Articles

"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

By: Patrick J. Flynn*

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 Jehovah's Witnesses asserted that their right to practice their faith through door-to-door contacts overrode the government's interest in restricting such activities, even through the government's use of neutral laws.[3] It was fitting that the Court, in finding the Witnesses' activities were the exercise of their religion, cited the free exercise decisions from the late 1930s and early 1940s.[4] The Jehovah's Witnesses brought most of those original cases before the Supreme Court,[5] and in doing so, used their beliefs to establish much of the First Amendment free exercise law still in use today. During the late 1930s and early 1940s, the Justices on the Supreme Court 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

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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." WATCHTOWER BIBLE AND TRACT SOC'Y, JEHOVAH'S WITNESSES: PROCLAIMERS OF GOD'S KINGDOM 683 (1993).

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2. Watchtower Bible & Tract Soc'y of New York, Inc. v. Vill. of Stratton, 536 U.S. 150 (2002).

3. The Watchtower Bible and Tract Society (hereinafter "Watchtower Society") is the corporate name for the organization; the individual members are called Jehovah's Witnesses.

4. 536 U.S. at 161-63 (citing Martin v. City of Struthers, 319 U.S. 141 (1943); Murdock v. Pennsylvania, 319 U.S. 105 (1943); and Schneider v. Town of Irvington, 308 U.S. 147 (1939) – all cases brought and won by Jehovah's Witnesses).

5. Between 1938 and 1945 the Jehovah's Witnesses were involved in twenty-four decisions before the Court raising free exercise issues.

were coming before the Court, the Court underwent one of the greatest changeovers in its history. Roosevelt appointed nine Justices to the Supreme Court, virtually remaking the entire Court in the process. The Justices appointed by President Roosevelt essentially remade First Amendment law, and in so doing, these Justices pursued the integration of their own constitutional faith into the law of the land.[6] This article tracks this remarkable confluence of forces that together created the First Amendment's free exercise jurisprudence.[7]

Arguments about where the balance should be struck between government regulation and an individual's freedom to practice their religion are nearly as old as the Republic itself.[8] During the 1930s and 1940s, 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. Two Supreme Court decisions, one involving the salute to the flag and the other involving the Pledge of Allegiance, marked the beginning and end of their struggle.[9] The road from *Gobitis*[10] to *Barnette*[11] is a remarkable story that serves as a 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.[12] The average age of the Justices dropped from seventy-two for the "Nine Old Men" in 1937 to fifty-six in 1943.[13] The judicial philosophies of the Court changed along with the change in personnel. The solicitude for individual rights and the Justices' beliefs about the Court's role in protecting those rights both increased. During that same period, the Jehovah's Witnesses' beliefs had evolved in a way that made

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6. Justice Black's own monograph on his view of constitutional law is entitled, *A Constitutional Faith*. HUGO L. BLACK, A CONSTITUTIONAL FAITH (1968).

7. This does not seem too strong a characterization. From its inception until 1937, the Court heard only a handful of religious clause cases. Stephen K. Shaw, *Present at the Creation: The Roosevelt Court, Religion, and the First Amendment, in* 3 FRANKLIN D. ROOSEVELT AND THE TRANSFORMATION OF THE SUPREME COURT 194-195 (Stephen K. Shaw et al. eds., 2004). On a single day in 1943, they decided thirteen, all involving Jehovah's Witnesses. (Douglas v. City of Jeannette, 319 U.S. 157 (1943); Martin v. City of Struthers, 319 U.S. 141 (1943); Murdock v. Pennsylvania, 319 U.S. 105 (1943) (eight companion cases); and Jones v. Opelika II, 319 U.S. 103 (1943) (three consolidated cases)).

8. *See* Murdock v. Pennsylvania, 319 U.S. 105, 131 (1943); Douglas recounts that the hand distribution of religious tracts is "as old as the history of printing presses."

9. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940).

10. 310 U.S. 586.

11. 319 U.S. 624.

12. Justices Black, Reed, Frankfurter, Douglas, Murphy, Byrnes, Rutledge, and Jackson; he also nominated Justice Stone to replace Hughes as Chief Justice.

13. ALPHEUS T. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 602 (1956).

aggressive preaching of the "good news" central to the practice of their faith.[14]

During the Court's transition period, the Jehovah's Witnesses brought their arguments before the Supreme Court eight times, and they lost all eight times.[15] But the tide turned for the Jehovah's Witnesses on May 3, 1943. On that single day, the Supreme Court decided thirteen cases involving Jehovah's Witnesses; the Jehovah's Witnesses won twelve.[16] The Court found the request for injunctive relief in the thirteenth case moot based on their striking down the relevant statute in one of the other twelve cases.[17] One month later, on Flag Day, June 14th, 1943, the Supreme Court decided in *West Virginia State Board of Education v. Barnette,*[18] that the schoolchildren, who were Jehovah's Witnesses, could not be compelled to salute the American flag in public school classrooms. This stunning reversal of the Court's own recent precedent[19] has been called one of the "strongest opinions in Supreme Court history."[20]

I. THE WITNESSES

The story of the 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 1930s and 1940s were, and still are, a small but zealous sect. They are millennialists; they believe the world is coming to an end soon, when God will triumph over Satan and begin a thousand-year reign.[21] 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

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14. *See* discussion *infra* p. 5.

15. Between 1941 and 1942, the Witnesses were denied certiorari six times. The two cases the Court decided were unanimous decisions against the Witnesses: Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Cox v. New Hampshire, 312 U.S. 569 (1941).

16. Martin v. City of Struthers, 319 U.S. 141 (1943); Murdock v. Pennsylvania, 319 U.S. 105 (1943) (eight combined cases); Jones v. Opelika II, 319 U.S. 103 (1943) (three consolidated cases).

17. Douglas v. City of Jeannette, 319 U.S. 157, 165 (1943) (finding that relief was unnecessary, based on *Murdock* v. *Pennsylvania*).

18. 319 U.S. 624, 642 (1943).

19. Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940) (this decision had only been decided two and a half years earlier and was an 8-1 decision).

20. Irving Dilliard, *The Flag-Salute Cases, in* QUARRELS THAT HAVE SHAPED THE CONSTITUTION 222, 239 (John A. Garraty ed., 1964).

21. MERLIN OWEN NEWTON, ARMED WITH THE CONSTITUTION: JEHOVAH'S WITNESSES IN ALABAMA AND THE U.S. SUPREME COURT, 1939-1946, at 27 (1995). Since their origin, the Witnesses have awaited Armageddon on several occasions. *Id.* at 4, 26, 36-37.

and his followers would share in the Kingdom at that time.[22] But the Apocalypse did not take place, and Russell died suddenly three years later. Joseph Rutherford, who had been Russell's lawyer, eventually assumed leadership of the group and imposed tight controls.[23] He developed a central organizational structure and explained Russell's "error" in predicting the date of Armageddon as a "test" from God.[24]

Russell had taught that a small group of the anointed would rule with God in Heaven. As time passed and many of these anointed people died, the rest of his followers did not have much reason to expand their numbers beyond these chosen few,[25] as only the anointed could benefit from the old doctrine. Rutherford subsequently modified this doctrine. Rutherford taught that Christ 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.[26] This new doctrine provided something all believers could benefit from. Rutherford urged all his followers to spread this good news.[27]

Rutherford further organized and directed his flock. No longer known as "Russellites," they became Jehovah's Witnesses on earth.[28] They were organized much like an army on a great crusade. Local congregations were "companies," their directors were "company servants," and the individual members were "pioneers."[29] The need to "spread the good news" became central to their belief system.[30] As Rutherford led the group from the 1920s into the 1930s, he became more authoritative and more strident. Initially, the pioneers (the door-to-door preachers) used personal testimony to convert others. However, as time went on, pioneers were armed with calling cards and literature to convey a more cohesive message. The need for this material caused the publications of the group to proliferate.[31] Their cards identified them as ordained ministers of Jehovah's Witnesses. They carried pamphlets, which elaborated Witness beliefs, or portable phonographs that played

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22. *See* SHAWN FRANCIS PETERS, JUDGING JEHOVAH'S WITNESSES: RELIGIOUS PERSECUTION AND THE DAWN OF THE RIGHTS REVOLUTION 29 (2000).

23. *Id.*

24. *Id.* at 83, 96-98.

25. *Id.* 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, such as Moses and other prophets.

26. *Id.* at 24.

27. *Id.* at 83, 96-98. Rutherford told all Witnesses to "Advertise, Advertise the Kingdom!"

28. *Id.* at 102. At the National Assembly of International Bible Students ("Russellites") in 1931, Rutherford formally changed the name of the group to Jehovah's Witnesses.

