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## Justice Jackson in The Jehovah's Witnesses' Cases

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## JUSTICE JACKSON IN THE JEHOVAH’S WITNESSES’ CASES

John Q. Barrett\*

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Thank you so much, Dean Page and Professor Wasserman, FIU faculty, students, and fellow panelists. This is dazzling company, and it is a privilege to be aiding, I hope, your digestion with this lunchtime lecture.

My quick comment on the morning’s panels is to voice nearly full agreement. From one angle or another, each speaker set up very nicely one of the two topics that I plan to address.

One is Justice Robert H. Jackson. I come to *Barnette* as a law professor and also as a biographer—I am interested in the constitutional law, and also in Justice Jackson the person. The author of the Court’s opinion in *West Virginia State Board of Education v. Barnette*<sup>1</sup> interests me at least as much as does its law. Many of the perspectives that have been voiced here regarding *Barnette* and Jackson, including comments on the decision, his

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I am very grateful to Professor Howard Wasserman for organizing this excellent symposium, to Dean Antony Page and everyone at FIU for their great planning, arrangements, and hospitality, to the *FIU Law Review* editors for their work on the symposium and this publication, to the late Bennett Boskey (1916–2016) for his friendship and guidance, and to Max D. Bartell for sharp and diligent research assistance. Copyright © 2019 by John Q. Barrett. All rights reserved.

<sup>1</sup> 319 U.S. 624 (1943).

opinion, doctrine, absence of doctrine, literary skill, music, prayer, and so forth are views that I share, deeply. It is a great set-up to hear them voiced so well.

In addition to discussing Justice Jackson, I also will address a second topic that, to my surprise, did *not* come up so far in this symposium, except implicitly or in passing. That topic is Jehovah's Witnesses. They were the religious believers who became litigants. They were repeat players in a run of 1930s and 1940s United States Supreme Court cases and decisions that included, in 1943, *Barnette*.

I will address Justice Jackson and Jehovah's Witnesses in four parts. First, I will begin with Robert Jackson himself, introducing the man who became a Supreme Court Justice, and who came to author *Barnette* and at least one other very notable opinion in a Jehovah's Witness case. Second, I will turn to the *Barnette* case in its Supreme Court legal context, which turns out to be two Court terms, 1941–42 and 1942–43, of many Jehovah's Witnesses cases. These cases produced a run of Court decisions that are a framework surrounding *Barnette*, and thus understanding them is important to understanding it—*Barnette* was one of many decisions regarding Jehovah's Witnesses, not a decision standing alone. Third, I will turn back to discussing Justice Jackson, the author of *Barnette*, and how his opinion there was a piece of his judging overall in the Jehovah's Witnesses' cases. Finally, I will conclude by pointing to some of Robert Jackson's life experiences that one can see, at least between the lines, in his Jehovah's Witness case opinions.

## I. ROBERT H. JACKSON BEFORE HE BECAME JUSTICE JACKSON

Robert Houghwout Jackson's life, 1892 to 1954, was not long, but it was full and varied—he achieved much before heart disease got the best of him at age 62, shortly after he was part of the unanimous Supreme Court decision in *Brown v. Board of Education*.<sup>2</sup>

Jackson's life was an arc that really is the story of the rising, modern United States. As his former law clerk Justice William Rehnquist once noted, Jackson was a lot like Abraham Lincoln, who, born almost ninety years earlier, also traveled from rural isolation to law, politics, high national office, and permanent significance.<sup>3</sup> Jackson became not only a great U.S. Supreme

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<sup>2</sup> 347 U.S. 483 (1954). For details on Jackson's life, see my Introduction in ROBERT H. JACKSON, THAT MAN: AN INSIDER'S PORTRAIT OF FRANKLIN D. ROOSEVELT, at xiii–xix (John Q. Barrett, ed., 2003).

<sup>3</sup> See William H. Rehnquist, *Robert H. Jackson: A Perspective Twenty-Five Years Later*, 44 ALB. L. REV. 533, 536 (1979–1980) (noting “Jackson's remarkable similarity to Abraham Lincoln in many respects. Obviously, there was only one Lincoln, and Robert Jackson did not lead the Union victoriously

Court Justice but, two years after *Barnette*, a leading world figure as the chief U.S. prosecutor of Nazi war criminals at Nuremberg. That made Jackson a leader of the process that held top Nazis legally accountable for their crimes, produced the record that is the basis for history's understanding of what Hitler's Third Reich was and did, including the Holocaust, and built modern international criminal and humanitarian law.

Robert Jackson ended up in those high places. He began, late in the 19th century, on a family farm in Spring Creek Township in Warren County, in the northwest corner of the Commonwealth of Pennsylvania. His great-grandfather settled there around 1800. He built a cabin, cleared land, and started to farm. And he had a son, who had a son, who fathered Robert H. Jackson. (Women also were involved.)

