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Supreme Court of the United States

OCTOBER TERM, 1942

No. 591

THE WEST VIRGINIA STATE BOARD OF EDUCATION, etc., et al.,

Appellants,

vs.

WALTER BARNETTE, PAUL STULL, AND LUCY McCLURE,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

BRIEF OF THE COMMITTEE ON THE BILL OF RIGHTS, OF THE AMERICAN BAR ASSOCIATION, AS FRIENDS ~~ON~~ OF THE COURT.

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Preliminary Statement.

This brief is filed by the Committee on the Bill of Rights, of the American Bar Association, as friends of the Court.[1] This Committee was permitted to intervene in the same capacity in Minersville School District v. Gobitis, 310 U.S. 586 (1940), which involved similar issues of the constitutionality of the compulsory flag salute for children in the public schools The Committee appears with due authority from the American Bar Association, given in the manner described in our brief in the Gobitis case, to which we beg leave to refer. The consent of counsel for the parties has also been given.

The Gobitis case related to the constitutionality of a regulation of the Minersville School District in Pennsylvania estab-

[1] The membership of the Committee is as follows Douglas Arant, Chairman (Alabama), Julius Birge (Indiana), George L Buist (South Carolina), William D Campbell (California), Zechariah Chafee, Jr (Massachusetts), L Stanley Ford (New Jersey), Abe Fortas (District of Columbia), George I Haight (Illinois), H Austin Hauxhurst (Ohio), Monte M Lemann (Louisiana), Alvin Richards (Oklahoma), Earl F Morris (Ohio), Burton W Musser (Utah), Basil O'Connor (New York) George L Buist does not join in this brief

lishing the compulsory flag salute. The brief filed by this Committee opposed its constitutionality. The majority of the Court upheld the regulation. The present Chief Justice filed a dissenting opinion, contending that there had been an unconstitutional denial of religious liberty.

The case at bar concerns the constitutionality of a resolution of the West Virginia Board of Education, adopted January 9, 1942, requiring all pupils in the West Virginia public schools to participate regularly in a salute of the flag; and saying a refusal so to salute shall be regarded as an act of insubordination and dealt with accordingly. This means that the child will be excluded from school until he complies, and that his parents are liable to prosecution for his absence [2]

This suit was brought in the United States District Court to enjoin the enforcement of the resolution by the Board of Education and other defendants. The plaintiffs are three members of an unincorporated religious body called Jehovah's witnesses, with children of compulsory school age, and they sue for the benefit of their own children and for all other Jehovah's witnesses in West Virginia who are similarly situated and their children, said to aggregate many hundreds. They state that all Jehovah's witnesses sincerely believe that the act of participating in the flag-saluting ceremony violates the Biblical Commandment against bowing down to graven images. The facts, as found by the trial court,[3] are that the plaintiffs and their children have conscientious scruples based on religious grounds against saluting the flag; that because of such scruples the children will not comply with the regulation of the Board of Education and will be expelled from school; and that the children will thus be deprived of public school education, and the plaintiffs will either have to pay to have them educated in private schools or be subject to prosecution under the compulsory education law of West Virginia for failure to send them to school.

The plaintiffs claim that they are thus deprived of the "liberty" guaranteed to them by the Fourteenth Amendment,

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[2] W. Va Code (1931) Chap 18, Art 8, as amended by Acts of Legis (1941) c 32

[3] Record, p 47

which includes religious liberty guaranteed by the First Amendment. They say the resolution of the Board of Education on January 9, 1942, is also invalid because it has been superseded by a Joint Resolution of Congress of June 22, 1942.[4] Here Congress, after describing the pledge of allegiance to the flag, provided as follows.

> "However, civilians will always show full respect to the flag when the pledge is given by merely standing at attention, men removing their headdress. Persons in uniform shall render the military salute."

The defendants moved to dismiss the action for various reasons, including the constitutionality of the West Virginia regulation and the fact the complaint goes counter to the decision of this Court in the Gobitis case

The district court of three judges, declining to follow the Gobitis decision, held the compulsory flag salute unconstitutional in so far as it applies to children having conscientious scruples, and enjoined its enforcement as to them 47 F. Supp 251 (1942). The defendants have appealed.

The Committee's Position.

The Committee has no interest in this litigation save as its outcome will affect the integrity of the basic right to freedom of conscience Consequently, this brief will not discuss the effect of the Joint Resolution of Congress. This omission does not indicate any belief on our part that this federal statute is immaterial,[5] but simply that our sole concern is with the proper scope of religious liberty.

The constitutional issues in this case are the same as those in the Gobitis case. Therefore, the Committee has filed this brief in the hope that the Court will now, upon a reconsideration of that case, decide to follow the opinion of the present Chief Justice.

