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Supreme Court of the United States

OCTOBER TERM, 1939

No. 690

MINERSVILLE SCHOOL DISTRICT, BOARD OF EDUCATION OF MINERSVILLE SCHOOL DISTRICT, CONSISTING OF DAVID I. JONES, DR. E. A. VALIBUS, CLAUDE L. PRICE, DR. T. J. McGURL, THOMAS B. EVANS AND WILLIAM ZAPF, AND CHARLES E. ROUDABUSH, SUPERINTENDENT OF MINERSVILLE PUBLIC SCHOOLS,

Defendants-Petitioners,

vs.

WALTER GOBITIS, INDIVIDUALLY, AND LILLIAN GOBITIS AND WILLIAM GOBITIS, MINORS, BY WALTER GOBITIS, THEIR NEXT FRIEND,

Plaintiffs-Respondents

ON CERTIORARI FROM THE THIRD CIRCUIT COURT OF APPEALS

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

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

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] The Committee was created in 1938 under authority of a resolution of the House of Delegates of the Association. Its present purposes and powers are defined

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[1] The membership of the Committee is as follows Douglas Arant (Alabama), Zechariah Chafee, Jr (Massachusetts), Grenville Clark, Chairman (New York), Osmer C Fitts (Vermont), Lloyd K Garrison (Wisconsin), George I Haight (Illinois), Monte M Lemann (Louisiana), Ross L Malone, Jr (New Mexico), Burton W Musser (Utah), John Francis Neylan (California), Joseph A Padway (Washington, D C), and Charles P Taft (Ohio) Mr Neylan was unable to participate in the consideration of this brief

in a resolution of the House of Delegates dated January 9, 1940, which empowers the Committee

> "when authorized by the House of Delegates or Board of Governors, or, in case of emergency, by the President, to appear as *amicus curiae* or otherwise in cases in which vital issues of civil liberty are deemed to be involved."

The text of the resolution is set forth in an appendix to this brief.

This case involves the constitutionality of the compulsory flag salute for children in the public schools. The opinion of the Circuit Court (holding void the regulation of the Minersville School District) states that compulsory flag salute statutes exist in 18 States and that 120 children have refused for religious reasons to comply with the compulsory salute. The issue of constitutionality has, therefore, a wide application. However, the importance of the issues presented is not to be judged by their immediate practical importance, but rather by the effect upon the integrity of American liberties; and the case would be no less vital if it related only to the statute of a single state and to the rights of a single child. The Committee believes that the issues involved are fundamental and worthy of discussion from an impartial standpoint, with special reference to the interest of the public at large. Accordingly, the Committee has sought and obtained authority to present this brief. The consent of counsel for the parties has also been given.

The Committee has no interest in this litigation save as its outcome (a) will affect the integrity of the basic right to freedom of conscience, and (b) will bear upon the extent of governmental power affirmatively to *force* our people to express themselves in a particular manner. In this latter aspect the case presents a constitutional question apparently new to this Court, in that the question relates to the validity of an affirmative command that the individual *shall* perform a certain ritual. This is a new type

of legislation, raising questions different from the validity of a mere restraint or prohibition against a particular form of expression, e.g., seditious or obscene utterances.

The Committee believes that the preservation of such rights as are here involved depends in large part upon the understanding of the community as to the issues at stake and their practical implications. This understanding in turn largely depends upon the opinions of the courts in test cases; and it is thought that the judicial opinions delivered by most of the lower courts in cases involving the problems here presented have failed to promote such understanding. In a number of instances, they seem to have obscured rather than clarified what the Committee deems to be the pivotal question of law: Is there any public interest in a *compulsory* flag salute sufficiently sound and substantial to justify the State in overriding and penalizing a sincerely held religious scruple and abridging personal liberty?

Although not minimizing the importance of the case to the particular parties litigant, the Committee has been especially moved by the hope that this Court in its opinion will take the occasion to elucidate the principles which safeguard religious freedom and to define the limits of state power to *coerce* individual expression under our system of free institutions.

The Committee's Position.

The Committee believes that the compulsory flag salute regulation adopted by the petitioner Board of Education violates the constitutional prohibition against the deprivation of liberty without due process of law, because without sufficient justification it requires the suppression of a sincerely held religious scruple; and also because, apart from any religious aspect, it transcends the limits of governmental power in attempting to compel a particular form of expression without sufficient reason for such compulsion.

Findings of Fact.

The findings of the District Court (which have not been disturbed by the Circuit Court and therefore, in the absence of plain error, are conclusive here) establish that the two infant plaintiffs refused to salute the American flag as a part of the daily exercises in a public school in Minersville, Pennsylvania (R. 122). The findings further recite:

> (a) that because of their refusal to salute, they were expelled by the petitioner Superintendent from the Minersville Public Schools (R. 122)[2];
>
> (b) that the children are members of a religious sect generally known as Jehovah's Witnesses, who sincerely believe that the act of saluting the flag is a violation of the divine commandment stated in verses 3, 4, and 5 of the twentieth chapter of the Biblical book of Exodus (being the Second Commandment) which forbids the bowing down to a graven image (R. 122);
>
> (c) that they believe such a salute to signify that the flag is an exalted emblem or image of the civil government and as such receives the obeisance and reverence of the person who salutes it (R. 122);
>
> (d) that they believe that the salute contravenes the law of God for the further reason that it means in effect that the saluting person ascribes salvation and protection to the thing or power which the flag stands for and that, since the flag and the Government which it symbolizes are worldly institutions, the flag salute denies the supremacy of God (R. 122);
>
> (e) that the children's refusal to salute the flag was based solely upon their sincerely held religious convictions, described above (R. 123);

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[2] In so expelling the children, the Superintendent was acting pursuant to a regulation adopted by the petitioner Board of Education under color of authority conferred by a Pennsylvania statute which empowered the Board to provide for instruction "in civics, including loyalty to the State and National Government" (R 123, cf R 156)

(f) that both they and their father, the respondent Walter Gobitis, are loyal American citizens who honor and respect their state and country and who are willing and ready to obey all its laws which do not conflict with what they sincerely believe to be the higher commandments of God (R.123);

(g) that their refusal to salute the flag was not intended by them to be disrespectful to the Government and did not promote disrespect for the Government and its laws (R. 123); and, finally

(h) that as a result of the expulsion of the children from the public schools, their father has been compelled to bear the expense of sending them to a private school in order to escape the criminal penalties provided by Section 1423 of the Pennsylvania School Code for failure to comply with the state compulsory school attendance statute (Section 1414) (R. 123-124). This finding of fact necessarily implies that there is no available public school which the children can attend without being subjected to the flag salute requirement.

The Committee predicates its discussion, insofar as facts are assumed, upon the above findings of fact.

Considerations To Be Advanced.

The Committee will submit the following:

First: Neither the legislative branch nor the courts have any power to declare that a given practice does not and cannot carry a religious significance, in the face of an individual's sincere and honest determination that *for him* a religious significance exists. Consequently the finding of fact that the respondent children sincerely regarded the salute as a religious ritual forbidden by the Second Commandment is a conclusive answer to the contention that the salute *must* be considered merely a patriotic ceremony which *cannot* have any religious significance. To hold otherwise and thus to deny the right of private judgment as to what carries a religious meaning would, we shall submit, strike at the heart of religious freedom.

Second: Granting that the State, under some circumstances, can constitutionally override religious scruples, such action cannot constitutionally be taken unless there is a clear showing that the overriding of the individual's religious belief is essential in the public interest. No such showing, we shall submit, has been made here; and consequently the school regulation cannot be upheld as a reasonable measure in the public interest.

In our view, the two points just stated should, for clarity, be carefully separated and dealt with as distinct issues.[3] The former involves the question whether the right of private judgment as to the religious content of a particular practice shall be held inviolate. The second point relates to a wholly different matter, *viz.*: Assuming the existence of the religious scruple, under what circumstances may the State constitutionally override it? The second question is of a character that the courts have been accustomed to deal with in a variety of situations. But the first issue, as to whether it is within the power of legislature or court to pass upon the fact of the existence of a particular religious scruple or its validity, involves the question whether our courts are to enter upon an unfamiliar type of determination in theological matters.