29. NEWTON, *supra* note 21, at 36-37.

30. M. JAMES PENTON, APOCALYPSE DELAYED: THE STORY OF JEHOVAH'S WITNESSES 206 (1985).

31. MARLEY COLE, JEHOVAH'S WITNESSES: THE NEW WORLD SOCIETY 106-08 (1955).

four and a half minute recordings of Judge Rutherford's speeches on different topics.[32] By 1938 the campaign to save the "multitude" became even more organized, as the country was divided into a network of districts, zones, and circuits with regular reports from each to the central office.[33] The Witnesses had a force of 12,600 volunteers in seventy-eight motorized battalions fighting this war. These groups could descend on a small town and reach most members of the community before anyone could react.[34] 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. The Witnesses were unwilling to abide by such man-made restrictions on their divine calling.[35]

As the tempo of the Witnesses' proselytizing increased in the 1930s, 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 and others required the permission of the mayor or council.[36] In response, Rutherford gathered a staff of attorneys in the central office to direct the battle against these obstacles. He was fortunate to have the services of Hayden Covington, a spirited and charismatic Witness attorney from Texas, who first assisted in, and then led, a national legal campaign on behalf of the Witnesses.[37]

Charles Russell had taught his followers to be obedient to secular government.[38] However, under Judge Rutherford's leadership, the Witnesses' position toward earthly government changed. The "higher powers" referred to in the Bible[39] were not secular rulers, but Jehovah and Christ Jesus.[40] Therefore, earthly governments had no basis in divine authority. Witnesses were to obey no human law "unless it was in harmony with God's."[41] This 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, overriding any conflicting secular law.

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32. NEWTON, *supra* note 21, at 40; PENTON, *supra* note 30, at 71.

33. PENTON, *supra* note 30, at 68-69.

34. *See generally* DAVID MANWARING, RENDER UNTO CAESAR: THE FLAG-SALUTE CONTROVERSY 17-28, 34 (1962).

35. *See generally* CHARLES SAMUEL BRADEN, THESE ALSO BELIEVE: A STUDY OF MODERN AMERICAN CULTS & MINORITY RELIGIOUS MOVEMENTS 358-84 (1949) (describing the Witnesses' proselytizing efforts).

36. WATCHTOWER BIBLE AND TRACT SOC'Y, *supra* note 1, at 683.

37. NEWTON, *supra* note 21, at 48.

38. PENTON, *supra* note 30, at 138-39.

39. *Romans* 13:1; Russell had previously taught that these higher powers were secular governments.

40. PENTON, *supra* note 30, at 139.

41. *Id.* at 139. Judge Rutherford announced the new doctrine in a June 1929 issue of *The Watch Tower* magazine. *Id.*

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 their own salvation.[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, but it was also central to 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. Judge Rutherford helped to ensure the advancement of Witness doctrine by abolishing the position of "elder," as the elders were not supporting the preaching.[47]

The vitriolic nature of Witness preaching, along with a message that is often at odds with the beliefs of established religions,[48] led to many attacks and persecution.[49] This caused the Witness leadership to become more zealous. In 1942, Judge Rutherford's successor, Nathan Knorr, established minority schools in each congregation and a national missionary training school called Gilead.[50] The Witnesses also became increasingly intent on carrying their struggle to deliver their message to the courts.[51]

This struggle was as organized and militant as was 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 headquarters distributed several publications discussing relevant case law and offering suggestions to Witnesses on

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42. PENTON, *supra* note 30, at 206.
43. *Id.*
44. *Id.*
45. *Id.* at 194-195.
46. *Id.* at 245-46.
47. PENTON, *supra* note 30, at 246.
48. Rutherford taught that other religions were actually God's enemies. The Catholic Church was heavily targeted. *See, e.g.*, JOSEPH RUTHERFORD, ENEMIES (Watchtower Bible and Tract Society 1937) (one of Rutherford's phonograph recordings).
49. Ken Jubber, *The Persecution of Jehovah's Witnesses in Southern Africa*, 24 THE SOCIAL COMPASS 121, 121 (1977). (The Witnesses proudly claim they are the most persecuted Christians in the twentieth century).
50. WATCHTOWER BIBLE AND TRACT SOC'Y, JEHOVAH'S WITNESSES IN THE DIVINE PURPOSE 201-05, 213-14 (1959).
51. Between 1938 and 1955 the Witnesses had forty-five cases come before the Supreme Court. Additionally, there were hundreds of other cases in various state and federal courts. WATCHTOWER BIBLE AND TRACT SOC'Y, QUALIFIED TO BE MINISTERS 618 (1955); PETERS, *supra* note 22, at 126-27.
52. WATCHTOWER BIBLE AND TRACT SOC'Y, *supra* note 1, at 690-91.

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

II. 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 had begun to reflect on the results of Franklin Roosevelt's extraordinary number of Court appointments.[58] The battle over the constitutionality of New Deal legislation had been resolved by the Court adopting a policy of judicial restraint.[59]

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.[60] 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

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53. WATCHTOWER BIBLE AND TRACT SOC'Y, JEHOVAH'S SERVANTS DEFENDED (1941) and WATCHTOWER BIBLE AND TRACT SOC'Y, FREEDOM OF WORSHIP (1943); PETERS, *supra* note 22, at 129.

54. BARBARA GRIZZUTI HARRISON, VISIONS OF GLORY: A HISTORY AND A MEMORY OF JEHOVAH'S WITNESSES 191-92 (1978).

55. PETERS, *supra* note 22, at 129, 146-47 (explaining that, in 1941 and 1942, for example, attorneys from the national office sought injunctions against enforcement of anti-peddling ordinances in Oklahoma, Idaho, New Hampshire, Pennsylvania, Texas, Colorado, and Ohio).

56. *Schneider v. Town of Irvington*, 308 U.S. 147 (1939) and *Lovell v. City of Griffin*, 303 U.S. 444 (1938) were the first cases decided regarding the Witnesses' challenges to local ordinances applied to their evangelism techniques.

57. MELVIN I. UROFSKY, DIVISION AND DISCORD: THE SUPREME COURT UNDER STONE AND VINSON, 1941-1953, at 1-5 (1997) (From 1932-1936 the Court 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). PETER G. RENSTROM, THE STONE COURT: JUSTICES, RULINGS AND LEGACY 14 (2001) (This proposal split the Democratic party and caused a storm of protest from the bench and bar).

58. In August 1937, Justice Van Devanter 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. *See* UROFSKY, *supra* note 57, at 265.

59. On the pre-1937 Court, those members who advocated the policy of deference to government legislation were viewed as "liberals." On the Stone court this would become the "conservative" view. UROFSKY, *supra* note 57, at 5, 7.

60. This group – McReynolds, Van Devanter, Butler, and Sutherland – became known as the "Four Horsemen". UROFSKY, *supra* note 57, at 3; *See also* WILLIAM O. DOUGLAS, THE COURT YEARS, 1939-1975, at 10 (1980) ("When I went on the Court I knew former Justices Willis Van Devanter 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.").

it.[61] Chief Justice Hughes and Justice 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 tenured for more than ten years had not retired within six months of their 70th birthday. The proposal would have given Roosevelt the authority to appoint up to six new justices, expanding the Court to fifteen members.[62] While the personnel on the Court in 1937 would have only allowed for five new justices, the proposal would have still allowed him to ensure a clear majority for New Deal legislation.[63]

Two things averted the crisis and caused Roosevelt'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, Hugo Black, was a loyal New Deal senator who had supported the court-packing proposal.[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," as only two New Deal Justices were on the Court at that time. Chief Justice Hughes and Justices McReynolds, Brandeis, Butler, Stone, and Roberts were the 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, when *Lovell* was argued and decided.[67] Justice Black was President Roosevelt's first appointment to the Court, replacing Justice Van Devanter in the fall of 1937.[68] Justice Sutherland retired in January 1938 and was replaced by Justice Reed.[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 the time of

61. UROFSKY, *supra* note 57, at 3.

62. UROFSKY, *supra* note 57, at 4-5.

63. C. HERMAN PRITCHETT, THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES, 1937-1947, at 2-3 (1948).

64. In March 1937, the Court upheld a state minimum wage law, thanks to the votes of Hughes and Roberts. The second piece of legislation was a fair labor standards act. UROFSKY, *supra* note 57, at 5. This change became known as "the switch in time that saved nine."

65. *Supra* note 57.

66. UROFSKY, *supra* note 57, at 15.

67. 303 U.S. 444. The case lists Justices Huges, McReynolds, Brandeis, Butler, Stone, Roberts, Black, and Reed as those participating in the decision. Justice Cardozo is not mentioned.

68. PRITCHETT, *supra* note 63, at 9.

69. *Id.* at 10.

Schneider, there were four New Deal appointments out of the eight Justices who heard the case.

These changes in the Court firmly established judicial restraint as a majority view on the Court. While the doctrine was limited to the area of property rights, there were different views on the Court toward the inclusion of individual rights in the doctrine, even before the Roosevelt appointments. Chief Justice Hughes wrote for the Court in 1931 that the 14th Amendment's Due Process Clause included the First Amendment freedoms.[70] The assertion that different standards of analysis should apply to legislation affecting property rights than those affecting individual rights, including First Amendment rights, was presaged by Harlan Stone, a "liberal bloc" Associate Justice and Hughes' successor as Chief Justice. 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's group of consensus builders to the most divided 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 traditionally, its Chief Justices reflected that belief.[73] Until 1935, the Court did not even have its own building, but was instead housed 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 that these freedoms could be enforced against not only the federal government but also state governments.[75] The process of incorporating the freedoms enumerated in the first eight Amendments into the Fourteenth Amendment continued throughout the 1930s.[76] When the first Jehovah's Witnesses cases, *Lovell v. Griffin*[77] and *Schneider v. Town of Irvington*[78]

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70. Stromberg v. California, 283 U.S. 359, 368 (1931); DOUGLAS, *supra* note 60, at 44.

71. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

72. Shaw, *supra* note 7, at 194.

73. Hughes modeled his role as Chief Justice on Taft. Both believed the Court had a limited role in democratic government.

74. The Supreme Court Historical Society, *History of the Court: Homes of the Court at* http://www.supremecourthistory.org/02_history/subs_sites/02_d.html (last visited Nov. 16, 2004). It may only be coincidence, but the Court's increased role in determining the Constitution's protection of individual rights began shortly after their move into their own quarters.

75. Gitlow v. New York, 268 U.S. 652, 666 (1925); UROFSKY, *supra* note 57, at 6-7.

76. Palko v. Connecticut, 302 U.S. 319, 323-24 (1937).

77. 303 U.S. 444 (1938).

78. 308 U.S. 147 (1939).

reached the Court, the First Amendment freedoms of speech and press had been fully incorporated and their protection against state action found co-extensive with their reach against the federal government.[79]

The analysis the Court applied to determine cases involving individual rights also evolved at this time. The "clear and present danger" test enunciated by Justice 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 that government interests usually prevailed. This was the standard until Justice Stone wrote his footnote in the *Carolene Products*[82] case in 1938, suggesting that the Court's deferential analysis of economic legislation ought to differ when it reviewed 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 with Justices Black and Reed took up this new analysis and began applying stricter scrutiny in the 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 Witnesses 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 by stating that 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 the brief for the case, the Witnesses had argued that the ordinance violated not only free speech rights but also the

79. Thornhill v. Alabama, 310 U.S. 88, 95 (1940) (explaining that these rights have the same reach against a state as they do against the Federal government); Near v. Minnesota, 283 U.S. 697 (1931) (freedom of the press); *Gitlow*, 268 U.S. 652 (free speech).

80. Schenck v. United States., 249 U.S. 47, 52 (1919).

81. *Id.*

82. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

83. *Id.*

84. *Id.*

85. Schneider v. Town of Irvington, 308 U.S. 147 (1939).

86. *Id.* at 161.

87. *Id.*

Witnesses' right to free exercise of their religion. They urged the Court to extend to religious freedom the same protection enjoyed 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 of Michigan. In typical Witness style, Newton Cantwell and his two teenaged 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 charitable" and to issue or withhold approval accordingly.[92] Justice Roberts again wrote for the Court, and, in doing so, he used the "clear and present danger" test and found that 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 should prevail.[95]

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

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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!" Brief for Petitioner at 32, Schneider v. Irvington, 308 U.S. 147 (1939) (No.11).

89. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

90. HENRY J. ABRAHAM & BARBARA A. PERRY, FREEDOM AND THE COURT: CIVIL RIGHTS AND LIBERTIES IN THE UNITED STATES 237 (7th ed. 1998).

91. *Id.*

92. *Id.*

93. *Id.* at 238.

94. *Cantwell,* 310 U.S. at 307; ABRAHAM & PERRY, *supra* note 90, at 238.

95. *Cantwell,* 310 U.S. at 303-304; ABRAHAM & PERRY, *supra* note 90, at 235-36.

But only two weeks later, the Court dealt a severe blow to the Witnesses that 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] As a result of this belief, they refused to participate in displays of allegiance to nations or causes. They also did not vote.[97] After German Jehovah's Witnesses refused to perform the Nazi salute and were persecuted because of this, Judge Rutherford announced to American Witnesses that they, likewise, could not salute the American flag and still abide by the tenets of their faith.[98]

The Gobitas family in Minersville, Pennsylvania heard Rutherford's broadcast and heeded his words.[99] When the Gobitas children were expelled from school for refusing to salute the flag, Mr. Gobitas sought an injunction against enforcement of the statute.[100] Both the Pennsylvania Federal District Court and the Third Circuit of Appeals ruled in his favor.[101] So it astonished many court watchers when the Supreme Court reversed the lower court judgments and upheld the Minersville flag salute requirement.[102] Perhaps even more astonishing was the fact that the vote of the Court was 8 to 1, with only Justice Stone dissenting.[103] Over the next three years, the Jehovah's Witnesses brought eight cases to the Supreme Court, losing them all.[104] We must look closely at the changes in the composition of the Court, the individual Justices appointed, and their evolving judicial philosophies to understand how the Witnesses could win their early victories, why they lost their gains just as quickly, and what ultimately led to the remarkable reversal of their fortunes on May 3rd and June 14th of 1943.[105]

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96. HARRISON, *supra* note 54, at 206 (noting that the Witnesses prayed daily for the "disintegration of all nations.").

97. *Id.*

98. *Id.* at 188-89. Rutherford made this announcement in a nationwide radio broadcast on October 6, 1935. He interpreted the Second Commandment admonition "Do not bow down to graven images" as to forbid saluting the flag, because it would be idolatry. *Id.*

99. *See* Dilliard, *supra* note 20, at 222-25.

100. *Id.* at 225.

101. *Id.* at 225.

102. Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940). The Gobitas name was misspelled by the lower courts and never corrected on appeal. PETER IRONS, A PEOPLE'S HISTORY OF THE SUPREME COURT 338 (1999).

103. *Gobitis,* 310 U.S. 586.

104. Six of the cases were denied certiorari. *See* cases cited note 323. Two decisions were unanimous against the Witnesses: *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) and *Cox v. New Hampshire*, 312 U.S. 569 (1941).

105. On May 3, the Witnesses won twelve cases. *See* cases cited *infra* note 324. One of their victories was *Jones v. Opelika II,* 319 U.S. 103 (1943), a reversal of the Supreme Court's earlier decision in *Jones v. Opelika,* 316 U.S. 584 (1942). On June 14, the Court handed down its decision in *West Virginia State Board of Education v. Barnette*, reversing the *Gobitis* decision. *Barnette*, 319 U.S. 624, 642 (1943).

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 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 "previous 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 *Schneider* 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.[113] The only limits placed on government were that these regulations be reasonably related to the government purpose and not unduly abridge First Amendment freedoms.[114]

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.[115] However, the Court simply noted that the Free Exercise Clause was part of the First Amendment.[116] 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.[117] 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."[118] In this context, the Court's decision did not make new law. Justice Roberts went on to stress the Court's adherence to its restrained "balancing of interests" test and reiterated that the Court's role was

106. 303 U.S. 444 (1938).
107. 308 U.S. 147 (1939).
108. *Schneider*, 308 U.S. at 161-62 (prior cases prevented the "administrative censorship" involved here); *Lovell*, 303 U.S. at 451 ("The struggle for the freedom of the press was primarily directed against the power of the licensor.").
109. 268 U.S. 652 (1925).
110. 283 U.S. 697 (1931).
111. *Lovell*, 303 U.S. at 450-51.
112. *Schneider*, 308 U.S. at 161-62.
113. *Id.* at 160.
114. *Lovell*, 303 U.S. at 450; *Schneider*, 308 U.S. at 160.
115. *Cantwell*, 310 U.S. at 303.
116. *Id.*
117. *Id.* at 304.
118. *Id.* at 305.

limited to determining whether the legitimate power to regulate was exercised by the state in such a way as to unduly infringe on protected rights.[119] Here, the unfettered discretion given to the State Secretary to determine "legitimate" religions and charities crossed that line. But the Court again stressed that general regulations that did not involve religious tests or obstruct the collection of funds would not violate the Constitution.[120] The *Gobitis* case involved just such a general requirement: it was a neutral regulation, applicable to all school children. It did not involve determining what a legitimate religion was, nor did it relate to the ability to solicit funds.

III. CONSTITUTIONAL FAITHS

By the time *Cantwell* and *Gobitis* were decided in 1940, there were five Roosevelt appointees on the Court.[121] To understand how this group could vote against the Witnesses in the *Gobitis* decision and then reverse itself within three years, we must look at the internal workings of the Court during this period and the individual Justices' philosophies about law and judging.

The Roosevelt appointees were not a homogenous group of justices. Roosevelt seemed not to have had any particular judicial philosophy he wanted the Court to reflect. Rather, his initial appointments were primarily made to install strong New Deal supporters on the Court in order to ensure that the Court would uphold his massive legislative agenda. These appointments, along with Roosevelt's subsequent appointments to the Court, were all chosen with this pragmatic goal in mind.[122] 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' term as Chief Justice and became full-blown when Stone succeeded Hughes.

Chief Justice Hughes presided over the end of one era of the Court and the beginning of another. Hughes followed the practice established by Chief Justice John Marshall of trying to have the Court issue a single opinion for a case.[123] As a result, he viewed the function of the Court

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119. *Id.* at 306-07.

120. *Cantwell*, 310 U.S. at 305.

121. Justices Black, Reed, Frankfurter, Douglas, and Murphy. Chief Justice Hughes and Associate Justices McReynolds, Stone, and Roberts were the holdovers from before 1937.

122. 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 did not pay enough attention to the political consequences of his prosecutorial decisions. SIDNEY FINE, FRANK MURPHY: THE WASHINGTON YEARS 130-132 (1984).