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[4] 56 Stat. 380, 36 U S.C A , 1942 Cum Supp § 172

[5] In fact, the majority opinion gave as one reason for upholding the Pennsylvania local regulation in 1940 "It is to be noted that the Congress has not entered the field of legislation here under consideration " 310 U S at 600, n 7 Congress has since entered the field by the Joint Resolution of 1942

ARGUMENT.

The Committee believes that the constitutional prohibition against the deprivation of liberty without due process of law is violated by the enforcement of the compulsory flag salute against children who have sincere religious scruples against participating in this ceremony. The reasons for the invalidity of the regulation are set forth fully in the opinion of the present Chief Justice in the Gobitis case and in the brief which this Committee filed in that case, to which we respectfully beg the Court to refer. The two essential reasons for our position will be briefly stated in this brief.

I.

The flag salute in its application to the plaintiffs and their children should be treated by this Court as a religious ceremony.

Most of us may regard it as merely a beneficial training in patriotism, as a "gesture of respect for the symbol of our national life"; but it does have religious significance *for them* They feel it to be an idolatrous worship abhorrent to their deep spiritual emotions, a deadly sin to be shunned under peril of damnation Therefore *as to them* it must be judged as a restraint on religious liberty which can only be justified, if at all, by very strong contravening public good. This problem of justification will be discussed under our second argument, but our immediate point is that such justification is necessary. The court may have to prevent a man from following the pathway revealed to him by the inner light, but it must not tell him that the inner light does not shine. The right of private judgment as to the religious quality of one's own conduct should be held inviolate. For a court to deny that right would strike at the heart of religious freedom. No American judge should presume to tell any person that he is wrong in his opinion as to how he may best serve the God in whom he believes.

This conclusion results naturally from the traditional American attitude toward small religious groups, an attitude which

forms an integral part of our way of life These small groups have been accorded all rights and privileges granted to the larger and more ancient religious bodies

It is of course true, even under Bill of Rights, that particular religious views from time have had to yield to the paramount demands of public health, safety or morals But that, as we have just said, is an entirely distinct problem Courts are competent to judge when the public welfare is in fact jeopardized by a belief, but they are not competent to judge that the belief is not religious Here analysis and logic must yield to simple faith. It should, we submit, be deemed inadmissible for a court to brush aside a *sincere* religious objection because the same scruple is not held by most of the people, or because in the court's own view the scruple is theologically unsound Such an official determination would presuppose a unity between church and state which is foreign to our most basic institutions

The issue as to whether the individual should be the sole judge of his own religious belief is a very old one. For centuries, various sects have honestly ascribed religious significance to acts and ceremonies that, to the vast majority, held no religious meaning whatever. The Jews in Pilate's time considered the carrying of busts of the Emperor Tiberius through the streets of Jerusalem to be a violation of the Biblical Commandment involved in the present case The early Christian soldiers thought the wearing of laurel wreaths to be incompatible with Christianity The Quakers in seventeenth-century England declined to uncover their heads in court The record of history shows that the existence and seriousness of religious beliefs are not to be measured by the current opinion of the time. The truth is that the existence of religious scruples lies within the mind and heart of the individual man or woman, and nowhere else. Here a man is the only judge of himself. No outsider, not even legislature or court, can decide what pathway will lead his spirit to salvation or what road will take him to a moral or a physical hell Therefore the compulsion of a child to participate in a ceremony which he considers idolatrous worship cannot be brushed aside as raising no issue of religious liberty. For that child religious liberty is just as much at stake in his expulsion from the only

school his parents can afford as it was at stake for the Scotch Covenanters who were harried for refusing to listen to the Anglican prayer-book or for the English Catholics when they were heavily fined for absence from the parish church.

II.

This impairment of religious liberty has no reasonable tendency to promote any public interest.

Since the compulsory flag salute thus impairs the religious liberty of these children to worship only in their own way and the liberty of these parents to bring up their children in their own faith, the regulation must be invalid *as to them* unless it be essential for the attainment of some public purpose which is so important as to outweigh even the right to religious freedom. We do not contend that religious liberty is unlimited, but only that limits must be justified by a plain and strong public need. No clear showing has been made here, we submit, of any public good which is served by a ceremony regarded by the unwilling participants as idolatrous

In the first place, this legislation is of a sort new to America. It is an attempt to *compel* a particular expression as distinguished from *restraints* on certain kinds of expression. Judges have recognized the validity of prohibitions against various practices even though they were actuated by religious motives, such as bigamy and polygamy, human sacrifices, suttee, thuggery and the religious belief in assassination, promiscuous sexual intercourse, the possession of sacramental wine in excess of a statutory limit, burial customs dangerous to health, and spiritualistic fortune-telling.[6] There the individual was forbidden to do something which he believed holy. It is a much more serious interference with his religious liberty to order him to do something which he believes to be unholy like participation in a religious ceremony violative of his beliefs. There is no precedent prior to the flag salute legislation for requiring a person to perform a particular ceremony contrary to his religious beliefs. The present regulation is novel also in that the legislative power is not here exercised, as in the cases just listed, in furtherance of the safety, morals, physical health or economic welfare of the people. In the few situations where religion was held not to excuse the

[6] The authorities for these and other prohibitions are given in the Committee's *Gobitis* brief, p 28.

failure to perform affirmative acts, those acts were important in themselves, not a ceremony, and they bore a close relation to the public health and safety like furnishing medical aid to sick children or military training.[7] But the object of the present law is not to obtain definitely useful services, but merely to produce a state of mind Religious liberty is now to be limited for the novel purpose of presumably promoting loyalty and morale and national unity.

