"Writing their Faith into the Laws of the Land:[1] Jehovah's Witnesses and the Supreme Court's Battle for the Meaning of the Free Exercise Clause, 1939-1945

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The Supreme Court recently upheld the free exercise rights of a religious group to canvas door to door without first obtaining a permit.[2] The group asserting that their right to practice their faith through door to door contacts overrode the government's interest in restricting such activities even through 'neutral' laws was the Jehovah's Witnesses.[3] It was altogether fitting that the Court in finding the Witnesses' activities were the exercise of their religion cited the free exercise decisions from the late 1930's and early 1940's.[4] For it was Jehovah's Witnesses who brought most of those cases before the Supreme

[1] Hayden Covington, the Witnesses' attorney during the period covered by this article said the Witnesses' efforts had resulted in their "way of worship being written into the law of the land." Jehovah's Witnesses: Proclaimers of God's Kingdom (Watchtower Bible and Tract Society of N.Y., Brooklyn, N.Y. 1993, p. 683)

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[2] *Watchtower Bible and Tract Society, et al. v. Village of Stratton, et al.*, 536 U.S. 150 (2002).

[3] The Watchtower Bible and Tract Society is the corporate name for the organization; the individual members are called Jehovah's Witnesses.

[4] The Court cited to *Murdoch v. Pennsylvania*, 319 U.S. 105 (1943), *Schneider v. Townr of Irvington*, 308, U.S. 147 (1938), *Cantwell v. Connecticut*, 310 U.S. 296 (1939) and *Martin v. City of Strothers*, 319 U.S. 141 (1943). All these cases were brought and won by Jehovah's Witnesses.

Court,[5] and in doing so, used their beliefs to establish much of the First Amendment free exercise law we still use today. It is doubly fitting because the Justices on the Supreme Court during that period used the Witnesses' cases to establish their own constitutional "faiths" about how much protection the Court should give these practices from the effects of "neutral" laws. At the time these cases were coming before the Court the Court was undergoing one of the greatest changeovers in its history.[6] The justices appointed by President Roosevelt remade First Amendment law. In so doing, these Justices pursued development of their own constitutional faith into the law of the land.[7] This article tracks this remarkable confluence of forces that together created the First Amendment's free exercise jurisprudence.[8]

Arguments about where the balance should be struck between government regulation and individuals' freedom to practice their religion are as old as the Republic

[5] Between 1938 and 1945 the Jehovah's Witnesses were involved in twenty-four decisions before the Court raising free exercise issues.
[6] Roosevelt appointed nine Justices to the Supreme Court, virtually remaking the entire Court.
[7] Justice Black's own monograph on his view of constitutional law is entitled "A Constitutional Faith." Black, "A Constitutional Faith" Alfred A. Knopf, Inc., N.Y. 1968.
[8] This does not seem too strong a characterization. From its inception to 1937 the Court heard only a handful of religious clause cases. On one day in 1943 they decided 13, all involving Jehovah's Witnesses. Shaw, "Present at the Creation: The Roosevelt Court, Religion and the First Amendment," pp. 153-154, in Shaw, et al., ed's, "Franklin D. Roosevelt and the Transformation of the Supreme Court" (M.E. Sharpe, Armonk, N.Y. 2004).

itself.[9] But during the 1930's and 1940's, while the world waged a war pitting democratic governments against totalitarian regimes in Europe and the South Pacific the Jehovah's Witnesses fought a war on the home front to establish the primacy of their right to freely practice their faith against government interference or obstacles. Bookmarks bracketing the beginning and end of their struggle were two Supreme Court decisions involving the salute to the flag and the recitation of the Pledge of Allegiance.[10] The road from Gobitis[11] to Barnette[12] is a remarkable story of the confluence of history, theology and law. Franklin Roosevelt transformed the Supreme Court during his four terms as President. He made nine appointments to the Court between 1937 and 1943.[13] The average age of the Justices dropped from seventy-two for the "Nine Old Men" in 1937 to fifty-six in 1943.[14] The judicial philosophies of the Court changed as well as the change in personnel. The solicitude for individual rights increased as did the Justices'

[9] See Murdoch v. Pennsylvania, 319 U.S. 105 (1943); Douglas recounts preaching door to door an activity dating back" as far as there were printing presses."
[10] Minersville Unified School District v. Gobitis,310 U.S.586 (1940); West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943)
[11] 310 U.S. 586 (1940)
[12]319 U.S. 624 (1943)
[13] Justices Black, Reed, Frankfurter, Douglas, Murphy, Byrnes, Rutledge, and Jackson; he also nominated Justice Stone to replace Hughes as Chief Justice.
[14] Mason, "Harlan Fiske Stone: Pillar of the Law", (Viking Press 1956), p. 601

beliefs about the Court's role in protecting those rights.[15] During the same time the Jehovah's Witnesses' beliefs had evolved in a way that made aggressive preaching of the "good news" central to the practice of their faith.[16]

During the Court's transition period the Jehovah's Witnesses brought their arguments before the Supreme Court eight times.[17] Eight times they lost. But on May 3, 1943 the tide turned. On that single day the Supreme Court decided thirteen cases involving Jehovah's Witnesses; they won twelve.[18] The Court found the request for injunctive relief in the thirteenth case moot, based on their striking down the statute involved, in one of the other cases that day.[19] One month later, on Flag Day – June 14th, 1943 – the Supreme Court decided in West Virginia Board of Education v. Barnette[20] that Jehovah's Witness' schoolchildren could not be compelled to salute the American flag in the public school classrooms. This stunning reversal of the Court's own recent

[15] See infra, pp.
[16] See infra, pp.
[17] Between 1941 and 1942the Witnesses were denied certiorari six times; the two cases the Court decided, Cox v. New Hampshire and Chaplinsky v. New Hampshire, were unanimous decisions against the Witnesses.
[18] Jones v. Opelika, Bowden v. Fort Smith, Jobin v. Arizona, 319 US 103 (1943); Murdock v. Pennsylvania, Perisich v. Pennsylvania, Mowder v. Pennsylvania, Seders v. Pennsylvania, Lamborn v. Pennsylvania, Maltezos v. Pennsylvania, Jones v. Pennsylvania, Tzains v. Pennsylvania, 319 US 105 (1943); Martin v. City of Struthers, 319 US 141 (1943)
[19] Douglas v. City of Jeannette, 319 US 157 (1943)
[20] 319 US 624 (1943)

precedent[21] has been called "one of the most notable acts in the entire span…of Supreme Court history."[22]

The story of Jehovah's Witnesses battle for the First Amendment must begin with a look at the unique characteristics of their faith. These tenets led them to proselytize their faith in the streets and door to door in small towns across America. It also contributed to their decision to use the courts to vindicate their right to do so.

Jehovah's Witnesses in the 1930's and 1940's were, and still are, a small but zealous sect. They are milennialists; they believe the world is coming to an end soon, when God will triumph over Satan and begin a thousand year reign.[23] The group was founded in the late 19th century in Pennsylvania by Charles Taze Russell. He taught his followers to warn mankind of the impending Armageddon and to spread the "Truth" to all who would listen. Russell thought the end would come in 1914 and he and his followers would share in the Kingdom then.[24] But the Apocalypse did not take place, and Russell died suddenly three years later. The man who eventually assumed control of the

[21] Minersville School District v. Gobitis, US (1940) had only been decided two and a half years earlier and was an 8-1 decision.
[22] Urofsky, "Division and Discord", p. 25
[23] Since their origins the Witnesses have awaited Armageddon on several occasions; 1917 was the first calculated "end time". Newton, "Armed with the Constitution: Jehovah's Witnesses in Alabama and the U.S. Supreme Court, 1939-1946" (U. of Alabama Press 1995), p. 25
[24] Marley Cole, "Jehovah's Witnesses: The New World Society", Vantage Press, N.Y. (1955) pp. 213-214

group was Joseph Rutherford, who had been Russell's lawyer.[25] Rutherford imposed tight controls. He developed a central organization of the group. Rutherford explained Russell's "error" in predicting the date of Armageddon as a "test" from God.[26]

Russell had taught that a small group of the anointed would rule with God in Heaven. As time passed and the number of these people, including Russell, died the rest of his followers did not have much reason to expand their numbers beyond these chosen few.[27] Rutherford modified this doctrine. Christ, Rutherford taught, had begun the millennial rule in 1914 as Russell had predicted. But the reign began in Heaven. Christ had kicked Satan out of the Kingdom and restricted him to Earth. Now, at the appointed time the "anointed ones" on Earth would rise up and rule with God in Heaven. But the "multitude" still on Earth – most of the rank and file believers – could look forward to immortality on Earth after Armageddon.[28] This new doctrine provided something all believers could benefit from. Rutherford urged all his followers to spread this good

[25] Ibid.
[26] Cole, supra, pp. 83, 96-98
[27] The number of the anointed was 144,000; while this was more than the number of Russell's followers, it included a number of persons already dead- Moses and other prophets, to name a few. Ibid.
[28] Cole, supra, p. 24

news.[29] Rutherford further organized and directed his flock. No longer known as "Russellites" they became Jehovah's Witnesses on earth.[30] They were organized much like an army, on a great crusade. Local congregations were "companies"; their directors were "company servants"; the individual members were "pioneers".[31] The need to "spread the good news" became central to the beliefs of Jehovah's Witnesses. And as Rutherford led the group from the 1920's into the 1930's , he became more authoritative and more strident. Initially the pioneers (the door to door preachers) used personal testimonies to convert others. Now pioneers were armed with calling cards and literature; the publications of the group proliferated.[32] Their cards identified them as ordained ministers of Jehovah's Witnesses. They carried pamphlets with Witness beliefs elaborated, or portable phonographs that played four and a half minute recordings of Judge Rutherford's speeches on different topics.[33] By 1938 the campaign to save the "multitude" got even more organized: the country was divided into a network of districts,

[29] Cole, supra, pp. 83, 96-98. Rutherford told all Witnesses to "Advertise, Advertise the Kingdom!"
[30] At the National assembly of International Bible Students ("Russellites") in 1931, Rutherford formally changed the name of the group to Jehovah's Witnesses. Cole, supra, p. 102
[31] Newton, "Armed with the Constitution", supra, p. 36
[32] Cole, supra, pp. 106-108
[33] Newton, p. 40; Penton, "Apocalypse Delayed", p. 71

zones and circuits with regular reports to the central office.[34] The Witnesses had a force of 12,600 volunteers in 78 motorized battalions fighting this war. These groups could descend on a small town like locusts and reach most members of the community before anyone could react.[35] Indeed, that was a primary reason for the "locust" technique – to spread the word in spite of local restrictions like license, solicitation or permit requirements. For the Witnesses were unwilling to abide by such man-made restrictions on their divine calling.[36]

As the tempo of the Witnesses' proselytizing increased in the 1930's, so did the opposition to their efforts. Many towns passed ordinances attempting to limit their practices. The ordinances required permits or licenses to solicit door to door, or to distribute literature. Some required the payment of fees; others the permission of the mayor or council.[37] In response, Rutherford gathered a staff of attorneys in the central office to direct the battle against these obstacles. He was fortunate in bringing Hayden

[34] Newton, p. 46
[35] David Manwaring, "Render unto Caesar: Jehovah's Witnesses and the Flag Salute Controversy", University of Chicago Press (1962), pp.17-28, 34.
[36] George Samuel Braden, "They Also Believe" (N.Y., Macmillan Co. 1950), pp. 358-380.
[37] "Proclaimers of God's Kingdom", supra, p. 683; Barbara Harrison, "Visions of Glory: A History and a Memory of Jehovah's Witnesses", (Simon & Schuster, N.Y. 1978) p. 192.