123. DOUGLAS, *supra* note 60, at 34.

Conference as trying to find a consensus among the members.[124] His efforts may have been most apparent during the period leading up to the 1937 "court packing" plan.[125] Although Hughes may have been more liberal in his views than the "Four Horsemen,"[126] he and Justice Roberts would join them in certain cases, to avoid having the Court issue decisions that were split 5 to 4.[127] But Hughes also used the position of Chief Justice aggressively to try to enforce a consensus.[128] He dominated the discussion of cases at conference through the force of his personality[129] and the traditional rule honored at case conferences.[130] Hughes would state his position first, with boldness and assurance.[131] He limited the discussion of other Justices.[132] He also spoke last, reviewing the discussion and pointing out his agreement with, or dissent from, the other views expressed.[133] The Justices then voted with Hughes's views and comments freshest in their minds.[134] Hughes's command of the facts and law in conferences left junior Justices in awe.[135] And again, according to custom, the junior Justices were the first to vote.

Hughes originally presided over a court that 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.[136] Ironically, concern over limiting judicial activism led to this change, and Justices originally labeled as "liberals" were the ones who became the staunchest dissenters to the Court's views on civil rights.[137]

The beginning 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.[138] At the conference, Hughes introduced the controversial issue regarding the flag salute by saying, "I come up to this case like a skittish horse to a

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124. *Id.*

125. *See* discussion *supra* note 57.

126. *Supra* note 60.

127. UROFSKY, *supra* note 57, at 4.

128. Hughes took charge of the Court more than any Chief Justice since John Marshall. ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 285 (2d ed. 1997).

129. Murphy was almost awestruck in describing Hughes' presentation of cases at conference. *Id.*

130. At conference, the Chief Justice traditionally introduced the cases for discussion and expressed his views first and then the other justices would speak in order of seniority. *Id.*

131. *Id.*

132. Hughes tried to limit discussion to 3 ½ minutes; he allowed more in argued cases. FINE, *supra* note 122, at 147.

133. NEWMAN, *supra* note 128, at 285.

134. *Id.*

135. FINE, *supra* note 122, at 190; NEWMAN, *supra* note 128, at 269.

136. UROFSKY, *supra* note 57, at xiii.

137. *See supra* note 59.

138. Murphy's notes of the conference suggest that Hughes and Frankfurter were the only justices who spoke at the conference. MURPHY PAPERS, No. 690 (Oct. Term 1939, Library of Congress), *quoted in* NEWMAN, *supra* note 128, at 284-85 and FINE, *supra* note 122, at 185.

brass band."[139] He then went on to insist that the case had "nothing to do with religion" but was a question of the State's power to inculcate an important "social objective" and stated his opinion that the State did have such power.[140] Next, Justice Frankfurter spoke passionately about the role of schools in instilling patriotism, drawing 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."[141]

The *Gobitis* decision, marked by Frankfurter's opinion, surprised most liberals.[142] The Court's previous decisions seemed to clearly establish a protection for freedom of religion against state infringement.[143] The makeup of the court also suggested that the decision would come out differently. Stone had espoused a less deferential analysis when viewing state infringements of individual rights.[144] Frankfurter was the defender of Sacco and Vanzetti and the inheritor of the mantle of Holmes.[145] Justice Murphy had established the Civil Rights Division of the Justice Department during his stint as Attorney General in an effort to protect individual rights.[146] Black and Douglas would become the architects of the "absolute" position of First Amendment protections.[147] How could this decision have happened?

For one, the court-packing plan was still a fresh memory. The reasoning that led to it was also still fresh in the Justices' minds. The new members, as well as the holdovers, were all advocates of judicial restraint in the context of interfering with the government's power to legislate. The main reason they were appointed or remained on the Court was to ensure that Roosevelt's New Deal legislation was upheld.[148]

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.

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139. NEWMAN, *supra* note 128, at 284.

140. *Id.* at 284. FINE, *supra* note 122, at 185.

141. NEWMAN, *supra* note 128, at 284.

142. JOSEPH P. LASH, FROM THE DIARIES OF FELIX FRANKFURTER 69-70 (1974).

143. Cantwell v. Connecticut, 310 U.S. 296 (1940).

144. United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

145. LASH, *supra* note 142, at 69.

146. On establishing the Civil Liberties Unit, later the Civil Rights Division, Murphy said "an important function of the ...[g]overnment is the aggressive protection of the fundamental rights inherent in a free people." FINE, *supra* note 122, at 79.

147. 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, *supra* note 60, at 44.

148. "President Roosevelt arguably had no understanding of judicial philosophy, and probably no interest in trying to . . .. [H]e chose justices primarily for one political reason: [t]hey would not strike down New Deal . . . legislation." William D. Bader, *Felix Frankfurter's Transition to the Judicial Role*, *in* 3 FRANKLIN D. ROOSEVELT AND THE TRANSFORMATION OF THE SUPREME COURT 128 (Stephen K. Shaw et al. eds., 2004).

Black had been on the Court the longest – only three terms.[149] 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 judicial experience.[150] Out of the new appointees, the most experienced judge was Justice Murphy, who also had experience as a trial court judge but no appellate experience.[151] 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, had studied the Court, and had written about its workings for twenty-five years.[152] Both Douglas and Murphy expected Frankfurter to be their leader on the Court, and both admired him greatly.[153]Justice Stone, who had been on the Court with Hughes since 1925, thought that Frankfurter was the only one of the new Justices on the Court with the legal resources "to face Chief Justice Hughes in conference and hold his own in discussion."[154]

So at the time of the *Gobitis* conference, it was likely true that only Hughes and Frankfurter spoke.[155] Black, Murphy, and Douglas all spoke about how moved they were by Frankfurter's passionate discussion of patriotism at the conference.[156] 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 did not express them.[157] Black said that he, Douglas, and Murphy did not want to break their word to Frankfurter after telling him they would support him.[158] But Black wrote notes to Frankfurter suggesting changes to the opinion, which Frankfurter made. Black also did not have a problem

149. Black was confirmed as a Justice on August 17, 1937. NEWMAN, *supra* note 128, at 240-242.

150. DOUGLAS, *supra* note 60, at 3-4; UROFSKY, *supra* note 57, at 22.

151. 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, *supra* note 122, at 138. Douglas says Black had more courtroom experience than any Justice in the 20th century. DOUGLAS, *supra* note 60, at 20.

152. UROFSKY, *supra* note 57, at 33; Frankfurter and Landis's book on the internal operations of the Supreme Court was considered the seminal work at the time. *Id.*

153. DOUGLAS, *supra* note 60, at 44: "[At the time Gobitis was decided] Felix 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, *supra* note 128, at 286.

154. UROFSKY, *supra*, note 57 at 19; 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 C. GERHART, ROBERT H. JACKSON: COUNTRY LAWYER, SUPREME COURT JUSTICE, AMERICA'S ADVOCATE 165-66 (2003).

155. *See supra* note 137.

156. NEWMAN, *supra* note 128, at 284; MURPHY PAPERS, No. 690 (Oct. Term 1939, Library of Congress).

157. NEWMAN, *supra* note 128, at 284; FINE, *supra* note 122, at 185-86; DOUGLAS, *supra* note 60, at 45.

158. NEWMAN, *supra* note 128, at 284.

taking positions on the Court against other members.[159] In his first term on the Court he wrote eight solo dissenting opinions.[160] Black's views on the First Amendment were clearly not aligned with Frankfurter's. In an earlier Jehovah's Witnesses' leafleting case, *Schneider v. City of Irvington,* 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.[161] Black suggested that he knew immediately the decision in *Gobitis* was wrong and that he, Douglas, and Murphy decided to correct it as soon as they could.[162] The opinion Frankfurter wrote in *Gobitis* also appealed directly to the one unifying jurisprudential philosophy on the Court: the belief in judicial restraint.[163]

IV. DEVELOPMENT OF THEIR OWN FAITHS

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.[164] In six instances the Court denied certiorari;[165] in the other two the Court found there was no free exercise right involved.[166] During this time they continued to develop their own judicial 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.[167] He became convinced that

159. *Id.* at 284-85.

160. UROFSKY, *supra* note 57, at 17.

161. NEWMAN, *supra* note 128, at 283-84.

162. *Id.* Black's assertion does not explain why he and the other Justices voted against the Witnesses in eight more cases over the next 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.

163. UROFSKY, *supra* note 57, at 107. Frankfurter's analysis paid scant attention to the free exercise claim, deferring to the competence of the legislature in this area. Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 600 (1940).

164. *See* cases cited *infra* note 304.

165. *Id.* (excluding *Cox v. New Hampshire* and *Chaplinsky v. New Hampshire).*

166. In *Cox v. New Hampshire*, 312 U.S. 569, 578 (1941), Hughes, writing for a unanimous Court, upheld a license requirement, finding that there was no interference with the freedom of worship in the case. In *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942), Justice Murphy found, again for a unanimous Court, that cursing a police officer was not an exercise of religion. This was the only time he voted against the Witnesses.