Jackson had a rural, outdoors, hard-working, autonomous upbringing. His parents were farm people, but Jackson's father inclined toward the 20th century, and so around 1898 the family moved into New York State to a village called Frewsburg. Jackson's father pursued ventures: he logged and marketed wood; he bought, sold, and raced horses; he ran Frewsburg's "Hotel Jackson" until it burned to the ground; he had a livery stable. He also drank, and he did not live a very long life, but perhaps he gave his son his autonomous, entrepreneurial spirit.

Robert Jackson attended the Frewsburg school. He received knowledge and training, including in civic values, in a small public school that was very much like the ones that the Gobitas children and the Barnett sisters—Jehovah's Witnesses whose surnames, misspelled, would become part of U.S. constitutional law—attended in the same general region.

Jackson, age seventeen, was Frewsburg High School's valedictorian in 1909. During the next year, he commuted by rail up the valley to Jamestown, New York, a much bigger city, where he took a second senior year at its high school. And that was the end of his general higher education—he never attended a day of college. Instead, at age 18, he became the apprentice in a two-man Jamestown law firm. One was a trial lawyer. The other handled appeals. One was a talker and a politico, the other a writer and a scholar. Each poured his talent and style into Jackson. After a year, Jackson crossed the state and took the second of a two-year curriculum at Albany Law School. Then he returned to Jamestown and resumed his apprenticeship until he was 21 and could take the New York State bar examination.

Jackson began to practice in Jamestown and its region. Trying cases in Chautauqua County court, he impressed a visiting judge from Buffalo. He soon connected Jackson to his former law firm there.

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through a Civil War which resulted in the abolition of slavery. But I am speaking now not of historical accomplishments but of character traits.”).

Jackson, and his new wife, then moved to Buffalo. He went to work in the massive Ellicott Square building. He did high volume trial and appellate work, mostly in state court, for the firm's main client, the streetcar company. He experienced "Big Law" circa 1917, and he became acquainted with bar leaders and rising legal stars, including John Lord O'Brian and William J. Donovan. Jackson, ambitious, figured out that it might take decades to become a leading legal figure in such a big city.

So, in 1918, he returned to Jamestown. He built his law practice there, became very active in bar associations, and through that became a legal profession "player" in New York State and then nationally. He prospered, becoming the father of two children, building a big house with white pillars, owning an 80-acre horse farm, and keeping a cabin cruiser on Chautauqua Lake. The Great Depression did not affect him much because his clients were practical businesses that kept selling, and thus paid his bills.

We might never have heard of Robert H. Jackson, or at least we would not be discussing him here, if he had stayed and become great only in New York State—history would remember him, probably, as an eloquent judge of the New York Court of Appeals, a position that Jackson came somewhat close to attaining in the 1930s, but not as a national figure, much less as someone who became significant on the international stage.

But Jackson also had, in addition to his legal skills and prosperity across two decades in private law practice, an interest in politics. From his upbringing through about 1921, he inherited and was involved with the Andrew (no relation) Jacksonian Democratic Party politics of his father and grandfather. In 1911, one of Robert Jackson's attorney-mentors introduced him, on a trip to Albany, to the new State Senator from Dutchess County, Frank Roosevelt. He was about 28 and Robert Jackson was about 18. Less than twenty years later, that Roosevelt had become F.D.R., and Jackson was connected to Roosevelt as governor, as presidential candidate, and then in the White House.

As President, Franklin Roosevelt nominated Robert H. Jackson, and the Senate then confirmed those nominations, to five different offices: in 1934, to be Assistant General Counsel in the Treasury Department's Bureau of Internal Revenue; in 1936, to be Assistant Attorney General, first heading the Tax Division in the Department of Justice and then DOJ's Antitrust Division; in 1938, to be Solicitor General of the U.S., where he became a renowned Supreme Court advocate; in 1940, to be Attorney General of the U.S.; and in 1941, to become an Associate Justice of the Supreme Court.

## II. *BARNETTE* IN ITS SUPREME COURT CONTEXT: THE JEHOVAH'S WITNESSES CASES, 1938–1943

I turn now to the Supreme Court's decision in *West Virginia State Board of Education v. Barnette*, announced in June 1943. Although the *Barnette* decision stands on its own, in its published words, it also was one of numerous decisions that the Court handed down during a five-year period regarding the constitutional rights of Jehovah's Witnesses.<sup>4</sup>

This section locates *Barnette* within that range of decisions. I first describe the Court's Jehovah's Witnesses decisions as they came down, in three discernable phases. I then describe chronologically how the Court's membership changed significantly as it was handling and deciding these cases.

### A. *The General Pattern of the Decisions: The Court Warming to Jehovah's Witnesses' Constitutional Claims*

During 1940–43, the Supreme Court decided Jehovah's Witnesses cases in three distinct time periods. For the most part, the Court at first rejected the Witnesses' constitutional claims. Then it came to uphold them. Then it upheld them by more than a bare majority vote.