The vital question before the Court is whether there is any clear relation between these purposes and this ceremony when performed by children who believe it a deadly sin. The resplendence of national unity and loyalty should not blind the Court to the need for clear proof that these purposes will be furthered by the *coercion of these children.* The advocates of the union of Church and State have constantly argued that it would promote national unity for all citizens to join in a common religious ceremony True enough if there were no dissenters to whom the ceremony is abhorrent. Since there are dissenters, we Americans learned long ago that nothing is gained by forcing them to join in acts which they think impious. Therefore, an extension of American legislative power in this direction should be viewed with suspicion, and, *in the absence of a showing of clear necessity,* should be condemned as a deprivation of individual liberty without due process of law.

In any search for the required proof, it is important to recognize that the compulsory flag salute by children who object to it on religious grounds is an entirely different thing from such a salute by children who accept it as a mere gesture of proper respect to the nation we love Any arguments that the salute is useful training to children in general have no bearing on the problem of its value to the few children who abhor it as image-worship. No evidence has been offered to prove that the salute has any educational value to such objectors, and the probabilities are so strongly to the contrary that the gap cannot be filled by judicial notice. The contention that the morale and loyalty of the children participating willingly would suffer if

[7] See the authorities cited on page 29 of our *Gobitis* brief.

the objectors were excused from the ceremony also rests on no evidence in the case or common knowledge to serve as the basis of judicial notice; and it is squarely rebutted by the present Chief Justice.[8]

> " I cannot say that the inconveniences which may attend some sensible adjustment of school discipline in order that the religious convictions of these children may be spared, presents a problem so momentous or pressing as to outweigh the freedom from compulsory violation of religious faith which has been thought worthy of constitutional protection."

The vital question whether there is any reasonable connection between the attainment of national unity and the compulsory flag salute *by these children* against their consciences should, we submit, be answered by this Court. And it is for this Court to decide whether this relationship, if it exist, is sufficiently close to outweigh the value of religious liberty Judgments of this nature cannot be entrusted to legislatures or school boards in cases involving civil liberties under the Bill of Rights Such has not been the practice of this Court. In *Hague* v. *Committee for Industrial Organization*, 307 U.S 496 (1939), the Court did not accept the judgment of the government of Jersey City that there was a necessary relationship between closing the streets and parks to speakers and the promotion of public safety. Here there was much more of a possible relationship shown by experience than that between a hateful ceremony and national unity, but the Court examined the connection itself and held it too thin to offset the right of free assembly. In *Stromberg* v. *California*, 283 U.S. 359 (1931), the connection between punishing salutes of the red flag and public safety was much more obvious than that between unwillingly saluting the United States flag and national unity in the case at bar Yet the Court did not accept the judgment of the California legislature as to the sufficiency of the connection. Indeed, the Court held that the relationship was too remote to constitute the clear and present danger of overt acts which is essential for the denial of freedom

[8] Minersville School District *v* Gobitis, 310 U S at 607

of speech. The same severe scrutiny of the alleged relationship between the compulsory flag salute and national unity seems indispensable, in the case at bar, unless this Court be ready to hold that religious liberty plays a less important part in our national life than liberty of speech.

This is not a contest between two powerful economic groups, where the side which suffers from a statute has a fair chance to obtain a revision of the law from another legislature after a fresh election through the use of normal democratic processes. In such contests this Court hesitates to substitute its judgment for that of the legislature. Here, however, the contest is hopelessly unequal as the Chief Justice points out:[9]

> "Here we have such a small minority entertaining in good faith a religious belief, which is such a departure from the usual course of human conduct, that most persons are disposed to regard it with little toleration or concern."

Such a small religious 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.

> "The Constitution expresses more than the conviction of the people that democratic processes must be preserved at all costs. It is also an expression of faith and a command that freedom of mind and spirit must be preserved, which government must obey, if it is to adhere to that justice and moderation without which no free government can exist."[10]

In *Hague* v. *Committee for Industrial Organization*, 307 U.S. 496 (1939), and in *Schneider* v. *New Jersey*, 308 U.S. 147 (1939), 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.

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[9] Minersville School District *v* Gobitis, 310 U S at 606.