Third: We shall submit that even if no question of religious liberty is deemed to be here involved, there is another and broader ground upon which legislation of this character should be held void, *viz.,* that to compel the salute over objection is an unconstitutional infringement upon individual liberty, even though the refusal to comply is not deemed to involve a religious question. The state courts have said several times, in broad terms, that the legislature may properly enact laws to promote loyalty and morale and that the compulsory salute may be justified as an exercise of legislative discretion as to the means to be

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[3] See Note, *Compulsory Flag Salutes and Religious Freedom,* 51 Harvard Law Review 1418, 1420 (1938)

employed to that end. The breadth of the language used in expressing this thought gives one pause and raises questions of a serious character.

When it is said that the legislature has a broad discretion to prescribe ceremonies in order to promote loyalty, it is fair to ask how far this doctrine extends. For instance, suppose that under such a doctrine a law were enacted requiring all *adult* persons to salute the flag at fixed intervals. Would such a law be constitutional under our system of government even in the absence of an assertion of religious scruples as the ground of opposition? We shall submit that it would not be constitutional; and if this position be sound, the question arises whether there is a constitutional difference between the imposition of the compulsory flag salute upon children and the imposition of a like requirement upon adults.

We respectfully suggest that this Court should consider the implications which are inherent in the broad language used by some of the state courts as to the extent of legislative discretion to require ceremonies of this sort. And we shall submit that this Court should hold, if necessary, that the compulsory flag salute is unconstitutional even if the refusal to conform thereto is not treated as involving an issue of religious liberty.

Fourth: Apart from the main issues above mentioned, there is also a subsidiary question of a more technical nature, as to whether the right to attend state supported schools is a mere privilege the enjoyment of which can be conditioned in any way that the State sees fit. Under a fourth heading, we shall submit that any such contention as a ground for the dismissal of this suit for reinstatement is without basis.

ARGUMENT

I

So far as the respondent children are concerned, the salute must be regarded as a religious ritual.

Most of the courts which have upheld the compulsory flag salute laws have taken the position that these laws present no issue of religious freedom at all, because a salute to the flag *cannot* ever have a religious significance. They have asserted, as the petitioner school authorities also assert here, that *the salute is not a religious ceremony* even as to children who honestly believe it will bring divine retribution. *Nicholls* v. *Lynn,* 7 N.E. (2d) 577, 580 (Mass., 1937); *Leoles* v. *Landers,* 184 Ga. 580, 587, 192 S.E. 218, 222 (1937); *Herring* v. *State Board of Education,* 117 N.J.L. 455, 189 Atl. 629 (1937); *People* v. *Sandstrom,* 279 N.Y. 523, 529-530, 18 N.E. (2d) 840, 842 (1939).[4] As

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[4] For example

"Saluting the flag in no sense is an act of worship or a species of idolatry, nor does it constitute any approach to a religious observance" 279 N Y at p 529, 18 N E (2d) at p 842

"The act of saluting the flag of the United States is by no stretch of reasonable imagination 'a religious rite'" 184 Ga at p 587, 192 S E at p 222

"There is nothing in the salute or the pledge of allegiance which constitutes an act of idolatry, or which approaches to any religious observance" 7 N E (2d) at p 580

The petitioners here take the same position when they say (Brief for Petitioners, p 28) "The act of saluting the national flag at daily school exercises can not be made a religious rite by the respondents' mistaken interpretation of the Bible The ceremony is in no way referable to the religious beliefs of any of the participants and it therefore follows that a pupil's refusal to salute the flag cannot be based on a religious belief"

To the contrary, see Lehman, J, in *People* v *Sandstrom, supra*

"Episcopalians and Methodists and Presbyterians and Baptists, Catholics and Jews, may all agree that a salute to the flag cannot be disobedience to the will of the Creator, all the judges of the State may agree that no well-intentioned person could reasonably object to such a salute, but this little child has been taught to believe otherwise * * * I cannot assent to the dictum of the prevailing opinion that she must obey the command of the principal, though trembling lest she incur the righteous wrath of her

has been said, the doctrine represented by these cases strikes at the heart of American religious freedom. We suggest that no American court should presume to tell any person that he is wrong in his opinion as to how he may best serve the God in which 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. Beginning with the mystic and evangelical religious groups of the Eighteenth Century, such as the Shakers and Illuminists and other primitive Old Testament communities, a host of religious associations have arisen to become a part of our national life.[5] It has been consistent American policy to accord these small groups all rights and privileges granted to the larger and more ancient religious bodies.

It is of course true, even under our Bill of Rights, that particular religious views from time to time have had to yield to the paramount demands of the public health, safety or morals. We fully recognize the general proposition that, in proper circumstances and by reasonable means, the State has power to protect the public welfare from any activity which threatens it, even from actions sought to be justified on grounds of religious belief. The first question to determine, however, is whether a matter

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Maker and be slain 'when the battle of Armageddon comes'" 279 N Y at pp 536-537, 18 N E (2d) at pp 845-846

See also the opinion of the District Court in the present case, on demurrer

"Liberty of conscience means liberty for each individual to decide for himself what is to him religious * * * To permit public officers to determine whether the views of individuals sincerely held and their acts sincerely undertaken on religious grounds are in fact based on convictions religious in character would be to sound the death knell of religious liberty To such a pernicious and alien doctrine this court cannot subscribe" (R 18)

[5] "* * * In the United States at the present time there are 212 denominations recognized by the United States Census as distinct entities, exclusive of a large number of Buddhist, Mohammedan, and other Oriental organizations, local communistic societies, and other bodies that call themselves religious Nowhere else in the world, save perhaps in India, does one find such a wilderness of sects and religious variations" Clark, *The Small Sects in America* (Cokesbury Press, Nashville, 1937), p 13

See also Mecklin, *The Story of American Dissent* (Harcourt, Brace & Co, New York, 1934) c XIV

of religious belief is actually involved. The method of resolving this issue is basic to every case of alleged interference with freedom of conscience.

Courts are competent to judge when the public welfare is in fact jeopardized, for that is a matter susceptible of rational analysis and logical disputation among men. But in matters of faith the case is different; here analysis and logic must yield to the simple individual belief. 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.

It may be admitted that an asserted religious belief may possibly be so fantastic as to justify an inference that the person asserting it is either insane or dishonest. See, e.g., *Barr* v. *Sumner,* 183 Ind. 402, 107 N.E. 675, 109 N.E. 193 (1915); *Nalty's Adm'r* v. *Franzman's Ex'r,* 221 Ky. 709, 299 S.W. 585 (1927); and cases collected in 28 R.C.L. 106. But it seems plain that the facts of this case cannot come within any such principle. There is no suggestion that the respondent children are insane; and it has been expressly found that their assertion of religious scruple was honest and sincere.

The philosophy upon which the four state courts mentioned above have swept aside the assertion of religious scruple as if it did not exist, is somewhat obscure. These courts have *affirmed* that the salute can have no religious significance, but, in our judgment, have not given an adequate explanation of the reasons for this declaration. However, so far as can be determined from their opinions, the thought appears to be that the asserted scruple, though honestly held, is of so unusual a character and so contrary to generally accepted views that it must be dismissed as having no real existence.

It is as if the following exchange had occurred between the state courts and the objecting children:

> *The Court:* You say that you have a religious objection to giving this salute. We cannot understand that. The salute is only a patriotic gesture and cannot have any religious meaning.
>
> *The Children:* We have been brought up to believe that it is against our religion to give this salute. It is against the 20th chapter of Exodus, which contains the Second Commandment.
>
> *The Court:* It makes no difference what you have been brought up to believe. We don't question your sincerity; but you are wrong in thinking that there is anything religious about this salute.
>
> *The Children:* Still we have to refuse. That is the way we have been brought up and that is the way we believe.
>
> *The Court:* It is too bad but we must tell you again that you are wrong in thinking the salute has any religious meaning.[6]

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. As bearing upon the question as to whether *bona fide* religious scruples can actually exist notwithstanding their lack of harmony with the opinion of the age, it may be useful to recall a few examples of historical situations analogous to that here presented. Accordingly, we cite several instances in which honest and serious religious scruples were, in fact, asserted in spite of the inability of the ma-

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[6] Compare the colloquy set out in the opinion of the Court in *People* v *Sandstrom*, 279 N Y 523, 528-529, 18 N E (2d) 840, 842 (1939)

jority to comprehend the religious significance of the acts to which these scruples were opposed.[7]

During the period from 26 to 36 A.D., when Pilate was the Roman procurator of Judea, he caused to be brought into Jerusalem standards bearing busts of the Emperor Tiberius, apparently in order to inculcate respect for the Roman State. The Jews considered the display of these images to be a violation of the same Biblical Commandment involved in the present case. In pursuance of this religious belief, they so annoyed Pilate with repeated petitions for removal of the statues from their city that, as Josephus relates:

> "* * * when the Jews petitioned him again, he gave a signal to the soldiers to surround them, and threatened that their punishment should be no less than speedy death, unless they left off disturbing him, and went their ways home. But they threw themselves upon the ground, and bared their necks, and said they would welcome death, rather than that the wisdom of their laws should be transgressed. Thereupon Pilate was astonished at their determination to keep their laws inviolable, and instantly commanded the images to be carried back from Jerusalem to Caesarea." Josephus, *Antiquities of the Jews,* xviii. 3. 1.