#### 1. The Pre-July 1941 Court

The “first Court,” the pre-Summer 1941 Court on which Robert Jackson was not yet a member, generally handed down decisions *rejecting* constitutional claims by Jehovah's Witnesses.

Yes, the Witnesses did not lose every time one of their cases made it to the Supreme Court in these years. In 1938, for example, in *Lovell v. City of Griffin*, the Court unanimously reversed a Witness's conviction for violating a city ordinance that prohibited unlicensed distribution of literature and required would-be distributors to get the city manager's permission to do so.<sup>5</sup> In 1939, in *Schneider v. New Jersey*, the Court reversed three Witnesses' criminal convictions for violating ordinances barring handbill distribution on

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<sup>4</sup> See generally SHAWN FRANCIS PETERS, *JUDGING JEHOVAH'S WITNESSES: RELIGIOUS PERSECUTION & THE DAWN OF THE RIGHTS REVOLUTION* (2000).

<sup>5</sup> 303 U.S. 444 (1938). Earlier in the same term as *Lovell*, the Court had dismissed a Jehovah's Witness's appeal that arose from a criminal prosecution, also in Griffin, Georgia. See *Coleman v. City of Griffin*, 302 U.S. 636 (1937) (*per curiam*). It appears that *Coleman* is the first Supreme Court decision, albeit a summary one, in a Jehovah's Witness case. See DAVID R. MANWARING, *RENDER UNTO CAESAR: THE FLAG-SALUTE CONTROVERSY* 27 (1962).

public streets or door-to-door.<sup>6</sup> And in May 1940, the Court in *Cantwell v. Connecticut*, reversed criminal convictions of three Witnesses who had been convicted for selling religious books without purchasing a government license.<sup>7</sup>

But the *Cantwell* Court was the same one that, just a month later, in *Minersville School District v. Gobitis*, held that the Constitution permitted a public school to expel Jehovah's Witness schoolchildren who refused to salute the American flag.<sup>8</sup>

And this was nearly the same Court—Justice James C. McReynolds did retire in the interim—that, in March 1941, nine months after *Gobitis*, upheld in *Cox v. New Hampshire*, the criminal convictions of 68 Jehovah's Witnesses for violating a state law barring unlicensed parades on public streets.<sup>9</sup>

During this period, Robert Jackson was Solicitor General and then Attorney General of the United States, not a Supreme Court Justice. I am aware of no evidence showing his reaction to *Lovell*, *Schneider*, *Cantwell*, or *Cox*. When *Gobitis* was decided in June 1940, however, Attorney General Jackson did disapprove, strongly, of its result, at least on the pragmatic ground that it was increasing public unrest. Jackson in this time period debated world security issues, and maybe even the *Gobitis* case, with his friend Justice Felix Frankfurter—on June 1, at a small, private dinner that Librarian of Congress Archibald MacLeish hosted at his Georgetown home,<sup>10</sup> Jackson and Justice Frankfurter debated past midnight, and with “a good deal of feeling,” the situation in Europe,<sup>11</sup> and maybe related topics. Only two days later, on Monday, June 3, Justice Frankfurter announced his opinion for the Court in *Gobitis*. And on Friday, June 14, which happened to be Flag Day, the presidentially proclaimed day to commemorate the Continental Congress adopting on June 14, 1777, the Stars and Stripes as the official flag of the U.S.,<sup>12</sup> Attorney General Jackson told President Roosevelt and the

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<sup>6</sup> 308 U.S. 147 (1939).

<sup>7</sup> 310 U.S. 296 (1940).

<sup>8</sup> 310 U.S. 586 (1940).

<sup>9</sup> 312 U.S. 569 (1941). One of the appellants in *Cox* was Walter Chaplinsky, soon to be subject of the Court's decision in *Chaplinsky v. New Hampshire*, upholding his criminal conviction for insulting a police officer.

<sup>10</sup> See Letter from Robert H. Jackson to Archibald MacLeish, May 9, 1940 (original) (accepting his invitation to this dinner), in Archibald MacLeish Papers, Library of Congress, Manuscript Division, Washington, D.C., Box 3.

<sup>11</sup> See HAROLD L. ICKES, III THE SECRET DIARY OF HAROLD L. ICKES: THE LOWERING CLOUDS, 1939-1941, at 198, 199 (1955) (diary notes concerning this dinner).

<sup>12</sup> In 1916, President Wilson proclaimed the first Flag Day. Since then, every president has done so annually. See, e.g., President Franklin D. Roosevelt, Proclamation No. 2586, 3 C.F.R. § 38-43 (1943). In 1998, a law was enacted designating June 14 as Flag Day and asking the president each year to issue a Flag Day proclamation. See 36 U.S.C.A. § 110 (West 1998).

Cabinet of anti-alien, anti-“fifth columnist” hysteria that was sweeping the country and expressed his particular bitterness about the *Gobitis* decision.<sup>13</sup>

## 2. The July 1941–May 1943 Court

The “second Court,” which was the one that Jackson joined in July 1941, evolved into a *pro*-Jehovah's Witness Court.