167. NEWMAN, *supra* note 128, at 292, 294, 301 (discussing Black's reading about the Constitution and his belief about the history of the Fourteenth Amendment).

the drafters intended to apply all of the Bill of Rights to the states.[168] He also believed that judicial restraint in applying the Constitution meant an absolute position on the Bill of Rights. This position would limit the discretion of individual justices to decide the parameters of these freedoms.[169]

Black and Douglas were extraordinarily close ideologically.[170] They both felt the Bill of Rights provided "pretty sturdy standards" for what constituted due process under the Fourteenth Amendment.[171] They also shared a belief that the intent of the Constitution was to remove First Amendment freedoms from legislative consideration.[172] Douglas's background in the legal realism movement at Yale[173] meshed with Black's lack of respect for precedent.[174] Both believed the Court played an important role in establishing public policy.[175] They also thought Frankfurter's mantra of "adherence to process without any regard for the substantive issues involved" led to "a sterile, mechanistic jurisprudence.[176]

Justice Murphy also shared this view. He was result-oriented and also did not respect the doctrine of stare decisis.[177] Murphy did not care much for "technical questions"; to him, the objectives of the law were justice and human dignity.[178] He eventually adopted Stone's view of the "preferred position" of the First Amendment as his own.[179] A devout Catholic, Murphy also thought that freedom of religion was the most "preferred"; the best way to secure his own faith, he reasoned, was to ensure the security of everyone else's.[180] After initially looking to Frankfurter for leadership,[181] Murphy was most impressed with Black.

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168. 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. Bridges v. California, 314 U.S. 252, 284-85 (1941). 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, *supra* note 128, at 290. Murphy later changed his vote and Black's opinion became the majority. *Id.* at 291.

169. UROFSKY, *supra* note 57, at 37.

170. NEWMAN, *supra* note 128, at 285.

171. DOUGLAS, *supra* note 60, at 44.

172. *Id.* at 47-48.

173. UROFSKY, *supra* note 57 at 22.

174. *Id.* at 17.

175. 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." NEWMAN, *supra* note 128, at 286 (quoting Letter from Hugo Black to William O. Douglas (Sept. 15, 1941) *in* WILLIAM O. DOUGLAS PAPERS (Library of Congress).

176. UROFSKY, *supra* note 57, at 57.

177. *See* FINE, *supra* note 122, at 239; Murphy voted with the majority in 21 of 25 cases overruling precedent while he was on the Court. *Id.*

178. UROFSKY, *supra* note 57, at 24.

179. The case Murphy chose for his first opinion, *Thornhill v. Alabama*, 310 U.S. 88, 95-96 (1940), picks up this idea, which Stone expressed in conference on the case. FINE, *supra* note 122, at 170.

180. *See* FINE, *supra* note 122, at 372.

181. *Id.* at 192-93.

He respected Black's intellect and heart and he believed Black could be trusted to defend religious freedom.[182] Black, Douglas, and Murphy became the new bloc of votes on the Court; Frankfurter derisively referred to them as "the Axis."[183]

Frankfurter's professorial habits manifested themselves in another way that shifted power to Black, Douglas, and Murphy during this period. He pored over his lengthy opinions that "often seemed to be learned essays masquerading as opinions, the impressive scholarship not directly related to the issue."[184] As a result, he was able to handle a smaller share of the Court's caseload than the others. As time progressed, he was assigned fewer and fewer opinions, while the others received a larger share of the Court's work.[185]

Wiley Rutledge had always believed the law should be practical[186] and also believed in the full incorporation of the Bill of Rights.[187] His appointment to the Court, when added to the "Axis" and Justice Stone, helped to form a solid group of supporters for the expansion of freedoms under the First Amendment[188] and set the stage 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 the two concepts of judicial restraint and the incorporation of the Bill of Rights was Justice Stone. Stone was a holdover on the Court and 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," voted with them to establish the doctrine of judicial restraint, and expressed his view on the subject clearly.[189] But Stone also authored the famous footnote in *Carolene Products*.[190] Stone held true to that philosophy in the *Gobitis* case and his was the only dissenting voice. Unfortunately, Stone did not speak out at the conference on the case and passed when the Justices were casting their votes.[191] When he did finally make a decision in the case, he found

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182. *Id.* at 192. Murphy said Black had a "primitive, powerful intellect . . . and the heart of a lion." *Id.*

183. LASH, *supra* note 141, at 176.

184. *See* NEWMAN, *supra* note 128, at 292.

185. Black and Douglas received thirty or more assignments per term, to Frankfurter's nine or ten. DOUGLAS, *supra* note 60, at 223. Murphy was proud he carried his share of the Court's work. *See* FINE, *supra* note 122, at 240-41.

186. Louis H. Pollak, *Wiley Blount Rutledge: Profile of a Judge*, *in* SIX JUSTICES ON CIVIL RIGHTS 184, 202 (Ronald D. Rotunda ed., 1983).

187. *See* UROFSKY, *supra* note 57, at 29.

188. *Id.*

189. *See* UROFSKY, *supra* note 57, at 10-11. Stone tended to let Holmes and Brandeis write the dissenting opinions on the issue, but believed in restraint as passionately as the others. *Id.* at 10. After Holmes's retirement, Stone became more vocal. *Id.* In 1936 he wrote a dissenting opinion 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; he urged the Court that self-restraint was the only check on its own powers. *See United States v. Butler*, 297 U.S. 1, 78-79 (1936).

190. 304 U.S. 144, 152 n.4 (1938).

191. FINE, *supra* note 122, at 185.

he could not agree with the majority. His dissenting opinion was circulated only the day before the conference on Frankfurter's draft of the majority opinion, and unlike Frankfurter's usual approach with regard to upcoming votes,[192] he did not campaign for support for his views.[193] As a result, Black, Douglas, and Murphy joined 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, recounted that the Justices immediately knew they had made a mistake.[194] However, they continued to vote against the Witnesses in eight other cases over the next two years. Douglas has said that over time they realized the decision was wrong.[195] 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 in these "neutral" ordinance challenges *were* about freedom of religion, contrary to Hughes's and Frankfurter's assertions in *Gobitis* that freedom of religion had nothing to do with it.[196]

The one clear record of one of these junior Justices' initial reluctance to join in the *Gobitis* decision is found in Justice 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 this time when [it] is being placed in jeopardy . . . ."[197] 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.[198] Murphy was a freshman Justice, still in awe of Hughes[199] and not yet disillusioned with Frankfurter.[200]

V. THE MOST DIVIDED COURT IN HISTORY

In the two years following *Gobitis*, the dynamics of the relationship among these Justices changed. Black, Murphy, and Douglas all drifted away from Frankfurter and towards each other. Murphy first

192. DOUGLAS, *supra* note 60, at 22.

193. *See* NEWMAN, *supra* note 128, at 284; DOUGLAS, *supra* note 60, at 45.

194. NEWMAN, *supra* note 128, at 284.

195. DOUGLAS, *supra* note 60, at 45.

196. *See* FINE, *supra* note 122, at 185.

197. *Id.* (quoting Draft dissent by Frank Murphy *in* FRANK MURPHY PAPERS, (undated)).

198. FINE, *supra* note 122, at 186 (In his notes on Frankfurter's draft opinion, Murphy noted the case "has been a Gethsemane for me." (quoting Letter from Frank Murphy to Felix Frankfurter (June 3, 1940) *in* FRANKFURTER PAPERS (Harvard Law School Library))).

199. FINE, *supra* note 122, at 190.

200. NEWMAN, *supra* note 128, at 286.

disagreed with Frankfurter on a case in January 1941, six months after *Gobitis*.[201] He disagreed with Frankfurter six more times that term.[202]

Black and Frankfurter came from vastly different backgrounds. Black was a politician, not a law professor[203] and had obtained his law degree from the University of Alabama, not Harvard.[204] He was new to the Court when Justice Cardozo advocated the idea of "selective incorporation" of the Bill of Rights protections into the Fourteenth Amendment.[205] And because Black loved and admired Cardozo,[206] he voted for Cardozo's majority opinion. But as time passed on the Court, Black became opposed to selective incorporation.[207] 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.[208] By 1941, after four terms on the Court, Black began to feel comfortable with his own "constitutional faith."[209]

Two other factors contributed to the Court's changing approach to individual rights issues: Hughes's retirement as Chief Justice (and his replacement by Harlan Stone) and the distinct personality of Felix Frankfurter.[210] These factors resulted in the Court becoming the most divided Court in history.[211]

In June 1941, Justice Stone succeeded Charles Evans Hughes as Chief Justice.[212] Stone and Roberts were holdovers on the New Deal Court and Stone had been an Associate Justice since 1925.[213] He had come to the Court after a career as a law professor and Dean at Columbia Law School.[214] Oliver Wendell Holmes had been Stone's mentor on the Court.[215] Felix Frankfurter was a professional colleague whom Stone admired. Although Stone was a Republican and one of the "Nine Old Men" from the old Court, Frankfurter urged Roosevelt to appoint Stone as Chief Justice to demonstrate his non-partisan attitudes, especially important in time of war.[216] Justice Murphy favored Black for the position, but ended up supporting the Stone nomination.[217] Stone himself

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201. FINE, *supra* note 122, at 190.
202. *Id.*
203. *See id.* at 156.
204. *Id.*
205. Palko v. Connecticut, 302 U.S. 319, 323-24 (1925); UROFSKY, *supra* note 57, at 86.
206. *See* NEWMAN, *supra* note 128, at 293.
207. *Id.* at 294.
208. *See* UROFSKY, *supra* note 57, at 36.
209. *See* NEWMAN, *supra* note 128, at 286.
210. *See* UROFSKY, *supra* note 57, at 37.
211. *See id.* at 40. The 36% non-unanimous opinions in Stone's first term as Chief Justice was the highest percentage in the Court's history; the following terms the percentage increased to 44%, then 58%. *See* PRITCHETT, *supra* note 63, at 39-42.
212. *Id.* at 9-10.
213. *Id.* at 10.
214. *Id.*
215. *See* MASON, *supra* note 13, at 219.
216. UROFSKY, *supra* note 57, at 12; MASON, *supra* note 13, at 566-67.
217. FINE, *supra* note 122, at 193.