Here, it will be observed, is a case in which the objection upon religious grounds must have seemed unreasonable or even fantastic to the civil authority. But that religious belief was no less sincere and no less a fact.

Another instance in which the scruple of the religious objector must have seemed unreasonable, is recorded in the essay *De Corona* by Tertullian of North Africa, written about 200 A.D.[8] It was customary for the Roman Emperors of that time to make presents to their soldiers,

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[7] For the materials from which are taken the examples to be mentioned, we are indebted to Prof Henry J Cadbury (Hollis Professor of Divinity), Prof Arthur D Nock (Frothingham Professor of the History of Religion), and Dean Willard L Sperry (Plummer Professor of Christian Morals), all of the Harvard Divinity School

[8] The essay appears in English translation in Volume III of the series called "The Ante-Nicene Fathers" (Charles Scribner's Sons, New York, 1918), at page 93

called the *donativum.* Since this was given personally by the Emperor, the soldiers were expected to appear in festal garments, wearing laurel wreaths upon their heads. For some reason, certain Christians thought the wearing of a wreath to be incompatible with Christianity. Apparently they felt either that God had not intended the flowers which He had created to be so used, or that this wreath was somehow connected with the wreaths used in pagan sacrifices. The pagans and even many Christians regarded the wreath as having no religious meaning. On one such occasion, a soldier appeared before the Emperor carrying his wreath in his hand. He was at once noticed, was questioned, confessed himself a Christian, and was summarily punished. Tertullian endorses the soldier's refusal to wear the wreath and praises his courage and consistency.

In this instance again, the sincerely held religious scruple must have seemed to nearly all Romans of that day at least as peculiar as does the scruple of Jehovah's Witnesses to most Americans in 1940.

In more modern times, perhaps the most apposite example is the assertion by the Quakers in England during the seventeenth century, of a religious scruple against uncovering the head in deference to any civil authority. The Quakers sincerely believed that the uncovering of the head was an act of worship, and were unable to bring themselves to take off their hats even under circumstances where the general custom of the kingdom demanded the gesture. This scruple, however fantastic it may have appeared to the vast majority, was, nevertheless, an accepted and important tenet of the Quaker sect. The doctrine is thus stated in a standard contemporary exposition of original Quakerism:

> "He that kneeleth, or prostrates himself to man, what doth he more to God? He that boweth, and uncovereth his head to the *creature,* what hath he reserved to the *Creator?* Now the apostle shows us, that the *uncovering of the head* is that which God requires of

> us in our worshipping of him, 1 Cor. xi. 14." Barclay, *Apology for the True Christian Divinity*, Proposition xv. Sect. 6 (1676).

For observing this scruple by refusing to doff their hats in court, many Quakers were punished, although some authorities, such as Charles II, respected their belief and declined to penalize them.[9]

There are two common aspects of these examples which, we believe, bear on the present issue. *Firstly,* in each instance it is clear that the religious belief or scruple in question must have been considered unusual and cantankerous and must, therefore, have been unpopular. *Secondly,* in each instance the religious significance of the practice objected to could not have been apparent to the majority, who must have been quite unable to see that the exhibition of the images or the carrying of the laurel wreath or the doffing of the hat could reasonably be considered as having a religious content.

These and many other instances that could be cited demonstrate, we believe, that the judicial unwillingness of some of the lower courts to concede the religious nature of the salute arises largely from the novelty and strangeness of the particular objection here made to it, and from the fact that Jehovah's Witnesses are a comparatively new and small group. Supposing that this same religious objection had been raised by an old and respected sect such as the Quakers, is it not possible or probable that the courts would have recognized the actuality of the religious significance attributed to the salute? Or if one of our largest denominations should have adopted the construction of the Second Commandment which is taught by Jehovah's Witnesses, so that hundreds of thousands of

[9]For punishments inflicted upon those who refused "hat honor" see Joseph Besse, *A Collection of the Sufferings of the People called Quakers* (1753) *passim* For instances of tolerance see *Calendar of State Papers Domestic*, 1657-8, p 156 (Cromwell), Richard Hawkins, *Brief Account of the Life of Gilbert Latey* (London, 1707) (Charles II), *Journal of Friends Historical Society* viii 16 (Duke of Monmouth), *ibid* x 59 (Louis XVI)

American citizens sincerely ascribed religious significance to the flag salute, is it not most probable that the state courts would have had no difficulty in recognizing such significance?

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. History shows that the existence of religious scruples lies in truth and fact within the breast of the individual and nowhere else; and no current opinion or fiats of legislatures or courts have ever been able to establish that a particular act or ceremony has no religious significance when the individual himself asserts the contrary.

The truth is that the attempt to adjudge whether or not a particular ceremony can have or does in fact have a religious significance is something beyond the competence of legislatures and courts. This is so for the simple reason that whether or not such religious significance exists lies inherently within the mind and heart of the individual man or woman.

The Committee respectfully suggests that this Court should definitely repudiate the idea that a governmental agency can predicate any official action whatsoever upon the notion that it, rather than the individual, can determine whether or not a particular ceremony carries a religious significance. When the legislature, the executive, or the courts enter this sphere, they are doing no more or less than attempting to tell the individual what is or is not displeasing to God.

We suggest, therefore, that this Court should deal with the case on the premise that a matter of religious belief *is* involved and that the courts of Georgia, Massachusetts, New Jersey and New York, in declaring the contrary, have been in error.

We turn now to the second and wholly different issue—whether it is constitutional to override the religious objection of the children under the circumstances of this case.

II

There is no such public need for the compulsory flag salute as to justify the overriding of the religious scruples of the children.

If, as we have submitted, the flag salute must be deemed a religious ceremony so far as these respondent children are concerned, the validity of the school regulation depends upon the existence of a clear public need for compulsory flag saluting in the schools.[10]

Since the Mormon Polygamy Cases it has not been doubted that religious scruples and beliefs must, under some circumstances, yield to "the laws of society, designed to secure its peace and prosperity, and the morals of its people". *Davis* v. *Beason,* 133 U .S. 333, 342 (1890). And though the brief of the petitioner school authorities relies largely upon the wholly different proposition that the salute cannot be regarded as a religious ritual, it is necessary to examine this further aspect of the problem, both because of the respect due to the official act of a state agency and because at least one state court has upheld the flag salute requirement on this ground. *Gabrielli* v. *Knickerbocker,* 12 Cal. (2d) 85, 82 P. (2d) 391 (1938), certiorari denied 306 U. S. 621 (1939); cf. *People* v. *Sandstrom,* 279 N. Y. 523, 18 N.E. (2d) 840, 843 (1939).

1. General Observations.

We submit two general observations which are basic to this branch of the argument.

(a) In the first place, the legislation is of a sort new to America. We have noted (supra, pp. 2-3) its novelty as an attempt to *compel* a particular form of expression as distinguished from *restraints* on certain kinds of expres-

[10] It is here assumed that the regulation will not be upheld on the technical ground discussed in Point IV of this brief, *viz,* that public school education is granted as a matter of grace and that expulsion from school therefore cannot serve as the basis of a claim of constitutional right

sion. It is novel also in that the legislative power here invoked rests upon a somewhat new ground. As the above quotation from *Davis* v. *Beason* indicates, the police power is customarily exercised in furtherance of the safety, morals, physical health or economic welfare of the people as distinguished from their *morale*. Later (pp 28-29) we shall point out that well-established public needs of this character were involved in all situations where the courts have held that religious convictions must yield to overriding public interests. It follows that a recognition of this new ground—the presumed promotion of loyalty and morale—as a basis for the overruling of religious scruples would be a new extension of legislative power. The present dominance of totalitarian ideas in other parts of the world suggests that an extension of 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.