Yes, the Witnesses at first continued to lose major cases before this Court. In March 1942, in *Chaplinsky v. New Hampshire*, the Court upheld, unanimously, the criminal conviction of a Jehovah's Witness street preacher for speaking offensive, derisive, and annoying words.<sup>14</sup> Walter Chaplinsky had called a police officer “a God damned racketeer” and “a damned Fascist,” and the Court held that such “fighting words” were not protected speech under the First and Fourteenth Amendments.<sup>15</sup>

And in *Jones v. City of Opelika* and its companion cases, decided in June 1942, this Court held that the Constitution permitted the city to require Jehovah's Witnesses to purchase licenses before they could distribute and sometimes sell religious books, pamphlets, and other publications—this did not violate the Fourteenth Amendment's protections of speech, press, and religious freedoms.<sup>16</sup>

But in a short period of time, this Court swung around. At first, more Justices started to vote to *uphold* Jehovah's Witnesses' claims to constitutional protection—while *Gobitis* in 1940 had been an 8-1 decision against the Witnesses, *Jones* two years later was a much-closer 5-4 defeat for the Witnesses. Three Justices—Hugo L. Black, William O. Douglas, and Frank Murphy—not only began in *Jones* to vote in favor of Witnesses' constitutional claims. These Justices, who had been part of the *Gobitis* supermajority, filed in *Jones*, gratuitously, an opinion recanting their votes to uphold the flag salute.<sup>17</sup>

Then, in 1943, this Court began to decide cases consistently *in favor* of the Witnesses' claims to constitutional protection. In *Murdock v. Pennsylvania (City of Jeanette)* and *Martin v. City of Struthers*, decided in May 1943, the Court recognized, respectively, the Witnesses' rights to distribute books and pamphlets door-to-door without having to pay for a

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<sup>13</sup> See *id.* at 211 (diary notes concerning President Roosevelt's June 14, 1940, Cabinet meeting).

<sup>14</sup> 315 U.S. 568 (1942).

<sup>15</sup> See *id.* at 573.

<sup>16</sup> See 316 U.S. 584 (1942). The companion cases were No. 280, *Bowden v. Fort Smith*, and No. 966, *Jobin v. Arizona*.

<sup>17</sup> See *id.* at 623–24 (opinion of Black, Douglas, and Murphy, JJ.)

license, and to distribute, door-to-door, handbills containing religious information.<sup>18</sup>

This Court also reconsidered *Jones* and its companion cases and decided them the other way. The Court held that, in light of *Murdock*, it was unconstitutional to enforce licensing ordinances against Witnesses who were distributing or selling literature door-to-door.<sup>19</sup>

On this Court, Justice Jackson was a vote *against* the Jehovah's Witnesses. In 1942, he was part of the 5-4 majority in the initial *Jones v. City of Opelika* decision—*Jones I*. And in 1943, when a majority of the Court shifted in *Murdock* and *Martin* from *Gobitis*-decision-type hostility toward Jehovah's Witnesses to support for their constitutional claims, Jackson was a dissenter . . .

### 3. The June 1943 Court

. . . except in the case of *West Virginia State Board of Education v. Barnette*.

For purposes of this typology, the “third Court” was the Court that decided *Barnette*. *Barnette* was its own category because, while the Court majority there continued the pro-Jehovah's Witnesses voting pattern of the 1942–43 term's other Witness case decisions, this one was made by more than a bare majority. Five Justices became six. The addition was the Justice who Chief Justice Stone Harlan Fiske Stone assigned to write the Court's opinion: Robert H. Jackson.

#### B. *Some Particulars of Supreme Court Personnel, Cases, and Decisions, From Gobitis (1940) to Barnette (1943)*

As just outlined, the chronology of the Supreme Court deciding Jehovah's Witnesses cases that are direct preludes to *Barnette* began in June 1940 when the Court announced its *Gobitis* decision.

In *Gobitis*, the Court declared that it was constitutional for a public school to expel Jehovah's Witness schoolchildren who refused to salute the American flag.<sup>20</sup> The vote was 8-1. Justice Felix Frankfurter wrote the Court's opinion. He was joined by Chief Justice Charles Evans Hughes and

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<sup>18</sup> See *Murdock v. Pennsylvania (City of Jeanette)*, 319 U.S. 105 (1943); *Martin v. City of Struthers*, 319 U.S. 141 (1943). In a third case, *Douglas v. City of Jeannette*, that the Court heard and then decided at the same as *Murdock* and *Martin*, the Court held unanimously that it lacked jurisdiction to decide the appeal. See 319 U.S. 157 (1943).

<sup>19</sup> See *Jones v. City of Opelika (Jones II)*, 319 U.S. 103 (1943).

<sup>20</sup> *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940).

Associate Justices James C. McReynolds, Owen J. Roberts, Hugo L. Black, Stanley Reed, William O. Douglas, and Frank Murphy. Then-Associate Justice Harlan Fiske Stone dissented alone.