[10] Stone, J , in Minersville School District *v* Gobitis, 310 U S at 606–7

If this doctrine is applicable to freedom of speech, is it not applicable also to the equally basic guarantee of liberty of conscience?

The Committee submits that the present case falls squarely within the rule of the *Hague* and *Schneider* decisions, and that the petitioner school authorities are required by the Constitution to adopt some alternative method or methods of fostering patriotism in school children instead of insisting upon the imposition of the salute upon children who object to it on religious grounds. Various alternative methods of this end are available and will readily occur to the Court

Therefore, we contend that no public interest has been established sufficient to justify the enforcement of the compulsory flag salute against these children. The only public interest alleged is the promotion of loyalty, morale, and national unity. Even if such vague concepts can ever validate a law which interferes with religious liberty, they should not do so unless such interference is shown to be clearly needed to attain these purposes. Since the constitutional protection of religious freedom requires the Court to pass upon the alleged relationship between the law and the public interest instead of accepting the judgment of the school authorities upon a constitutional issue, then we believe that the Court will find no proof of any sort that the enforced participation of these children in a ceremony which they regard as sinful idolatry will promote either their loyalty or the loyalty of their schoolmates.

III.

The subsequent effect of the Gobitis Case shows the soundness of the opinion of the present Chief Justice that the compulsory flag salute is unconstitutional as to these children.

Instead of further arguments, we shall devote the rest of this brief to material of an entirely different kind which has become available since that case was decided. This material will show the effect of the *Gobitis* case in three respects:

1. The opinion of the present Chief Justice has been overwhelmingly accepted by subsequent legal discussion as the sound presentation of the proper scope of religious liberty.

2. In so far as school authorities have been affected by the actual decision of the Court, the result has been harmful to religious liberty.

3. State courts, instead of being influenced by the actual decision, have tended to follow the reasoning of the present Chief Justice.

We venture to hope that this material will assist the Court in reaching the conclusion that the opinion of the present Chief Justice should have been adopted as the decision of the Court in the *Gobitis* case, and that the Court will now adopt that opinion as the basis of constitutional protection for religious liberty

1. *Legal discussion of the Gobitis decision overwhelmingly supports the opinion of the present Chief Justice*

Legal discussion of a contemporary constitutional decision, so far as it gets into print, must be mainly obtained from legal periodicals, the reports of bar associations, and similar sources. Treatises are unlikely to be sufficiently up-to-date. A careful examination of the material just described shows that the Gobitis case has been discussed in 22 different legal publications (some-

times more than once). Out of these 22, 18 approve the opinion of the present Chief Justice; only 2 agree with the decision of the Court; and 2 simply describe the case without taking sides. Of course law is not made by counting the noses of law reviews and a moderate majority would have little importance for the present case. But when 18 out of the 20 publications taking sides on the issue regard the opinion of the present Chief Justice as the sound exposition of religious liberty, this fact shows a definite trend of professional opinion which ought not to be ignored. To find a precedent for such overwhelmingly adverse professional criticism of a decision by the Court, we should have to go back to *Adkins* v. *Children's Hospital*, 261 U.S. 525 (1923), which held that Congress could not constitutionally establish a minimum wage for women and children.

It is true that, if we leave aside the articles by law professors and practitioners, the comments cited were written by young men and women studying in law schools; but they are none the less important for being the thoughts of youth. The writers are among the ablest students in their respective schools They are the bar and bench of the near future, so that their views forecast professional opinion. All of them wrote in 1940 and 1941 with the knowledge that they might soon be required to risk their lives in the defense of the nation Therefore, the virtually unanimous belief of these young men and women that religious liberty must not be sacrificed for a supposed effort to promote patriotism is a strong indication that the opinion of the present Chief Justice truly expresses the meaning of the Bill of Rights

Space permits only the quotation of a few brief extracts from this contemporary legal discussion of the *Gobitis* case. There is much of value in the other citations which are listed below.

Professor Thomas Reed Powell of Harvard Law School has written a careful examination of the decision in his essay, "Conscience and the Constitution," in a book edited by W T. Hutchinson, *Democracy and Unity* (University of Chicago Press, 1941), pp. 18–31. He says (pp. 29, 30):

> "This is not to suggest that conscientious scruples can stand against all compulsion to do positive acts Quite the contrary. The question is one of degree. I should think that

> it requires more justification to compel a man or child to commit what he regards as sin than to restrict him in the areas in which he can practice what he regards as a command of the Lord. The public need should be pretty clear if it is to override conscientious objections against performing positive acts. The public need for armed defense may well be regarded as the most pressing public need of all. The public need for coerced and insincere saluting of the flag by little children seems to me to be trivial, and the effort to coerce it seems to me likely to be self-defeating. . . . .
>
> "The dissent exposes the deficiencies in this particular compulsion of the young and points to alternative and better ways of attaining the very ends so strongly emphasized in the opinion of the majority. Clearly a contrary decision would have been no threat of the danger of making the state too weak to maintain its own existence."