(b) In the second place, it is important to recognize that the *compulsory* flag salute is an entirely different thing from the *voluntary* salute, which has come to be accepted as a mere gesture of proper respect to the nation we love.

The difference may be illustrated by the familiar custom that a gentleman raises his hat upon meeting a lady of his acquaintance on the street. The gesture is ordinarily regarded as a simple token of courtesy and its omission may lead to social disapproval. It does not follow, however, that a statute *requiring* the gesture would be constitutional, especially in the face of a religious objection. If a Quaker should object to the ceremony on the religious ground suggested in the quotation from Barclay set out above at pages 13-14, the invalidity of the requirement *as to him* would seem clear.

According to the opinion of the Circuit Court, the *compulsory* flag salute is a recent phenomenon, which made its first appearance in Kansas in 1907 (R. 157). Not until the last decade has it gained widespread legislative

support. Perhaps this is the reason why the difference between the compulsory and the voluntary salute is not more readily recognized.

Never having encountered a compulsory salute in their own school experience, many persons may tend to regard the ceremony as a normal gesture of respect to a national symbol. They may thus fail to appreciate the distinction in practical effect between a voluntary and compelled ceremony. The difference is, however, fundamental. Persons who willingly give a voluntary salute find that it increases their own loyalty. Then they may assume that, as a matter of course, the compulsory salute will increase the loyalty of others. But it by no means follows that the same effect of increased loyalty will be caused by a salute given only under compulsion and in violation of one's deepest convictions. The willing salutor easily assumes that failure to salute even under compulsion shows a lack of loyalty. Because the willing act of saluting is associated with loyalty in his own mind, he may assume that the failure of others to salute under compulsion is associated with disloyalty. But plainly this is not the fact. A concrete proof to the contrary is that the lower courts have expressly found, as indeed it has been proved or assumed in every litigated flag salute case, that the children are loyal American citizens and have not intended to show any disrespect for the Government.

With the novel character of the legislation and the distinction between voluntary and compulsory saluting kept clearly in mind, it becomes easier to place in its proper setting the precise issues as to the alleged justification for the compulsory salute.

2. Discussion of the appropriate standard of judicial scrutiny.

The Committee firmly believes that legislation which infringes upon such basic individual liberties as freedom of speech, press, assembly, and religion should be subjected to a more exacting test of validity than legislation which

regulates property and business. This position implies no indifference to the constitutional guarantees for the protection of property. The Fifth and Fourteenth Amendments deny the power of government to deprive any person of "property" without "due process of law" as plainly as they deny the power to take "life" or "liberty" without due process. Property is entitled to reasonable and proper protection within the spirit and letter of these guarantees; and if such protection should ever fail, a vital element of the American constitutional system would be eliminated.

Nevertheless, consistently with the views just expressed, there are solid reasons for a distinction in the *judicial approach* in testing the validity of laws in these two general categories. In the ordinary due process case involving legislation which taxes or otherwise affects property, the Court is dealing merely with a negative provision of the Constitution, which imposes some limits on common types of legislation. It is clear that these limits must be applied in such a way that the processes of government shall not be crippled but shall remain flexible to meet changing public needs. In this field the purpose of the Constitution is primarily to be sure that the regular processes of government are free from wholly unreasonable, that is to say arbitrary, legislative or official action. Accordingly a presumption may properly be held to run in favor of the validity of this class of legislation. In recognition of this principle, the general rule for such ordinary statutes and regulations is that they will be upheld if there is evidence in the record tending to establish the existence of a state of facts which rational men might consider a basis for governmental action, or if the Court can judicially notice such facts. A statement of this effect was recently made by this Court, through Mr. Justice Stone:

> " . . . regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known

> or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators." *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152 (1938); see also *South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 191-192 (1938).

On the other hand, when legislation undertakes to restrict or override religious beliefs it runs head on against a great affirmative principle expressly declared by the First Amendment and embodied in national emotions since the landing of the Pilgrims. So strong is the policy of safeguarding the basic individual liberties—including religious freedom—that the presumption should be against, rather than for, the validity of any statute abridging those liberties. Therefore, we submit that it would not be sufficient for the Court here to accept the mere opinion of other men. We respectfully submit that in a case of this kind the Court should *itself* be convinced of the existence of a public need which is sufficiently urgent to override the great principle of religious freedom in the particular case.

The desirability of such a different judicial approach to claims of infringement upon the fundamental individual liberties was suggested in the *Carolene Products* case. This Court, after stating the rule applicable in determining the validity of the ordinary statute, said (304 U. S. at p. 152, note 4):

> "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. See *Stromberg* v. *California,* 283 U. S. 359, 369-370; *Lovell* v. *Griffin,* 303 U. S. 444, 452.
>
> "It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of

> undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. * * *
>
> "Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, * * * or national, * * * or racial minorities * * *: whether 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, and which may call for a correspondingly more searching judicial inquiry."

The question thus reserved seems to have been answered in *Schneider* v. *New Jersey*, 308 U. S. 147 (1939) which held four city ordinances unconstitutional as unduly restricting the rights to distribute handbills and to canvass for non-commercial purposes. With reference to freedom of speech and the press, the Court, through Mr. Justice Roberts, said (at page 161):

> "In every case, therefore, where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. *Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions.*" [11] (Italics supplied.)

We respectfully suggest that this is a proper case in which to affirm and make definite the proposition that a "more exacting judicial scrutiny" will be applied in cases where abridgement of the rights mentioned in the First Amendment is charged.

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[11] "The [*Schneider*] decision * * * lends authoritative substance to the theory that there may be no room for the presumption of constitutionality, usually accorded state or municipal legislation, where the statute or ordinance interferes with a civil liberty as distinguished from legislative impairment of an economic privilege." 40 Columbia Law Review 531, 532 (1940)

3. Discussion as to whether there is sufficient justification for the compulsory salute.

Applying more specifically the principles just discussed, the Committee submits that when an official departure from the principle of religious liberty or any other fundamental individual liberty is at issue, the government must sustain two propositions which do not present themselves in the ordinary due process case. *First:* The public need for the challenged legislation must be shown, to the satisfaction of the Court, to be more important than the maintenance of the constitutional guarantee. *Second:* It is not sufficient that *some* legitimate end will be furthered by the challenged legislation, so long as the desired purpose can be accomplished in one or more other reasonable ways which do not result in impairment of the religious liberty of the individual or his other liberties.

We now discuss the present case in the light of these two points.

(a) *The alleged public need is not sufficiently urgent.*

The seriousness of the public need for an infringement of religious liberty can best be weighed by *comparing* that need with the value of the policy favoring religious liberty. The supposed public need tends to shrink in our estimation when we recall past infringements, and when we remember how reasons for limiting religious liberty which at the time seemed important are now thought negligible in contrast with the principle of religious toleration.

As is well known, the provision of the First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *" derives from and may be regarded as a condensed formulation of the Virginia Statute of Religious Freedom, drafted by Thomas Jefferson. Ever since, the intent and spirit of the great Virginia statute have been looked to as a guide in determining the scope and force of the religious guarantees set forth in the First Amendment

and, correspondingly, the scope of the religious "liberty" secured against state action by the Fourteenth Amendment.[12]

It will be observed that Jefferson, in drafting this Act, declared that "it is time enough" for government to interfere when religious principles "break out into overt acts against peace and good order." And we submit here that the underlying and fundamental question in this case is whether the failure of these children to salute the flag does constitute "overt acts against peace and good order." If so, an overriding public need for the expulsion of these children from school might be thought to exist. But we submit that the mere failure of these children, because of their religious beliefs, to conform to this ceremony is far indeed from constituting "overt acts against peace and good order."