Less than a year later, the Court's membership changed significantly. In January 1941, Justice McReynolds retired. That June, at the end of the Court's term, Chief Justice Hughes also retired. President Roosevelt then "elevated" Justice Stone—the lone dissenter in *Gobitis*—to be the new Chief Justice, and Roosevelt appointed Senator James F. Byrnes (D.-SC) to succeed McReynolds and Attorney General Robert H. Jackson to succeed Stone as an Associate Justice.

In the Court's next term, the new Stone Court continued, at first, to decide Jehovah's Witnesses cases as the Hughes Court had decided *Gobitis*, rejecting Witnesses' claims to constitutional protection against government regulation.

In *Chaplinsky v. New Hampshire*, the Court defined a Witness preacher's street speech as unprotected "fighting words."<sup>21</sup>

In *Jones v. City of Opelika*,<sup>22</sup> from Alabama, together with companion cases from Arkansas and Arizona, the Court upheld, by a narrow 5-4 vote, the constitutionality of Witnesses' criminal convictions for selling printed matter without purchasing city-required licenses. In *Jones*—which in short time came to be known as *Jones I*—Justice Reed wrote the Court's opinion.<sup>23</sup> He was joined by Justices Roberts and Frankfurter from the *Gobitis* majority of two years earlier, and by the two new Justices, Byrnes and Jackson. But Chief Justice Stone, still dissenting as he had, as an Associate Justice, in *Gobitis*, was no longer alone—in this case, Stone was joined by Justices Black, Douglas, and Murphy, who had cast anti-Jehovah's Witnesses votes in *Gobitis*.<sup>24</sup> And in a separate opinion, those three Justices now explicitly recanted their *Gobitis* votes to uphold the constitutionality of the flag salute.<sup>25</sup> The 8-1 *Gobitis* Court thus had become a bare majority of 5-4.

Following this decision, during the Court's 1942 summer recess, the Jehovah's Witnesses who were the losing parties in the *Jones* case filed petitions seeking rehearing. They were supported by *amici*, including the American Newspaper Publishers Association and the American Civil Liberties Union, who urged the Court to recognize that Jehovah's Witnesses' constitutional rights were violated by government enforcement of both

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<sup>21</sup> 315 U.S. 568 (1942).

<sup>22</sup> 316 U.S. 584 (1942).

<sup>23</sup> *See id.* at 584–600.

<sup>24</sup> *See id.* at 600–11 (opinion of Stone, C.J., joined by Black, Douglas, and Murphy, JJ.); *see also id.* at 611–23 (Murphy, J., joined by Black and Douglas, JJ., dissenting).

<sup>25</sup> *See id.* at 623–24 (opinion of Black, Douglas, and Murphy, JJ.).

licensing requirements on leafletting and by compelling schoolchildren to salute the flag.<sup>26</sup>

On October 5, 1942, as the new Supreme Court term began, Justice Byrnes resigned—he concluded his Court career after only one term. That departure led, before the term was out, to the demise of the *Jones* decision and to other Jehovah's Witnesses' victories in the Court, including in *Barnette*.

A major legal development occurred in West Virginia on the day following Byrnes's retirement: the U.S. Supreme Court was effectively overruled by an inferior court, the U.S. District Court for the Southern District of West Virginia.<sup>27</sup> Two young public school students, Gathie and Marie Barnett, had refused to salute and pledge allegiance to the American flag as the state board of education required, because doing so would have violated their beliefs as Jehovah's Witnesses.<sup>28</sup> Their school repeatedly sent them home for their noncompliance and eventually it expelled them. Other schools did the same to other children who were Witnesses and refusing to salute the flag.

The Barnett girls' father and two other adult plaintiffs filed a federal class action lawsuit. They argued that the State policy violated the U.S. Constitution and they sought an injunction. And in the District Court, the three-judge panel held that *Gobitis* was no longer good law, because three of the eight Justices who had been part of the *Gobitis* Court had recanted their votes and a fourth had resigned.<sup>29</sup> On the merits, the panel issued the injunction. It held that the compulsory flag salute denied the plaintiffs' fundamental rights of religious liberty.<sup>30</sup>

The West Virginia State Board of Education appealed this judgment to the Supreme Court. On January 4, 1943, the Court—only eight Justices, following Justice Byrnes's resignation—noted its probable jurisdiction.<sup>31</sup>

A few days later, on January 11, 1943, the country learned who the new ninth Justice would be. President Roosevelt nominated Justice Wiley Rutledge of the U.S. Court of Appeals for the District of Columbia to become an Associate Justice. The Senate confirmed the nomination swiftly and Justice Rutledge received his commission on February 11, 1943.

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<sup>26</sup> See *Publishers Urge Court Reversal*, N.Y. TIMES, Sept. 4, 1942, at 21.

<sup>27</sup> See *Barnette v. West Virginia State Board of Education*, 47 F. Supp. 251 (S.D.W.V. 1942).

