradox is useful in understanding the evolving relationship between religion and politics in the twentieth century United States. Ironically, these groups have built upon the foundation of the Jehovah's Witness litigants in the 1930s and 1940s, although their battles pit them against groups such as the ACLU.

The Supreme Court battles over the meaning of the First and Fourteenth Amendments have had profound consequences for the meaning of civil liberties and civil rights in America. Recognition of the strategic litigation implemented by Jehovah's Witnesses calls into question the broader story of constitutional freedoms in twentieth-century America. Between the First World War and the 1980s, various groups challenged the meaning of constitutional guarantees of equal rights. While scholars have described the expansion of civil liberties mainly in secular terms, however, the legal

[108] With some exceptions: Polygamy is still illegal, and Court rulings have allowed restrictions on some practices labeled religious worship—for example, some variations on animal sacrifice.

transformation owed much to religious groups. Moreover, while most discussions of these legal changes have focused on the courts, attributing legal changes almost exclusively to the views of Supreme Court justices, it is critical to understand the actions and motivations of the litigants themselves. Jehovah's Witnesses, the ACLU, and other legal special interest groups have been central to interpreting civil liberties in America.[109] Much has been written about the ACLU, the NAACP, and other groups as political entities, yet litigant-driven legal change was critical, and led to substantive changes in American life. The timing of the Jehovah's Witnesses' agitation justifies the inclusion of religious liberty in the birth of the "rights revolution." The Supreme Court's protection of religious liberty, a direct result of the Jehovah's Witnesses' protests, helped transform and extend the protection of other constitutional rights, far beyond what previous interpretations had allowed. It also helped to fuel a reaction to the expansion of rights and judicial activities, which has been a major force in twentieth century politics and constitutional practice.

[109] An exception is R. Jonathan Moore, *Suing for America's Soul: John Whitehead, The Rutherford Institute, and Conservative Christians in the Courts* (Grand Rapids, Michigan: William B. Eerdmans Pub., 2007).

Conclusion: Reinventing Civil Liberties

Although the federal Constitution enumerates many guarantees, most of these rights had been defined vaguely, at best, before the First World War. Whatever the venerable rhetoric of "liberty" and "freedom" implied, there was little precedent for expansive views of minority rights in America. Free speech could not be boundless, most people argued, and eccentric religious beliefs could not be accepted as justification for practices deemed unacceptable by the majority—any doubts about the restrictive nature of this model could have been answered swiftly by the Mormons in the West. After the First World War, the founders of the ACLU rejected the majoritarian impulse and attitude toward civil liberties. In a progressive society, they argued, those in the minority—political, economic, or social—must be allowed to voice their opinions, however unpopular. In fact, civil libertarians argued, this was the real meaning of the Bill of Rights. Constitutional rights to free speech, press, and assembly must be considered to be American values, and protected against official intrusions. The defense of civil liberties soon extended far beyond its First World War roots, and the ACLU worked extensively after 1920 to ensure a broad view of civil liberties and minority rights.

While ACLU activists were some of the most ambitious frontrunners in redefining civil liberties in America, however, their relationship to religious groups, and their attitude toward religious liberty was, at first, ambiguous. Civil libertarians were comfortable defending conscientious objectors; they had more difficulty, however, when it came to defining the precise meaning of religious liberty in practical terms. Judge Rutherford and his group found a natural affinity with the era's most prominent civil libertarians in part because, unlike other religious groups, the Watch Tower members had

free speech and press grievances, and were not simply religious conscientious objectors. The complaints of the Jehovah's Witnesses were far closer to those of the likes of Emma Goldman and Eugene Debs than they were to the issues faced by religious pacifists. Embracing the First Amendment and state constitutional provisions, Judge Rutherford maintained that religious liberty was absolutely meaningless unless it included the rights to publish and to preach those beliefs. In addition, Judge Rutherford long touted the idea that the legal system must be accessible to all citizens—and must be used to redress the pervasive inequalities of class and power. For this reason, perhaps, the Jehovah's Witnesses found an early and prolonged affinity with labor organizers as well as other civil libertarians.

Judge Rutherford honed his message regarding the necessity of protesting the suppression of dissent early in the organization's history, combining this point with a critique of social inequality. Although he and his followers undertook to remain separate from the world, his urgings took on the tone of political protest. In 1929, for example, he complained that "the laws of the so-called Christian nations are enforced with great partiality. The rich and the influential escape punishment for the violation of the law, while they also use the law to burden and oppress the less fortunate. The poor man has little or no show in the courts."[1] Coming at the time of the origins of movements such as Legal Aid in America, this attention to the inequalities underlying the legal system served as the backdrop for many of the organization's arguments. Aiming to change this situation, by the early 1930s, Rutherford's plan was clear. The Watch Tower Society did not simply present legal theories and lofty concepts to its followers, but provided them with practical advice on how to mount challenges in favor of their civil liberties.

[1] Rutherford, *Judgment*, 1929. Reprinted in Bergman, *Jehovah's Witnesses I*.

Rutherford and the Watch Tower Society staff trained Jehovah's Witnesses to deal with the authorities, publishing *Liberty to Preach*, a pamphlet instructing Jehovah's Witnesses about their constitutional rights. He published a detailed "Order of Trial," as well as several other pamphlets, containing increasingly detailed legal information.

Jehovah's Witness practices, including door-to-door preaching, hawking pamphlets in public places, and ultimately refusing to salute the flag, provoked reactions from secular authorities. The incendiary nature of the group's message, which criticized the "unholy trinity"—governments, churches and business—and accused secular and religious authorities of committing "spiritual fornication," led to complaints and negative visibility for the group. The Sunday canvass, sound cars and sound boats, and portable phonographs all irked people. When Jehovah's Witnesses were arrested, their cases were reprinted in detail in the group's publications. The arrests became more frequent, and FBI agents observed Rutherford's activities—confirming what might otherwise have seemed to be his paranoid suspicions. Jehovah's Witnesses were arrested in large groups, tried, and convicted of breaking a variety of laws. Rutherford refined the "Order of Trial," eventually detailing the entire process of resistance from first encounter with police to appealing all the way to the Supreme Court. When they were arrested, Jehovah's Witnesses were urged to go to jail rather than to pay fines; in this way they would be able to appeal their cases to higher courts. As a result, the group's members brought hundreds of cases in state and federal courts. At weekly service meetings, Jehovah's Witnesses received training and conducted mock trials, taking turns defending themselves as if in court—preparations similar to those practiced by Freedom Riders of the 1950s, sit-in movement participants of the 1960s, and integrators of schools and other

institutions. It was not only their option, but their obligation, to "fight and employ all legal means" to enable the preaching work."[2] Taking a stand while on the stand became, for Jehovah's Witnesses, a point of honor.

That Jehovah's Witnesses were "waging a vigorous campaign against the Devil" connected the group's legal battles with their religious practice. While encouraging individuals to read the Bible and to interpret it for themselves, Rutherford simultaneously managed the group in an extremely authoritarian mode. These organizational structures were utilized in the group's resistance and legal battles. The central organization exercised great control, requiring members to report their proselytizing activities in terms of time and literature "placed." Rutherford encouraged constant contact with the group's headquarters, assigning territories and creating an elaborate structure of hierarchical organization. The Watch Tower Society circulated immensely detailed instructions for canvassers and car drivers, and initiated a system of feedback and supervision which enabled them to assess the goings on in the territories. Judge Rutherford encouraged his followers to challenge their arrests in court, instructing them that "[i]n so doing you will be acting strictly according to the law of the land and in harmony with the Word of God." He instructed members of the group about how to deal with the police calmly and nonviolently, while insisting on their constitutional rights. The Watch Tower legal department also trained groups to appear in court, providing them with a "Memorandum of Authorities" (case precedents) and elaborate descriptions of trial procedures and appeals. The group used their power for social mobilization to make up for the power they lacked as an ostracized and despised minority.

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[2] "Suggestions for Attorneys and Witnesses Use in Interviews in Preparation for Trial of Cases Involving Constitutional Rights of Jehovah's Witnesses," [1944?]; Watch Tower Legal Department Archives, Patterson, New York. Folder: "Freedom of Worship."

Despite their antagonism toward worldly organizations, the Jehovah's Witnesses embraced a novel and expansive model of civil liberties. The Jehovah's Witnesses were a protective and isolated group, whose views differed significantly from those in the mainstream. Members of the group were bound together for purposes quite apart from constitutional, worldly ideas. Yet the group reasoned that their legal battles were entirely consistent with their detachment from and criticism of worldly institutions. Bringing cases in court was always an opportunity for witnessing, especially since charges filed against Jehovah's Witnesses were thoroughly related to their work. Particularly at the appellate level, members of the group and their lawyers were encouraged by the opportunity to speak about the Truth. Jehovah's Witnesses were gratified when their witnessing was reported in newspapers, on the radio, and in court documents. Furthermore, Covington insisted that the group's legal battles were not duplicitous; nor did they entangle Jehovah's Witnesses with the worldly institutions they disdained.