did not seem to care about the appointment.[218] He planned his summer vacation, telling friends he expected Robert Jackson to get the appointment.[219] 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 unwilling to do."[220] Still, when the appointment came, he remarked that "the responsibility [of Chief Justice] is so great that it doesn't create any sense of elation," indicating that he had both great respect for the position and doubts as to whether he was up to the task.[221]

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."[222] Stone's promotion led to a rapid deterioration of the consensus-building atmosphere established by Chief Justice Hughes.[223] Several factors contributed to this deterioration. Stone lacked the personality or commanding presence of Hughes.[224] Douglas said Stone "never knew how the other half lived."[225] He also seemed to have lacked the tact necessary to garner broad agreements among the other Justices. A newspaper columnist wrote an article, at Stone's urging, critical of Black for his lack of legal knowledge and experience.[226] Stone also thought of Murphy as an inferior intellect he needed to teach.[227] Stone also disliked Murphy and Douglas because of their continuing political ambitions; they both seemed, to Stone, to want to be somewhere besides the Court.[228]

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 did not agree with Hughes and Taft, his predecessors in the position, about the importance of unanimous or "massed" opinions. Instead, he felt there was great value in dissenting opinions.[229] Of course, Stone had served with the two great dissenters in the Court's history: Holmes and Brandeis.[230] Stone likewise disagreed with Hughes's tight control over discussion at the conferences.[231] Even as an Associate Justice, he began holding "rump conferences" with other

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218. *Id.*
219. MASON, *supra* note 13, at 566-67.
220. *Id.* at 568.
221. *Id.*
222. UROFSKY, *supra* note 57, at 9 (quoting Ltr. from William O. Douglas to Hugo L. Black (June 22, 1941) *in* WILLIAM O. DOUGLAS PAPERS (Library of Congress, 1941)).
223. *See infra* p. 20-21.
224. *Id.*
225. DOUGLAS, *supra* note 60, at 45.
226. FINE, *supra* note 122, at 156.
227. *See id.* at 192.
228. *See id.* at 251.
229. *See* UROFSKY, *supra* note 57, at 31.
230. DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 117 (2000).
231. UROFSKY, *supra* note 57, at 31.

Justices to allow more discussion and debate of the cases.[232] As Chief Justice, he held more, and longer, conferences on the cases.[233] The Associate Justices complained about the length and inefficiency of the conferences.[234]Surviving conference notes indicate that these sessions were dominated by Stone, Frankfurter, and occasionally Black.[235] Stone's biographer blames the length of the conferences, the delays in opinions, and the increasing dissents not on Stone, but on Felix Frankfurter's penchant for debate.[236]

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 its 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.[237] He also challenged Stone. But instead of leading the junior Justices who expected him to be their "knight,"[238] Frankfurter became one of the great disappointments on the bench in modern times.[239]

Frankfurter's personality and intellectual elitism, like Stone's, contributed to his alienation of the other new Justices.[240] He could never stop being a professor; he lectured his colleagues in conference,[241] belittled their intelligence or judicial ability,[242] berated lawyers at oral argument,[243] and wrote lengthy opinions that were difficult to read and understand.[244]

Douglas described Frankfurter coming to conferences with a stack of books, and how on his turn to speak, he would read from the books and throw them around the table.[245] Frankfurter's penchant for debate

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232. *Id.*

233. *Id.* at 31-32.

234. 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, *supra* note 122, at 242. Black found the conferences long and argumentative, and Murphy described them as "raw and personal." *See* NEWMAN, *supra* note 128, at 320. Douglas recalled that "if there were twenty-two points in a petition . . . he would discuss every single one of them. The work was grueling. . . " DOUGLAS, *supra* note 60, at 223. Frankfurter, in his diaries, decries the length of the conferences and Stone's habit of interrupting Justices who disagreed with him. LASH, *supra* note 142, at 152, 160.

235. *See* FINE, *supra* note 122, at 240.

236. MASON, *supra* note 13, at 603-04.

237. *See supra* p. 17.

238. NEWMAN, *supra* note 128, at 286.

239. UROFSKY, *supra* note 57, at 19-20.

240. *See* UROFSKY, *supra* note 57, at 32-33.

241. FINE, *supra* note 122, at 159; *See* NEWMAN, *supra* note 128, at 287.

242. UROFSKY, *supra* note 57, at 34. He made fun of Murphy behind his back, and addressed him as "Dear God" in conferences. *Id.* He also stated that Murphy was not qualified for the Court. FINE, *supra* note 122, at 137.

243. He questioned lawyers at oral argument as if they were in law school and sent memos to his colleagues on the bench to instruct them on precedents. FINE, *supra* note 122, at 158-59.

244. Frankfurter's opinions were lengthy, learned essays. The scholarship and verbiage were impressive, but it was not easy to understand the holding. *See* NEWMAN, *supra* note 128, at 292.

245. DOUGLAS, *supra* note 60, at 22.

lengthened the conferences, delayed opinions and led to more dissents.[246] Stone's willingness to allow long discussions at conference led Frankfurter to give "seemingly endless lectures."[247]

Frankfurter also seemed to have vitriol for all his colleagues. He insulted Murphy's intellect,[248] called Black a "self-righteous, self-deluded part fanatic, part demagogue"[249] and decried Douglas's ambition, suggesting that Douglas was more interested in being President than being on the Court.[250] A biographer of the Stone court agreed with Stone's biographer that Frankfurter was responsible for much of the bickering on the Court at the time.[251] He attributes Frankfurter's "poison[ing] the well of collegiality" to Frankfurter's frustration at not having the "leadership over the Court that he thought belonged to him."[252]

Explicit indications of Frankfurter's frustrations can be found in his diary entries from 1943. Frankfurter reported a conversation with Douglas concerning Black changing his mind subsequent to the *Gobitis* decision. Frankfurter asked Douglas whether Black had been re-reading the Constitution over the summer recess; Douglas replied, "No, but he has read the papers."[253] 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 that the conversation, as well as others recorded in Frankfurter's diaries during that period, were invented by Frankfurter and reflect the depths of his frustration during this period.[254] There is some support for this assertion, as Douglas never mentions this conversation in his autobiography.[255] Black, Douglas, and Murphy independently recount a number of conversations they had regarding the original decision, their change of

246. MASON, *supra* note 13, at 603-04.

247. UROFSKY, *supra* note 57, at 32.

248. *See* DOUGLAS, *supra* note 60, at 25-26.

249. FINE, *supra* note 122, at 251 (quoting Letter from Felix Frankfurter to Learned Hand (Nov. 5, 1954) *in* LEARNED HAND PAPERS (Harvard Law School)).

250. James L. Moses, *"An Interesting Game of Poker": Franklin D. Roosevelt, William O. Douglas and the 1944 Vice Presidential Nomination*, *in* 3 FRANKLIN D. ROOSEVELT AND THE TRANSFORMATION OF THE SUPREME COURT 138-39 (Stephen K. Shaw et al., eds., 2004). 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. *Id.*

251. UROFSKY, *supra* note 57, at 32.

252. *Id.*

253. LASH, *supra* note 142, at 209.

254. NEWMAN, *supra* note 128, at 298.

255. DOUGLAS, *supra* note 60, at 45.

position, and the correcting of the ruling.[256] Another entry critical of Black during this period is contradicted by other sources.[257]

Whether or not the comments are injudicious or "outright false," as Black's biographer believes,[258] the results of Frankfurter's histrionics and Stone's ineptitude drove the other members of the Court to band together and develop their own competing jurisprudence.[259] 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.[260] Some even thought his appointment was a jab at the Senate for rejecting the President's proposal.[261] Justice Stone's intemperate comments to a reporter expressing concerns regarding Black's "lack of legal knowledge and experience"[262] were published just as Black took his seat.[263] But Black had a fine mind and was an insatiable reader.[264] When Frankfurter told Black he was a Benthamite, Black gathered some of Jeremy Bentham's works in order to understand Frankfurter's beliefs.[265]

Black was opposed to judicial subjectivity, which he saw as a major source of mischief.[266] Thus, although he initially acquiesced to Cardozo's idea of "selective incorporation" of the Bill of Rights, he later changed his view, in part, because he thought it gave too much discretion to the Justices to determine constitutional parameters.[267] His own view of judicial restraint viewed limitations on the Court's discretion as essential to following the Framers' intent.[268]

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.[269] Frankfurter took to the task with his usual vigor, lecturing Black often at Washington parties and meetings where their

256. *Id.*; FINE, *supra* note 122, at 185-87; NEWMAN, *supra* note 127, at 284, 297.

257. Frankfurter attributes to Brandeis a criticism of Black as "going mad on free speech." NEWMAN, *supra* note 128, at 298. At about the same time, a colleague of Black's writes about a conversation between Brandeis and Stephen Wise where Brandeis expresses the opinion that Black will be recognized as "one of our great jurists." Letter to Hugo Black from Edward J. Kaufman (Sept. 8, 1945), BLACK PAPERS (quoted in NEWMAN, *supra* note 128, at 675).