Professor Robert E. Cushman of Cornell University, "Constitutional Law in 1939–40," 35 Am. Pol. Sci. Rev. 250, 271 (1941).

> "[The majority opinion] falls far short of proving that national unity or any other desirable result will come from compelling school children publicly to affirm unfelt loyalties. All of the eloquence by which the majority extol the ceremony of flag saluting as a free expression of patriotism turns sour when used to describe the brutal compulsion which requires a sensitive and conscientious child to stultify himself in public."

W. G. Fennell, "The 'Reconstructed Court' and Religious Freedom: The Gobitis Case in Retrospect," 19 N.Y. Univ L Q Rev. 31, 47 (1941).

> "To exercise care in seeing that no legislation is permitted to stand which threatens the processes whereby political changes may ordinarily be effected is necessary, but alone it is not enough. . . . It is in such situations where prejudice against minorities curtails the operation of ordinary political processes that the Supreme Court has a duty to scrutinize even more carefully legislation which violates the rights of religious or racial minorities. . . .

> "If the . . . [Court] continues to adhere in cases involving religious liberty to the doctrine of the majority in the *Gobitis* case, the scope of the state police power will be immeasurably enhanced and religious liberty will be at the mercy of shifting political majorities. It is to the lasting credit of the new Chief Justice that he comprehended that the Constitution expresses more than the conviction that democratic processes must be preserved at all costs; it is also an expression of faith and a command *which government itself must obey* that freedom of mind and spirit must be preserved."

Father Joseph T. Tinnelly, C M , in 15 St. John's L. Rev 95, 97 (1940) (it will be remembered that Jehovah's witnesses are bitter opponents of the Catholic Church).

> "It is conceded that there may be times when the government may lawfully demand a public and external manifestation of the loyalty of its citizens But it has no right, in the face of religious protests, to demand that that manifestation assume a particular, arbitrary form, when some other and religiously unobjectionable form would serve its purpose equally well. If national unity may be attained and freedom of conscience left uninfringed by the use of means other than the flag salute, those means should be used [A footnote refers to the fact that religious objections to the customary swearing of witnesses are respected by the provision of the alternative method of affirmation.] . . Patriotism and loyalty were not born in this country with the enactment of the first flag salute statute and the educational system which cannot foster them without infringing liberty of conscience is on the verge of pedagogical bankruptcy.
>
> "To be sure, national unity, freedom and security are fostered by external marks of respect for the flag which symbolizes them. But they are, nevertheless, independent of these acts. To forget this fact is to risk falling into a dangerous formalism; it is to confuse the symbol with the thing symbolized; the shadow with the reality; flag waving with patriotism. The patriotism of the Gobitis children is not on trial. The lower courts found that there was no question of their substantial loyalty. And when we have the substance of loyalty we can well afford to overlook the children's refusal to externalize it by some accidental and

arbitrary form to which they objected on religious grounds. The greater danger lies in false professions of loyalty; the undetected enemy saluting the flag he plans to destroy. There seems to be no valid reason, then, for the denial to the Gobitis children of their freedom of conscience and the compulsory flag salute would appear to be an unjustified and unconstitutional use of the police power."

The opinion of the present Chief Justice is also approved by the following:

1 Bill of Rights Rev 267 (1941).

H. G Balter, "Freedom of Religion interpreted . . ." 15 Cal St Bar J 161 (1940)

14 Univ. Cincinnati L. Rev 444; *id* 570, 571 (1940)

26 Cornell L.Q 127 (1940)

4 Univ. Detroit L. J 38 (1940)

Dean Ignatius M Wilkinson of Fordham Law School, "Some Aspects of the Constitutional Guarantees of Civil Liberty," 11 Fordham L. Rev. 50 (1942).

29 Georgetown L J. 112 (1940)

9 Internat. Juridical Assn. Bull. 1 (1940)

T. H Skemp, "Freedom of Religious Worship," 25 Marquette L. Rev. 19 (1940).

39 Michigan L. Rev. 149 (1940).

6 Missouri L Rev. 106 (1941).

18 N. Y. Univ. L Q Rev. 124 (1940).

Professor Charles E Carpenter, Southern California Law School, in 14 Univ. So. Cal. L. Rev. 56 (1940)

14 Univ. So. Cal. L. Rev. 73 (1940).

15 Wash. L. Rev. 265 (1940).

J. R. Green, "Liberty under the Fourteenth Amendment," 27 Wash. Univ. L. Q. 497 (1942).

Only two law reviews have been found since the Gobitis case which favor constitutionality.