> Although Jehovah's Witnesses are not part of the Devil's organization, they are necessarily in this world in much the same way that were the Israelites in Egypt. The fundamental liberties, particularly freedom of worship, guaranteed by the constitutions of these United States, are the people's 'treasures' and 'jewels'….These constitutionally guaranteed 'treasures', thus borrowed from the 'Egyptians', should be kept and held until the antitypical 'promised land' is reached by Jehovah's witnesses. Under no circumstances should these be surrendered to modify the demands of expedience, hostility of the court, or a mob.[3]

Covington maintained that accusations of hypocrisy, leveled against the group by some critics because of their simultaneous use of the legal system and condemnation of worldly systems, were unfounded. The fact that Jehovah's Witnesses used the courts to reinforce

[3] "Suggestions for Attorneys and Witnesses Use in Interviews in Preparation for Trial of Cases Involving Constitutional Rights of Jehovah's Witnesses," [1944?]; Watch Tower Legal Department Archives, Patterson, New York. Folder: "Freedom of Worship."

their fundamental liberties was, as Rutherford had asserted, not an aberration from but an important element in the group's Christian mission.

While their efforts served their preaching work, first and foremost, the group's leadership insisted that religious liberty was integrally connected with speech, press, and assembly rights, as well as the broader "liberties" outlined in the Fourteenth Amendment. Far from paying mere lip service to "American freedoms," Judge Rutherford, Olin Moyle, and Hayden Covington emphasized the importance of guaranteeing these rights for all groups—even their religious and secular "opponents." This outlook was consistent with the group's mission: Jehovah's Witnesses were certain that, if only given the opportunity to hear the Truth, people would be persuaded, and would become witnesses to Jehovah themselves. Yet, having experienced firsthand both official suppression and mob violence, the group's leaders insisted on the peril of curbing any individual or group's civil liberties. While promoted by changes to the Supreme Court's composition and outlook, the twentieth century transformation of civil liberties was also litigant-driven, powered by the campaigns of civil libertarians and other activists. That these groups included the Jehovah's Witnesses, a group of zealous Christians, defies standard understandings of civil liberties in the United States, which generally do not include fervent religious believers.

Unlike other religious groups before the 1960s, the Watch Tower Society willingly utilized the legal system, through strategic litigation, to protest what they saw as breaches of the group's fundamental rights. History abounds with examples of groups whose religious practices conflicted with secular laws—the Amish, the Salvation Army,

the Jews.[4] Under Rutherford's direction, the Jehovah's Witnesses differentiated themselves from other religious minorities. The group set themselves apart, even from those premillennialists with whom Jehovah's Witnesses shared their apocalyptic views. While Jehovah's Witnesses have long been grouped with religious conscientious objectors, they were not truly pacifists at all, as members of the group intended to fight in the final conflict in which Jehovah returned to rule the Kingdom of Heaven on Earth. What they opposed was earthly conflicts, bloodshed over religion, civil governments and national boundaries. Members of the group are more properly classified with socialists, anarchists, and other dissenters, many of them not religious, who landed in trouble because of their unconventional views. Like many political dissidents, Jehovah's Witnesses had long considered themselves to be "internationalists," eschewing national governments and boundaries. Jehovah's Witness rhetoric occasionally sounded like that of human rights activists. "All official efforts to curtail or stop our preaching of the gospel may be resisted…as being contrary to the fundamental law of any nation that is not a totalitarian or a police state," wrote Covington.

> We have the right and the responsibility of insisting on our citizenship rights accorded by the nations. We must assert and rely upon such citizenship rights which guarantee freedom of speech, freedom of press,

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[4] Most famously, of course, the Mormons, whose practice of polygamy conflicted with secular laws banning the practice, and who fought these regulations on religious liberty grounds. See *Reynolds v. United States*, 98 U.S. 145 (1879); *Murphy v. Ramsey*, 114 U.S. 15 (1885); *Davis v. Beason*, 133 U.S. 333 (1890); *The Late Corporation of the Church of Jesus Christ of Latter Day Saints v. United States*, 136 U.S. 1 (1890).

The Supreme Court used a case of Catholic funeral practices, which came into conflict with New Orleans city ordinances, as an early opportunity to assert that the First Amendment could not be invoked in cases where only state laws were involved. *Permoli v. First Municipality of New Orleans*, 44 U.S. 589 (1844).

Conscientious objectors who challenged draft laws came from many religions, including Amish, Mennonites, and other pacifist groups.

In the state courts, Jews brought suits alleging that Sunday closing laws were discriminatory (claims that were usually rejected). Amish sued for the right to educate children in their own schools.

> freedom of assembly, freedom of conscience and freedom to worship Almighty God, in order to protect our field of preaching.[5]

The primary mission of Jehovah's Witnesses was always a religious one. Nonetheless, because of this framework, and in contrast to other religious groups, Rutherford established relationships with groups interested in challenging the status quo regarding civil liberties.

Judge Rutherford, Olin Moyle, Hayden Covington, and countless individual Jehovah's Witnesses played a large role in having not only religious, but also civil, liberties defined more comprehensively than they ever had been before in the United States. Rutherford argued, most immediately, that the legal distinction between belief and action, well-established since the nineteenth century Mormon cases, was fallacious. In a narrow sense, the Jehovah's Witnesses sought to broaden the meaning of religious liberty to include modern nonconformist groups well beyond the Quakers. Years before Martin Luther King, Thurgood Marshall, and others publicly made similar arguments, Rutherford focused on the inequality inherent in these laws and their enforcement. Eventually, mainstream American society came to agree with this assessment. Laws used against the Jehovah's Witnesses were often "dead letter ordinances"—laws intended for other purposes entirely, that had lain dormant for years. "The ordinances complained of had in theory a general application," read a 1943 *New York Times* editorial, "They were in fact adopted, or revived after long inactivity, to penalize a certain group….Dead letter ordinances come alive when there is popular pressure to enforce them. The effect of the ordinances which the Court majority has disallowed was to discriminate between the

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[5] Covington, *Defending and Legally Establishing the Good News*.

Witnesses and better behaved or more popular religious canvassers."[6] Such unjust laws—those which were contrary to the "fundamental laws of the land"—must be fought. The group used an offensive strategy to change what they saw as restrictive police and governmental practices, rather than merely aiming to have charges against them dropped. Under Rutherford's guidance, the group combined civil disobedience with calculated legal action, attempting to test ordinances in the courts.

Judge Rutherford, of course, never sought pluralism as a long-term ideal. Yet he insisted that, although his group's practices did not match conventional religious customs, they must be accepted as Christian and true nonetheless. In so doing, he challenged the extent to which the majority view could dictate acceptable modes of behavior to minorities. It was easy to protect the rights of people to speak and publish uncontroversial views, Rutherford argued; legal and constitutional protections were in place for those whose beliefs were unpopular. Rutherford urged lawmakers and judges to "Give everybody a fair deal everywhere." Prejudice, and the power that religious officials had been allowed to exercise, had led to a situation of peril for civil liberties. Rutherford criticized what he saw as an "illicit relationship between church and state," first condemning acts such as Prohibition, then launching into a broad offensive against all laws which he said threatened his group's ability to practice their religion according to the dictates of their own consciences. The only counterweight to intolerance, he insisted, was the protection of civil liberties, and the complete separation of church from state. This understanding of the separation of church and state also profoundly differentiated them from evangelicals and fundamentalists who used the courts and became involved in politics to further their religious aims.

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[6] "Freedom and the 'Witnesses'," *New York Times*, May 11, 1943, 20.

The group confronted historically limited legal definitions of religious liberty, which differentiated belief from action, protecting only the former. Judge Rutherford insisted that religious liberty was virtually meaningless if viewed in this way. Rather than embodying simply a vague right to believe, Rutherford maintained, the right to religious liberty must include the freedom to act—via speech, publications, and assembly—upon one's belief. In order to expand the legal definition of religious liberty, however, the group first relied on other First Amendment rights. Free speech and press claims, while secondary to the group's larger message, were the reason the Jehovah's Witnesses gained the attention of both the Supreme Court and civil liberties groups. In 1938, in the first case for which the group gained review by the Supreme Court, that of Alma Lovell's Griffin, Georgia arrest, the Court recalled another case from the same set of police round-ups, in which the Jehovah's Witnesses' appeal was dismissed in October of 1937.[7] The Court had not taken the case based on the religious liberty arguments, recalled Justice Hughes, and could not "deal with the question of freedom of speech and of the press as it had not been properly presented."[8] In Alma Lovell's case, Rutherford and Moyle learned to include arguments connecting speech and press rights with religious liberty. These connections were, moreover, far from merely theoretical. The broad appeal of such an expansion of press and speech rights is indicated by the fact that the next Jehovah's Witness case heard by the Supreme Court, that of Clara Schneider's distribution of pamphlets in Irvington, New Jersey, was combined for decision with three other cases for handbill distribution ordinances—none of which involved Jehovah's

[7] *Coleman v. City of Griffin*, 55 Ga.App. 123 (1937).
[8] *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

Witnesses.[9] In that case, as well, the Court made the connection of religious liberty with speech and press. "If it covers the petitioner's activities," wrote Justice Roberts, referring to Clara Schneider, "it equally applies to one who wishes to present his views on political, social or economic questions."[10]

Because of Jehovah's Witnesses, religious liberty, far from being an afterthought, was critical to the birth of a new model of civil liberties in America. Their claims included not only attempts to define religion and religious liberty, but also broader assertions regarding the complex interdependency of the liberty guarantees contained in the First and Fourteenth Amendments. Although they believed that they could advocate for their own religious liberty and the rights of others, Moyle, Rutherford and the Watch Tower Society gladly collaborated with civil libertarians who shared their conception of rights. Although they were often criticized in the press, Jehovah's Witnesses had gained many important allies within the civil liberties community, including ACLU, American Bar Association, and other leaders. Roger Baldwin recalled Judge Rutherford, whom he described as "an imposing gentleman, elegantly dressed," some fifty years after their first meeting. When Baldwin protested Rutherford's attempt to donate a thousand dollars to the organization, Baldwin recalled, Rutherford replied, "No…this is not for what you do for us. It is for what you do for everybody.' That was the kind of contribution we could accept," remembered Baldwin, "and it was the biggest I had seen in a long time."[11] The groups' collaboration began with literature distribution and "gag law" (anti-Nazi

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[9] One of the appellants was distributing notices for a meeting of the "Friends Lincoln Brigade," with speakers to discuss the war in Spain; one was a petitioner in front of a meat market, distributing handbills about the labor dispute with the meat market, and one was distributing leaflets announcing a protest meeting in connection with the administration of State unemployment insurance.