Covington, a spirited and charismatic Witness attorney from Texas, first to aid in, then to lead a national legal campaign.[38]

Charles Russell had taught his followers to be obedient to secular government.[39] Under Judge Rutherford's leadership the Witnesses' position toward earthly government changed. The "higher powers" referred to in the Bible[40] were not secular rulers, but Jehovah and Christ Jesus. Earthly governments therefore had no basis in divine authority. Witnesses were to obey no human law "unless it was in harmony with God's."[41] The new position would cause the Witnesses to take an unyielding stand over their right to preach door to door and in the streets without submitting to local anti-solicitation or permit laws. This was because they viewed their preaching as following God's law.

The Witnesses viewed their preaching work as "the touchstone of their lives, central to their very *raison d'etre*."[42] Indeed, the Watchtower Society teaches that their preaching to others is essentially the means by which Witnesses attain salvation

[38] Newton, supra, p. 48
[39] Mr. James Penton, "Apocalypse Delayed: The Story of Jehovah's Witnesses," U. of Toronto Press 1985, pp. 138-139.
[40] Romans 13:1; Russell taught that these higher powers were secular governments. Id.
[41] Penton, supra, p. 139. Russell announced the new doctrine in The Watch Tower magazine in June 1929.
[42] Penton, supra, p. 206.

themselves.[43] Further, it is this preaching work that will separate those who will share the earthly kingdom from those who will be damned.[44] The 'great crowd' – the majority of Witnesses who are not part of the 144,000 kingdom heirs – must work for their salvation. And their preaching efforts are a great part of that work.[45]

The preaching work was not only central to Witness doctrine; it was also central in the organizational structure.[46] The hierarchy of the faith came from the pioneers who devoted most or all their time to preaching. Their continued rise depended on successfully pushing the preaching work; Rutherford ensured this by abolishing the positions of elders, who were not supporting the preaching.[47]

The vitriolic nature of Witness preaching, and a message that is often anti-established religions[48] led to many attacks and persecution.[49] This caused the Witness leadership to become even more zealous. Nathan Knorr, Judge Rutherford's successor in

[43] Id.
[44] Id.
[45] Newton, p. 194-198.
[46] Penton, p. 245.
[47] Penton, p. 246.
[48] Rutherford taught other religions were actually God's enemies; the Catholic Church was most often his target. See, e.g. "Enemies" one of Rutherford's phonograph recordings.Watchtower Bible and Tract Society 1937.
[49] The Witnesses proudly claim they are the most persecuted Christians in the twentieth century. Ken Julber, "The Persecution of Jehovah's Witnesses in Central Africa," The Social Compass, Vol. 24, (1977), p. 121.

1942 established minority schools in each congregation and a national missionary training school called Gilead.[50] They also became more militant in carrying their struggle to deliver their message into the Courts.[51]

This struggle was as organized and militant as the Witnesses' preaching. All Jehovah's Witnesses were trained in basic legal procedures. Discussions of the law and trial practice became an integral part of Witnesses' congregational meetings.[52] The Witnesses' legal staff prepared and the national headquarter distributed several publications discussing relevant case law and offering suggestions to Witnesses or how to use them in defending their actions in Court.[53] The local congregations were coached on how to respond to arresting officers. Mock trials were conducted at local meeting halls

[50] "Jehovah's Witnesses in the Divine Purpose," (Watchtower Bible and Tract Society, N.Y. 1959) pp. 201-205, 213-14.
[51] Between 1938 and 1955 the Witnesses had 45 cases come before the Supreme Court. Additionally were hundreds of cases in lower states and Federal courts. "Qualified to be Ministers," (Watchtower Bible and Tract Society, Brooklyn, N.Y. 1955) p. 618; Shawn Peters, "Judging Jehovah's Witnesses" p. 127.
[52] "Jehovah's Witnesses: Proclaimers of God's Kingdom," Watchtower Bible and Tract Society (1993) pp. 690-691.
[53] "Jehovah's Servants Defended" (WT 1941) and "Freedom of Worship" (WT 1943); Peters, "Judging Jehovah's Witnesses," supra, p. 129.

with procedural tips on preserving issues for appeal.[54] A bevy of regional attorneys and staff from the national office criss-crossed the country handling these cases.[55]

THE COURT

By the time the first Jehovah's Witnesses cases came before the Supreme Court[56] the Court had endured the "constitutional crisis" of 1937[57] and begun to reflect the results of Franklin Roosevelt's extraordinary number of Court appointments.[58] The battle over the constitutionality of New Deal legislation[59] had been resolved by the Court adopting a policy of judicial restraint.[60]

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[54] Barbara Grizzuti Harrison, "Visions of Glory: A History and a Memory of Jehovah's Witness," Simon and Schuster, N.Y. (1978) pp. 191-192.

[55] Peters, "Judging Jehovah's Witnesses," supra, pp. 130-133; in 1941 and 1942, for example, attorneys from the national office won injunctions against enforcement of anti- peddling ordinances in Oklahoma, Idaho, New Hampshire, Pennsylvania, Texas, Colorado, and Ohio.

[56] Lovell v. Griffin, 303 US 444(1938) and Schneider v. Town of Irvington, 308 US 137 (f1939) were the first cases decided regarding the Witnesses' challenges to local ordinances applied to their evangelism techniques.

[57] From 1932-1936 the Court had struck down a number of New Deal legislative initiatives. In frustration over the Court's actions President Roosevelt sent a proposal to Congress to reorganize the Federal judiciary. The proposal would have allowed him to appoint up to six additional justices to the existing Supreme Court; one for each Justice over the age of 70. Melvin Urofsky, "Division and Discord: The Supreme Court under Stone and Vinson, 1941-1953" (U. of So. Carolina Press 1997), pp. 1-5 This proposal split the Democratic party and caused a storm of protest from the bench and bar. Peter J. Renston, "The Stone Court: Justices, Rulings and Legacy" (ABC-CLIO Supreme Court Handbooks 2001)

[58] In August 1937 Justice van de Venter resigned, giving Roosevelt the first of nine appointments to the Court – Justice Hugo L. Black. Justice Reed was confirmed in January 1938; in 1939 Felix Frankfurter and William O. Douglas were appointed. Urofsky, supra, Appendix, p. 265; Renstrom, supra, p. 15

[59] See footnote 39, supra.

[60] On the pre-1937 Court those members who advocated this policy, of deference to government legislation, were viewed as "liberals". On the Stone court this would become the "conservative" view. Urofsky, supra, pp. 1-5.

Prior to 1937 senior members of the Court adhered to the view that government had limited authority to adopt legislation affecting property or contract rights unless the Constitution expressly permitted it.[61] The "liberal" bloc of Stone, Brandeis and Cardozo advocated judicial restraint; a view that permitted government to engage in activity in these areas if there was no specific constitutional prohibition against it.[62] Chief Justice Hughes and Owen Roberts were "swing votes" on this Court; but Hughes' aversion to 5 to 4 decisions often led him to join the majority if Roberts voted with the Four Horsemen. This was the alignment that struck down many New Deal proposals. Roosevelt was so frustrated with the Court that he sent his "court packing" plan to Congress. Under the plan, the President could appoint a new justice to the Court if any justices had not retired within six months of their 70th birthday. The personnel on the Court at the time of the plan would have given Roosevelt authority to appoint six new justices, expanding the

[61] This group – McReynolds, van de Vanter, Butler and Sutherland – became known as the "Four Horsemen". Urofsky, supra; see also Douglas, "The Court Years"(Random House, N.Y. 1980), p. 10: "When I went on the Court I knew former Justice Willis VanDeVanter and George Sutherland casually, and I had very few contacts with James McReynolds and Pierce Butler. My chief encounter with these Four Horsemen had been at the Chevy Chase Country Club."

[62] Urofsky, supra.

Court to 15 members and allowing him to ensure a clear majority for New Deal legislation.[63]

Two things averted the crisis and allowed FDR's plan to die in a Senate committee. First, Justices Hughes and Roberts voted with the "liberal bloc" and upheld two pieces of New Deal legislation.[64] The second occurrence was the retirements of the older Justices on the Court.[65] Roosevelt's first appointment was a loyal New Deal senator who had supported the court-packing proposal – Hugo Black.[66] The "Nine Old Men" had begun to give way. The decision in Lovell v. Griffin was handed down by a Court still primarily composed of the "Old Men;" only two New Deal justices were on the Court at that time. Chief Justice Hughes and Justices McReynolds, Brandeis, Butler, Stone and Roberts were holdovers who preceded President Roosevelt's appointments. Justice Cardozo was also pre-New Deal, but he was ill and did not participate in any of the Court's decisions in the Spring 1938 term of Court, when Lovell was argued and

[63] The media declared that the proposal created a constitutional crisis. Urofsky, supra, pp. 1-5.
[64] In March 1937 the Court upheld a state minimum wage law, thanks to Hughes and Roberts' votes. The second piece of legislation was a fair labor standards act. This change became known as "the switch in time that saved nine." Urofsky, p. 5.
[65] In August 1937 Justice Van De Vanter resigned, giving Roosevelt his first of nine appointments to the Court.
[66] Urofsky, p. 17.

decided.[67] Justice Black was President Roosevelt's first appointment to the Court, replacing Justice VanDeVanter in the fall of 1937.[68] Justice Sutherland retired at the beginning of the Spring term in 1938 and was replaced by Justice Reed January 31, 1938.[69] This was the composition of the Court when Lovell was decided. One year later, when Schneider v. Town of Irvington was decided, Justice Frankfurter had replaced Cardozo, and Justice Douglas had assumed Brandeis's seat. Justice Butler was ill at this time, and did not participate in the decision. So at this time, there were four New Deal appointments of the eight Justices who heard the Schneider case.

These changes in the Court firmly established "judicial restraint" as a majority view on the Court. But the doctrine's limitation to the area of property rights, and the different views on the Court toward individual rights was already underway before the Roosevelt appointments arrived. Chief Justice Hughes himself wrote for the Court in 1931 that the 14th Amendment due process clause included the First Amendment freedoms.[70] The assertion that different standards of analysis should apply to legislation

[67] 303 US Reports, "List of Justices Sitting During this Term of Court," p.
[68] Urofsky, "Division and Discord," supra, p. 17.
[69] 303 US Reports, supra, "List"
[70] Douglas, "The Court Years," p. 44.

affecting property rights than those affecting individual rights, including First Amendment rights, was presaged by a "liberal bloc" Associate Justice, and Hughes' successor as Chief Justice, Harlan Stone. This was Stone's famous "footnote four" in the Carolene Products case.[71] The conflict between Court members' advocacy of judicial restraint and the protection of First Amendment freedoms would occupy much of the new Court appointees' attention and change the Court from Hughes' group of consensus builders to the most fractious group of individuals to ever sit together on the Court.

Thus, at the same time the Court was moving toward deference to the political branches on economic initiatives; it was beginning to expand the role of the Court as an enforcer of individual rights.