258. NEWMAN, *supra* note 128, at 298.

259. UROFSKY, *supra* note 57, at 32-33.

260. UROFSKY, *supra* note 57, at 15.

261. *Id.* at 15-16.

262. FINE, *supra* note 122, at 156.

263. Marquis Childs, *The Supreme Court Today*, HARPER'S MAG., May 1938, at 581-82, 584; *See* NEWMAN, *supra* note 128, at 277-78.

264. *See* NEWMAN, *supra* note 128, at 300-01.

265. *See id.* at 288.

266. *See id.* at 293-94. *But see id.* at 435.

267. *See id.*

268. *See* MARK SILVERSTEIN, CONSTITUTIONAL FAITHS: FELIX FRANKFURTER, HUGO BLACK AND THE PROCESS OF JUDICIAL DECISION MAKING 129-30 (1984).

269. *See* MASON, *supra* note 13, at 469. Stone wrote Frankfurter asking if he knew Black well, and suggested to Frankfurter that Black needed "guidance." *Id.*

paths crossed.[270] Unfortunately, Frankfurter treated Black as he did his students, and his patronizing attitude resulted in Black mostly rejecting his views.[271]

Within three years of Frankfurter's appointment, Frankfurter's assumed leadership of the liberal wing of the Court was obliterated and assumed by Black.[272] It was Frankfurter's perception that his colleagues had strayed.[273] In truth, it was Frankfurter who had drifted from his libertarian views.[274] Frankfurter's increasing stridence and refusal to adapt his positions allowed Black to assume a leadership position on the Court.[275]

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 not deferring to Congress on the New Deal legislation.[276] But neither man suggested the Court should show such deference when the issue involved protection of individual liberties.[277] Frankfurter said as much when he stated that these issues came to the Court with a "special claim for constitutional protection."[278] The fundamental question for both men was how to give meaning to the Fourteenth Amendment without having the Court indulge in subjective decision-making.[279] 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. It also 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 constitutional history, look at Court precedents, and use their own "sense of fairness and decency" to determine the limits of constitutional protection.[280] Black believed such an approach would result in the Court "making law" in the same way the Court had done in striking down the New Deal legislation.[281] This was Black's view of judicial restraint. He

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270. JAMES F. SIMON, THE ANTAGONISTS: HUGO BLACK, FELIX FRANKFURTER AND CIVIL LIBERTIES IN MODERN AMERICA 99-100 (1989).

271. *See id.* at 100.

272. *Id.* at 118-19. In the *Gobitis* decision, Frankfurter wrote for a nearly unanimous Court. 310 U.S. 586. Three years later in *Barnette*, no member of the Court joined his dissent. 319 U.S. 624.

273. SIMON, *supra* note 270, at 118.

274. *Id.* As early as 1938, Frankfurter had noted claims regarding individual rights came to the Court with a "special claim for constitutional protection." *Id.* at 128. He wrote Justice Stone a note agreeing with the *Carolene* footnote, advocating a different standard for evaluating such claims. *See* NEWMAN, *supra* note 127, at 296.

275. SIMON, *supra* note 270, at 119.

276. *Id.* at 128, 172.

277. *Id.* at 128.

278. *Id.*

279. *Id.* at 172.

280. SIMON, *supra* note 270, at 172.

281. *Id.*

preferred to anchor the Fourteenth Amendment directly to the wording of earlier sections of the Constitution; to treat the amendment as a mandate to enforce the Bill of Rights against state encroachment.[282] Black also felt that the views expressed by the amendment's sponsors presented a historical argument for incorporation.[283] Black believed this approach best prevented subjective decision-making by the Court members – in other words, it would further the idea of judicial restraint.[284] 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.[285] On the Court, Black advocated the same position. In *Cox v. New Hampshire,* the Court upheld the conviction of Jehovah's Witnesses for not complying with a parade permit requirement.[286] Chief Justice Hughes's draft opinion initially stated that the permit requirement was a "reasonable" exercise of legislative discretion.[287] 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 judgment to decide the issue.[288] 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.[289] It was the first of several times he underestimated Black as an adversary.[290]

Frankfurter's arrogance also led him to be ineffective in soliciting support from his colleagues on his position. While 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.[291] Further, regardless of his personal estimation of his colleagues, he did not belittle or disparage them as Frankfurter did.[292]

Douglas, like thousands of others, had admired Frankfurter for his defense of Sacco and Vanzetti.[293] Douglas and Murphy were in a group of Roosevelt cronies who celebrated Frankfurter's appointment to the

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282. *Id.* at 172.
283. *Id.* at 173.
284. *Id.* at 173-74.
285. SIMON, *supra* note 270, at 119-20.
286. 312 U.S. 569 (1941).
287. SIMON, *supra* note 270, at 120.
288. *Id.* at 120-21. 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 U.S. 46, 89 (1947) (Black, J., dissenting).
289. SIMON, *supra* note 270, at 121.
290. *See id.* at 121, 127.
291. *Id.* at 127.
292. *Id.* at 127-128.
293. *Id.* at 187.

Court, expecting him to lead the liberal wing.[294] 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.[295] But Frankfurter's calculated use of histrionics at conferences, his constant politicking for votes on the cases, and his demeaning attitude soon caused Douglas to abandon Frankfurter and his views.[296]

Black was a natural ally for Douglas. Both were country boys who were suspicious of concentrations of power.[297] Both thought a jurisprudence that valued process over the result was too mechanical and sterile.[298] Black came to view the protection of individual liberties as the primary role of the Constitution in the balance of powers because it provided the best defense against overreaching government;[299] Douglas shared that view.[300]

Justice Murphy was singled out for a lion's share of Frankfurter's vitriol, as Frankfurter thought Murphy unqualified for the Court; Murphy himself thought the same.[301] One of Roosevelt's main reasons for appointing Murphy was that he was another loyal New Dealer who believed the Courts should defer to Congress on economic issues.[302]

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.[303] 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 that if Murphy "ever did the wrong thing, it was for the right reason."[304] Douglas noted that Murphy had "common sense, a keen orientation to the Constitution and the Bill of Rights, and a sense of the relevancy of facts."[305] Looking back on this tumultuous time on the Court, Douglas felt he made more mistakes not following Murphy than not following Frankfurter.[306]

As the rift between Frankfurter and the other New Deal appointees grew, Frankfurter began referring to the three as "the Axis,"[307] equating

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294. SIMON, *supra* note 270, at 64.

295. DOUGLAS, *supra* note 60, at 44-45.

296. *See id.* at 22, 45. Douglas minimizes his philosophical disagreement with Frankfurter as being less about the ultimate aims than the role of the Court in achieving those aims. *Id.* at 22.

297. *See* SIMON, *supra* note 270, at 184-186. While Black served in the Senate and Douglas at the SEC both worked to break up monopolies. *Id.* at 187.

298. UROFSKY, *supra* note 57, at 57.

299. *See* SIMON, *supra* note 270, at 243.

300. DOUGLAS, *supra* note 60, at 44-48.

301. *See* FINE, *supra* note 122, at 133.

302. *See* UROFSKY, *supra* note 57, at 23-24.

303. *Id.* at 24.

304. NEWMAN, *supra* note 128, at 397.

305. DOUGLAS, *supra* note 60, at 26.

306. *Id.*

307. LASH, *supra* note 142, at 176.

them with our wartime enemies Germany, Italy, and Japan. During this period, the Court members sometimes changed their opinions after the initial votes were taken and draft opinions were circulated.[308] Their lack of adherence to precedent was reflected in over 30 decisions overruled during Murphy's years on the Court, many of them recent decisions.[309]

By the time he reached his third term in 1939, Black was comfortable on the Court. 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 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 could not lead them, with their strong personalities and *non*-judicious temperaments. It was Black who articulated their constitutional faith, and in doing so, 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.[310]

But this solid bloc was short-lived. In 1937, with Black's appointment, the percentage of non-unanimous decisions significantly increased.[311] Black himself was responsible for much of the increase, with eleven solo dissents.[312] Hughes's attempts to establish a consensus are also reflected, as the Chief Justice agreed with every opinion rendered in 1937.[313] From 1938 through 1940, as Frankfurter, Douglas, and Murphy joined the Court, the percentage of non-unanimous decisions grew even larger.[314] At the same time, the development of a new bloc of Justices with broad agreement on the cases began to

308. FINE, *supra* note 122, at 147.

309. *Id.* at 152.

310. *See* PRITCHETT, *supra* note 63, at 32-34. During this period, the Court was non-unanimous, on average, in only 15% of its decisions. *Id.* at 25.

311. *Id.* at 25 (In 1937 the percent of non-unanimous decisions increased to 27 percent).

312. *Id.* at 35.