<sup>28</sup> See generally Gregory L. Peterson, E. Barrett Prettyman, Jr., Shawn Francis Peters, Bennett Boskey, Gathie Barnett Edmonds, Marie Barnett Snodgrass, & John Q. Barrett, *Recollections of West Virginia State Board of Education v. Barnette*, 81 ST. JOHN'S L. REV. 755 (2007) [hereinafter *Recollections of West Virginia State Board of Education v. Barnette*].

<sup>29</sup> See *Barnette*, 47 F. Supp. at 252–53.

<sup>30</sup> *Id.* at 255.

<sup>31</sup> See 63 S. Ct. 437 (1943); accord 1942 J. Sup. Ct. U.S. 110, 112 (1943).

On the very next day, Friday, February 12, the Court began to hear oral arguments in the first of that term's many cases involving Jehovah's Witnesses. It was still an eight-Justice Court that heard argument that day because Justice Rutledge, although commissioned, did not take his seat until the following Monday, February 15.<sup>32</sup>

The February 12 argument cases, *Jamison v. Texas* and *Largent v. Texas*, arose from arrests and prosecutions of Jehovah's Witnesses for leafletting and selling books door-to-door without the requisite licenses. The Court decided these cases three weeks later, 8-0, with Justice Rutledge not participating. In *Jamison*, the Court held that Fourteenth Amendment press and free exercise rights applied to Jehovah's Witnesses distributing handbills on the streets even if the handbills contained some commercial information.<sup>33</sup> In *Largent*, the Court held that the Jehovah's Witnesses had a Fourteenth Amendment right to sell books in the residential areas of Paris, Texas, without getting from the mayor the permit which he had unrestricted discretion to issue or withhold.<sup>34</sup>

On Monday, February 15, Justice Rutledge was present for the first time on the Supreme Court bench. He thus was part of the Court that on that day, back at full strength, granted the petition for rehearing in *Jones* and its companion cases<sup>35</sup>—soon leading to the decision known as *Jones II*.

March 1943 was an even more significant month. On March 10 and 11, the Court heard oral arguments in a raft of Jehovah's Witnesses cases. In the first, the high-profile re-argument of *Jones*, Jehovah's Witnesses' attorney Hayden Covington argued unopposed—the City of Opelika did not, unlike its approach in 1942 when the case first was argued (and it had won), send an attorney to argue its side. Perhaps it knew that it was in trouble.

The Court also heard oral arguments that day in four other Jehovah's Witnesses cases: (1) *Murdock v. Pennsylvania*, arising from the city of Jeannette, Pennsylvania; (2) *Martin v. Struthers*, arising from the city of Struthers, Ohio; (3) *Douglas v. City of Jeannette* (also from Jeannette, Pennsylvania); and (4) *West Virginia State Board of Education v. Barnette*. The *Barnette* case was, in other words, not a stand-alone event in the Supreme Court.

On Saturday, March 13, the Justices met in conference to discuss and decide these just-argued cases. In the main, they voted 5-4 in favor of the Jehovah's Witnesses. In *Jones II*, for example, Chief Justice Stone plus

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<sup>32</sup> 1942 J. Sup. Ct. U.S. 153 (1943). Cf. JOHN M. FERREN, SALT OF THE EARTH, CONSCIENCE OF THE COURT: THE STORY OF JUSTICE WILEY RUTLEDGE 221 (2004) (quoting the letter that Justice Rutledge wrote from the Court to President Roosevelt on February 15, 1943).

<sup>33</sup> 318 U.S. 413 (1943).

<sup>34</sup> 318 U.S. 418 (1943).

<sup>35</sup> See *Jones v. City of Opelika*, 318 U.S. 797 (1943).

Justices Black, Douglas, Murphy, and Rutledge voted for the Witnesses, the opposite of what the Court had decided in *Jones I* the previous June. In *Murdock* and *Martin*, the same Justices voted in favor of the Witnesses. In *Douglas*, the Justices concluded they lacked jurisdiction. And in *Barnette*, the vote was 6-3 in the Witnesses' favor. This was the only case in which Justice Jackson voted with the five "liberals"—he voted opposite them in *Jones II*, *Murdock*, and *Martin*, and he joined them to overrule *Gobitis*.

Following the conference voting, Chief Justice Stone assigned Justice Jackson to draft the opinion of the six-Justice Court in *Barnette*. Stone might well have, with the assigning power of his position plus his history of having been the lone dissenter in *Gobitis*, kept that assignment for himself. His assignment, instead, to Jackson suggests the closeness of their relationship, and perhaps a logical distribution of Court workload. It also indicates the possible "softness" of Jackson's vote in *Barnette*—he was, by voting pattern, the least pro-Jehovah's Witness member of the six-Justice *Barnette* majority, so having him write the Court's opinion upholding the Witnesses' constitutional argument would mean, by definition, that he would be comfortable with it. Bennett Boskey, Chief Justice Stone's senior law clerk at the time, recalled all of this vividly more than sixty years later:

Stone, having written the *Gobitis* case, would have been overjoyed to be the author of the opinion in the *Barnette* case. But he had better sense than that. He knew that he had a new Justice in Jackson. He knew that if Rutledge was given the opinion, he would write probably too wide an opinion to hold the six votes together. [Stone] had no hope that if Black, Douglas, or Murphy wrote the opinion, it would be sufficiently, narrowly constructed to hold the six votes together—it might lose Jackson. So we talked about it some and [Stone] decided the best thing to do for the Court to get an opinion which would be subscribed to by the maximum number of Justices, which in this case would be six, would be to assign the opinion to Jackson, whatever chances that might involve taking. And that's what he did. And that's how Jackson, who was a relatively junior Justice, ended up as the author of this terribly important opinion.<sup>36</sup>

In April, while the Justices were drafting and circulating proposed opinions in these cases, the Court heard oral arguments in an additional cluster of Jehovah's Witnesses cases. On April 15 and 16, the Court heard argument in *Taylor v. Mississippi*, *Benoit v. Mississippi*, and *Cummings v.*

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<sup>36</sup> *Recollections of West Virginia State Board of Education v. Barnette*, *supra* note 28, at 784 (quoting Bennett Boskey).

*Mississippi*.<sup>37</sup> In the cases, the appellants claimed that their criminal convictions for promoting refusal to salute the American flag violated the Constitution. They argued, in other words, that they had constitutional rights to teach and encourage refusal to salute the American flag—the substantive issue that was pending in *Barnette*.

In May, the Court announced decisions in four of the pending cases. First was its reconsideration of its decision of the previous June, *Jones v. City of Opelika*. This time, in *Jones II*, the Court held 5-4 that the Jehovah's Witnesses had First and Fourteenth Amendment rights to leaflet without obtaining municipal licenses.<sup>38</sup> Justice Douglas read the Court's brief *per curiam* opinion, for himself, Chief Justice Stone, and Justices Black, Murphy, and Rutledge.<sup>39</sup> Justices Roberts, Reed, Frankfurter, and Jackson dissented. The switch of Justice Rutledge for Justice Byrnes had flipped the *Jones* case.

Chief Justice Stone—or perhaps his law clerk Bennett Boskey, if he initially drafted that *per curiam* opinion—had been prepared, at least at first, to say explicitly that the Court's personnel change had caused the change in result from *Jones I* to *Jones II*. Stone had, back on March 25, circulated to the other Justices a proposed *Jones II per curiam* opinion stating that “the Court *as now constituted* is of opinion that the judgment in each case [i.e., in *Jones* and its companion cases, and in *Murdock* and its companion cases] should be reversed.”<sup>40</sup> The candid words “as now constituted” startled Justice Roberts (and maybe others). Roberts discussed his concerns with Justice Douglas, who then reported them to the Chief Justice, who “readily agreed” to delete those words.<sup>41</sup> In the brief *Jones II* opinion that the Court handed down on May 3, it rested its decision to reverse the Witnesses' criminal convictions on only its concurrent decision in *Murdock*, and on the dissenting opinions that had been filed a year earlier in *Jones I*.<sup>42</sup> It was nonetheless true, if not stated explicitly, that the four *Jones I* dissenters now had, with Justice Rutledge, the fifth vote that made the case come out the other way.

Justice Douglas, following his announcement of *Jones II*, then announced his opinion for the Court in the *Murdock* case from Jeannette,

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<sup>37</sup> See 1942 J. Sup. Ct. U.S. 212-13 (1943); *Taylor v. Mississippi*, 319 U.S. 583, 584-85 (1943).

<sup>38</sup> 319 U.S. 103, 104 (1943).

<sup>39</sup> See 1942 J. Sup. Ct. U.S. 222 (1943).

<sup>40</sup> See Printed and circulated opinion, No. 280, *Jones v. City of Opelika*, No. 314, *Bowden & Sanders v. City of Fort Smith*, and No. 966, *Jobin v. Arizona*, Mar. 25, 1943 (Justice Jackson's copy, received from Chief Justice Stone) (emphasis added), in Robert H. Jackson Papers, Library of Congress, Manuscript Division, Washington, D.C., (“RHJL”), Box 127, Folder 1.

<sup>41</sup> See Note from “WOD” [Justice Douglas] to “OJR” [Justice Roberts], “3/26” [Mar. 26, 1943] (“I called the CJ about the suggested change in the *per curiam* in *Jones v. Opelika*. He readily agreed to it[.]”), in WOD LOC, Box 89, Folder 9. Roberts wrote “Thanks!! OJR” on this note and sent it back to Douglas. *Id.*

<sup>42</sup> See *Jones II*, 319 U.S. at 104.

Pennsylvania. The Court invalidated license requirements for selling books and religious literature on public streets.<sup>43</sup> The Justices again divided 5-4—Stone, Black, Douglas, Murphy, and Rutledge voted for the Jehovah’s Witnesses, and Roberts, Reed, Frankfurter, and Jackson dissented.