[10] *Schneider v. State of New Jersey*, 308 U.S. 147 (1939).

[11] Interview with Roger Baldwin, 1973; Peggy Lamson Collection on Roger Baldwin, Box 1, Folder 1, "ACLU, ca. 1973."

legislation) cases, and moved to flag salute and public assembly issues. Although the ACLU and the Watch Tower officials had been in intermittent contact since the First World War regarding Espionage Act cases, in the mid-1930s they established a working relationship based on shared legal goals. It is not clear that the groups ever fully trusted one another; yet their collaboration led to significant changes to civil liberties jurisprudence in the twentieth century.

Despite the groups' vastly differing worldviews, the relationship proved to be auspicious. Because of Rutherford's legal views and the Jehovah's Witnesses' practices, their relationship was one of collaboration, rather than the traditional relationship of simple advocacy ordinarily used by the ACLU. Civil libertarians found willing partners in the Jehovah's Witnesses in the early 1930s, when Arthur Garfield Hays and the ACLU were eager to test the Anti-Nazi gag laws. In 1935 and 1936, a flood of flag cases increased their correspondence and determination to test these laws. The fact that the Jehovah's Witnesses would defend themselves in court was a boon to the ACLU as that group refined its policy regarding religious liberty. While the ACLU was reluctant to argue, and judges remained reluctant to accept, that flag saluting had anything to do with religion, Rutherford insisted that arguments be based on religious liberty guarantees as well as free speech arguments. The ACLU and the Watch Tower collaborated, seeking sympathetic and flawless test cases. In the late 1930s, the Jehovah's Witnesses gained the respect of the ACLU as well as the cooperation of labor activists and other civil liberties advocacy groups due to their adherence to overriding principles.

That the group collaborated so effectively with other organizations, and went so far with these arguments, contributing to the redefinition of civil liberties in the United

States, certainly had something to do with Rutherford's legal mindset. The group's view of civil and religious liberties grew increasingly refined over time. During the First World War, the group's publications had used broad strokes to argue for "fundamental American freedoms" and the First Amendment. Over the next three decades, they made gradually more sophisticated arguments about incorporation and the meaning of civil liberties.

While they did not introduce the idea of strategic litigation to the ACLU, Jehovah's Witnesses developed and implemented such strategies simultaneously with other civil liberties agitators. The famous *Scopes* "monkey trial," which challenged a Tennessee state law regarding teaching evolution in the public schools, was an action planned by the ACLU to challenge state laws they deemed to be overly restrictive. Additionally, the ACLU had long sought to publicize repressive practices, whether they concerned labor, obscenity, or political speech. However, the Jehovah's Witnesses were critical players in the implementation of broad-based test case strategies because their cases were so numerous, their ambitions touched on so many fundamental issues, and their group was so willing to push cases.

Not everyone agreed with the Jehovah's Witness and ACLU assessment of the reach of fundamental rights. In each case in which the Jehovah's Witnesses were involved, the opposition also found ground to defend their positions. In the early days, before Jehovah's Witnesses had achieved much notoriety or explained their beliefs, mayors, city managers, and local magistrates found it patently ridiculous that members of the group sought protection for their unconventional—and often downright disruptive—religious practices. Even after these initial cases, city and state governors argued that

restrictions on Jehovah's Witnesses' activities were necessary—and constitutional. In part, these arguments rested on solid historical reasoning—there had always been restrictions on these liberties. In the *Lovell* and *Schneider* cases, for example, lawyers for the City of Griffin argued that ordinances regulating literature distribution made no reference to religion. Such ordinances, town and city managers and state governments would consistently argue, were "reasonable and proper" exercises of police power, "in furtherance of the public welfare." Similarly, advocates for flag salute laws argued that these regulations had nothing to do with religion, and should be upheld to encourage patriotism. As the American Legion's Ralph B. Gregg wrote in an amicus brief in *Barnette*, "Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs."[12] Referring to "national unity" and to "police power," city managers, superintendents, and legislators reinforced their positions.

For many years, those who argued against the Jehovah's Witnesses in court certainly had precedent on their side—as, indeed, did those who argued against civil rights decisions in the Supreme Court. Yet changed minds of Supreme Court justices—or even changes in Court personnel, while a critical part of the puzzle, go only so far in explaining the jurisprudential changes of the twentieth century "rights revolution." In addition, Jehovah's Witnesses were a critical force in the longer civil rights movement of the twentieth century. The group serves as a link between First World War era civil liberties battles (focusing on free speech and press), the constitutional revolution of 1937 (revolving around "preferred freedoms") and, finally, the civil rights movement of the

[12] Amicus Brief, American Legion, in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

1950s. While the efforts of individual litigants do not tell the whole story (in the end, the courts did rule on these issues, and judicial opinions are an important element in these developments), strategic litigation and interest group work certainly played a large role in this legal transformation.

Nor does characterizing justices—or litigants and groups themselves—as "liberal" or "conservative" explain this legal transformation. Even a cursory examination of the way justices voted in these critical years indicates that more was at play than a simply-classifiable judicial philosophy. The spectrum of liberal and conservative, while perhaps helpful in describing the political realm, is not particularly useful either in explaining or in predicting the judicial system. Moreover, the debate between "internalists" and "externalists" regarding the Supreme Court reflects far more than a theory about jurisprudence. The level of "judicial activism" which is acceptable—and the degree to which the courts must practice restraint—is an issue which, perhaps, will never be fully resolved. What is certain is that, as minority groups—including, prominently, Jehovah's Witnesses and African Americans—began to push for social and legal changes in their status, the Court took a decidedly activist position.

It would be inaccurate to construe the Watch Tower Society as proto-civil rights activists. Their concerns centered on the First Amendment's civil liberties guarantees, and they used the Fourteenth Amendment's "liberty" framework as a means to an end. Nevertheless, the group did use strategic litigation, civil disobedience and other tactics similar to those used by civil rights workers beginning in the 1950s. That many of the hundreds of cases pursued by the Jehovah's Witnesses, dozens of which reached the Supreme Court, were test cases is confirmed by the statements of both lawyers and

ordinary Jehovah's Witnesses who participated in the action. The Jehovah's Witness lawyer Victor Blackwell, for example, recalled a group's 1940 arrest in Oakdale, Louisiana. "The jailhouse door had been left open," remembered Blackwell, "with the hope, I later learned, that the prisoners would walk out; then the city could charge them with jailbreaking. But the Witnesses remained."[13] The willingness of Jehovah's Witnesses of all ages and backgrounds to risk their livelihoods—and many times their lives—in order to make a point indicates that members of the group were well-versed in their legal rights and responsibilities.[14] The Jehovah's Witnesses did not put themselves on the line during the civil rights movement, nor did they instruct civil rights activists directly on tactics of protest or strategic litigation. Yet the group's contribution to the changing panorama of rights in America remains a critical part of both civil liberties and protest movements. "We think the rights of all Americans," wrote the *New York Times* in 1943, "are a little safer because Jehovah's Witnesses have had their second day in court."[15]

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[13] Victor Blackwell, "Defending God's People and His Truth," in *The Watchtower*, February 15, 1973, 117-123.

[14] There is no evidence that any Jehovah's Witnesses were killed in the rioting; nonetheless, the mob actions of the 1940s, including beatings and other brutal treatment, were risky.

[15] "The 'Witnesses'—And Others," *New York Times*, May 4, 1943, 22.

Appendix I:
Cases Involving Jehovah's Witnesses Decided by the U.S. Supreme Court, 1938-1955

1. ***Lovell v. City of Griffin***, 303 U.S. 444 (March 28, 1938)

Alma Lovell convicted of violating a city ordinance of Griffin, Georgia, prohibiting distribution of circulars, handbooks, advertising, or literature of any kind without a permit.

Court held that ordinance constituted prior censorship of the press in violation of the First Amendment.

Issues: abridgment of freedom of the press and free exercise of religion, prior restraint on distribution of printed materials

Attorney: O.R. Moyle

Amicus Curiae Briefs: Workers' Defense League, American Civil Liberties Union

2. ***Schneider v. New Jersey***, *Young v. People of State of California*, *Snyder v. City of Milwaukee, Nichols et al. v. Commonwealth of Massachusetts*, 308 U.S. 147 (November 22, 1939)

Clara Schneider convicted of canvassing without a permit as required by an ordinance of the Town of Irvington, New Jersey

Kim Young convicted of violating a section of Los Angeles Municipal Code prohibiting distribution of handbills

Harold F. Snyder convicted of violating an ordinance of City of Milwaukee, Wisconsin, prohibiting circulation or distribution of circulars and handbills

Elmira Nichols and Pauline Thompson convicted of violating an ordinance of the City of Worcester, Massachusetts, prohibiting the distribution of handbills or similar papers.