9 Jo Bar Assn of Kansas 276 (1941) [but compare the later Kansas decision stated *infra* p. 23]

14 Temple L Q. 545 (1940)

The remaining discussions of the Gobitis case in legal periodicals take no position on either side·

C. G Galston, "Conscription of the Mind in Support of the Bill of Rights," 1 Bill of Rights Rev. 269 (1941).

3 Ga. Bar J No 2, p 66 (Nov. 1940) The reversed decision by the Circuit Court of Appeals was approved in 2 *id* No. 4, p 74 (May, 1940)

H. Wright, "Religious Liberty under the Constitution of the United States," 27 Va L. Rev 75 (1940)

To complete the picture of law review opinion, we may mention that several reviews which did not discuss the decision of the Court in the Gobitis case had already opposed the validity of the compulsory flag-salute in reviewing the case below or state cases.

20 Boston Univ L. Rev 356 (1940).

9 Brooklyn L Rev. 205 (1940).

51 Harv. L. Rev. 1418 (1938)

23 Ia. L Rev 424 (1938).

F. W. Grinnell, "Children, the Bill of Rights and the American Flag," 24 Mass L Q No.2, p. 1 (April-June 1939), *id.* No. 3, p 1 (July-Sept. 1939), *id.* No 4, p. 18 (Oct.-Dec 1939)

23 Minn. L. Rev. 247 (1939)

74 New York L Rev 4 (1940)

18 Ore. L. Rev. 122 (1939)

86 Univ. Pa. L Rev 431 (1938).

2 Univ. Pittsburgh L Rev 206 (1936)

12 Rocky Mt. L Rev 202 (1940).

By contrast only two law reviews upheld the compulsory flag-salute in these earlier discussions:

8 Geo. Wash L. Rev. 1094 (1940).

Professor E. M. Million of University of Idaho Law School, "Validity of Compulsory Flag Salutes in Public Schools," 28 Ky. L.J. 306 (1940) (questioning wisdom of compulsion).

The following law reviews were non-committal:

6 Kans. City L. Rev. 217 (1938).

14 Notre Dame Lawy. 115 (1938).

2 Law Journal of the Student Bar Assn., Ohio State Univ., 151 (1936) (questioning wisdom of regulation).

2 *The continued enforcement of the flag salute against children with religious scruples, which the* Gobitis *decision permitted, has been harmful to religious liberty.*

The decision in the *Gobitis* case merely held that the children could be expelled from a public school for refusing to salute the flag. It did not say what was to happen to them afterwards. But the decision left the children and their parents in a dilemma. Unless they were wealthy enough to send them to a private school, what was to be done? If the children went to another public school, they would merely suffer another expulsion. If they stayed at home, the parents would be prosecuted and imprisoned. Furthermore, statutes could easily be construed to make the expelled children juvenile offenders for their disobedience of a valid school regulation The line is very thin between wrongdoing which deserves expulsion from a public school and wrongdoing which deserves commitment to a reform school The parents too became liable to prosecution in some states for not returning their children to the very public school from which they had been expelled. Attempts have even been made to remove children from the custody of their parents on the ground of unfitness to bring them up.[11]

[11] See Fennell, *op cit supra*, 19 N Y U L Q Rev at 42, Plaintiff's Bill of Complaint, Record pp 8–10, "The *Gobitis* Case in Retrospect," 1 Bill of Rts Rev. 267

Some of these harsh proceedings were checked by court decisions, as we shall show, often because of some technical loophole in the school-laws; but for every parent or child thus judicially rescued there were possibly many more who went to jail or reform school because the local statute offered no hopeful loophole or because the family was too poor to resort to the courts.

Although the decision of this Court did not go so far as to send children to reform school or their fathers to jail, nevertheless the *Gobitis* decision by sanctioning expulsion made it easy for school boards to take the first step in a process which would naturally end in imprisoning somebody unless the board was willing to let the law become a dead-letter And nothing in the decision provides a safeguard against the incarceration of father and child. Professor Thomas Reed Powell describes the whole situation:[12]

> "For the inanity of thinking that the ancient Hebrews gave or had authority to give any command not to salute the American flag, I have no real respect. Yet for little children I have great sympathy, however misguided the teachings and compulsions of their simple-minded, unintelligent parents. For the folly of excluding them from the benefits of public education I have nothing but contempt, on the very basis of the hopes of making them loyal Americans and of promoting national unity and patriotism. To commit them to institutions for the wayward and make them scholars in the schools of vice is to be guilty of an outrage that would make my blood boil. The decision under review does not sanction that . . . I cannot believe that the Supreme Court will permit such degradation and disgrace, although it left the Gobitis children to such poor and meager instruction as impecunious parents can provide, and it refrained from caveats that would distinguish other penalties from that of expulsion from public schools "

(1941) The actual operation of the compulsory flag salute with its attendant criminal proceedings is fully reviewed by Professor E. M Million of Idaho University College of Law, 28 Ky L J 306 (1940), written before the Gobitis case

[12] *Op. cit supra* p 13 of this brief, at p 28.