Before 1937, the Court had only decided a handful of religion cases in its 150-plus year history.[72] It held firm to its position as "the least dangerous branch" – and its

[71] U.S. v. Carolene Products Co., 304 US 144, 152-153, fn. 4 (1938); "these (restrictions affecting civil liberties) should be subjected to more exacting scrutiny."
[72] Shaw, et al., ed's, "Franklin D. Roosevelt and the Transformation of the Supreme Court," vol. 3, Sharpe Library of FDR Studies, (M.E. Sharpe, Armonk, N.Y. 2004), p. 194.

Chief Justices reflected that belief.[73] Before 1935, the Court did not even have its own building, but was housed in quarters in the basement of Congress.[74]

The Court began the process of enforcing individual rights by finding that the due process clause of the Fourteenth Amendment incorporated "basic freedoms" contained in the Bill of Rights and these freedoms could be enforced against not only the Federal but state governments.[75] The process of "incorporation" of the freedoms enumerated in the first eight Amendments into the Fourteenth Amendment was continued in the 1930's.[76] When Lovell v. Griffin[77] and Schneider v. Town of Irvington[78], the first Jehovah's Witnesses cases reached the Court, the First Amendment freedoms of speech and press had been fully incorporated and their protection against state action found coextensive with their reach against the Federal government.[79]

[73] Hughes modeled his role as Chief Justice on Taft; both believed the Court had a limited role in democratic government.
[74] It may be only coincidence but the Court's increased role in determining the Constitution's protection of individual rights begins shortly after their move into their own quarters.
[75] Urofsky, supra, p. 7; Gitlow v. New York, 268 US 562 (1925)
[76] Palko v. Connecticut, 302 US 319 (1937)
[77] 303 US 444(1938)
[78] 308 US 137 (1939)
[79] Gitlow, supra (free speech); Near v. Minnesota, 283 US 697 (1931) (freedom of the press); Thornhill v. Alabama, US (these rights have same reach against state as Federal government)

The analysis the Court applied to determine cases involving individual rights was also evolving at this time. The "clear and present danger" test enunciated by Holmes[80] had set the standard: the government must show a clear and present danger of harm to an important government interest to warrant abridgment of free speech or press rights.[81] While the Court did apply this test to strike down some legislation, the test was still applied in a manner consistent with the Court's policy of judicial restraint and deference to government. This meant the government interest usually prevailed. Then in 1938 Justice Stone wrote his footnote in the Carolene Products[82] case, suggesting that the Court's use of a deferential analysis of economic legislation, ought to differ when it was reviewing restrictions affecting civil liberties.[83] These restrictions, Stone said, "should be subjected to more exacting scrutiny" and "statutes directed at particular religious … minorities" and "prejudice against discrete and insular minorities" could call for a "more searching judicial inquiry" than ordinary legislation.[84] The newly reconstituted Court

[80] Schenck v. U.S., US (Holmes, J. dissenting)
[81] Id.
[82] U.S. v. Carolene Products Co., 304 US 152-153 fn. 4 (1938)
[83] Id.
[84] Id.

with Black and Reed took up this new analysis and began applying stricter scrutiny in free speech cases coming before it.

One of the first opportunities presented to the Court to apply this new standard of scrutiny came in the second Jehovah's Witness' case to reach the Court, Schneider v. Town of Irvington.[85] A group of Witnesses were arrested for violating a town ordinance in Irvington, New Jersey that required a permit from the Chief of Police in order to canvass door to door to distribute literature. In striking down the ordinance Justice Roberts echoed the Carolene Products footnote. In cases where the legislative abridgment of free speech rights was asserted, the Court "should be astute to examine the effect of the challenged legislation."[86] Legislative preferences or beliefs that may be sufficient to uphold other legislation may be "insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions."[87] In his brief in the case, the Witnesses' lawyer Hayden Covington had argued the ordinance violated not only free speech rights but the Witnesses' right to free exercise of their religion. He urged the Court to extend to religious freedom the same protection enjoyed

[85] 308 US 147 (1939)
[86] Schneider, supra, at.
[87] Id.

by speech and press.[88] One year later, in Cantwell v. Connecticut[89] the Court did find the protections of free exercise were incorporated into the Fourteenth Amendment. By this time Roosevelt had also made another appointment to the Court – Justice Frank Murphy, a Catholic Senator and former Governor from Michigan.

In typical Witness style, Newton Cantwell and his two teen-aged sons approached pedestrians in a heavily Roman Catholic neighborhood in New Haven, Connecticut and asked permission to play a record on their portable phonograph.[90] The recording they played was "Enemies", a speech by Judge Rutherford claiming the Catholic Church was an instrument of Satan, a "great racket" and responsible for untold suffering of mankind.[91]The listeners told Cantwell to shut the record off and get moving; Cantwell and his sons did. They were charged with breach of the peace and with soliciting funds without a certificate of approval from the state Public Welfare Council. The Council was empowered to determine whether a cause seeking to solicit funds was "religious or

[88] Covington wrote "What mysterious quality can there be in the principles of constitutional law which prohibits licensing or censoring of the press but authorizes a license for preaching the gospel of God's kingdom?" Petitioner's Brief, Schneider v. Irvington, p. 32
[89] 310 US 296 (1940)
[90] Abraham and Perry, "Freedom and the Court: Civil Rights and Liberties in the United States", 7th ed. (Oxford Univ. Press 1998), p. 237
[91] Id.

charitable" or not, and to issue or withhold approval accordingly.[92] Justice Roberts again wrote for the Court. He used the "clear and present danger" test and found there was no breach of the peace. There was no assault, and the Cantwells were not threatening or verbally abusive.[93] The Court also found the certificate requirement violated the newly established test for scrutinizing laws abridging free exercise rights: granting a government official unfettered power to censor the religious practices involved "lay a forbidden burden upon" the free exercise of religion.[94]

Justice Roberts was quick to point out, however, that there were limits to this free exercise right: while the right to hold one's beliefs was absolute, the right to act on those beliefs was not. Roberts adhered to a "balancing" test, weighing the individual rights against the needs of society, to determine whether free exercise or government regulation would prevail.[95]

The victories in these three early cases seemed to have secured the constitutional protection for the Witnesses' unique style of evangelism. But only two weeks later the

[92] Id.
[93] Abraham and Perry, supra, p. 238
[94] Id.; Cantwell v. Connecticut, 310 US 296, 306 (1940)
[95] Abraham and Perry, supra, pp. 235-236.

Court dealt a severe blow to the Witnesses and marked these cases as just the beginning, not the end, of the Witnesses' struggles.

One of the tenets of the Witnesses' faith was that all earthly governments were corrupt; they waited for the time when God would rule over his earthly kingdom.[96] An offshoot of their belief was their refusal to participate in displays of allegiance to nations or causes. They did not vote.[97] And after German Jehovah's Witnesses refused to perform the Nazi salute and were persecuted, Judge Rutherford announced to American Witnesses that they, likewise, should not salute the flag or recite the Pledge of Allegiance.[98]

The Gobitas family in Minersville, Pennsylvania heard Rutherford's broadcast and heeded his words.[99] When the children were expelled for refusing to salute the flag, Gobitas sought an injunction against enforcement of the statute. Both lower Federal

[96] Barbara Grizzuti Harrison, "Visions of Glory: A History and a Memory of Jehovah's Witnesses" (Simon and Schuster, N.Y. 1978), p. 206. Ms. Harrison notes the Witnesses prayed daily for the "disintegration of all nations."
[97] Id.
[98] Harrison, supra, p. 188. Rutherford made this announcement in a nationwide radio broadcast October 6, 1935; he interpreted the Second Commandment admonition "Do not bow down to graven images" to forbid saluting the flag, as it would be idolatry.
[99] Irving Dilliard, "The Flag Salute Cases", ch. 15, pp. 222-225, in "Quarrels that Have Shaped the Constitution", John A. Garraty, editor (Harper & Row, N. Y. 1964)

courts ruled in his favor.[100] So it astonished many court-watchers when the Supreme Court reversed the lower court judgments and upheld the Minersville flag salute requirement.[101] Perhaps even more astonishing was the fact the vote of the Court was 8 to 1, with only Justice Stone dissenting.[102] Over the next three years the Jehovah's Witnesses brought eight cases to the Supreme Court.[103] They lost them all.[104]

We must look closely at the changing composition of the Court, the individual Justices appointed and evolving judicial philosophies to understand how the Witnesses could win their early victories, why they lost their gains just as quickly and what led ultimately to the remarkable reversal of their fortunes and results on May 3 and June 14, 1943.[105]

As noted earlier, Lovell v. Griffin[106] and Schneider v. Town of Irvington[107] , the Witnesses' initial victories were decided on free speech and free press grounds. They

[100] "The Flag Salute Cases", supra at pp. 225-228
[101] Minersville School District v. Gobitis (sic), 310 US 586 (1940). The Gobitas name was misspelled by the lower courts and never corrected on appeal.
[102] Id.
[103] Six of the cases were denied certiorari. Two decisions were unanimous against the Witnesses, Cox v. New Hampshire and Chaplinsky v. New Hampshire
[104] Id.
[105] On May 3, the Witnesses won twelve cases; one of their victories was the Court's reversal of its own decision in Jones v. Opelika. On June 14, the Court handed down its decision in West Virginia Board of Education v. Barnette reversing the Gobitis decision.
[106] 303 US 444 (1938)

also involved permit requirements that vested unfettered discretion in local officials. As such, they were treated as "censorship" cases and viewed as simple applications of existing Court precedent.[108]

In Lovell, Chief Justice Hughes cited the Gitlow v. New York[109] and Near v. Minnesota[110] precedents and treated the permit requirement as a "prior restraint"[111]. Justice Roberts' opinion in Schneider referred to the earlier free press precedents, including Lovell, as prohibiting "administrative censorship" and equated the permit requirement in that case to this prohibited burden on a free press.[112] Just as importantly, the Court in both cases reiterated the limited judicial role in reviewing legislation and stressed that government could enact regulations limiting First Amendment rights. The only limits placed on government were that these regulations be "reasonably related" to the government purpose and not "unduly abridge" First Amendment freedoms.[113]

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[107] 308 US 147 (1938)
[108] Lovell, 303 US 444, 451 (1938) "freedom of the press primarily directed against the power of the licensor"; Schneider, 308 US 147, 161-162 - prior cases prevented the "administrative censorship" involved here.
[109] US
[110] US
[111] Lovell, supra, at 451
[112] Schneider, supra at pp. 161-162
[113] Lovell, p. 450; Schneider, p. 160

The Cantwell case, another early Witness victory, did represent an expansion of the law; but it was an evolutionary, not revolutionary advance. Cantwell extended the Fourteenth Amendment protection of First Amendment rights to include the right to free exercise of religion.[114] But the Court simply noted the free exercise clause was part of the First Amendment. The Court then analogized the statute, which prohibited religious or charitable solicitation without approval of the state secretary of public welfare, to a "prior restraint." [115] In this respect the statute was no different than statutes imposing such restraints on free speech and press which the Court had already struck down, in Lovell and other cases. The Court found the discretion placed in the state official permitted arbitrary and capricious decisions amounting to "censorship of religion".[116] In this context the Court's decision did not make new law. And Justice Roberts went on to stress the Court's adherence to its restrained "balancing of interests" test. He reiterated the Court's role was limited to determining whether the legitimate power to regulate was

[114] Cantwell v. Connecticut, 310 US 296, 303 (1940); First Amendment liberties are among the "fundamental liberties" encompassed by the Fourteenth Amendment; these liberties include the prohibition against laws abridging free exercise.
[115] Cantwell, supra at 303
[116] Cantwell, supra at 306

exercised by the state in such a way as to unduly infringe on protected rights.[117] Here the unfettered discretion given to the secretary to determine "legitimate" religions and charities crossed that line. But the Court again stressed that general regulations that didn't involve religious tests or obstruct the collection of funds would not violate the Constitution.[118]

The Gobitis case involved just such a general requirement: it was a neutral regulation, applicable to all school children. It didn't involve determining what a legitimate religion was or relate to the ability to solicit funds.