The effort to assimilate the innocent and sincere religious objections of these children to acts against "peace and good order", so as to justify their expulsion from their school, seems to us the result of misconception and overzeal. It seems inconsistent also with the statement

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[12] For the Virginia Statute of Religious Freedom, see 12 Hening, Va Stat At L 84-85 (1823) For brevity, we do not quote the statute at length, but suggest that in view of its close relation to the religious guarantee of the First Amendment, it deserves re-examination in connection with this case We call attention especially to what the Statute sets forth as to the ignoble character of a bribe to a candidate to abandon his religious beliefs as a condition of holding office—a thought which seems equally applicable to a virtual bribe to a child to contravene his religion as a condition of staying in public school.

The close historical relation between the Virginia Statute of Religious Freedom and the religious clause of the First Amendment is well established (*Reynolds* v *United States*, 98 U S 145, 163-164 (1878)) Jefferson's authorship of the Statute is common knowledge by reason of the inscription which he directed to be placed on his tomb at Monticello "Author of the Declaration of American Independence, of the Statute of Virginia for Religious Freedom, and Father of the University of Virginia" The direct connection of the Statute, through James Madison, with the First Amendment is, however, less commonly known Madison, long associated with Jefferson, was interested in 1786 in the adoption of the Statute which Jefferson had written seven years before, and later, in the summer of 1789, became the principal draftsman and advocate in the First Congress of the first ten Amendments, upon which Jefferson had been insistent See *James Madison* by S H Gay in the American Statesmen Series (pp 68, 145 146) and *Thomas Jefferson* by John T Morse, Jr in the same series (pp 45-47)

of the principles of religious liberty made by Chief Justice Hughes (dissenting with the concurrence of Mr. Justice Holmes, Mr Justice Brandeis and Mr. Justice Stone) in *United States* v. *Macintosh,* 283 U. S. 605, 634 (1931).

> " . . . freedom of conscience itself implies respect for an innate conviction of paramount duty. The battle for religious liberty has been fought and won with respect to religious beliefs and practices, which are not in conflict with good order, upon the very ground of the supremacy of conscience within its proper field. What that field is, under our system of government, presents in part a question of constitutional law and also, in part, one of legislative policy in avoiding unnecessary clashes with the dictates of conscience. There is abundant room for enforcing the requisite authority of law as it is enacted and requires obedience, and for maintaining the conception of the supremacy of law as essential to orderly government, without demanding that either citizens or applicants for citizenship shall assume by oath an obligation to regard allegiance to God as subordinate to allegiance to civil power. The attempt to exact such a promise, and thus to bind one's conscience by the taking of oaths or the submission to tests, has been the cause of many deplorable conflicts."

Whether the challenged regulation is tested by the narrow approach used in ordinary due process cases or by the broader approach of common sense and experience, we submit that no urgent need for the regulation is shown.

So far as evidence in the record is concerned, there is very little which even tends to support the reasonableness of the regulation. The only testimony of this sort was given by the one witness for the petitioners—Superintendent Charles E. Roudabush, of the Minersville Public Schools. His testimony on the point can fairly be summarized as follows: (1) Experience with the *voluntary* salute indicates that it tends to inculcate in the saluting children a love of country (R. 91); (2) the refusal of some children to salute would lead to a general breakdown of classroom morale (R. 92).

The Committee believes that this testimony offers no substantial support for the regulation as here applied. Experience with the *voluntary* salute can have no bearing on the fundamentally different *compulsory* ceremony here involved, at least when opposed by religious scruple. Indeed, Mr. Roudabush declined to answer the question whether patriotism would be inculcated in a child forced to salute in disregard of religious convictions.

As for his fear that general classroom morale would suffer, the witness' statement is a pure expression of opinion unsupported by reference to actual situations in which demoralization had in fact resulted. There is no suggestion that the classes from which the respondent children have been expelled were demoralized or showed any tendency in that direction. Nor is there any explanation as to why demoralization could not be prevented by a simple explanation that exemption from the salute is granted on religious grounds.

Furthermore, the insubstantial evidence outlined above is opposed by the statements of authorities on educational psychology which are noticed in the opinion of the Circuit Court (R. 173-174). These statements are to the effect that the compulsory flag salute not only is ineffectual to accomplish the purpose of inculcating patriotism, but may indeed tend to dull patriotic sentiment. Both lower courts have found that enforcement of the salute requirement is not a reasonable method of teaching civics and arousing loyalty, but tends to have the contrary effect upon children who object upon religious grounds (R. 123, 173, 174). And it has also been found as fact that the children's refusal to salute did not promote disrespect for the Government and its laws (R. 123). Thus, the lower courts have refused to credit either branch of the testimony of the petitioner Superintendent, which has been summarized above.

The Committee therefore submits that, on this record, there is no substantial evidence to show the existence of

a reasonable factual basis for the regulation. And since the petitioners state no additional facts which can be judicially noticed for this purpose, the regulation fails to meet even the test by which the validity of ordinary legislation is to be determined.

Furthermore, even if the meager evidence set out above could be thought sufficient to sustain the legislation if the constitutional attack were upon an ordinary commercial regulation, it is believed that the flag salute requirement *must be held invalid under the "more exacting judicial scrutiny"* which should be applied in adjudicating claims of infringement upon the fundamental individual liberties.

We emphasize that the alleged public need in this case does not admit of proof like ordinary issues of fact or even the special issues of fact involved in the usual due process cases.[13] No eye-witnesses can say whether a child's morale and loyalty are actually increased after a compulsory salute opposed to his religious beliefs. The Court cannot depend on experts, because there are no experts.[14] Opinions can be expressed one way or another about the effect of compulsory salutes, but these are based almost wholly in mere speculation. There are no considered researches. Nobody has made a psychoanalytical investigation of the mental reactions of children after a repugnant salute. This is a question which the Court has to decide with little, if any, useful outside help of any sort. The issue is simply not susceptible of determination on the basis of concrete evidence either within or without the record. Rather a proper conclusion depends on common sense and human experience—in short upon the judgment of mature and sensible men.

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[13] See Bikle, *Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action*, 38 Harvard Law Review 6 (1924), Frankfurter & Landis, *The Supreme Court under the Judiciary Act of 1925*, 42 Harvard Law Review 1, 18-24 (1928)

[14] Contrast the proof as to the value of vaccination described in *Jacobson v Massachusetts*, 197 U S 11, 23-24 (1905)

Thus viewed, it simply does not make sense that morale is raised by a compulsory salute offending the child's deepest convictions. To the contrary, the conclusions of the District and Circuit Courts that the children's refusal to salute did not promote disrespect for the Government and its laws (R. 123) are in accordance with common sense and common experience. We must remember again that we are dealing here not with a voluntary ceremony in which children are invited to participate if they wish. Nor are we dealing with a required ceremony to which no objection is made. We are dealing with a case in which, although the ceremony is required under pain of expulsion from school, the religious convictions of the dissenters are nevertheless so strongly held that they firmly resist the orders of the school authority. Is there any common sense to the thought that the coercion of children holding views so strongly as do these respondent children can possibly induce sentiments of loyalty in such children?

The above considerations may oblige the supporters of the compulsory flag salute to grant that coercion of children who refuse to comply with the salute upon religious grounds cannot induce loyalty *in them.* But they may suggest that the necessities of discipline require universal enforcement even if this means driving the children out of school. Such a position is, of course, familiar in military life. There coercion is often reasonable and necessary, since the very function of a military unit requires implicit and uniform obedience; and to obtain this, all non-compliance with orders, reasonable or unreasonable, must be firmly dealt with in furtherance of the very purpose for which the unit exists. The fallacy of attempting to apply this analogy to school life lies in the difference between the purposes of school education and the purposes of an army. The function of an army is to fight, and for that very reason to achieve a disciplined and regimented organization. But the purpose of *American* schools is primarily

to impart knowledge and to prepare for life under free institutions. The purpose is *not* to turn out a regimented group seasoned to coercive methods.

When an examination is made of the other situations where it has been declared that religious liberty must give way to a legal requirement, the public need for such a requirement is obvious to sensible men and very different from the vague conception of *morale* involved in the case at bar.