Ordinance held to be an abridgment of freedom of the press contrary to the First Amendment.

Issues: freedom to speak, write, print or distribute information or opinion, free movement in public streets

Attorneys: Joseph F. Rutherford and Olin R. Moyle; in other cases, Osmond K. Fraenkel and A.L. Wirin (both of ACLU); A.W. Richter, Sidney S. Grant and Osmond K. Fraenkel (of ACLU)

3. ***Cantwell v. Connecticut***, 310 U.S. 296 (May 20, 1940)

Newton, Jesse and Russell Cantwell convicted of violating Connecticut statute prohibiting solicitation of money for alleged religious, charitable, or philanthropic causes without approval of Secretary of Public Welfare, and of inciting a breach of the peace.

Statute held to be a violation of the freedom of religion provision of the First Amendment; common law conviction for breach of the peace held to abridge freedom of speech and freedom of worship guaranteed by the First Amendment.

Issues: First Amendment rights declaring that Congress shall enact no law respecting establishment of religion or prohibiting the free exercise thereof embraced by fundamental concept of "liberty" embodied in the Fourteenth Amendment.

Attorney: Hayden C. Covington

4. ***Minersville v. Gobitis***, 310 U.S. 586 (June 3, 1940)

Gobitas children refused to salute the flag in their Minersville Public School and were expelled. Court held that the compulsory flag salute regulation was valid.

Issues: constitutionality of regulation mandating flag salute

Attorneys: George K. Gardner (of Harvard University Law School) and Joseph F. Rutherford

Amicus Curiae Briefs: Committee on the Bill of Rights, of the American Bar Association, American Civil Liberties Union

5. ***Cox v. New Hampshire***, 312 U.S. 569 (March 31, 1941)

Willis Cox, Walter Chaplinsky, John Konides and sixty-three others convicted of taking part in a parade or procession on a public street without a license. Marching with signs reading "Religion is a Snare and a Racket" and "Serve God and Christ the King" and "Fascism or Freedom. Hear Judge Rutherford and Face the Facts" and handing out leaflets advertising a talk on government."

Statute held to be valid police regulation.

Issues: civil liberties, civil rights, parades or processions on the public streets

Attorneys: Hayden C. Covington and Joseph F. Rutherford

6. ***Chaplinsky v. New Hampshire***, 315 U.S. 568 (March 9, 1942)

Walter Chaplinsky convicted of violating a New Hampshire statute prohibiting addressing of any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, or calling him by any offensive or derisive name. Chaplinsky called a police officer, who refused to protect him from a mob, a "God damned racketeer" and "damned fascist" and asserted that "the whole government of Rochester [New Hampshire] are Fascists or agents of Fascists."

Court ruled that statute did not violate Chaplinsky's First Amendment liberties.

Issues: freedom of speech, press and worship, due process, breach of peace

Attorney: Hayden C. Covington

7. ***Jones v. Opelika, Jobin v. Arizona, Bowden v. Arkansas***, 316 U.S. 584 (June 8, 1942)

Rosco Jones, Lois Bowden and Zada Sanders, and Charles Jobin convicted of violating city ordinances of Opelika, Alabama, Fort Smith, Arkansas, and Casa Grande, Arizona, prohibiting the sale of books without a license.

Court held that regulations were valid as they covered commercial activity, not religious.

Issues: constitutionality of city ordinances imposing license taxes upon sale of printed matter.

Attorneys: Hayden C. Covington and Joseph F. Rutherford

8. ***Jones v. City of Opelika (II)***, 319 U.S. 103 (1943)

Court reversed itself, held ordinances to be invalid as applied. (On basis of *Murdock et al. v. Pennsylvania*)

Attorney: Hayden C. Covington

Amicus Curiae Briefs (on reargument): General Conference of Seventh-Day Adventists, American Newspaper Publishers Association, American Civil Liberties Union

9. ***Jamison v. Texas***, 318 U.S. 413 (March 8, 1943)

Ella Jamison convicted of violating city ordinance prohibiting distribution of handbills on city streets.

Court held that enforcement of ordinance abridged appellant's liberty of press and religion contrary to the First Amendment.

Issues: constitutionality of ordinance prohibiting distribution of handbills on streets

Attorney: Hayden C. Covington

10. ***Largent v. Texas***, 318 U.S. 418 (March 8, 1943)

Daisy Largent convicted of violating city ordinance making it unlawful for any person to solicit orders, or to sell books, wares or merchandise within residence portion of the city without obtaining a permit.

Court held that ordinance requiring application to Mayor for permit to sell or canvass constituted prior censorship of the press in violation of the First Amendment.

Issues: city ordinance requiring permit to sell books, as applied to distribution of religious publications

Attorney: Hayden C. Covington

11. ***Murdock v. Pennsylvania***, & seven others, 319 U.S. 105 (May 3, 1943)

Robert Murdock, Jr., Anna Perisich, Willard L. Mowder, Charles Seders, Robert Lamborn, Anthony Maltezos, Anastasia Tzanes and Ellaine Tzanes convicted of violating ordinance of City of Jeannette, Commonwealth of Pennsylvania, prohibiting sale of goods, wares and merchandise of any kind within the city by canvassing for or soliciting without a license. Required that solicitors and canvassers pay a license tax and obtain a license from the Burgess.

Court held ordinance to be an abridgment of freedom of press and worship, when applied to Jehovah's Witnesses' literature distribution.

Issues: distribution of religious literature

Attorney: Hayden C. Covington

12. ***Martin v. Struthers***, 319 U.S. 141 (May 3, 1943)

Thelma Martin convicted of violating an ordinance of the City of Struthers, Ohio, which made it illegal to ring doorbells to aid in the door-to-door distribution of handbills or other advertising.

Court held that ordinance was abridgment of freedom of the press.

Issues: right to distribute literature and to receive it

Attorney: Hayden C. Covington

13. ***Douglas v. Jeannette***, 319 U.S. 157 (May 3, 1943)

Suit by Robert L. Douglas and others against City of Jeannette, to restrain threatened criminal prosecutions for violation of city ordinance.

Court held that Jehovah's Witnesses could not obtain federal injunction to enjoin enforcement of Jeannette, Pennsylvania license tax law (involved in *Murdock* case).

Issues: requirement of license to solicit or collect orders for merchandise

Attorney: Hayden C. Covington

14. ***Taylor v. Mississippi, Benoit v. Same, Cummings v. Same***, 319 U.S. 583 (June 14, 1943)

R.E. Taylor, Betty Benoit and Clem Cummings convicted of violating Mississippi anti-sabotage and sedition statute, for distributing literature explaining refusal to salute the flag.

Court ruled that statute was unconstitutional in this enforcement, depriving appellants of their rights to free speech and press in the First Amendment.

Issues: freedom to distribute literature advocating refusal to salute the flag

Attorney: Hayden C. Covington

Amicus Curiae Briefs: American Civil Liberties Union

15. ***Busey v. District of Columbia***, 319 U.S. 579 (June 14, 1943)

David Busey and Orville J. Richie convicted of selling magazines on streets of District of Columbia without first procuring a license and paying license tax.

Court vacated appeal's court's upholding of conviction, ordered reconsideration in light of *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

Issues: license tax for distributing literature on streets

Attorney: Hayden C. Covington

16. ***West Virginia State Board of Education v. Barnette***, 319 U.S. 624 (June 14, 1943)

Gathie Barnette expelled from public school because she refused to salute the flag with a stiff-armed salute, as required by West Virginia statute.

Court held compulsory flag salute regulation unconstitutional because it abridged freedom of speech contrary to the First Amendment.

Issues: validity of mandatory flag salute statute

Attorney: Hayden C. Covington

Amicus Curiae Briefs: American Civil Liberties Union, American Legion, Committee on the Bill of Rights, of the American Bar Association

17. ***Matthews v. Hamilton***, 320 U.S. 707 (October 18, 1943)

Judgment enjoining the distribution of literature explaining why Jehovah's Witnesses do not salute the flag and bear arms.

In light of *Barnette* and other decisions, case sent back for reconsideration; state court later dismissed the case.

Issues: literature distribution, flag salute

Attorney: Hayden C. Covington

18. ***Falbo v. United States***, 320 U.S. 549 (January 3, 1944)

Nick Falbo convicted of willfully failing to obey order of local draft board to report for assignment to work of national importance.

Court held that Falbo had failed to exhaust his administrative remedies, and the Congress had not authorized judicial review of the propriety of a board's classification in a criminal prosecution for willful violation of an order directing a registrant to report for the last step in the selective process, and affirmed his conviction

Issues: draft law

Attorney: Hayden Covington

Amicus Curiae Briefs: Julien Cornell, National Committee on Conscientious Objectors of the American Civil Liberties Union

19. ***Prince v. Massachusetts***, 321 U.S. 158 (January 31, 1944)

Sarah Prince convicted of furnishing an infant [Betty M. Simmons, age 9, her foster child] with magazines knowing she would sell them unlawfully on the street, and of permitting such infant to work contrary to Massachusetts child labor laws.

Court held that the conviction was valid, and did not violate her rights under the First Amendment.