At the time Cantwell and Gobitis were decided in 1940, then, there were five Roosevelt appointees on the Court.[119] To understand how this group could vote against the Witnesses in the Gobitis decision and reverse itself within three years, we must look at the internal working of the Court during this period and the individual Justices' philosophies about law and judging.

[117] Id.
[118] Cantwell, supra at 305
[119] Justices Black, Reed, Frankfurter, Douglas and Murphy. Chief Justice Hughes and Associate Justices McReynolds, Stone and Roberts were the holdovers, from before 1937.

The Roosevelt appointees were definitely not all of a piece. Roosevelt seems not to have had any particular judicial philosophy he wanted the Court to reflect. Rather, his initial appointments were primarily made to install good New Deal supporters on the Court. He thought this would ensure the Court would uphold his massive legislative agenda. These appointments and Roosevelt's subsequent appointments to the Court were all very pragmatic decisions.[120] The New Deal justices also took a new approach to decision making. They had little of the attachment to precedent that characterized the earlier Court. This change began during the latter days of Hughes' reign as Chief Justice, and became full-blown when Stone succeeded Hughes.

Chief Justice Hughes presided over the end of one era on the Court and the beginning of another. Hughes followed the practice established by Chief Justice John Marshall of trying to have the Court issue one opinion on cases.[121] As a result, he viewed the Chief Justices' function as trying to find a consensus among the members.[122] His efforts may have been most apparent during the period leading up to the 1937 "court

[120] For example, Roosevelt picked Murphy to replace Butler. Both were Catholics from the Midwest; Murphy was a loyal New Dealer. Some people also thought Roosevelt made the appointment because he wanted Murphy out of the Attorney General position – his job prior to the Court appointment – because he didn't pay enough attention to the political consequences of his prosecutorial decisions. Sidney Fine, "Frank Murphy: The Washington Years"; vol. 3, pp. 130-132 (U. of Michigan Press 1984)
[121] William O. Douglas, "The Court Years", p. 34
[122] Id.

packing" plan.[123] Although he may have been more liberal in his views than the "Four Horsemen,"[124] Hughes and Justice Roberts would join with them in cases, to avoid having the Court issue decisions that were split 5 to 4.[125] But Hughes also used the position of Chief Justice aggressively to try to enforce a consensus.[126] He dominated the discussion of cases at conference through the force of his personality[127] and the traditional rule honored at case conferences[128]. Hughes would state his position first, with boldness and assurance.[129] He limited the other justices' discussion.[130] He also spoke last, reviewing the discussion and pointing out his agreement with, or dissent from, the other views expressed. The justices then voted, with Hughes's views and comments freshest in their minds.[131] Hughes's command of the facts and law in conferences,

[123] See footnote, infra.
[124] Justices McReynolds, VanDeVanter, Sutherland and Butler. Urofsky, "Division and Discord", p. 5
[125] Melvin I. Urofsky, "Division and Discord:"
[126] Hughes ran the Court more than any Chief Justice since John Marshall. Newman, "Hugo Black:", p. 285
[127] Douglas and Murphy were both almost awestruck in describing Hughes' presentation of cases at conference, with a consummate command of the law and facts.
[128] Traditionally, at conference the Chief Justice introduced the cases for discussion and expressed his views first; then the other justices would speak in order of seniority.
[129] Newman, supra, p. 285
[130] Hughes tried to limit discussion to 3 ½ minutes; he allowed more, in argued cases. Sidney L. Fine, "Frank Murphy: The Washington Years", p. 148
[131] Newman, "Hugo Black", p. 285

speaking without notes, left junior justices in awe.[132] And again, according to custom, the junior justices voted first on the cases.

The Court Hughes originally presided over was primarily concerned with property rights. The Court he left in 1941 had begun the shift to the modern era's focus on individual liberties.[133] Ironically, it was concern over limiting judicial activism that led to this change and justices originally labeled "liberals" who became the staunchest dissenters to the Court's views on civil rights.

The beginnings of the struggle came soon after the personnel changes began. By the time the Gobitis case came before the Court there were four relatively new, and inexperienced, Justices sitting. Chief Justice Hughes presided over the conference with his usual efficiency. [134]At the conference on the case, Hughes introduced the controversial issue regarding the flag salute by saying "I come up to this case like a skittish horse to a brass band."[135] He then went on to insist the case had "nothing to do with religion" but was a question of the State's power to inculcate an important "social

[132] Fine, "Frank Murphy", p. 190
[133] Urofsky, supra, p. xiii
[134] Murphy's notes of the conference suggest that Hughes and Frankfurter were the only justices who spoke at the conference. Murphy papers, NO. 690 (October term 1939); quoted in Newman, "Hugo Black: A Biography" and Fine, "Frank Murphy: The Washington Years", p. 185
[135] Newman, supra at

objective" and stated his opinion that the State did have such power.[136] Next Frankfurter spoke passionately about the role of schools in instilling patriotism from his own immigrant experience. Hughes was moved by the speech and assigned the writing of the opinion in the case to Frankfurter because, as Hughes said, "an immigrant could really speak of the flag as a patriotic symbol."[137]

The Gobitis decision and Frankfurter's opinion surprised most civil libertarians.[138] The Court's previous decisions seemed clearly to establish protection for freedom of religion against State infringement.[139] And Stone had espoused a less deferential analysis when viewing state infringements of individual rights.[140] Frankfurter was the defender of Sacco and Vanzetti, the inheritor of the mantle of Holmes and Cardozo.[141] Justice Murphy had established the Civil Rights Division of the Justice Department during his stint as Attorney General to protect individual rights.[142] And Black and Douglas would be

[136] Newman, supra
[137] Id.
[138] Lash, "From the Diaries of Felix Frankfurter", pp. 69-70
[139] Cantwell v. Connecticut, US
[140] Carolene Products, supra
[141] Lash, "From the Diaries", supra, p. 69
[142] On establishing the Civil Liberties Unit, later the Civil Rights Division, Murphy said "an important function of the …government is the aggressive protection of the fundamental rights inherent in a free people." Fine, "Frank Murphy: The Washington Years", p. 79

the architects of the "absolute" position of First Amendment protections.[143] Then how could this decision have happened?

The court-packing plan was still a recent memory, for one thing. The reasoning that led to it was also still fresh in the Justices' minds. The new and holdover members of the Court were all advocates of judicial restraint in the context of interfering with the government's power to legislate. That was the main reason they were appointed or remained on the Court – to ensure Roosevelt's New Deal legislation was upheld.[144]

A second factor explaining the ruling was that Hughes was still Chief Justice. And he had five very "junior" Justices sitting with him. They were all much younger, and had little previous judicial experience. Black had been on the Court the longest – only three terms.[145] His previous judicial experience was on a state court trial bench. Douglas was thirty-nine years old when he was appointed; he had been a law professor at Yale and Commissioner of the Securities and Exchange Commission but had no prior

[143] Black and Douglas thought the first Eight Amendments were "pretty sturdy standards" for what constituted due process and better to apply in toto than to leave it to individual justices to define their parameters. Douglas, "The Court Years", p. 44

[144] "FDR arguably had no understanding of judicial philosophy and probably no interest in trying to….he chose justices primarily for one political reason: they would not strike down New Deal…legislation." Felix Frankfurter's Transition to the Judicial Role, by William D. Boder, p.128; Ch. 6 in "Franklin D. Roosevelt and the Transformation of the Supreme Court", Shano, et. al, editors; Vol. 3 of the Sharpe Library of FDR Studies, M.E. Sharpe, Armok, N.Y. 2004

[145] Black was confirmed as a Justice August 13, 1937.

judicial experience.[146] The most experienced judge of the new appointees, Murphy, also had experience as a trial court judge but no appellate experience.[147] Frankfurter was the only one who came to the Court with a background that seemed to prepare him for the job. He had been a law professor for many years. He had studied the Court and written about its workings for twenty-five years.[148] Both Douglas and Murphy expected Frankfurter to be their leader on the Court; both admired him greatly.[149]

Justice Stone, who had been on the Court with Hughes since 1925 thought Frankfurter was the only one of the new Justices on the Court with the legal resources "to face Hughes in conference and hold his own in discussion."[150]

So at the time of the Gobitis conference, it was likely true that only Hughes and Frankfurter spoke.[151] Black, Murphy and Douglas all spoke about how "moved" they

[146] Douglas, "The Court Years", p. 14
[147] Murphy had been a judge in the Detroit criminal courts, Recorder's Court, for six years. His biographer says that gave him more judicial experience than any of the other FDR appointments. Fine, "Frank Murphy: The Washington Years" p. 138. Douglas says Black had more courtroom experience than any Justice in the 20th century. Douglas, "The Court Years', p. 20
[148] Urofsky, "Division and Discord", p. 33; Frankfurter and Landis book on the internal operations of the Supreme Court was considered the seminal work at the time.
[149] Douglas, "The Washington Years", p. 44: "(at the time Gobitis was decided), Frankfurter was our hero. He was indeed learned in constitutional law and we were inclined to take him at face value." Murphy (and Douglas) thought Frankfurter would be their "knight" on the Court. Newman, "Hugo Black: A Biography", p. 287
[150] Mason, "Harlan Fiske Stone: Pillar of the Law", p. 482; Stone had always admired Frankfurter's scholarship. Justice Jackson, another junior Justice during the 1940's repeated Stone's remark about Frankfurter and Hughes. Eugene Gerhart, "America's Advocate: Robert Jackson", p. 166
[151] Fine, "Frank Murphy", p. 185; Murphy papers No. 690, undated "Observations of …Hughes".

were by Frankfurter's passionate discussion of patriotism at the conference.[152] The discussion obviously made an impression on Hughes also, to assign Frankfurter the writing of the opinion because "an immigrant could really speak of the flag as a patriotic symbol."[153]

But the force of Hughes's leadership must receive most of the credit for producing an 8 to 1 decision in the case. Other explanations are less convincing. Black, Douglas and Murphy all say they had reservations about the opinion but didn't express them.[154] Black says he, Douglas and Murphy didn't want to break their word to Frankfurter after telling him they would support him.[155] But Black wrote notes to Frankfurter suggesting changes to the opinion, which Frankfurter made. And Black had not had a problem taking stands on the Court against other members. In his first term on the Court he wrote eight solo dissenting opinions.[156] Black's views on the First Amendment were clearly not aligned with Frankfurter's. In an earlier Jehovah's

[152] Newman, "Hugo Black", p.. 284; Murphy papers No. 690, October term 1939, Library of Congress; Douglas, "The Court Years"
[153] Id.
[154] Newman, p. 284; Fine, p. 185; Douglas, p.
[155] Newman, supra.
[156] Newman, supra; Urofsky, "Division and Discord", p. 17

Witnesses' leafleting case, Schneider v. City of Irvington[157] Black had drafted a rewrite of Justice Roberts' opinion for the Court. In the draft Black expressed the view that freedom of speech and press were made secure against all invasions by the express prohibitory language of the Constitution and these rights must not be abridged regardless of the cost of their protection.[158] Black suggests he knew immediately the decision in Gobitis was wrong and he, Douglas and Murphy decided to correct it as soon as they could.[159]

The opinion Frankfurter wrote in Gobitis also appealed directly to the one unifying jurisprudential philosophy on the Court, the belief in judicial restraint.[160]

The junior justices continued to "feel their way" on the Court. Over the next two years the Witnesses sought eight times to get their religious practices protected by the Court. In six instances the Court denied certiorari; in the other two the Court found there

[157] US
[158] Newman, "Hugo Black", p. 283-284
[159] Newman, supra, p. 284. Black's assertion doesn't explain why he and the other Justices voted against the Witnesses in eight more cases over the new two years, before finally suggesting in their dissent in Jones v. Opelika that the Gobitis decision was wrongly decided. Their ability to count the votes on the Court seems a likely explanation for the delay, if they had already had their epiphany.
[160] Urofsky, p. 107; Frankfurter's analysis paid scant attention to the free exercise claim, deferring to the competence of the legislature in this area.

was no free exercise right involved[161]. During this time they continued to develop their own judicial philosophies; philosophies that could square their belief in judicial restraint with aggressive protection of individual freedoms. Each of them found their philosophies partly in unique individual sources, and partly in each other.