Examples of religious practices which can be constitutionally prohibited, according to judicial decisions or dicta, are: bigamy and polygamy, which have "always been odious among the northern and western nations of Europe" and are "crimes by the laws of all civilized and Christian countries"[15]; human sacrifices[16]; suttee[17]; thuggery and the religious belief in assassination[18]; promiscuous sexual intercourse[19]; circulation of obscene writings[20]; the possession of sacramental wine in excess of a statutory limit[21]; burial customs dangerous to health[22]; violation of Sunday Law by Seventh Day Adventist[23]; the wearing by public school teachers of dress or insignia showing membership in a religious sect, which would break down the separation of the Church and State[24]; and spiritualistic fortune-telling[25]. In *all* these cases specific adverse consequences of the forbidden action were made plain by general experi-

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[15] *Reynolds* v *United States,* 98 U S 145 (1878), *Davis* v *Beason,* 133 U S 333 (1890)

[16] *Davis* v *Beason, supra,* at pp 343-344

[17] *Davis* v *Beason, supra,* at p 344

[18] *Mormon Church* v *United States,* 136 U S 1, 49 (1890), *Guiteau's Case,* 10 Fed 161, 175 (Supreme Court, D C, 1881)

[19] *Davis* v *Beason, supra,* at p 344

[20] *Knowles* v *United States,* 170 Fed 409, 411 (C C A 8th, 1909)

[21] *Shapiro* v *Lyle,* 30 F (2d) 971 (D C, W D Wash, 1929)

[22] *In re Wong Yung Quy,* 2 Fed 624, 632 (Circuit Court, D Cal, 1880)

[23] *Scales* v *State,* 47 Ark 476, 1 S W 769, 58 Am Rep 768 (1886)

[24] *Commonwealth* v *Herr,* 229 Pa 132, 78 Atl 68 (1910)

[25] *McMasters* v *State,* 21 Okla Cr 318, 207 Pac 566, 29 A L R 292 (1922)

ence; and, if necessary, further proof of their bad effects could have been introduced by witnesses.

The unusual feature of the case at bar—that the law *requires* a person to perform a particular ceremony contrary to his religious beliefs—is not paralleled by any strictly analogous case; and in the cases bearing some resemblance, the public need for the conduct required was far clearer than for a compulsory flag salute. Thus parents have been punished in several cases for failure to furnish medical aid to their children on account of religious beliefs.[26] Military training has been imposed despite religious objections[27]; and the expression of a willingness to bear arms has been upheld as a condition of naturalization by this Court, although with the dissent of four justices.[28] Even though opinions differ about the power of the government to override religious convictions in the matter of bearing arms, it is still plain that a soldier may have some usefulness to the country despite his religious objections to his task. But the object of the present law is admittedly not to obtain definite useful services, but merely to produce a state of mind. An increase of loyalty is proposed to be caused in the child by requiring conduct which offends his spiritual convictions. The possibility of such a result is so contrary to human experience and so completely unsupported by evidence, that the case at bar is clearly differentiated from the military service and other cases just mentioned.

(b) *Even if the challenged legislation be deemed to serve a public need, there are other reasonable ways of accomplishing the purpose without infringing the religious convictions of the children.*

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[26] *Owens* v *State*, 6 Okla Cr 110, 116 Pac 345 (1911), annotated in 36 L R A N S 633 and Ann Cas 1913B, 1221, see also Note, 13 Yale Law Journal 42 (1903)

[27] *Hamilton* v *Regents*, 293 U S 245, 262 (1934)

[28] *United States* v *Macintosh*, 283 U S 605 (1931) See also *Fraina* v *United States*, 255 Fed 28, 36 (C C A 2d, 1918)

The petitioner Superintendent himself admitted that, although he considered the salute an appropriate means of teaching loyalty to the State, it is not an indispensable method but is merely one of several available means to that end (R. 98). The Committee submits that, on the basis of authorities now to be discussed, this consideration by itself is conclusive against the validity of the regulation.

In *Hague* v. *Committee for Industrial Organization,* 307 U. S. 496 (1939) the Court held invalid a city ordinance which provided for the licensing of meetings in the public streets and parks. The ordinance was defended on the ground that it allowed refusal of a permit to assemble only if such refusal would prevent "riots, disturbances or disorderly assemblage". Such a purpose is unquestionably a salutary one. The Court held, however, that the city must deal with the threatened disorder by the alternative method of police protection, instead of employing an expedient which, though probably more effective as an administrative matter, would interfere more seriously with freedom of assembly.

Again, in *Schneider* v. *New Jersey* and its three companion cases, 308 U. S. 147 (1939) this Court held invalid four city ordinances allegedly designed to further two legitimate and indeed laudable purposes: to prevent littering of the streets and to thwart fraudulent appeals in the name of charity and religion. Even though the State courts had found that distribution of handbills on the public streets resulted in a littering of the streets which the questioned ordinances would effectively prevent, this Court held that interference with such distribution was an unconstitutional abridgment of the right to freedom of speech and press. The Court said:

> "We are of opinion that the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature

> to one willing to receive it. Any burden imposed upon the city authorities in cleaning and caring for the streets as an indirect consequence of such distribution results from the constitutional protection of the freedom of speech and press. * * *
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> "* * * As we have pointed out, *the public convenience in respect of cleanliness of the streets does not justify an exertion of the police power which invades the free communication of information and opinion secured by the Constitution.*" 308 U. S. at pp. 162-163. (Italics supplied.)

With reference to an ordinance requiring house-to-house canvassers to procure a permit from the local chief of police, the Court said:

> "Conceding that fraudulent appeals may be made in the name of charity and religion, we hold a municipality cannot, for this reason, require all who wish to disseminate ideas to present them first to police authorities for their consideration and approval, with a discretion in the police to say some ideas may, while others may not, be carried to the homes of citizens; some persons may, while others may not, disseminate information from house to house. Frauds may be denounced as offenses and punished by law. Trespasses may similarly be forbidden. *If it is said that these means are less efficient and convenient than bestowal of power on police authorities to decide what information may be disseminated from house to house, and who may impart the information, the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press*" 308 U. S. at p. 164. (Italics supplied.)

In other words it was 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 a relatively inefficient and inconvenient means 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?

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 to this end are available and will readily occur to the Court. Some of them are mentioned in the next point of this brief (p. 38).

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Summarizing our argument under this main head, we submit:

First: (a) The legislation is novel as purporting to compel a ceremony, instead of merely restraining expression. Moreover, the legislative purpose here invoked—the promotion of loyalty and morale as distinguished from safety, morals, health or economic welfare—represents a novel exercise of power; such an extension of power should be viewed with suspicion.

(b) The case relates to the validity of a compulsory ceremony, the character and effect of which are wholly different from that of the voluntary flag salute. Considerations relating to the voluntary salute are, therefore, irrelevant.

Second: Judicial scrutiny of the validity of legislation asserted to abridge basic individual liberties—including religious freedom—should be more exacting

than in other kinds of "due process" cases. In a case like that at bar, there should be no presumption of validity.

Third: There is no sufficient justification for the compulsory salute.

(a) To support a statute or regulation overriding religious beliefs, the Court itself should be satisfied that there is an urgent public need for the challenged legislation; and no such urgent need is here shown whether the need is tested by evidence in the record or by common sense and experience.

(b) Even if a public need is deemed to be served, the Court should be satisfied that no reasonable ways other than the compulsory salute are available to accomplish the avowed purpose; and there are other reasonable ways available.

Since the School Board regulation does not meet these constitutional tests, it is void.

III

Even if the salute be considered incapable of any religious meaning, compulsory salute legislation is void as an unjustifiable infringement of the liberty of the individual.

Up to this point, we have dealt with the problem on the assumption that an issue of strictly religious liberty is involved—as distinguished from the liberty of the citizen in a broader sense, of which religious liberty is only one aspect. We have argued: (1) that a question of religious liberty is clearly at issue because a religious objection is sincerely asserted and neither legislature nor court is competent to deny its existence; and (2) that there is no sufficient justification for the overriding and penalizing of this religious scruple.

Assuming that this Court holds that an issue of religious liberty *is* involved, the broader question now argued would not be presented. We must, however, recognize the possibility that the Court will agree with the four state courts above mentioned in refusing to recognize the existence of a religious question. On this hypothesis, it is important to inquire whether the legislation would still be unconstitutional as a deprivation, without due process of law, of liberty in a broader sense. On this point, we shall submit that the legislation is void even though the refusal by the respondent children is not treated as a religious objection.