The truth is that this chaotic situation is bound to continue so long as the *Gobitis* decision stands. The only lawful ways out of the dilemma created by the compulsory flag salute for a family of Jehovah's witnesses are (a) compliance with the salute regulation, which is for them a deadly sin; and (b) a private school for which these persons, largely working people, cannot pay. If the sect provides its own school, this means tearing the children from home for an education inferior to that in the public schools. All other ways out are illegal and lead straight to jail if the compulsory salute law is worth enforcing.

Since no one benefits from a continuance of this chaos, there seems to be little public good to justify the prolongation of interference with religious liberty

3. *State courts, instead of being influenced by the actual decision in the* Gobitis *case, have tended to follow the reasoning of the present Chief Justice.*

The three years which have elapsed since the *Gobitis* case have shown an extraordinary preponderance of professional opinion, set forth under heading 1 of this brief, that the opinion of the present Chief Justice was sound; and there has also been a striking desire on the part of courts to follow that opinion In addition to the decision by the three-judge district court in the case at bar, this tendency has been exhibited in state courts. Before the *Gobitis* case a large number of state courts of last resort had upheld the constitutionality of the compulsory flag salute, whereas since the publication of the opinion of the present Chief Justice not a single state decision in a court of last resort has been found which sustains the expulsion of a child from public schools for refusing on religious grounds to salute the flag. States which previously favored constitutionality have continued to do so, but no new state has been added to the list. The trend has been in the opposite direction. While school authorities have been active in enforcing the compulsory flag salute by expulsions and prosecutions of parents and children, yet judges, whenever they had the opportunity to review a case, have taken a much more lenient attitude toward the dissenting

children and their parents. The state court cases fall into two groups. The first group has kept the enforcement of the compulsory flag salute within narrow limits, and the second group has prevented its enforcement altogether.

In the first group of state cases children have been expelled from school for refusing to salute the flag, but the validity of this expulsion had either been settled by a previous decision or was not before the court. Instead, the court had to consider the question whether the school authorities could follow up the expulsion by sending the child to a reform school as a delinquent juvenile or by prosecuting the father for failing to send his child to public school. The following cases quashed such prosecutions:

Commonwealth v. *Johnson*, 309 Mass. 476, 35 N.E. 2d 801 (1941).

Although the Massachusetts statutes had previously been construed to permit the expulsion of the child from school, such exclusion was held not to imply such wrongdoing that the child could be committed to a county training school as a habitual offender. This severe penalty should not be imposed in the absence of express statutory provisions therefor. The constitutional question was expressly left aside.

State v. *Lefebvre* (N.H.), 20 A. 2d 185 (1941).

Children expelled from school for refusal to salute the flag had been adjudged delinquent and been committed to the Industrial School for their minorities. A powerful opinion by Judge Page refused to let family life be broken up and discharged the children, expressly relying on the opinion of the present Chief Justice.

Matter of Jones, 175 Misc. 451, 24 N.Y.S. 2d 10 (1940), same point.

Re Reed, 262 App. Div. 814, 30 N.Y.S. 2d 702 (1941), same point.

Commonwealth v. *Nemchick*, Court of Quarter Sessions. Luzerne County, Pa. (Nov. 20, 1942), unreported.

In Pennsylvania, the very state where the *Gobitis* case arose, the conviction of a mother for failure to have her expelled children attend school was reversed The decision rested partly on the fact that the school authorities did not

give the required written notice three days before proceeding against her; but the court also held that the entire regulation prescribing the compulsory flag salute was invalidated by the Act of Congress of June 22, 1942, quoted in the Introduction in this brief

Bolling v *Superior Court for Clallam County*, Supreme Court of Washington (January 29, 1943), not yet reported.

Children of Jehovah's witnesses were expelled from school for refusal to salute the flag The parents had no other means of educating them. The children were brought before the juvenile court as delinquent and declared to be wards of the court. They were taken away from their parents on a finding that the parents had neglected and refused to provide and permit proper training and education, and were placed in charge of their older sister. The Supreme Court of Washington issued a writ of prohibition to prevent the enforcement of this order, holding it to violate the Fourteenth Amendment, the Joint Resolution of Congress quoted *supra* page 3, and Amendment 4 to the Washington Constitution. The court, through Judge Beals, relied on the opinion of the former Chief Justice, which was quoted at length, and expressed entire agreement with the decision of the District Court in the case at bar Although the validity of the expulsions was not before the court, the reasoning of the opinion is completely opposed to any enforcement of the compulsory flag salute against these children.

The material portion of the Constitution of the State of Washington, Amendment 4, reads· "Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. . . ."

The preceding cases leave the children and their parents safely at home, although the children remain deprived of any education.[12a] The cases now to be considered reached the still

[12a] But see State *v* Davis (Ariz) 120 P 2d 808 (1942) as to criminality of parents for instructing their children

more desirable result of restoring the children to their normal status in a public school.

State v. *Smith*, 155 Kans. 588, 127 P 2d 518 (1942).