Justice Black found his jurisprudence from studying the original debates over the Fourteenth Amendment. He became convinced the drafters intended to apply all of the Bill of Rights to the States.[162] He also believed that judicial restraint in applying the Constitution meant an absolute position on the Bill of Rights. This limited the discretion of individual Justices to decide the parameters of these freedoms.[163]

Black and Douglas were extraordinarily close ideologically.[164] They both felt the Bill of Rights provided "pretty sturdy standards" for what constituted due process under

[161] In Cox v. New Hampshire, 312 US 569 (1941), Hughes wrote for a unanimous Court upholding a license requirement that there was no interference with a freedom of worship in the case; in Chaplinsky v. New Hampshire, 315 US 568 (1942), Justice Murphy found, again for a unanimous Court, that cursing a police officer was not an exercise of religion. It was the only time he voted against the Witnesses.
[162] During the 1940 term, Frankfurter drafted an opinion in Bridges v. California, upholding a contempt citation against a newspaper and a union leader for criticizing a court on a pending case. He cited the "deeply rooted" Anglo-American tradition of the contempt power. Black circulated a dissent stressing the Founders' adoption of the First Amendment to "assure Americans a freedom…which…had been denied to the people of Great Britain." Newman, "Hugo Black", p. 290 After reading the draft, Murphy changed his vote and Black's opinion became the majority.
[163] Newman, "Hugo Black", p. 293; Urofsky, "Division and Discord", p. 36
[164] Newman, supra, p. 286

the Fourteenth Amendment.[165] They also shared a belief that the intent of the Constitution was to remove First Amendment freedoms from legislative consideration.[166] Douglas's background in the "legal realism" movement at Yale meshed with Black's lack of respect for precedent. Both believed the Court played an important role in establishing public policy.[167] They also thought adherence to "process", Frankfurter's mantra, without any regard for the substantive issues involved in individual cases led to a sterile jurisprudence.[168]

Justice Murphy also shared this view. He was "result-oriented" and also no respecter of "stare decisis".[169] Murphy didn't care much for "technical questions"; to him, the objectives of the law were "justice and human dignity".[170] Eventually he adopted Stone's view of the "preferred position" of the First Amendment as his own.[171] A devout Catholic, Murphy also thought that freedom of religion was most "preferred": the best

[165] Douglas, "The Court Years", supra, p. 44
[166] Douglas, supra, p. 48
[167] In his fourth term (1941) Black wrote Douglas "you and I know the Court is the last word on questions of law which are determinative of questions of public policy upon which the course of our Republic depends." HLB to WOD, September 15, 1941; William O. Douglas Papers, Library of Congress.
[168] Urofsky, "Division and Discord", p. 57
[169] Fine, "Frank Murphy", p. 246; Murphy voted with the majority in 21 of 25 cases overruling precedent while he was on the Court. Fine, p. 299
[170] Urofsky, supra, pp. 23-25
[171] The case Murphy chose for his first opinion, Thornhill v. Alabama, 310 US 88 (1940) picks up this idea which Stone expressed in conference on the case. Fine, "Frank Murphy", pp. 168-174

way to secure his own faith, he reasoned, was to ensure the security of everyone else"s.[172] After initially looking to Frankfurter for leadership, it was Black who most impressed Murphy. He respected Black's intellect and his heart. He believed Black could be trusted to defend religious freedom.[173]The three became the new bloc of votes on the Court; Frankfurter derisively referred to them as "the Axis".

Frankfurter's professorial habits manifested themselves in another way that shifted power to Black, Douglas and Murphy during this period. He pored over his opinions, writing and rewriting them; most became "tomes" on the history of the development of a doctrine. As a result, he was able to handle a smaller share of the Court's caseload than the others. And he was assigned fewer and fewer opinions, while the others received a larger share of the Court's work.[174]

Wiley Rutledge had always believed the law should be practical. He had great empathy for the less fortunate. He believed in full incorporation of the Bill of Rights and

[172] Fine, supra, p. 372; this is probably why one critic noted that if Murphy was ever nominated for sainthood, it would be by the Jehovah's Witnesses.
[173] Murphy said Black had a "primitive, powerful intellect…and the heart of a lion." Fine, supra, p. 191
[174] Black and Douglas received thirty to forty assignments per term, Frankfurter nine or ten. Douglas, "The Court Years", p. 223. Murphy was proud he carried his share of the Court's work. Fine, supra, p.

that they played an important role in protecting the rights of minorities.[175] His appointment to the Court, when added to the "Axis" and Justice Stone would mean a solid group of supporters for the First Amendment and set the state for a distinctly focused period in the development of the free exercise doctrine.

The one justice on the Court who already had a clearly articulated vision for reconciling these two concepts was Justice Stone. Stone was a holdover on the Court. He had been allied with Holmes, Brandeis and Cardozo – they were his mentors when he was a junior justice. He was allied with them in the "liberal bloc" and voted with them to establish the doctrine of judicial restraint. He had expressed his view on the subject clearly.[176] But Stone also authored the famous footnote in Carolene Products.[177] In that Stone held true to this philosophy in the Gobitis case. His was the only dissenting voice. Unfortunately, Stone did not speak out at the conference on the case, and passed when

[175] Fine, "Frank Murphy:, pp. 194-195; Urofsky, "Division and Discord", pp. 26-29
[176] Stone tended to let Holmes and Brandeis write the dissenting opinions on the issue, but believed in restraint as passionately as the others. Urofsky, "Division and Discord", p. 10 After Holmes's retirement, Stone became more vocal. In 1936 he wrote a dissenting opinion in United States v. Butler, 297 US 1, 78-79 (1936) expressing the view that the Court should not concern itself with the wisdom of a statute, only whether the legislature had the power to enact it; and he urged the Court that self-restrain was the only check on its own powers.
[177] United States v. Carolene Products, 304 US 144, 152-153, footnote 4 (1938)

the justices were casting their votes.[178] As a holdover on the Court, he still adhered to Hughes's approach to try to express consensus, and limit the dissenting views expressed.[179] When he did finally decide he could not agree with the majority and must write, it was too late. His dissenting opinion was circulated only the day before the conference on Frankfurter's draft of the majority opinion; and unlike Frankfurter, he didn't campaign for support for his views.[180] As a result, Black, Douglas and Murphy kept their word to Frankfurter and went along with the majority in the case.

Their reticence, if it existed, is difficult to gauge from hindsight. Black, as indicated earlier, says the justices knew immediately they had made a mistake.[181] But of course they continued to vote against the Witnesses in eight other cases over the next two years. Douglas says that over time they realized the decision was wrong.[182] This comports more with their voting on the Witnesses cases over the next few years. It also is consistent with Douglas's legal realism; the continued cases coming to the Court from the Witnesses alleging the persecution of their views eventually convinced him the issues

[178] Mason, "Stone," p. _____
[179] He had rarely dissented on the 'Old" Court, leaving that task to his mentors Holmes, Brandeis, and Cardozo.
[180] Fine, "Frank Murphy", p. 185; Newman, "Hugo Black", p. 284; Douglas, "Court Years", p. 45
[181] Newman, p. 284
[182] Douglas, supra, p. 45

in these "neutral" ordinance challenges were about freedom of religion, contrary to Hughes' and Frankfurter's assertions in Gobitis and later cases that that had nothing to do with it.

The one clear record of one of these junior justices' initial reluctance to join in the decision is found in Frank Murphy's papers. Justice Murphy actually drafted a dissent in the case, but did not circulate it. In the draft, he stressed the importance of protecting freedom of conscience, "(e)specially at the time when (it) is being placed in jeopardy…."[183] The persuasive power of Chief Justice Hughes seems to have convinced Murphy not to file his dissent, and to go along with the Court's majority opinion.[184] Murphy was a freshman Justice, still in awe of Hughes and not yet disillusioned with Frankfurter.[185]

Over the next two years as well, the dynamics of the relationship among all these Justices changed. Black, Murphy and Douglas all drifted away from Frankfurter, and

[183] Fine, supra, p. 185; Frank Murphy papers, No. 169, undated.
[184] Id. In his notes on Frankfurter's draft opinion, Murphy noted the case "has been a Gethsemane for me." Murphy to Frankfurter, June 3, 1940; Frankfurter Papers, Harvard Law School Library.
[185] Fine, supra, p. 190; Newman, supra, p. 286

towards each other. Murphy first disagreed with Frankfurter on a case in January, 1941 (six months after Gobitis). He disagreed with Frankfurter six more times that term.[186]

Black had preceded Frankfurter on the Court. But Black was a politician, not a law professor. And he had graduated from the University of Alabama, not Harvard.[187] He was new to the Court when Justice Cardozo advocated the idea of "selective incorporation" of the Bill of Rights protections in the Fourteenth Amendment.[188] Black loved, and admired Cardozo; again he "went along". But as time passed on the Court, Black became opposed to selective incorporation. It ran contrary to his belief that the Justices should have limited discretion in interpreting the reaches of the freedoms in the Bill of Rights.[189] By 1941, after four terms on the Court, Black began to feel comfortable with his own "constitutional faith". [190]

Two other factors contributed to the Court's changing approach to individual rights issues. They also resulted in the Court becoming the most divided Court in

[186] Fine, supra, p. 190
[187] Fine, pp. 155-157.
[188] Palko v. Connecticut, 302 US 319 (1937); Urofsky, p. 86
[189] Urofsky, "Division and Discord" supra, pp. 17 and 36.
[190] Newman, "Hugo Black", supra, p. 286

history.[191] They were Hughes' retirement as Chief Justice and his replacement by Harlan Stone, and the distinct personality of Felix Frankfurter.