Issues: literature distribution, child labor law

Attorney: Hayden C. Covington

20. ***Follett v. McCormick***, 321 U.S. 573 (March 27, 1944)

Lester Follett convicted of violating ordinance of Town of McCormick, South Carolina, requiring permit for book selling.

Court ruled that, although the case was distinguished from *Murdock* and *Opelika* because Follett was not an itinerant but a resident of the town, and earned his living selling books, the ordinance was unconstitutional as applied.

Issues: license tax

Attorney: Hayden C. Covington

Amicus Curiae Briefs: American Civil Liberties Union

21. ***Marsh v. Alabama***, 326 U.S. 501 (January 7, 1946)

Grace Marsh convicted of violating Alabama law making it a crime to enter or remain on the premises of another after being warned not to do so.

Although Marsh had ignored a "Private Property" warning, Court set aside the trespass conviction on the grounds that it violated the rights guaranteed by the First Amendment.

Issues: literature distribution on private property

Attorney: Hayden C. Covington

22. ***Tucker v. Texas***, 326 U.S. 517 (January 7, 1946)

A.R. Tucker convicted in Medina County, Texas of violating part of penal code of Texas making it an offense for a peddler or hawker of merchandise to refuse to leave premises after being notified to leave. Similar to *Marsh*, but instead of a private corporation, the federal government owned and operated the village, which housed workers engaged in producing war materials.

Court set aside the trespass conviction for similar reason in this case.

Issues: hawking and peddling of merchandise on government-owned property

Attorney: Hayden C. Covington

23. ***Estep v. United States, Smith v. United States***, 327 U.S. 114 (February 4, 1946)

William Murray Estep and Louis Dabney Smith convicted of refusing to submit to induction into the armed forces.

Court reversed holdings of all lower federal courts that no challenge to draft board classification permitted in defense to indictment charging refusal to submit to induction.

Issues: draft law

Attorney: Hayden C. Covington

24. ***Gibson v. United States, Dodez v. United States***, 329 U.S. 338 (December 23, 1946)

Taze Hamrick Gibson convicted of violating Selective Training and Service Act of 1940 by deserting from the civilian public service camp to which he, as a conscientious objector, had been assigned to perform work of national importance; George William Dodez convicted of violating the same statute for failing to report for work of national importance after being ordered to do so.

Court extended doctrine articulated in *Estep*, permitted defense by persons charged with failing to report to or remain at conscientious objector camps.

Issues: draft law, conscientious objection

Attorney: Hayden C. Covington

25. ***Alexander v. Kulick, Sunal v. Large***, 332 U.S. 174 (June 23, 1947)

Habeas corpus proceedings by Theodore Martin Sunal against David R. Large, superintendent, Federal Prison Camp, Mill Point, West Virginia, and by the United States on their relation of John Myron Kulick against Myrl Alexander, warden, for release from imprisonment under conviction of refusing to submit to induction.

Court ruled that they had not yet exhausted the proper appeals.

Issues: appeal of draft board rulings

Attorney: Hayden C. Covington

26. ***Cox v. United States, Thompson v. United States, Roisum v. United States***, 332 U.S. 442 (November 24, 1947)

Wesley William Cox, Theodore Romaine Thompson, and Wilbur Roisum convicted of absence without leave from civilian public service camp.

Court held that it could not hold there was no basis in fact for denial of ministerial exemption under draft law; petitioners carried on their ministry part time and devoted substantial time to secular vocations.

Issues: draft law

Attorney: Hayden C. Covington

27. ***Saia v. New York***, 334 U.S. 558 (June 7, 1948)

Samuel Saia convicted of violation of municipal ordinance prohibiting the use of sound amplification devices except with permission of Chief of Police for amplifying lectures in public park on designated Sundays.

Court held ordinance invalid, as right of freedom of speech and assembly had been violated.

Issues: constitutionality of ordinance prohibiting sound amplification devices

Attorney: Hayden C. Covington

28. ***Niemotko v. Maryland, Kelley v. Maryland, Kunz v. New York, Feiner v. New York***, 340 U.S. 268 (January 15, 1951)

Daniel Niemotko and Neil W. Kelley convicted of disorderly conduct; one basis for arrest was that defendants using public park in Havre de Grace for Bible talks without permit from city officials, even though no statute or ordinance prohibited use of park without permit (application for permit was customary).

Court held policy, which required a permit from the city counsel before meeting could be held or speech given in local city park, to be unconstitutional.

Issues: disorderly conduct, use of public parks

Attorney: Hayden C. Covington

29. ***Fowler v. Rhode Island***, 345 U.S. 67 (March 9, 1953)

Jehovah's Witness who addressed a religious meeting at a public park convicted of violating ordinance providing that no person would address any political or religious meeting in a public park.

Court found discrimination in favor of popular religions and against Jehovah's Witnesses in use of the park; declared ordinance to be unconstitutional.

Issues: constitutionality of ordinance prohibiting political or religious meetings in public parks

Attorney: Hayden C. Covington

30. ***Poulos v. New Hampshire***, 345 U.S. 395 (April 27, 1953)

Defendant convicted in Superior Court of conducting open air meetings in Portsmouth, New Hampshire, without license required by ordinance.

Court held valid requirement that Jehovah's Witnesses ask for permit before using the park.

Issues: constitutionality of ordinance prohibiting open air meetings

Attorney: Hayden C. Covington

31. ***Dickinson v. United States***, 348 U.S. 389 (November 30, 1953)

Prosecution for refusal to be inducted into the armed forces. Dickinson, a pioneer, claimed exemption as a minister.

Court held that this classification was illegally denied to him, a full-time minister.

Issues: draft law, conscientious objection

Attorney: Hayden C. Covington

32. ***Gonzales v. United States***, 75 U.S. 409 (March 14, 1955)

Defendant convicted of refusal to submit to induction into armed forces; claimed exemption from combatant and noncombatant service as a minister and conscientious objector in 1950.

Court held that due process demanded chance to answer recommendation before appeal board acted.

Issues: draft law

Attorney: Hayden C. Covington

33. ***Witmer v. United States***, 75 U.S. 392 (March 14, 1955)

Defendant convicted of willfully refusing to submit to induction into armed forces.

Court held that there were inconsistencies in defendant's testimony and conduct before board, casting doubt on his claim of conscientious objector status. Board had properly considered this sufficient basis in fact for denial of conscientious objector status.

Issues: draft law, conscientious objection
Attorney: Hayden C. Covington

34. ***Sicurella v. United States***, 75 U.S. 403 (March 14, 1955)

Defendant convicted of willfully refusing to submit to induction.

Court held that board recommendation to deny conscientious objector status was illegal.

Issues: draft law, conscientious objection
Attorney: Hayden C. Covington

35. ***Simmons v. United States***, 75 U.S. 397 (March 14, 1955)

Defendant convicted of willfully refusing to submit to induction.

Court held that Department of Justice withheld information at hearing, which was a denial of due process of law.

Issues: draft law, conscientious objection
Attorney: Hayden C. Covington

36. ***Bates v. United States***, 348 U.S. 966 (March 28, 1955)

Local board and appeal board gave Bates conscientious objector classification. National Selective Service Appeal Board changed his status, making him liable for unlimited military service.

Court held that failure to refer case to Department of Justice for a recommendation on conscientious objector claim constituted denial of due process of law.

Issues: draft law, conscientious objection
Attorney: Hayden C. Covington

37. ***Simon v. United States***, 348 U.S. 967 (March 28, 1955)

Charles Simon convicted of refusal to be indicted into armed forces.
Judgment reversed.
Issues: draft law, conscientious objection
Attorney: Hayden C. Covington

38. ***Bradley v. United States***, 348 U.S. 967 (March 28, 1955)

Jack Warren Bradley convicted for refusal to be inducted into armed services.
Judgment reversed.
Issues: draft law, conscientious objection
Attorney: Hayden C. Covington

39. ***DeMoss v. United States***, 349 U.S. 918 (April 1955)
Donald Jackson DeMoss convicted of refusal to be inducted into armed services.
Judgment reversed.
Issues: draft law, conscientious objection
Attorney: Hayden C. Covington

Appendix II:
Select Cases in State and Lower Federal Courts Involving Jehovah's Witnesses, 1934-1955

1. ***City of Wheaton v. Howard***, 358 Ill. 432 (1934)
Supreme Court of Illinois
Edward Howard convicted of violating municipal ordinance of the City of Wheaton making it unlawful to peddle without a license; appeals.
Transferred to Appellate Court (no constitutional issue)
Issues: peddling license, applicability to house-to-house sale of religious literature
Attorneys: O.R. Moyle, Edwin S. Wertz, of counsel

2. ***Coleman v. City of Griffin***, 55 Ga.App. 123 (1936)
Court of Appeals of Georgia, Division No. 1
Spencer Coleman convicted for violating city ordinance of Griffin, Georgia.
Appealed to Supreme Court, 302 U.S. 636 (1937). Appeal dismissed for want of a substantial federal question.
Issues: literature distribution without written permission
Attorneys: Charles G. Reynolds, John O. Owen, and C.F. Hutcheson

3. ***Nicholls v. Mayor and School Committee of Lynn***, 297 Mass. 65 (1937)
Supreme Judicial Court of Massachusetts, Suffolk.
Petition for mandamus by Carleton Nicholls, Jr. by next friend, against Mayor & School Committee of Lynn, to compel petitioner's reinstatement as pupil in a public school
Petition dismissed.
Issues: mandatory flag salute law
Attorneys: J.P. Roberts (of Massachusetts ACLU) and O.R. Moyle

4. ***Leoles v. Landers***, 184 Ga. 580 (1937)
Supreme Court of Georgia
Proceeding by Dorothy Leoles, a minor, by her father as next friend, against J.H. Landers and others, to compel her reinstatement as a student at the Crew Street School in AtlantaAppealed to Supreme Court, 302 U.S. 656 (1937). Appeal dismissed for want of a substantial federal question.
Issues: mandatory flag salute law
Attorneys: Lanham & Parker, Grover C. Powell, J. Herbert Johnson

5. ***Syracuse Center of Jehovah's Witnesses v. City of Syracuse***, 163 Misc. 535 (1937)
Supreme Court, Onondaga County, New York
Action for cancellation of tax as cloud on title by Syracuse Center of Jehovah's Witnesses, Inc., against City of Syracuse and County
Judgment for Plaintiff
Issues: tax-exempt status
Attorney: Morris Garber

6. ***Rollery v. City of Atlanta***, 56 Ga.App 175 (1937)

Court of Appeals of Georgia, Division No. 1

Louise Rollery convicted of peddling without a license in violation of an ordinance of the City of Atlanta.