313. *Id.*

314. *Id.* at 25. (Non-unanimous decisions accounted for an average of 31% of the Court's decisions during these three terms.).

develop. While Black continued to file a large number of dissents, he was no longer alone in his dissents: in 1939 and 1940, Douglas agreed with Black on every decision and Murphy joined both on almost all decisions.[315]

Frankfurter's declining ability to garner support for his positions 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.[316] But in 1941, when Byrnes and Jackson joined the Court and Stone took over as Chief Justice, the breakdown of consensus became complete. Frankfurter issued sixteen dissents in this term alone.[317] And Justices Douglas, Black, and Stone dissented even more than Frankfurter.[318]

But it must be noted that 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 "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.[319] As noted earlier, before 1935 the Court had only heard a handful of cases regarding the First Amendment. Thanks in large part to the Jehovah's Witnesses, the Court heard more individual liberties cases during this period than in its entire previous history.[320]

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, had been Attorney General, like Murphy, Stone, and McReynolds.[321] Six ex-governors (like Murphy) and ten ex-senators (like Black) had been appointed to the bench prior to 1937.[322]

315. PRITCHETT, *supra* note 63, at 35-38, 249. (In 1940, Murphy agreed with Black and Douglas 84% of the time.).

316. PRITCHETT, *supra* note 63, at 38.

317. *Id.* at 39.

318. *Id.*

319. *Id.* at 30-31.

320. The Court issued decisions in twenty-six cases brought by Jehovah's Witnesses between 1938 and 1943. Civil liberties cases accounted for 34 of the Court's non-unanimous decisions between 1939 and 1947. *Id.* at 129.

321. PRITCHETT, *supra* note 63, at 12.

322. *Id.* at 12-13.

VI. THE CASES

After the *Gobitis* decision, the Witnesses continued to press the Court to protect their proselytizing from "neutral" laws. 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.[323] Through eight attempts, the advocates of judicial restraint held firm.[324]

Finally, in *Jones v. Opelika,*[325] the split on the Court reached 5 to 4. Moreover, the dissenting opinions were memorable. In his dissent, 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 as well as direct attacks.[326] Justice Murphy had rejected the Witnesses' arguments in *Chaplinsky v. New Hampshire,*[327] the "fighting words" case, refusing to extend the First Amendment to protect the actions of Chaplinsky.[328] 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.[329] But in his *Opelika* dissent, Justice Murphy adopted the Witnesses' arguments that these activities were integral to the practices of their faith. He stated that 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.[330]

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 *Opelika* case was being wrongly decided, but that the analysis was the result of the *Gobitis* reasoning.[331] And, they said, they would now reverse their votes in *Gobitis*.[332] The Witnesses' belief that their preaching activities were the exercise of their religion and should

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323. *Id.* at 163-67. In the six months following the *Gobitis* decision, the ACLU reported 1,488 Witnesses were attacked in 335 communities that included all but 4 states. Am. Civil Liberties Union, The Persecution of Jehovah's Witnesses 3 (1941) ACLU Papers, Vol. 2215, "The Persecution of Jehovah's Witnesses"

324. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Cox v. New Hampshire, 312 U.S. 569 (1941); Hussock v. New York, 312 U.S. 659 (1941) (dismissed for want of jurisdiction); Leiby v. City of Manchester, 313 U.S. 562 (1941) (writ of certiorari denied); Bevins v. Prindable, 314 U.S. 573 (1941) (granted motion to affirm); Trent v. Hunt, 314 U.S. 573 (1941) (affirmed judgment); Hannan v. City of Haverhill, 314 U.S. 641 (1941) (writ of certiorari denied); Pascone v. Massachusetts, 314 U.S. 641 (1941) (writ of certiorari denied).

325. 316 U.S. 584 (1942).

326. *See id.* at 608-11 (Stone, J., dissenting).

327. 315 U.S. 568 (1942).

328. *Id.*

329. *See* cases cited *supra* note 306.

330. *See Opelika*, 316 U.S. at 616 (Murphy, J., dissenting).

331. *Id.* at 623-24 (Black, J., dissenting).

332. *Id.*

receive as much protection as accorded to free speech,[333] was now put forth as the constitutional faiths of these four Justices.[334]

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.[335] President Roosevelt nominated Wiley Rutledge to replace him.[336] Murphy had recommended Rutledge be nominated for the D.C. Court of Appeals when Murphy was Attorney General.[337] 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.[338]

In fact, Roosevelt had considered Rutledge for several of the previous vacancies on the Court.[339] Rutledge headed a group of law professors who had supported the President's court packing plan.[340] While on the Court of Appeals, he had also authored a dissent in support of Jehovah's Witnesses in an anti-picketing ordinance case.[341] Murphy cited the *Busey* opinion in his own dissent in *Jones v. Opelika*.[342] Rutledge took his seat on the Court on February 15, 1943.[343] Four days later, the Court voted to have re-argument in *Jones v. Opelika* and granted certiorari in *Murdock v. Pennsylvania*.[344] On May 3, 1943 the Court handed down decisions in thirteen Jehovah's Witnesses cases.[345] All were favorable to the Witnesses.[346] One of the decisions reversed the Court's own recent precedent in *Jones v. Opelika*.[347] *Martin v. Struthers*, relied on by the Court in its most recent decision for Jehovah's Witnesses, was another in favor of the Witnesses.[348] A third decision was *Murdock v. Pennsylvania*.[349] Writing for the Court in *Murdock*,

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333. Cantwell v. Connecticut, 310 U.S. 296 (1939).

334. *Opelika*, 316 U.S.at 611-24 (dissenting opinions).

335. UROFSKY, *supra* note 57, at 28.

336. *Id.*

337. FINE, *supra* note 122, at 194.

338. LASH, *supra* note 142, at 154.

339. UROFSKY, *supra* note 57, at 29.

340. *Id.*

341. Busey v. District of Columbia, 129 F.2d 24, 27 (D.C. Cir. 1942) (Rutledge, J., dissenting).

342. 316 U.S. at 614 n.4.

343. LASH, *supra* note 142, at 188.

344. MASON, *supra* note 13, at 599.

345. Martin v. City of Struthers, 319 U.S. 141 (1943); Jones v. Opelika II, 319 U.S. 103 (1943) (three consolidated cases); Murdock v. Pennsylvania, 319 U.S. 105 (1943) (eight companion cases); Douglas v. City of Jeannette, 319 U.S. 157 (1943).

346. 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. 319 U.S. at 166. But the Court did so on the grounds that their striking down the ordinance involved in *Murdock* made the injunction unnecessary. *Id.* at 165.

347. Jones v. Opelika II, 319 U.S. 103 (reversing Jones v. Opelika I, 316 U.S. 584).

348. Watchtower Bible and Tract Soc'y v. Vill. of Stratton, 536 U.S. at 163 (citing *Martin*, 319 U.S. 141).

349. 319 U.S. 105 (1943)

Justice Douglas established Stone's "preferred position" for First Amendment freedoms as the law of the land.[350] He also made clear that the Witnesses' preaching and door-to-door solicitation were religious exercises, an "age-old type of evangelism" that was as old as the Republic itself.[351] Recognition of the Witnesses' practices as part of their religion and establishing strict scrutiny as the standard for legislation impacting these practices spelled doom for the advocates of judicial restraint. One month later, on Flag Day, June 14, 1943, the Court reversed its decision in *Gobitis*.[352] This second reversal by the Court was called "one of the most notable acts in the entire span of 154 years of Supreme Court history."[353] 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.

The first Jehovah's Witnesses case came before the Roosevelt-era Court in 1938.[354] After their 1943 victories, only four Jehovah's Witnesses cases came before the Court during the next three terms.[355] The battle was over and they had won.

VII. 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.[356] 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.[357] Frank Murphy died in a hospital during the summer recess in 1949.[358] His last opinion, a dissent, stands 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."[359]

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350. 319 U.S. at 115.

351. *Id.* at 110.

352. W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624.

353. PETERS, *supra* note 22, at 241.

354. PRITCHETT, *supra* note 63, at 94.

355. These cases all involved restrictive local laws that infringed upon free exercise rights. Tucker v. Texas, 326 U.S. 517 (1946); Follett v. Town of McCormick, 321 U.S. 573 (1944); Prince v. Massachusetts, 321 U.S. 158 (1944); and Marsh v. Alabama., 326 U.S. 501 (1946).

356. UROFSKY, *supra* note 57, at 142-43.

357. *Id.* at 29.

358. *Id.*

359. FINE, *supra* note 122, at 588.

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 that they should not pay taxes or need licenses to exercise their beliefs, so they refused to pay license fees. Saluting the flag or pledging allegiance was, in their belief, worshipping false idols, and so they refused to do so.

At the same time, 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 the human rights of minorities. The Court acted to ensure that this was not allowed 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,[360] the incorporation of the Free Exercise Clause of the First Amendment into the Due Process Clause of the Fourteenth Amendment,[361] and the application of a strict scrutiny standard to provide maximum protection to free exercise rights.[362] In truth, these contributions also reflect 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.

360. 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 repeatedly saved petitioners' coreligionists from petty prosecutions reflected the Court's evaluation of the First Amendment freedoms that are implicated in this case." *Stratton*, 536 U.S. at 169.

361. Cantwell v. Connecticut, 310 US 296 (1939).

362. *See* William Shepard McAninch, *A Catalyst for the Evolution of Constitutional Law: Jehovah's Witnesses in the Supreme Court*, 55 U. CIN. 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 fighting to defend those very freedoms from totalitarian attack is unchanged. It motivates our decision today." *Stratton*, 536 U.S. at 169. 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.