As already noted, the state courts, in confirming the constitutionality of the compulsory salute, have sometimes stated that the legislature has wide discretion to stimulate loyalty and strengthen morale even by means of coercive requirements. This is the effect of such statements as are made in *Nicholls* v. *Lynn,* 7 N. E. (2d) 577, 579 (Mass., 1937); *Gabrielli* v. *Knickerbocker,* 12 Cal. (2d) 85,

82 P. (2d) 391, 394 (1938); *People* v. *Sandstrom,* 279 N. Y. 523, 531, 18 N. E. (2d) 840, 843 (1939).[29]

The Committee has, of course, no quarrel with the broad statements of this character in so far as they declare that maintenance of loyalty and preservation of morale are of the highest importance to the welfare of the State. No one disputes that. We submit, however, that such a premise falls far short of supporting the conclusion which these courts have sought to draw from it: that government can accomplish this proper purpose by *forcing* citizens, under severe penalty and against their will, to salute a particular symbol in a particular way. The crux of the whole matter relates to method. Granted that the object is proper, is it constitutional to try to achieve it by this form of compulsion, rather than by many other available methods?

The breadth of the courts' language above referred to must indeed give one pause as to the implications of the doctrine thus expressed. If it be constitutional to prescribe a salute and pledge to the *flag* on the part of school children and to force compliance upon the ground that to do so may promote loyalty, then why, it may be fairly asked, could not the legislature choose to require a tribute of respect to some other symbol? In many countries, a person rather than a flag is considered the most appropriate symbol of national unity and morale—usually the chief-of-state. In Germany, it is the Fuehrer rather than the swastika or the German flag that is the usual subject of a gesture of loyalty; in Italy it is the same with the Duce, and in Russia, with Stalin. Would it, upon the reasoning just referred to, be constitutional to require school children to salute a por-

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[29] For example, in *People* v. *Sandstrom,* the New York Court of Appeals said in a dictum (279 N. Y. at p. 531, 18 N. E. (2d) at p. 843)

> "There is another strength which is necessary to preserve the government besides military force, and that is the moral strength, or public opinion of its citizens. Public opinion is as vital to the maintenance of good government as an army or a navy, in fact these latter can be destroyed quicker by public opinion than by the attacks of an enemy. Many a nation has succumbed to the breakdown of the morale of its people. The State, therefore, is justified in taking such measures as will engender and maintain patriotism in the young."

trait of a national hero—Washington, Lincoln or Jefferson—even if objecting children did not put their refusal upon religious grounds? Under like circumstances, would it be constitutional to require such a salute to a picture of the President during his term, whoever he might be?

It may be said that a portrait of a man differs from the flag in that the flag is merely an abstract symbol. Whether such a distinction is valid may be tested by inquiring whether it would be constitutional for the legislature to require *all persons,* young and old (except young infants, the infirm and the sick), to salute the *flag* at stated intervals. The statute of Pennsylvania in the case at bar permits the school authorities to require the salute from children; and statutes of other states directly require the ceremony and frequently prescribe its frequency, such as once a week and even daily.[30] The requirement of the salute from the whole population would therefore be merely a matter of extending these very statutes to a different age group.

Specifically, let us suppose that a statute of Pennsylvania or New York should require the whole adult population to give this particular form of salute once a week at a time to be fixed by the Governor or other executive agency. Let us suppose that many citizens refused to comply, but none on religious grounds. Some would presumably refuse on grounds of mere inconvenience; others might object to the particular form of the salute as too much resembling the Nazi and Fascist salutes. Still others would doubtless invoke their "liberty" as American citizens without further specifying what they had in mind. Let us suppose that these objectors were arrested and put on trial as to whether they should suffer penalties for their non-compliance and that they were to plead the unconstitutionality of the legislation as depriving them of

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[30] The Massachusetts statute involved in *Nicholls* v *Lynn*, 7 N E (2d) 577 (1937) and *Johnson* v *Deerfield*, 25 F Supp 918 (D Mass, 1939), affd without opinion 306 U S 621 (1939) required the salute ceremony to be held every week The New Jersey statute involved in *Hering* v *State Board of Education*, 117 N J L 455, 189 Atl 629, affd 118 N J L 566, 194 Atl 177 (1937), appeal dismissed 303 U S 624 (1938), called for a daily salute

their "liberty" under the Fourteenth Amendment. Would this plea be good?

We submit that the plea would be good and that such legislation would be unconstitutional. The requirement of such a ritual is clearly alien to our institutions. It would be an intolerable invasion of individual liberties. Because it is inherent in the very nature of Americans to resent unnecessary assertions of authority, such a measure would not further the end of promoting loyalty and strengthening morale, but would have precisely the opposite effect. It would be unconstitutional because there would be no "appropriate relation" between the legislative command and the prescribed punishment, on the one hand, and the avowed objective on the other.[31]

As already pointed out, it was not until the first of these flag salute statutes was enacted that any American Government had attempted to *force* its citizens (not in military service) to go through any form of ceremony similar to this. We suggest that the supposed legislation would be held void for the broad reason that such an encroachment on the liberty of the citizen would be unnecessary and unreasonable and wholly inconsistent with the spirit of our institutions.

If the above conclusion be sound in respect of legislation seeking to *compel* a salute from the whole population, does precisely similar legislation become valid merely because it is restricted to children of school age? We suggest that this difference is not sufficient to sustain the legislation. It is true that it may be argued that children of school age need the salute and may be benefited by it to an extent that does not apply to adults. The argument might have some validity if it appeared that there was an "appropriate relation" between the object sought—*viz.*, the promotion of loyalty—and the means employed. However, as we have shown in the preceding section of this brief, there is no

[31] *Cf Roberts, J., in Herndon v. Lowry*, 301 U. S. 242, 258 (1937) "The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule * * * The judgment of the legislature is not unfettered. The limitation upon individual liberty must have appropriate relation to the safety of the state * * *"

evidence or common sense to support the conclusion that saluting the flag *under coercion* is reasonably adapted to the promotion of loyalty or morale; rather, the idea that such coercion can produce the desired result is contrary to common sense and experience.

Assuming that the compulsory flag salute legislation of these 18 states is held void, let there be no fear that there will have been abolished a method that is needed for the promotion of national loyalty. For nearly five generations since 1789, the nation relied wholly on spontaneous and voluntary manifestations to preserve sentiments of loyalty. We have survived five wars during that period without resorting to compulsory salutes from the civil population.

The country does not lack ways and means of promoting loyalty. These methods have been practiced for generations. We have our national holidays—the Fourth of July, when the Declaration of Independence is honored; the birthday of "the father of his country," when the name of Washington is honored; the birthday of Lincoln, when honor is paid to the saviour of the Union; Memorial Day, when respect is paid to the veterans of our wars. The observance of these and other occasions, such as Army Day and Navy Day, may be made more significant for children. They can be further encouraged to visit places of historic interest. Above all, in order to instill a well-grounded loyalty, instruction can be increased and improved in those aspects of English and American history which deal with the evolution of our fundamental rights. In these and a hundred other ways, the schools of America can find *spontaneous and voluntary* methods of stimulating and conserving patriotic loyalty.[32] These methods have served us well.

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[32] In this automobile age, millions of children can see one or more of the *places* that inspire love of country—Lexington and Concord, Mt Vernon and Monticello, the Washington monument and Arlington, Independence Hall, the tombs of Lincoln and Grant They can be led to read and better understand some of the great utterances of our famous men and some of the great documents of our history including the first ten Amendments The number of ways available for the promotion of loyalty, without resort to compulsory ritual, is indefinitely large

In a country of many diverse racial stocks and religious beliefs, these voluntary manifestations have been effective to weld a strong national spirit. We will lose nothing and we may gain much if we firmly resist the imposition of such compulsory methods as are represented by these flag salute statutes.

If these laws are held void we shall be deprived of nothing useful. They are not needed; and their invalidation is demanded by the spirit and letter of our Constitution.

IV

The compulsory flag salute cannot be sustained on the ground that public school education is granted as a matter of grace so that the requirement, even though arbitrary and capricious, can be enforced by expulsion from public school.

Some courts have suggested that public school education is provided as a matter of grace, the possible inference being that it can therefore be withheld for any reason that seems proper to the school authorities, whose determination on the question of reasonableness must be final. See *Leoles* v. *Landers,* 184 Ga. 580, 192 S.E. 218, 221, 222 (1937); *Hering* v. *State Board of Education,* 117 N.J.L. 455, 189 Atl. 629, affd. 118 N.J.L. 566, 194 Atl. 177 (1937). The position of these courts seems to be that expulsion from public school inflicts injury of a special kind which can never serve for the basis of a claim of constitutional right, no matter how arbitrary the rule which the school authorities seek to enforce. The Committee submits that such a position is unsound in principle and that it has been repudiated by this Court.