Reversed

Issues: peddling license

Attorney: H.A. Allen

7. ***Gabrielli v. Knickerbocker***, 74 P.2d. 290 (1937)

District Court of Appeal, Third District, California

Petition for writ of mandate by Charlotte Gabrielli, a minor, by Joseph J. Gabrielli, her guardian ad litem, against Dorothy Knickerbocker and others

Appealed to Supreme Court of California, 12 Cal.2d 85 (1938)

Respondents appealing judgment directing issuance of peremptory writ. Reversed and writ discharged.

Appealed to Supreme Court, 306 U.S. 621 (1939) Per curiam. Motion to dismiss appeal granted for want of jurisdiction. Certiorari denied.

Issues: mandatory flag salute regulation

Attorneys: Wayne Collins, Olin R. Moyle

8. ***Gobitis v. Minersville School Dist.***, 21 F.Supp. 581 (1937)

District Court, E.D. Pennsylvania

Suit in equity by Walter Gobitis, individually and as next friend of Lillian Gobitis and another, minors, against the Minersville School District and others.

Defendants' motion to dismiss the bill of complaint denied

District Court, E.D. Pennsylvania, 24 F.Supp. 271. Appeal for injunction to enjoin defendants from prohibiting the attendance of the minor plaintiffs at the Minersville public schools because of their refusal to salute the national flag.

Injunction granted.

Issues: mandatory flag salute law

Attorney: H.M. McCaughey

8. ***People ex rel. Fish v. Sandstrom***, 167 Misc. 436 (1938)

County Court, Suffolk County, New York

Charles Sandstrom and another convicted of failing to send their children to school in violation of law.

Appealed to Court of Appeals of New York, 279 N.Y. 523 (1939)

Reversed & information dismissed.

Issues: mandatory flag salute law

Attorney: Arthur Garfield Hays (of the ACLU)

9. ***Town of Irvington v. Schneider***, 120 N.J.L. 460 (1938)

Supreme Court of New Jersey

Clara Schneider convicted by the Recorder's Court in the Town of Irvington and by the County Court of Common Pleas, to which an appeal was taken, for canvassing without a permit as required by an ordinance of the town, and the brings certiorari.

Writ dismissed.
Issues: canvassing permits
Attorneys: Jacob S. Karkus, O.R. Moyle (on the brief)

9. ***Dallas v. Atlantic City***, 120 N.J.L. 314 (1938)
Supreme Court of New Jersey
Michell Dallas and Peter Butrus convicted of violation of ordinances of the City of Atlantic City relating to disorderly conduct and regulating electrical installation. Certiorari dismissed.
Issues: disorderly conduct, electrical installation
Attorneys: Robertson & Robertson, O.R. Moyle (of counsel)

10. ***Watch Tower Bible & Tract Society v. City of Bristol***, 24 F.Supp. 57 (1938)
District Court, D. Connecticut
Suit by Watch Tower Bible & Tract Society et al. against City of Bristol for injunction restraining defendants from enforcing / proceeding against complainants to enforce law of Connecticut
Decree for defendants affirmed.
Issues: injunction against enforcement of breach of peace statute
Attorneys: Otto LaMacchia, O.R. Moyle

11. ***Smith v. City of Cedartown***, 58 Ga.App. 806 (1938)
Court of Appeals of Georgia, Division No. 1
Hollis Smith convicted of violating ordinance of the city of Cedartown requiring peddlers or itinerant traders of any kind to obtain a license.
Reversed
Issues: peddling license
Attorney: Grover C. Powell

12. ***Shinn v. Barrow***, 121 S.W.2d 450 (1938)
Court of Appeals of Texas, Galveston
Suit by Flora Mae Shinn, Billie Lee Shinn et al. against Melvin Barrow to enjoin from enforcing a suspension order
Motion that question was moot sustained, case dismissed.
Issues: mandatory flag salute law
Attorneys: Mandell & Combs, Hayden C. Covington, O.R. Moyle, Arthur Garfield Hayes (of the ACLU), W.A. Combs (of counsel)

13. ***Johnson v. Town of Deerfield***, 25 F.Supp. 918 (1939)
District Court, D. Massachusetts
Action for declaratory judgment decreeing statute void as unconstitutional
Application for temporary injunction, heard by three-judge court
Application for interlocutory judgment denied; bill dismissed.
Issues: temporary injunction against enforcement of flag salute law
Attorneys: O.R. Moyle, A. Frank Reel and Roewer & Reel

14. ***City of Milwaukee v. Snyder***, 230 Wis. 131 (1939)
Supreme Court of Wisconsin
Appeal from judgment of Milwaukee County Circuit Court.
Affirmed (against Jehovah's Witnesses)
Issues: handbill distribution license
Attorneys: Perry J. Stearns; Osmond K. Fraenkel and Jerome M. Britchey (both of ACLU, amici curiae)

15. ***City of Pittsburgh v. Ruffner***, 134 Pa.Super 192 (1939)
Superior Court of Pennsylvania
J.S. Ruffner convicted of violating an ordinance of the City of Pittsburgh, providing that no person shall engage in hawking, peddling, selling merchandise without a license.
Appeal quashed.
Issues: peddling license
Attorneys: O.R. Moyle, Samuel J. Feigus

16. ***Thomas v. City of Atlanta***, 59 Ga.App. 520 (1939)
Court of Appeals of Georgia, Division No. 1
B.H. Thomas convicted of violating an ordinance of the City of Atlanta imposing a fine on any person who fails and refuses to register his business.
Reversed
Issues: peddling license
Attorneys: Grover C. Powell, J. Herbert Johnson, W.A. Mason

17. ***People v. Guthrie***, 26 N.Y.S.2d 289 (1939)
County Court, Monroe County, New York
Mary Guthrie convicted of disorderly conduct; appeals.
Reversed
Issues: disorderly conduct
Attorney: Olin R. Moyle

18. ***People v. Ludovici***, 13 N.Y.S.2d 88 (1939)
County Court, Westchester County, New York
Minnie Ludovici convicted of disorderly conduct and breach of the peace; appeals. Judgment reversed with directions & information dismissed.
Issues: disorderly conduct
Attorney: Olin R. Moyle

19. ***Smoker v. Ohl***, 335 Pa. 270 (1939)
Supreme Court of Pennsylvania
Action of trespass by Amos K. Smoker against Amos Ohl and another for false arrest and imprisonment
From order refusing motion for new trial, plaintiff appeals
Affirmed
Issues: trespass and false imprisonment

Attorneys: O.R. Moyle, Conrad A. Falvello, Rocco C. Falvello, Charles M. Bowman, Ralph R. John

20. ***State ex rel. Bleich v. Board of Public Instruction for Hillsborough County,*** 139 Fla. 43 (1939)

Proceeding by state of Florida on relation of Fred Bleich against Board of Public Instruction for mandamus commanding defendants to permit relators to re-enter school or show cause.

To review judgment of dismissal. Bring error.

Affirmed (against Jehovah's Witnesses)

Issues: mandatory flag salute law

Attorneys: Ralph C. Binford, O.R. Moyle

21. ***Vlass v. McCrary***, 60 Ga.App. 744 (1939)

Court of Appeals of Georgia, Division No. 2

Action for false arrest and imprisonment by Vlass against McCrary.

Judgment for defendants, plaintiff brings error.

Reversed

Issues: false arrest and imprisonment

Attorneys: Grover C. Powell, Jno. Bolton, and Ben Blackmon

22. ***Com. v. Stewart***, 137 Pa.Super. 445 (1939)

Superior Court of Pennsylvania

Charles Stewart et al. found guilty of violating city ordinance regulating canvassing/soliciting.

Defendants appeal order refusing their petition for allowance of appeal.

Appeal dismissed.

Issues: canvassing license

Attorneys: S. Khan Spiegel, William M. Kahanowitz

23. ***State v. Langston,*** 195 S.C. 190 (1940)

Supreme Court of South Carolina

J.D. Langston and E.F. Godwin convicted of breach of the peace; they appeal.