In June 1941, Justice Stone succeeded Charles Evans Hughes as Chief Justice. Stone and Roberts were holdovers on the New Deal Court. He had been an Associate Justice since 1925. He had come to the Court after a career as a law professor and Dean at Columbia.[192]Oliver Wendell Holmes had been Stone's mentor on the Court. Felix Frankfurter was a professional colleague he admired. Although he was a Republican and one of the "Nine Old Men" from the old Court, Frankfurter urged Roosevelt to appoint Stone Chief Justice to demonstrate his nonpartisan attitudes, "especially important in time of war."[193] Hughes, as well as Justice Murphy, favored Black or Jackson for the position, but supported the Stone nomination. Stone himself did not seem to care about the appointment.[194] He planned his summer vacation, telling friends he expected Robert Jackson to get the appointment.[195] He discounted the importance of the post, telling his family the job was like a law school dean's: "he does what the janitor is unable or

[191] Urofsky, p. 37; also see infra, at . The 36% nonunanimous opinions in Stone's first term as Chief Justice was the highest in the Court's history; the following terms the percentage increased to 44%, then 58%.
[192] Urofsky, p. 9
[193] Urofsky, p. 12; Mason, "Harlan Fiske Stone: Pillar of the Law", pp. 566-567
[194] Fine, "Frank Murphy: the Washington Years", p. 192
[195] Mason, "Stone", p. 567

unwilling to do."[196] Still, when the appointment came, he wondered whether he was up to the task.[197]

Some of his colleagues on the Court were already certain he was not. Douglas predicted in a letter to Black that the Court "will not be a particularly happy or congenial atmosphere in which to work."[198] Stone's promotion led to rapid deterioration of the consensus-building atmosphere established by Chief Justice Hughes. Several factors contributed to this. Stone was personally aloof; he lacked the personality or commanding presence of Hughes. Douglas said Stone never knew how "the other half" lived.[199] He also seems to have lacked the tact necessary to garner broad agreements of the other Justices. He wrote an article critical of Black for his lack of legal knowledge and experience.[200] He thought of Murphy as an inferior intellect he needed to teach.[201] Stone also didn't like Murphy or Douglas because of their continuing political ambitions; they both seemed to Stone to want to be somewhere besides the Court.[202]

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[196] Mason, p. 568
[197] Id.
[198] WOD to HLB, June 22, 1941; Douglas Papers, Manuscript Division, Library of Congress; Urofsky, "Division and Discord", supra, p. 9
[199] Douglas, "The Court Years", p. 47
[200] Fine, "Frank Murphy", p. 170
[201] Fine, supra, p. 191
[202] Fine, supra, p. 251

Stone's conception of the role of the Chief Justice and the purpose of the Court's conferences also contributed to the fractioning of the Court. Stone didn't agree with Hughes and Taft, his predecessors in the position, about the importance of unanimous or "massed" opinions. He felt there was great value in dissenting opinions. Of course, he had served with the two great dissenters in the Court's history, Holmes and Brandeis.[203] Stone likewise disagreed with Hughes' tight control over discussion at the conferences. Even as an Associate Justice, he began holding "rump conferences" with other Justices to allow more discussion and debate of the cases. As Chief Justice, he held more, and longer, conferences on the cases.[204] All the Justices complained about the length and inefficiency of the conferences.[205] Murphy noted that at some point Stone and Frankfurter would speak at length in the conferences. Sometimes Black contributed; the others usually didn't say much.[206] Stone's biographer blames the length of the conferences, the

[203] Stone expressed his views about these topics in an article written before his nomination but published after . Stone, "The Chief Justice", 27 ABA Journal 407 (July 1941)
[204] Urofsky, pp. 31-32
[205] Murphy said they were too long, and Stone argued with the other Justices rather than allowing them to just state their views, as Hughes had. Fine, "Frank Murphy", supra, p. 242. Black found the conferences long and argumentative; "raw and personal", as Murphy said. Newman, "Hugo Black", supra, p. 320 Douglas called the conferences "free for alls". Douglas, "The Court Years", p. 223 Frankfurter, in his diaries, decries the length of the conferences and Stone's habit of interrupting Justices who disagreed with him. Lash, "From the Diaries of Felix Frankfurter", supra, pp. 152 and 160
[206] Fine, p. 240

delays in opinions and the increasing dissents not on Stone, but on Felix Frankfurter's penchant for debate.[207]

The personality of Felix Frankfurter was clearly the second important factor in the changing beliefs and attitudes on the Court that ultimately led to the revolution in their approach to Free Exercise cases. As noted earlier, Stone believed Frankfurter was the only New Deal justice with the background and experience to challenge Hughes. He also challenged Stone. But instead of leading the junior Justices who expected him to be their "knight", he became one of the great disappointments of all time on the bench.[208]

Frankfurter's personality and intellectual elitism, like Stone's, contributed to his alienation of the other new Justices.[209] He could never stop being a professor; he lectured his colleagues in conference[210], belittled their intelligence or judicial ability[211], berated

[207] Mason, supra, p. 603
[208] Urofsky, supra, p. 20
[209] Justice William Brennan, who served on the Court with Frankfurter in later years, said "we would have been tempted to agree with Felix more often in conference, if he quoted Holmes less frequently to us." Hutchinson, "Frankfurter and the Business of the Supreme Court:, p. 205
[210] Newman, supra, p. 287; Douglas, supra, p. 22: "He came in with piles of books and on his turn would pound the table, read from books, throw them around and create a great disturbance."
[211] He made fun of Murphy behind his back, and addressed him as "Dear God" in conferences; he told Stone Murphy was not qualified for the Court. Fine, supra, p. 137; Urofsky, supra, p. 36

lawyers at oral argument[212] and wrote lengthy opinions that were difficult to read and understand.[213]

Douglas described Frankfurter coming to conferences with stack of books. On his turn to speak, he would read from the books and throw them around the table for the other Justices to look at.[214] His penchant for debate made the conferences longer, delayed opinions and led to more dissents.[215] Stone's willingness to allow long discussions at conference led Frankfurter to give "seemingly endless lectures".[216] His insulting of Murphy's intellect alienated not only Murphy but other Justices.[217] But he had vitriol enough for all his colleagues. He called Black a "self-righteous, self-deluded part demagogue, part fanatic".[218] He decried Douglas's ambition and thought Douglas was more interested in being President himself than being on the Court.[219] A biographer of the

[212] "He questioned lawyers at oral argument as if they were in law school, sent memos to his colleagues on the bench to instruct them on precedents; he was the professor: he understood judicial review better than anyone." Fine, "Frank Murphy", supra, p. 158
[213] Frankfurter's opinions were lengthy, learned essays: the scholarship and verbiage were impressive, but it was not easy to understand the holding. Newman, "Hugo Black", supra, p. 291
[214] Douglas, supra, p. 22
[215] Mason, "Stone", supra, p. 528
[216] Urofsky, "Division and Discord", p. 32
[217] Douglas, supra, p. 25; Fine, supra, p. 137
[218]Frankfurter to Learned Hand, November 5, 1954, Frankfurter Papers, Library of Congress
[219] While Douglas was a regular at White House poker games and was pushed by his admirers for the Vice Presidential nomination in 1944 – a nomination that would almost certainly have led to the Presidency because of Roosevelt's declining health, statements made by Douglas at the time seem to indicate he himself did not want the nomination and did not harbor presidential ambitions. Jas. L. Moses, "An

Stone court agreed with Stone's biographer that Frankfurter was responsible for much of the bickering on the Court at the time.[220] He attributes Frankfurter's "poisoning of the well" of collegiality to Frankfurter's frustration at not having the leadership on the Court he thought belonged to him.[221]

Explicit indications of Frankfurter's frustrations can be found in his diary entries for 1943. Frankfurter reports a conversation with Douglas concerning Black changing his mind about the Gobitis decision. Frankfurter inquires whether Black has been reading the Constitution over the summer recess; Douglas replies "No, he's been reading the newspapers". [222] The story is one of the most popular anecdotes told about the Justices change of position on the flag salute . It suggests that Black, and Douglas, changed their position because of the intense publicity about attacks on Jehovah's Witnesses in the aftermath of the Gobitis decision, rather than a sincere belief that the Constitutional interpretation was wrong. One of Black's biographers believes the conversation, and others for that period in Frankfurter's diaries, are invented from whole cloth and reflect

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Interesting Game of Poker: FDR, William O. Douglas and the 1944 Vice Presidential Nomination", pp. 134-148, in Shaw, et al's "Franklin D. Roosevelt and the Transformation of the Supreme Court", supra

[220] Urofsky, supra, p. 32

[221] Id.

[222] Lash, "From the Diaries", supra, p. 209

the depths of his frustration during this period.[223] There is some support for this assertion. Douglas never mentions this conversation in his autobiography.[224] Black, Douglas and Murphy independently recount a number of conversations they had regarding the original decision, their change of position and correcting the ruling.[225] Another entry during this period critical of Black is contradicted by other sources.

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Regardless whether the comments are injudicious or "outright false" as Black's biographer believes[227] the results of Frankfurter's histrionics and Stone's ineptitude were to drive the other members of the Court to band together and to develop their own competing jurisprudence.[228] The architect of a new view of the First Amendment and the leader of the group opposing Frankfurter was Hugo L. Black.

Black was Roosevelt's first selection to fill a Court vacancy in August 1937. He was a loyal New Deal supporter in the Senate and had supported the President's court-packing plan. Some even thought his appointment was a slap at the Senate for rejecting

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[223] Newman, "Hugo Black", supra, p. 298
[224] Douglas, "The Court Years", supra.
[225] Douglas, supra; Newman, supra; Fine, supra.
[226] Frankfurter attributes to Brandeis a criticism of Black as "going mad on free speech". Lash, supra, p. ; at about the same time, a colleague of Black's writes about a conversation between Brandeis and Stephen Wise where Brandeis expresses the opinion Black will be recognized as "one of our great jurists". Letter to Hugo Black from Edward J. Kaufman, September 8, 1945, Black Papers.
[227] Newman, p. 238
[228] Urofsky, supra, p. 32

the President's proposal.[229]Justice Stone's intemperate comments to a reporter expressing his views critical of Black's "lack of legal knowledge and experience" were published before Black even took his seat.[230]

But Black had a fine mind, and was an insatiable reader. When Frankfurter told Black he was a Benthamite, Black ordered several of Jeremy Bentham's works to read to understand Frankfurter's allusion.[231]

Black was opposed to judicial subjectivity, which he saw as a major source of mischief. Thus, although he acquiesced in Cardozo's idea of "selective incorporation" of the Bill of Rights initially, he changed his view in part because he thought it gave too much discretion to the Justices to determine constitutional parameters. His own view of judicial restraint viewed limitations on the Justice's discretion as essential to following the Framer's intent.[232]

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[229] Urofsky, supra p. 17
[230] Marquis Childs, "The Supreme Court Today", Harper's Magazine (May 1938)
[231] James F. Simon, "The Antagonists: Hugo Black, Felix Frankfurter and Civil Liberties in Modern America", Simon and Schuster, N.Y., N.Y. 1989, pp. 102, 173
[232] Mark Silverstein, "Constitutional Faiths: Felix Frankfurter, Hugo Black and the Process of Judicial Decision-making", Cornell University Press, Ithaca, N.Y. 1984, pp. 129-130

Stone's low opinion of Black's capabilities led him to ask his friend Frankfurter to give some guidance to Black after Black's appointment.[233] Frankfurter took to the task with his usual vigor, lecturing Black often at Washington parties and meetings where their paths crossed. Unfortunately, Frankfurter treated Black as he did his students and his patronizing attitude resulted in Black mostly rejecting his views.[234]