The Minersville Public Schools are maintained by property taxes imposed on taxable property within the district; and, as the petitioners have admitted in their answer, the respondent Walter Gobitis is a resident of the Borough of Minersville and the School District (R. 4, 28). His testimony that he was a taxpayer was not contradicted (R. 47).

The respondent children have a legal right against expulsion for insufficient cause, and have brought this action to vindicate that legal right. If expulsion from public school cannot serve as the basis for a constitutional attack, the reason must be found either in the insubstantiality of the injury (*cf. Standard Computing Scale Co.* v. *Farrell,* 249 U. S. 571 (1919)) or in the School District's proprietary interest in the school facilities.

There can be no doubt that deprivation of a common school education would be a serious disadvantage to the children. For a child to go through life without the rudimentary training provided by grade schools is a tremendous handicap. And the District Court has found that, if the children are to be relieved of that handicap, the petitioner Walter Gobitis must pay upwards of $3,000 for tuition and other expenses incidental to their education in a private school. Thus it seems plain that enforcement of the flag salute requirement will inflict either a great hardship upon the children or a heavy pecuniary loss upon their father.

Since the threatened harm is a substantial one, the only remaining question is whether the fact that the title to school facilities is in the public enables the State or its agency, like a private owner, to exclude any persons distasteful to it. A similar contention was repudiated by this Court in *Hague* v. *Committee for Industrial Organization,* 307 U. S. 496 (1939) and in *Schneider* v. *New Jersey,* 308 U. S. 147 (1939), with respect to public streets and parks The reasoning of the Court in those cases is decisive against the contention here. The concept of governmental services as public utilities, which we developed in our brief as friends of the Court in the *Hague* case, is particularly applicable to schools. Education is certainly more of a necessity of life than urban transportation and electric power. It should be subject to the same requirements of service without arbitrary discrimination. The notion that the public school authorities can arbitrarily run the schools as they please would justify the exclusion of any unpopular group.

Furthermore, it should be noted that to uphold the present regulation on such a ground would fall far short of settling the flag salute problem, because of the virtually universal statutory requirement, generally backed by criminal sanctions, that young children attend some school, public or private. Such a statute is embodied in the Pennsylvania School Code, as amended, Section 1423 (24 P. S. Pa. § 1430). If an expelled child is unable to obtain private schooling, disciplinary action might be taken against the child's parents or the child himself (depending upon the law of the particular state) for violation of the compulsory school attendance statute.

This is not an academic question. Such a prosecution was actually instituted against the parents of an expelled child in *People* v. *Sandstrom,* 279 N. Y. 523, 18 N. E. (2d) 840 (1939). Their convictions were reversed by the New York Court of Appeals on the ground that, "if it is thought necessary to carry the matter further, the action must be against the scholar, not the parents." 18 N. E. (2d) at p. 844. A still more striking example arose out of the situation presented in *Johnson* v. *Deerfield,* 306 U. S. 621 (1939). After this Court's refusal to hear oral argument on the appeal in that case, the expelled children were prosecuted as "habitual school offenders" within the meaning of the applicable Massachusetts statutes and were sentenced to a reform school.[33] Their convictions have been affirmed by the Superior Court of the County of Franklin, and a further appeal was argued on September 20, 1939 in the Supreme Judicial Court, where it is still awaiting decision.

It may be suggested that the decision of this Court in *Hamilton* v. *Regents,* 293 U. S. 245 (1934) militates against the Committee's position on this branch of the case. That decision upheld a requirement that all persons attending the University of California, a state institu-

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[33] See Grinnell, *Children, The Bill of Rights and the American Flag,* Massachusetts Law Quarterly, April-June 1939. See also Clark, a lecture at the Association of the Bar of the City of New York, *The Limits of Free Expression,* N. Y. Law Journal, July 11, 12, 13 and 14, 1939, reprinted in 73 U. S. Law Review 392, 399-402 (1939).

tion, be required to undergo a period of military training. The requirement was upheld against the objection of a member of the Methodist Episcopal Church who complained that it infringed his right of religious liberty.

There are expressions in the opinion of the Court that might be construed to mean that attendance at a state university is a privilege which, if accepted, must be taken with any accompanying hardships. However, the Committee believes that the decision is explained rather by the paramount public necessity of training able-bodied male citizens of suitable age to develop their fitness for military and police service. If the Committee is mistaken in this respect and the decision did involve a determination that university training is a gratuity which can be withheld at will, then it appears to have been overruled by the later case of *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337 (1938), holding invalid a statute which unconstitutionally restricted the right to attend a state-supported law school.

In any event, it should be pointed out that the *Hamilton* case is distinguishable on its facts Whatever may be thought of a ruling that a free or inexpensive *university* training may be withheld in the discretion of the local authorities, it cannot be doubted that deprivation of a *common school* education is a far more serious hardship. In the New York and Massachusetts cases mentioned above, such deprivation has already resulted, and it would result even in the situation here before the Court if the respondent Walter Gobitis should become financially unable to send his children to private school.

Moreover, the *Hamilton* case is distinguishable in that there is no legal obligation to attend a university, whereas there is a legal obligation to obtain a common school education and, as a practical matter, the average child must get it in a public school. Thus the average child cannot avoid a compulsory salute requirement in states where it prevails, although any conscientious objector can avoid a compulsory drill requirement in a university by choosing not to go there.

CONCLUSION

The philosophy of free institutions is now being subjected to the most severe test it has ever undergone. Advocates of totalitarian government point to the speed and efficiency with which such systems are administered, and assert that democracy can offer nothing to outweigh these advantages. The answer is to be found in the value of certain basic individual rights and the assurance afforded by free institutions that these shall not be required to yield to majority pressure no matter how overwhelming.

The worth of our system must ultimately be judged in terms of the importance of those values and the care with which they are safeguarded. We consider them immeasurably important. We believe that the letter and spirit of our Constitution demand vindication of the individual liberties which are abridged by the challenged regulation.

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

DOUGLAS ARANT
(of the Alabama Bar)

ZECHARIAH CHAFEE, JR.
(of the Rhode Island Bar)

GRENVILLE CLARK, *Chairman*
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BURTON W. MUSSER
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JOSEPH A. PADWAY
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(of the Ohio Bar)

APPENDIX

Resolution of the House of Delegates of the American Bar Association, dated January 9, 1940.

RESOLVED that the resolution with reference to the Special Committee on the Bill of Rights, adopted by the House of Delegates on July 29, 1938, and amended on January 9, 1939, be amended to read as follows:

> "Whereas, it is desirable that the American Bar Association shall take immediate and practical steps to assure to American citizens that whenever rights or immunities secured by the Bill of Rights are anywhere denied to any citizen or threatened with denial, there shall be a speedy and impartial investigation of the facts, and where the facts warrant it, there shall be certainty of the assistance of competent lawyers and defense in protection of such rights; and
>
> Whereas, for centuries it has been and now is an important duty of the legal profession to safeguard these rights and to promote general understanding thereof,
>
> It is hereby resolved:
>
> That the American Bar Association hereby creates a Special Committee on the Bill of Rights which shall consist of fourteen members* and shall be authorized:
>
> 1. To investigate, or cause to be investigated, instances of seeming substantial violations or threatened violations of Bills of Rights, whether by legislative or administrative action or otherwise, and, when authorized by the House of Delegates or Board of Governors or in case of emergency by the President, to make public its conclusions in respect thereto.

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* There are now two vacancies on the Committee, the present membership being twelve

2. To take such steps as it may deem proper in the defense of such rights in instances which otherwise might go undefended; and, when authorized by the House of Delegates or Board of Governors or, in case of emergency, by the President, to appear as *amicus curiae* or otherwise in cases in which vital issues of civil liberty are deemed to be involved.

3. To disseminate information generally concerning our constitutional liberties to the end that violations thereof may be the better recognized and proper steps taken to prevent or correct them.

4. To cooperate with State and Local Bar Associations and with appropriate committees thereof and to do such other things as may be necessary or proper and are authorized by the Board of Governors, to carry out the purposes of this resolution.