Affirmed

Issues: breach of peace

Attorney: Grover C. Powell

24. ***People v. Kieran***, 6 Misc.2d 245 (1940)

County Court, Nassau County, New York

Fred Kieran and others convicted of disorderly conduct and they appeal.

Reversed, fines remitted and information dismissed.

Issues: disorderly conduct

Attorneys: A.S. Arnold and Hayden C. Covington

25. ***Village of South Holland v. Stein***, 373 Ill. 472 (1940)

Supreme Court of Illinois

Mrs. Paul Stein found guilty in prosecution for soliciting subscriptions for a magazine without a solicitor's permit from the Board of Trustees, and she appeals.

Judgment reversed.

Issues: solicitors' permits

Attorneys: Landon L. Chapman, Hayden C. Covington (of counsel)

26. ***Leiby v. City of Manchester***, 33 F.Supp. 842 (1940)

District Court, D. New Hampshire

Action by Milton Leiby and others against City of Manchester to enjoin enforcement of an ordinance

Judgment in accordance with opinion; defendants appeal.

Appealed to Circuit Court of Appeals, 117 F.2d. 661 (1941). Reversed and remanded with directions.

Issues: enjoinment of enforcement of pamphleteering ordinance

Attorney: Hayden Covington

27. ***Tucker v. Randall***, 18 N.J.Misc. 675 (1940)

Supreme Court of New Jersey

Cecil A. Tucker convicted of violation of an ordinance of Twp. of Washington; brings cert.

Conviction set aside.

Issues: house-to-house soliciting permit

Attorneys: Abram Waks, Paul Rittenberg (of counsel)

28. ***Com. v. Palms***, 141 Pa.Super. 430 (1940)

Superior Court of Pennsylvania

Appeals order of Court of Quarter Sessions refusing to allow an appeal.

Order reversed; record remitted with directions.

Issues: disorderly conduct

Attorneys: Conrad A. Falvello, Joseph F. Rutherford and Hayden C. Covington

29. ***Com. v. Hessler***, 141 Pa.Super. 421 (1940)

Superior Court of Pennsylvania

Charles R. Hessler convicted for violating ordinance which prohibited parades / processions within a borough without a permit; appeals.

Affirmed

Issues: ordinance prohibiting parades or processions without permit

Attorneys: Benjamin C. Sigal, Joseph F. Rutherford and Hayden Covington

30. ***People v. Northum***, 41 Cal.App.2d 284 (1940)

District Court of Appeal, Fourth District, California

Lester A. Northum, John H. Chism, L.M. Feaster, Dorothy Templeton and Grace Templeton convicted of conspiracy to disturb the peace; they appeal.

Reversed

Issues: conspiracy to disturb the peace

Attorneys: Earl F. Crandell, A.L. Wirin (of ACLU, as Amicus Curiae)

31. ***State ex rel. Semansky v. Stark***, 196 La. 307 (1940)
Supreme Court of Louisiana
Mandamus proceeding by the State, on rel. of Semansky, against Stark, Sheriff, to compel him to release Semansky's automobile, book & pamphlets.
Judgment reversed and set aside; automobile, books, pamphlets ordered released.
Issues: hawking and peddling licenses
Attorneys: Edmond L. Deramee, George A. Dreyfous and Fontaine Martin, Jr. (amici curiae)

32. ***In re Jones***, 175 Misc. 451 (1940)
Children's Court, Jefferson County, New York
Doris Jones, chilled under 16 years of age, charged with delinquency for refusal to pledge allegiance to and salute the flag.
Proceeding dismissed; child discharged.
Issues: mandatory flag salute law
Attorney: Melvin Hinkley

33. ***Slaughter v. State***, 64 Ga.App. 423 (1941)
Court of Appeals of Georgia, Division No. 1
Fred Slaughter convicted of assault and battery in La Grange, brings error.
Judgment affirmed.
Issues: trespassing, assault and battery
Attorneys: Grover C. Powell, Jno. W. Bolton

34. ***Hannan v. City of Haverhill***, 38 F.Supp. 234 (1941)
District Court, D. Massachusetts
Action by Robert Hannan and others against the City of Haverhill to restrain enforcement of an ordinance
Application for temporary injunction denied.
Issues: injunction to restrain enforcement of ordinance forbidding streets for selling without permit
Attorneys: Hayden Covington, Alfred A. Albert, Henry G. Judson

35. ***Com. v. Anderson***, 308 Mass. 370 (1941)
Supreme Judicial Court of Massachusetts, Suffolk
John Anderson convicted of violating an ordinance of the City of Boston prohibiting carrying and displaying of placards without a permit; brings exceptions.
Exceptions sustained; judgment reversed; judgment for the defendant.
Issues: carrying and displaying of placards without a permit
Attorneys: A.A. Albert, W.P. Fowler

36. ***State v. Chaplinsky***, 91 N.H. 310 (1941)
Supreme Court of New Hampshire

Walter Chaplinsky convicted of violating statute prohibiting addressing of offensive, derisive or annoying word to any other person lawfully in any street or public place.

Exceptions overruled.

Issues: free speech on public streets

Attorneys: Hayden Covington, Alfred A. Albert, Frank E. Blackburn

37. ***Jones v. City of Opelika***, 30 Ala.App. 142 (1941)

Court of Appeals of Alabama

Rosco Jones convicted of violating ordinance of the City of Opelika.

Reversed and rendered.

Appealed to Supreme Court of Alabama, 241 Ala. 279 (1941)

Cert. granted by United States Supreme Court.

Issues: peddling license

Attorney: Grover C. Powell

38. ***Cox v. State of New Hampshire***, 91 N.H. 137 (1940)

Supreme Court of New Hampshire

Willis Cox, Walter Chaplinsky, John Konides, Arvid E. Moody, and Olivia Paquette convicted of taking part in a parade or procession on public streets in the City of Manchester without license, and they bring exceptions

Exceptions overruled.

Issues: permits for parades or processions

Attorneys: Charles D. Barnard and Charles Barnard, Joseph F. Rutherford and Hayden Covington

39. ***Com. v. Pascone***, 308 Mass. 591 (1941)

Supreme Judicial Court of Massachusetts, Suffolk

George Pascone charged with carrying and displaying a certain show card without a permit; using and occupying part of a street for purchase, sale, storage and distribution of merchandise in violation of statute; he brings exception.

Exceptions sustained and judgment reversed as to the first charge; judgment entered discharging defendant and exceptions overruled as to second charge.

Issues: carrying placard without a permit

Attorneys: G.E. Lodgen, J. Sugarman

40. ***People v. Douglas***, 29 N.Y.S.2d 206 (1941)

County Court, Nassau County, New York

Gladys Randolph Douglas convicted of disorderly conduct; she appeals.

Judgment reversed on the law; facts and information dismissed.

Issues: disorderly conduct

Attorneys: Badger & Lockwood, White & Chase and Chester Bordeau

41. ***Zimmerman v. Village of London***, 38 F.Supp. 582 (1941)

District Court, S.D. Ohio, Eastern Division

Action by George Zimmerman et al against Village of London, Ohio to restrain defendants from enforcing an ordinance

Permanent injunction granted.

Issues: injunction to restrain enforcement of canvassing ordinance

Attorney: Victor F. Schmidt

42. ***Reid v. Borough of Brookville***, 39 F.Supp. 30 (1941)

District Court, Western District of Pennsylvania

Injunction actions by W. Reid against Boroughs of Brookville, Clearfield, Monessen, New Bethlehem

Judgment for plaintiffs

Issues: permit ordinance requiring applicants to salute the American flag

Attorney: Theodore Epstein

43. ***Douglas v. City of Jeannette***, 39 F.Supp. 32 (1941)

District Court, Western District of Pennsylvania

Action by Robert Douglas against City of Jeannette to enjoin enforcement of ordinance allegedly violating First and Fourteenth Amendments to the Constitution

Judgment for plaintiffs

Issues: solicitation ordinance

Attorneys: Theodore Epstein, Hayden Covington (of counsel)

44. ***State v. Lefebvre***, 91 N.H. 382 (1941)

Supreme Court of New Hampshire

Proceeding in the matter of Roland Lefebvre et al. alleged to be delinquent and neglected children, committing them to the state industrial school.

Complaints dismissed.

Issues: mandatory flag salute ordinance

Attorneys: Morris D. Stein, Hayden C. Covington, Arthur Garfield Hays and Franklin S. Pollack (of ACLU, amicus curiae), Winthrop Wadleigh (on the brief)

44. ***Kennedy v. City of Moscow***, 39 F.Supp. 26 (1941)

District Court, D. Idaho, Central Division

Action for injunction by E.C. Kennedy against City of Moscow and others

Motion to dismiss overruled and preliminary injunction granted.

Issues: distribution of pamphlets, handbills, posters and cards

Attorneys: Harve H. Phipps

45. ***State ex rel. Hough v. Woodruff***, 147 Fla. 299 (1941)

Supreme Court of Florida

Writ of habeas corpus to obtain petitioner's release from custody (hawking/peddling);

Petitioner discharged.