In reversing a criminal prosecution against the parents of expelled children, the Supreme Court of Kansas expressly invalidated the earliest of all the compulsory flag salute statutes, holding that it could not be constitutionally construed to support the expulsion of children from school if they refused on religious grounds to participate in the ceremony Religious liberty was held to receive a wider protection from the Kansas Bill of Rights than under the national Bill of Rights as construed in the Gobitis case. The Kansas Bill of Rights, § 7, reads

"The right to worship God according to the dictates of conscience shall never be infringed, nor shall any person be compelled to attend or support any form of worship; nor shall any control or interference with the rights of conscience be permitted, nor any preference given by law to any religious establishment or mode of worship No religious test or property qualification shall be required for any office of public trust, nor for any vote at any election, nor shall any person be incompetent to testify on account of religious belief."

In Minnesota a District Court judge held that the expulsion of children from school for refusing on religious grounds to salute the flag violated the First and Fourteenth Amendments and also paragraph 16 of the Minnesota Bill of Rights

Brown v. *Skustad*, District Court for the Eleventh Judicial District, St Louis County, Minnesota (December 12, 1942).

We respectfully submit that liberty of religion under the First and Fourteenth Amendments should have the same breadth as under the more detailed constitutional provisions of Kansas, Minnesota, and Washington.

Thus the three years since the Gobitis case have supplied much evidence as to the actual operation of the compulsory flag

salute. The nature of most of the recent cases has obliged staet judges to focus their attention upon what the enforcement of the law does to these children and their parents, rather than upon what it is supposed to do to the nation. The state courts have had before them children, otherwise loyal and well behaved, who had been rendered stubborn and rebellious at a critical time in their lives when steady growth and freedom from unnecessary emotional strains is essential. Their education has been demoralized by the expulsions which this Court sanctioned; some get piecemeal instructions from their parents; some are sent away to a distant sectarian school; others are torn from their homes and committed for the rest of their adolescence to institutions for juvenile delinquents. The state judges have had to deal with fathers and even mothers who have also been torn from their homes and sent to jail for no other crime than teaching their simple faith to their own offspring. These ugly facts have made glowing abstractions about loyalty and national unity seem increasingly remote from the enforced salute. When men see how enforcement of the flag salute against a conscientious child disunites his school and his family, they doubt the reasonableness of its power to unite the nation.

CONCLUSION

The regulation forcing the children of these plaintiffs to engage in a ceremony which they believe to be sinful is an interference with religious liberty. We recognize that some interferences with religious liberty are constitutional, for it is not unlimited. The value of religious liberty must be weighed in the scales against the value of the conduct which the law requires. It is a problem of balancing. But this Court in view of the constitutional mandate must do this balancing itself. Religious liberty has been the cherished possession of small minorities, and would lose all its safeguards were it entrusted to the judgment of majorities in legislatures or administrative bodies.[13]

Everybody recognizes that national unity is a great ideal, but the whole question is whether national unity has anything to do with the case. What is to be weighed in the scales is the value of the conduct which the law requires. The law does not require national unity and it could not National unity is a creation of the spirit, and the wind of the spirit "bloweth where it listeth." What the law does require is the salute of the flag by children who regard such saluting as a damnable sin. What must be weighed is the value of that ceremony as performed *by these children*—not by some other children who welcome it but by these children who detest it as forbidden by the Word of God. On that alone should the attention of the Court be concentrated Everything then turns on the question whether there is any *reasonable* connection between the enforced participation of the children in a sinful ceremony and the promotion of national unity. The more one looks squarely at facts and probabilities, the better he can see that there never was any *reasonable* connection. The means are wholly unfit to attain the end which we all desire. As the present Chief Justice observes:[14]

> "And while such expressions of loyalty, when voluntarily given, may promote national unity, it is quite another matter to say that their compulsory expression by children

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[13] See Stone, J , Minersville School District *v* Gobitis, 310 U S at 604–605

[14] Minersville School District *v* Gobitis, 310 U S at 605

> in violation of their own and their parents' religious convictions can be regarded as playing so important a part in our national unity as to leave school boards free to exact it despite the constitutional guarantee of freedom of religion."

The nation which survived Valley Forge and the dark days of the Civil War without compulsory flag salutes will not go to rack and ruin because a few children fail to participate in this novel ceremony on account of their religious beliefs. We respectfully urge the Court to adopt the view of the present Chief Justice that their absence will not endanger the safety of the nation. Robert Frost, the poet, put this whole case in a nutshell when he recently said in reply to the observation that Mr Justice Stone's opinion showed no such fears

"Yes, he knew the flag was all right, any way."

Accordingly, the Committee submits that the judgment of the lower court should be affirmed.

Respectfully submitted,

THE COMMITTEE ON THE BILL OF RIGHTS, OF THE AMERICAN BAR ASSOCIATION

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