Within three years, Frankfurter's assumed leadership of the liberal wing of the Court was obliterated and had been assumed by Black.[235] It was Frankfurter's perception that his colleagues had strayed. In truth, it was Frankfurter who had drifted from his libertarian views.[236] And his increasing stridence and refusal to adapt his positions allowed Black to assume his leadership position on the Court.[237]

The shift was ironic since the two started out in agreement on the question of judicial restraint. Both felt the Nine Old Men had abused the Fourteenth Amendment in

[233] Stone wrote Frankfurter asking if he knew Black well, and suggested to Frankfurter that Black needed "guidance". Mason, "Harlan Fiske Stone", supra p. 469
[234] Simon, "The Antagonists", supra pp. 99-100
[235] Simon, supra p. 118. In the Gobitis decision, Frankfurter wrote for a nearly unanimous Court; three years later in Barnette no member of the Court joined his dissent.
[236] As early as 1938 Frankfurter had noted claims regarding individual rights came to the Court with a "special claim for constitutional protection; he wrote Justice Stone a note agreeing with the Carolene footnote advocating a different standard for evaluating such claims. Simon, supra at 128.
[237] Simon, supra p. 119

not deferring to Congress on the New Deal legislation.[238] But neither man suggested the Court should show such deference when the issue involved protection of individual liberties. Frankfurter said as much when he said these issues came to the Court with a "special claim for constitutional protection".[239] The fundamental question for both men was how to give meaning to the Fourteenth Amendment without having the Court indulge in subjective decision-making. It was their different answers to this question and their different approaches to advocating their position with their colleagues that led to the dramatic decline of Frankfurter and the ascension of Black as leader of the liberal bloc and caused Black's constitutional faith to be reflected in the Jehovah's Witnesses cases.

Frankfurter had studied the Court for many years and thought he knew best how the Court should approach these issues. They should study history, look at Court precedents and use their own "sense of fairness and decency" to determine the limits of constitutional protection.[240] Black believed such an approach would result in the Court "making law" the same way they had in striking down the New Deal legislation. This was Black's view of judicial restraint. He preferred to anchor the interpretation of the

[238] Simon, supra, pp. 128, 172
[239] Id.
[240] Id.

meaning in the words used in the amendment itself and the views expressed by the sponsors of the amendment as a mandate to enforce the Bill of Rights against state encroachment.[241] Black believed this best prevented subjective decision making by the Court members – in other words, it would further the idea of judicial restraint.[242] Contrary to Frankfurter's view that Black and others had abandoned judicial restraint, Black's views remained remarkably consistent. As early as 1929 in a debate on the Senate floor over legislation to ban certain foreign literature Black called free speech a "sacred privilege" and said he could not vote for any measure that tended "in the slightest degree" to restrict it.[243] On the Court, Black advocated the same position. In Cox v. New Hampshire[244] the Court upheld the conviction of Jehovah's Witnesses for not complying with a parade permit requirement. The Court found the permit requirement a "reasonable" exercise of legislative discretion. In the first of many of their debates over the essential meaning of the First Amendment Black insisted the word "reasonable" be stricken from the opinion because it suggested the Court could use its subjective

[241] Id.
[242] Simon, supra pp. 173-174
[243] Simon, supra at pp. 119-120
[244] US

judgment to decide the issue.[245] Frankfurter believed the term gave the Court limited discretion, but agreed to the omission because he thought without the qualifier it was more clear the Court could exercise its own judgment. It was the first of several times he underestimated Black as an adversary.[246]

Frankfurter's arrogance also led him to be ineffective in soliciting his colleagues to support his position. Frankfurter continued to lecture Douglas and Murphy on the meaning of the First Amendment; Black was a better politician and knew how to persuade his colleagues without lecturing. Further, regardless of his personal estimation of his colleagues he did not belittle or disparage them as Frankfurter did.[247]

Douglas like the others had admired Frankfurter for his defense of Sacco and Vanzetti. Douglas and Murphy were in a group of FDR cronies who celebrated Frankfurter's appointment to the Court, expecting him to lead the liberal wing.[248] On the first flag case they waited to hear his views. When their champion of civil liberties found no First Amendment protection they went along with him despite their reservations. But

[245] Black later articulated his concern in a dissent in another case: "I fear to see the consequences of the Court's practice of substituting its own concepts of decency and fundamental justice for the language of the Bill of Rights." Adamson v. California, 332 US 46, 89 (1946)
[246] Simon, supra pp. 119-120
[247] Simon, supra pp. 127-128; Frankfurter belittled Murphy and castigated Douglas for his use of flattery; while Frankfurter himself shamelessly curried favor of new appointees.
[248] Simon, supra at 64

his calculated use of histrionics at conferences, his constant politicking for votes on the cases and his demeaning attitude soon cased Douglas to abandon Frankfurter and his views.[249]

Black was a natural ally for Douglas. Both were country boys who were suspicious of concentrations of power.[250] Both thought a jurisprudence that valued process over the result was too mechanical and sterile.[251] Black came to view the protection of individual liberties as the primary role of the Constitution in the balance of powers, one providing the best defense against overreaching government.[252] Douglas shared that view.[253]

Justice Murphy was singled out for a lion's share of Frankfurter's vitriol. Frankfurter thought Murphy unqualified for the Court; Murphy himself thought the

[249] Douglas, supra at pp.25-45. Douglas minimizes his philosophical disagreement with Frankfurter as less about the ultimate aims than the "role of the Court in achieving those aims".

[250] Black in the Senate and Douglas at the SEC had worked to break up monopolies. Simon, supra at 187-188

[251] Urofsky, "Division and Discord" supra at pp. 59-62. Douglas's views may have also been influenced by his time at Yale, which was a center for "legal realism" during his time there. This jurisprudence taught that legal doctrines were not autonomous but could be manipulated for social good or ill. Dennis Hutchinson, "The Oxford Companion to the Supreme Court", p. 233

[252] Simon, supra p. 131

[253] Douglas, supra pp. 44-48

same.[254] Roosevelt's reasons for appointing Murphy were he was another loyal New Dealer who believed the Courts should defer to Congress on economic issues. He was also a Catholic from the Midwest as was Pierce Butler whom he replaced.

Murphy had little use for "technical" questions. His was a visceral jurisprudence, based on a belief that "justice and human dignity" were the objectives of decisions.[255]

While Black and Douglas articulated judicial philosophies for their decisions, they clearly appreciated Murphy's belief that getting the right result was most important. Black said if Murphy "ever did the wrong thing, it was for the right reason."[256] Douglas noted that Murphy had "common sense, a keen orientation to the Constitution and Bill of Rights and a sense of the relevancy of facts."[257] Looking back on this tumultuous time on the Court, Douglas felt he made more mistakes not following Murphy than not following Frankfurter.[258]

[254] Fine, supra p. 132
[255] Urofsky, pp. 23-25
[256] Newman, "Hugo Black: A Biography," supra, p. 397.
[257] Douglas, "The Court Years," pp. 25-26.
[258] Douglas, supra, pp. 26-27.

As the rift between Frankfurter and the other New Deal appointees grew, Frankfurter began referring to the three as "the Axis,"[259] equating them with our wartime enemies Germany, Italy and Japan. During this period the Court members changed their opinions frequently after the initial votes were taken and draft opinions were circulated. Their lack of adherence to precedent was reflected in over 30 decisions overruled.[260]

By the time he reached his third term in 1939, Black was comfortable on the Court. And he began asserting more forcefully his view of the First Amendment's central importance to our constitutional system. With his politician's skills, he quickly won converts on the Court. Douglas, the Westerner, came from Yale and the school of 'legal realism.' The Constitution was not a 'static' document, but one that changed and adapted to the times, to ensure 'just' results. Murphy also joined the group. His was a 'visceral' jurisprudence, again more interested in results than doctrine. And he had a special feeling for the protection of religious freedom and minorities. All were now alienated from Frankfurter and seeking out their own jurisprudence. Stone couldn't lead them, with their strong personalities and non-judicious temperaments. It was Black who

[259] Lash, "From the Diaries of Felix Frankfurter," p. 176.
[260] Sidney Fine, "Frank Murphy: The Washington Years," pp. 147-152.

articulated their constitutional faith, and in so doing transformed First Amendment free exercise jurisprudence.

The effect of the tremendous turnover in personnel and the different philosophies of the new Justices on the Court toward unanimity and precedent are reflected in statistics on the lack of consensus during much of the period. From 1930 through 1936 there were the two coherent blocs – the liberal wing of Stone, Cardozo and Brandeis and the conservative "Four Horsemen." When Chief Justice Hughes and Justice Roberts joined with the liberal bloc to uphold the New Deal legislation the Court had a solid majority on most issues.[261]

But this solid bloc was short-lived. In 1937 with Black's appointment the percentage of non-unanimous decisions nearly doubled.[262] Black himself was responsible for much of the increase, with eleven solo dissents. Hughes' attempts to establish a consensus are also reflected; the Chief Justice agreed with every opinion

[261] During this period, the Court was non-unanimous on average in only 15% of its decisions. C. Herman Pritchett, "The Roosevelt Court: A Study in Judicial Politics and Values 1937-1947" (MacMillan Co., N.Y. 1948), pp. 25, 32-34.
[262] In 1937 the percent of non-unanimous decisions increased to 27 percent. Pritchett, supra, p 25.

rendered.[263] From 1938 through 1940, as Frankfurter and Douglas joined the Court, then Murphy, the percentage of non-unanimous decisions continued to rise. At the same time, the development of a new bloc of Justices with broad agreement on the cases began to develop. During this same period, Black continues to file more and more dissents. But he is no longer alone: from 1938 through 1940, Douglas agrees with Black on every decision, and Murphy joins both on almost all decisions.[264]

Frankfurter's eroding leadership position is also reflected in the statistics for the Court's work during this period. In his first three terms on the Court, Frankfurter only dissented seven times. But in 1941, when Byrnes and Jackson joined the Court, and Stone took over as Chief Justice, the breakdown of consensus became complete. Frankfurter doubled his number of dissents in this one term. And Justices Douglas, Black and Stone dissented more than Frankfurter.[265]

But it must be noted these disagreements reflect more than just the personality differences and feuds between individual Justices. Once the battle over New Deal legislation had been won, the Court's docket was increasingly filled with narrower, more

[263] Pritchett, "The Roosevelt Court," supra, p. 35.
[264] Pritchett, supra, pp. 35-38, 249. Murphy agreed with Black and Douglas 84% of the time.
[265] Id.

"thorny" questions of constitutional interpretation, where the vagueness of the language and questions about where the balance between government authority and individual liberties would be struck occupied most of the Court's time.[266] As noted earlier, before 1935 the Court had only heard a handful of cases regarding the First Amendment. Thanks in part to Jehovah's Witnesses the Court heard more individual liberties cases during this period than in its entire previous history.[267]

Again, the Roosevelt Justices' political backgrounds, a complaint of Frankfurter's ,do not explain their differences. Justice Reed, who voted with Frankfurter often, was Solicitor General; Jackson who only supported the Witnesses on the second flag case, like Murphy had been Attorney General. So had Chief Justice Stone and Justice McReynolds. Six ex-governors (like Murphy) and ten ex-senators (like Black) had been among the twenty Justices appointed to the Court in the forty year period prior to 1937.[268]

THE CASES

[266] Pritchett, supra, p. 30.
[267] The Court issued decisions in twenty-six cases brought by Jehovah's Witnesses between 1938 and 1943. Westlaw search (on file with author) and civil liberties cases accounted for 34 of the Court's non-unanimous decisions between 1939 and 1947. Pritchett, supra, p. 129.
[268] Pritchett, supra, pp. 12-14.