Issues: hawking and peddling licenses

Attorneys: Bryan & Bryan

Appendix III:
Additional Cases Filed in the United States Supreme Court, 1938-1955

1. ***Stewart v. Com. of Pennsylvania***, 309 U.S. 674 (1940) – appeal dismissed, certiorari denied
2. ***Langston v. South Carolina***, 311 U.S. 685 (1940) – certiorari denied
3. ***Hussock v. People of State of New York***, 312 U.S. 659 (1941) – certiorari denied
4. ***Leiby v. City of Manchester***, 313 U.S. 562 (1941) – certiorari denied
5. ***Bevins v. Prindable***, 314 U.S. 573 (1941) – certiorari denied
6. ***Trent v. Hunt***, 314 U.S. 573 (1941) – certiorari denied
7. ***Pascone v. Com. of Massachusetts***, 314 U.S. 641 (1941) – certiorari denied
8. ***Hannan v. City of Haverhill***, 314 U.S. 641 (1941) – certiorari denied
9. ***Bowden v. City of Fort Smith, Arkansas***, 314 U.S. 651 (1941) – certiorari denied; 315 U.S. 793 (1943) – certiorari granted
10. ***Bohnke v. People of State of New York***, 316 U.S. 667 (1942) – certiorari denied; 316 U.S. 713 (1942) – petition for rehearing denied
11. ***Derr v. Derr***, 317 U.S. 631 (1942) – certiorari denied
12. ***Hilley v. Spivey***, 317 U.S. 668 (1942) – certiorari denied; 318 U.S. 801 (1943) – rehearing denied
13. ***Largent v. Reeves***, 317 U.S. 668 (1942) – certiorari denied; 317 U.S. 713 (1943) – rehearing denied
14. ***Killam v. City of Floresville***, 317 U.S. 668 (1942) – certiorari denied; 318 U.S. 801 (1943) – rehearing denied
15. ***Tzanes v. Com. of Pennsylvania***, 318 U.S. 748 (1943) – certiorari granted
16. **Jobin *v. State of Arizona***, 318 U.S. 797 (1943) – rehearing granted
17. ***Seders v. Com. of Pennsylvania***, 318 U.S. 748 (1943) – certiorari granted
18. ***Perisich v. Com. of Pennsylvania***, 318 U.S. 748 (1943) – certiorari granted
19. ***Mower v. Com. of Pennsylvania***, 318 U.S. 748 (1943) – certiorari granted
20. ***Maltezos v. Com. of Pennsylvania***, 318 U.S. 748 (1943) – certiorari denied
21. ***McSparran v. City of Portland***, 318 U.S. 768 (1943) – certiorari denied; 319 U.S. 780 (1943) – rehearing denied
22. ***Davis v. State of Arizona***, 319 U.S. 775 (1943) – certiorari denied; 320 U.S. 809 (1943) – rehearing denied
23. ***Bennett v. City of Dalton, Georgia***, 320 U.S. 712 (1943) – appeal dismissed
24. ***Matter of Catanzano***, 321 U.S. 793 (1944) – certiorari denied
25. ***Stull v. United States***, 322 U.S. 745 (1944) – certiorari denied
26. ***Clayton v. United States***, 322 U.S. 745 (1944) – certiorari denied
27. ***United States ex rel. Lohrberg v. Nicholson***, 322 U.S. 744 (1944) – certiorari denied
28. ***Grieme v. United States***, 322 U.S. 744 (1944) – certiorari denied
29. ***Com. of Pennsylvania v. Conte***, 323 U.S. 717 (1944) – certiorari denied
30. ***Domres v. United States***, 323 U.S. 723 (1944) – certiorari denied
31. ***Thornton v. City of Portland, Oregon***, 323 U.S. 770 (1944) – certiorari denied
32. ***Mayborn v. Heflebower***, 325 U.S. 854 (1945) – certiorari denied
33. ***Flakowicz v. United States***, 325 U.S. 851 (1945) – certiorari denied
34. ***Jensen v. United States***, 325 U.S. 851 (1945) – certiorari denied
35. ***Parsons v. United States***, 325 U.S. 851 (1945) – certiorari denied

36. ***Rinko v. United States***, 325 U.S. 851 (1945) – certiorari denied; 325 U.S. 894 (1945) – rehearing denied
37. ***Smith v. United States***, 325 U.S. 846 (1945) – certiorari denied
38. ***Rea v. McDonald***, 327 U.S. 794 (1946) – certiorari denied; 327 U.S. 819 (1946) – rehearing denied
39. ***Buice v. Patterson***, 329 U.S. 739 (1946) – certiorari denied
40. ***Swaczyck v. United States***, 329 U.S. 726 (1946) – certiorari denied
41. ***Cahoon v. United States***, 329 U.S. 739 (1946) – certiorari denied; 329 U.S. 833 (1947) – rehearing denied
42. ***Kennedy v. United States ex rel. Kulick***, 329 U.S. 712 (1947) – certiorari granted
43. ***United States v. Balogh***, 329 U.S. 692 (1947) – certiorari granted; ***Balogh v. United States***, 331 U.S. 837 (1947) – certiorari denied
44. ***Wells v. United States***, 330 U.S. 827 (1947) – certiorari denied
45. ***Garland v. United States***, 330 U.S. 827 (1947) – certiorari denied
46. ***Turner v. United States***, 330 U.S. 830 (1947) – certiorari denied
47. ***Klopp v. Overlade***, 332 U.S. 771 (1947) – certiorari denied
48. ***Fox v. People of State of Michigan*** (1947) – certiorari denied
49. ***Peel v. People of State of Michigan*** (1947) – certiorari denied
50. ***Ciocarlan v. People of Michigan*** 332 U.S. 758 (1947) – certiorari denied
51. ***Watch Tower Bible & Tract Society v. County of Los Angeles, California***, 332 U.S. 811 (1947) – certiorari denied; 340 U.S. 820 (1950) – certiorari denied
52. ***Johnson v. Sellers***, 332 U.S. 851 (1948) – certiorari denied
53. ***Zieber v. United States***, 333 U.S. 827 (1948) – certiorari denied
54. ***Flakowicz v. Alexander***, 333 U.S. 828 (1948) – certiorari denied
55. ***Hall v. Com. of Virginia***, 335 U.S. 875 (1948) – appeal granted; 335 U.S. 912 (1949) – rehearing denied
56. ***Watch Tower Bible & Tract Society, Inc. v. Metropolitan Life Insurance Company***, 335 U.S. 912 (1949) – rehearing denied
57. ***Gibson v. Reynolds***, 337 U.S. 925 (1949) – certiorari denied
58. ***Comodor v. United States***, 337 U.S. 925 (1949) – certiorari denied
59. ***Niznik v. United States***, 337 U.S. 925 (1949) – certiorari denied
60. ***Peterson v. United States***, 337 U.S. 925 (1949) – certiorari denied
61. ***Mansavage v. United States of America***, 339 U.S. 931 (1950) – certiorari denied
62. ***State of Ohio, ex rel. Greisinger v. Grand Rapids Board of Education***, 340 U.S. 820 (1950) – certiorari denied
63. ***McKnight v. Board of Public Education***, 341 U.S. 913 (1951) – appeal dismissed for lack of federal question
64. ***Halrajian v. Board of Education of City of Englewood***, 341 U.S. 913 (1951) – appeal dismissed for lack of federal question
65. ***Lyon v. Compton Union High School and Junior College District***, 341 U.S. 913 (1951) – appeal dismissed for lack of federal question
66. ***Kurzen v. Marzall***, 342 U.S. 823 (1951) – certiorari denied
67. ***Martin v. United States***, 342 U.S. 872 (1951) – certiorari denied
68. ***Geuss v. Com. of Pennsylvania***, 342 U.S. 912 (1952) – dismissed for want of federal question

69. ***Labrenz v. People of State of Illinois ex rel. Wallace***, 344 U.S. 824 (1952) – certiorari denied
70. ***Good v. Dow Chemical Company***, 344 U.S. 805 (1952) – appeal dismissed for want of jurisdiction
71. ***Salvaggio v. Barnett***, 344 U.S. 879 (1952) – certiorari denied
72. ***United States v. Packer***, 345 U.S. 915 (1953) – certiorari granted
73. ***United States v. Nugent***, 345 U.S. 915 (1953) – certiorari granted; 346 U.S. 1 (1953) – reversed
74. ***Davis v. Virginia***, 345 U.S. 996 (1953) – certiorari denied
75. ***Neal v. United States***, 345 U.S. 996 (1953) – certiorari denied
76. ***Dickinson v. United States***, 345 U.S. 991 (1953) – certiorari granted; 346 U.S. 389 (1953) – reversed
77. ***Atkins v. United States***, 346 U.S. 818 (1953) – certiorari denied
78. ***Dal Santo v. United States***, 346 U.S. 858 (1953) – certiorari denied
79. ***United States v. Taffs***, 347 U.S. 928 (1954) – certiorari denied
80. ***United States v. Hinkle***, 348 U.S. 970 (1955) – certiorari denied
81. ***United States v. Close***, 348 U.S. 970 (1955) – certiorari denied
82. ***Tomlinson v. United States***, 348 U.S. 970 (1955) – certiorari denied
83. ***White v. United States***, 348 U.S. 970 (1955) – certiorari denied
84. ***Niles v. United States***, 349 U.S. 939 (1955) – certiorari denied
85. ***Pomorski v. United States***, 350 U.S. 841 (1955) – certiorari denied
86. ***Diercks v. United States***, 350 U.S. 841 (1955) – certiorari denied
87. ***Hoepker v. United States***, 350 U.S. 841 (1955) – certiorari denied
88. ***White v. Anson***, 350 U.S. 908 (1955) – appeal dismissed for want of a federal question

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