After the Gobitis[269] decision, the Witnesses continued to press the Court to protect their proselytizing from 'neutral' laws. The Witnesses argued the Court should treat these laws the same as prior restraints on free speech, and give their free exercise rights the same protection.[270] But Frankfurter's argument from Gobitis continued to hold a majority, though support for the idea weakened as the cases continued to come before the Court and Witnesses were being subjected to physical attacks in communities across the country.[271] Through eight attempts the advocates of judicial restraint held firm.[272]

Finally, in Jones v. Opelika[273], the split on the Court reached 5 to 4. Moreover, the dissenting opinions were memorable. Chief Justice Stone articulated the "preferred position" doctrine for First Amendment freedoms, expressing his belief that free speech and free exercise rights must be protected against indirect infringements like license taxes

[269] 310 U.S. 586 (1940).
[270] David L. Manwaring , "Render Unto Caesar: The Flag Salute Controversy," U. of Chicago Press (1962), p. 206.
[271] Id. In the six months following the Gobitis decision, the ACLU reported 1488 Witnesses were attacked in 335 communities that included all but 4 states. ACLU Papers, Vol. 2215, "The Persecution of Jehovah's Witnesses"
[272] Cox v. New Hampshire, ____ U.S. ____, Chaplinsky v. New Hampshire, ___ U.S. ___, Hussack v. New York, 312 U.S. 659 (1941), Leby v. Manchester, 313 U.S. 652 (1941), Bevins v. Prindable, 314 U.S. 573 (1941), Trent v. Hunt, 314 U.S. 573 (1941), Hannon v. City of Haverhill, 314 U.S. 641 (1941), Poscone v. Mass., 314 U.S. 641 (1941).
[273] 316 U.S. 584 (1942).

as well as direct attacks.[274] Justice Murphy had rejected the Witnesses' arguments in Chaplinsky v. New Hampshire[275] (the "fighting words" case) refusing to extend the First Amendment to protect the actions of Chaplinsky in that case. In the other cases lost by the Witnesses during this period the Court had characterized the Witnesses' distribution of pamphlets and proselytizing as "commercial" speech, entitled to no more protection than a door to door salesperson.[276] But in his Jones dissent, Justice Murphy adopted the Witnesses' arguments that these activities were integral to the practices of their faith. He stated the Witnesses were "disseminating their faith as they saw it," and argued the license tax ordinance taxed their "ideas" in violation of the First Amendment.[277]

The third dissenting opinion was authored by Black and joined by Douglas and Murphy. The "Axis" members openly professed their belief not only that the Jones case was being wrongly decided, but that the analysis was the result of the Gobitis reasoning. And, they said, they would now reverse their votes in Gobitis[278]. The Witnesses' beliefs that their preaching activities were the exercise of their religion and should receive as

[274] 316 U.S. 584, ___ 1942) (Stone, dissenting).
[275] ___ U.S. ___
[276] Supra, n. 4.
[277] 316 U.S. 584, ___ (1942).
[278] 316 U.S. 584, ___ (1942).

much protection as free speech was accorded,[279] was now put forth as the constitutional faiths of these four Justices.[280]

The Justices needed another convert to establish this "faith" as the "law of the land," however. Within months, it happened. Justice Byrnes resigned to head the government's war mobilization efforts.[281] President Roosevelt nominated Wiley Rutledge to replace him.[282] Murphy had nominated Rutledge for the D.C. Court of Appeals when Murphy was Attorney General.[283] When Murphy took credit for 'discovering' Rutledge, Justice Frankfurter said he had told Roosevelt even before Frankfurter's own appointment, that Rutledge was "entirely qualified" for the Supreme Court.[284]

In fact, Roosevelt had considered Rutledge for several of the previous vacancies on the Court.[285] Rutledge headed a group of law professors who had supported the

[279] Arguments in Cantwell v. Connecticut, 310 U.S. 296 (1940)
[280] Dissenting opinions, Jones v. Opelika, 316 U.S. 584, ___ - ___ (1942)
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[282]
[283] Fine, "Frank Murphy," supra, p. ___.
[284] Lash, "From the Diaries," supra, p. 154.
[285] Notes from Frankfurter's diaries suggest Roosevelt considered Rutledge for the Court as early as 1938 as a replacement for Cardozo, then Brandeis. Roosevelt was reluctant to appoint too many "law professors" to the Court; Rutledge was Dean at Iowa before his appointment to the D.C. Circuit.

President's "court packing" plan.[286] While on the Court of Appeals he had also authored an opinion supportive of Jehovah's Witnesses in an anti-picketing ordinance case.[287] Murphy cited the Busey opinion in his own dissent in Jones v. Opelika.[288] Rutledge took his seat on the Court February 15, 1943.[289] Four days later the Court voted to have re-argument in Jones v. Opelika and granted certiorari in Martin v. Struthers.[290] On May 3, 1943 the Court handed down decisions in thirteen Jehovah's Witnesses' cases.[291] All were favorable to the Witnesses.[292] One of the decisions was the Court's reversal of its own recent precedent in Jones v. Opelika.[293] Martin v. Struthers, relied on by the Court in its most recent decision for Jehovah's Witnesses, was another.[294] A third decision was Murdoch v. Pennsylvania.[295] Writing for the Court in Murdoch, Justice Douglas established Stone's "preferred position" for First Amendment freedoms as the law of the

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[286] (Rutledge bio., p. ___)
[287] Busey v. District of Columbia, ____ F. _____
[288] 316 U.S. 584, ___
[289] Lash, "From the Diaries," p. 185.
[290] Mason, "Harlan Fiske Stone," p. 599.
[291] Martin v. Struthers, Jones v. Opelika II (three consolidated cases) Murdoch v. Commonwealth of Pennsylvania (eight companion cases) and Douglas v. City of Jeanette.
[292] Twelve of the thirteen were entirely favorable; in the thirteenth, Douglas v. City of Jeannette, the Court reversed the grant of an injunction to the Witnesses. But the Court did so on the grounds their striking down the ordinance involved in Murdoch made the injunction unnecessary.
[293] Jones v. Opelika I, ___ U.S. ___ ( ); Jones v. Opelika II, ___ U.S. ___.
[294] ___ U.S. ___; Watchtower Bible and Tract Society v. Village of Stratton, ___ U.S.___.
[295] 319 U.S. 105 (1943)

case.[296] He also made clear the Witnesses' preaching and door to door solicitation were religious exercises, an "age old form of evangelism" as old as the Republic itself.[297] Recognition of the Witnesses' practices as part of their religion and establishing strict scrutiny as the standard when legislation impacted on these practices spelled doom for the advocates of judicial restraint. One month later, on Flag Day, June 6, 1943 the Court reversed its decision in Gobitis.[298] This second reversal by the Court was called "one of the most notable acts in the entire span of one hundred fifty four years of Supreme Court history."[299] It firmly established the Witnesses' beliefs about free exercise of religion as the law of the land. And it represented the constitutional faiths of Stone, Black, Douglas, Murphy and Rutledge as well: the First Amendment was entitled to special protection against state and Federal intrusion.

[296] 319 U.S. 105, ___ (1943)
[297] 319 U.S. 105, ___ (1943)
[298] West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943)
[299] Peters, "Judging Jehovah," supra, p. 237.

The first Jehovah's Witnesses case came before the Court in 1938.[300] After their 1943 victories only four Jehovah's Witnesses cases came before the Court the next three terms. Their battle was over; they had won.

CONCLUSION

The stream of Witnesses cases suddenly had become a trickle. And the alignment of Justices who shared their constitutional faith disappeared almost as swiftly. On April 22, 1946 Chief Justice Stone fell ill while announcing the Court's decisions; he died later that day and was replaced by Fred M. Vinson.[301] Wiley Rutledge was only on the Bench for six years; he died of a cerebral hemorrhage at age 55, just a few months after Justice Murphy.[302] Frank Murphy died in hospital during the summer recess in 1949. His last opinion, a dissent, could stand as a statement of the lasting legacy of the Court's decisions in the Witnesses' cases: "Law is at its loftiest when it examines claims of injustice even at the instance of one to whom the public is bitterly hostile."[303]

[300] C. Herman Pritchett, "The Roosevelt Court: A Study in Judicial Politics and Values, 1937-1947" (MacMillan Co., N.Y. 1948).
[301] Urofsky, "Division and Discord", supra, pp. 142-143
[302] Urofsky, supra, p. 29
[303] Fine, "Frank Murphy", supra, pp. 588-589

Jehovah's Witnesses pursued their beliefs into the courts. They believed their freedom to practice their religion should embrace their door to door preaching so they opposed anti-solicitation ordinances. They felt their peddling of literature for donations was part of their calling to spread their faith and they shouldn't pay taxes or need licenses to exercise their beliefs, couldn't be taxed, so they refused to pay license fees. Saluting the flag or pledging allegiance was in their belief worshipping false idols, and so they refused.

At the same time Jehovah's Witnesses were asserting their right to practice their beliefs to the courts, the members of the Supreme Court were developing their own "constitutional faith." Stone asserted the Court should give more protection to individual rights than it did commerce. Black and Douglas agreed and developed their belief that the best way for the Court to protect these rights was to limit government authority to act in areas involving the First Amendment. Murphy and Rutledge shared Douglas's legal realism, and thought the best jurisprudence was one that produced the right results. The country was at war, fighting dictators who promoted blind worship and trampled on

human rights of minorities. The Court acted to ensure we did not allow this to happen at home.

Three major contributions to constitutional law resulted from the free exercise cases the Jehovah's Witnesses brought before the Court: the "preferred position" of the First Amendment freedoms[304], incorporating the free exercise clause of the First Amendment into the Due Process Clause of the Fourteenth Amendment[305] and the application of a strict scrutiny standard to provide maximum protection to free exercise rights.[306]In truth, these contributions reflect as well the constitutional faiths of the Justices who decided these cases, and in so doing transformed the meaning of the free exercise clause of the First Amendment.

[304] Even though the doctrine is no longer held by a majority on the Court, the opinion in the Stratton case noted this continuing legacy from the Witnesses' cases: "The rhetoric used in the World War II-era opinions that saved petitioner's coreligionists from petty prosecutions reflected the Court's evaluation of the First Amendment freedoms that are implicated in this case."
[305] Cantwell v. Connecticut, 310 US 296 (1940)
[306] McAninch, "A Catalyst for the Evolution of Constitutional Law: Jehovah's Witnesses in the Supreme Court", 55 Cincinnati L. Rev. 997 (1987) While the Stratton court found the ordinance unconstitutionally overbroad and therefore found it unnecessary to decide on a standard of review, it is clear the Court still puts the balance firmly in favor of First Amendment freedoms: "The value judgment that then motivated a united democratic people in fighting to defend those very freedoms from totalitarian attack is unchanged It motivates our decision today." There is some irony in the Court citing the sixty year old precedents of these Justices who overruled at least 25 precedents during the short period they were together.