One other decision that the Court announced on May 3 was a big victory for the Jehovah’s Witnesses. In *Martin v. City of Struthers*, the Court—the same majority of five Justices—invalidated an ordinance outlawing door-to-door knocking and proselytizing throughout Struthers, Ohio.<sup>44</sup>

The Court’s final Jehovah’s Witness decision announced that day is the one that you likely do not know: *Douglas v. City of Jeannette*. The Court held 9-0 that federal courts lacked equitable power to enjoin future state enforcement of speaker licensing laws, such as those that the Court had, just minutes earlier, held unconstitutional in *Jones II*. The Court held in *Douglas* that because the danger of such enforcement was too speculative, the Court in effect should abstain from deciding its constitutionality.<sup>45</sup>

With regard to Justice Jackson and Jehovah’s Witnesses, the *Douglas* decision might be the most interesting. Jackson’s “big” 1942 term opinion regarding Jehovah’s Witnesses arguably is *Barnette*, the 75th anniversary of which brings us together. But that mantle also, arguably, fits the opinion that he filed in *Douglas*.<sup>46</sup>

This Jackson opinion is literally hard to find. Its location in the reported *Douglas* decision is topically incongruous, because Jackson’s opinion has nothing to do with the *Douglas* case. In this respect, Jackson filing in *Douglas* his very significant non-*Douglas* thoughts was a bit like Justices Black, Douglas, and Murphy having filed in *Jones I* their recantation of their votes in *Gobitis*—it had nothing to do with the issues of *Jones II*, except at the very macro level of both cases involving Jehovah’s Witnesses. Yes, Jackson’s opinion in *Douglas* noted his concurrence in that 9-0 result, that the Court lacked jurisdiction. But much more importantly, the opinion was, as its odd and complicated opening author and case identification states,<sup>47</sup> his substantive *dissent* in *Murdock* and in *Martin*, the 5-4 decisions of that day which declared the constitutional rights of Jehovah’s Witnesses to sell books and to preach door-to-door.

Jackson announced his *Douglas* “dissenting” opinion, really his dissenting opinion in *Murdock* and *Martin*, six weeks before he announced

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<sup>43</sup> 319 U.S. 105 (1943).

<sup>44</sup> 319 U.S. 141 (1943).

<sup>45</sup> *Douglas v. City of Jeannette*, 319 U.S. 157 (1943).

<sup>46</sup> See 319 U.S. at 166–82 (Jackson, J., joined by Frankfurter, J., concurring in the result & dissenting in *Murdock v. Pennsylvania* and *Martin v. City of Struthers*).

<sup>47</sup> See *id.* at 166 (“Mr. Justice Jackson, concurring in the result in this case and dissenting in Nos. 480-487, *Murdock v. Pennsylvania*, ante, p. 105, and No. 238, *Martin v. Struthers*, ante, p. 141.”).

his opinion for the Court in *Barnette*. The reason for that gap in time was simple: the Justices had finished writing their *Murdock*, *Martin*, and *Douglas* opinions while they were still working on their draft opinions in *Barnette*. The gap between the decision announcements meant that *Douglas*, decided first, got noticed in its moment, and that it soon was overshadowed, and in the decades since then it has been overshadowed, by the later decision, which is to say *Barnette*.

During the time gap between the *Murdock*, *Martin*, and *Douglas* decisions on May 3 and *Barnette* on June 14, the Court heard oral arguments in *Busey v. District of Columbia*, another Jehovah's Witness case. At issue was the constitutionality of a D.C. code provision requiring magazine-sellers such as Jehovah's Witnesses to procure a government license and pay a license tax. This law was the federal equivalent of the Alabama law that the Court had considered in *Jones v. City of Opelika*. In *Busey*, the lower court, the U.S. Court of Appeals for the District of Columbia, had in April 1942 upheld, based on *Jones I*, the federal law's constitutionality.<sup>48</sup> Justice Wiley Rutledge, then serving on the Court of Appeals, dissented from the *Busey* panel's 2-1 decision. By June 1, 1943, when *Busey* was argued in the U.S. Supreme Court, Rutledge had become an Associate Justice there, so he recused himself—the case was argued to an eight-Justice Court. And because the Court by that time had reheard *Jones v. Opelika* and held in *Jones II* that the Alabama law was unconstitutional, it seemed clear that the federal law's days were numbered as well.

And then came Monday, June 14. In the Court's session that day, Justice Jackson announced the decision in *West Virginia State Board of Education v. Barnette*.<sup>49</sup> The Court, by a 6-3 vote, reversed its *Gobitis* decision upholding the constitutionality of the school-required American flag salute and Pledge of Allegiance. Jehovah's Witness schoolchildren, Supreme Court losers three years earlier, now were paragons of following conscience as protected by the U.S. Constitution, even as they refused to join in national rituals of patriotism and unity. Jackson still felt what he had voiced in President Roosevelt's Cabinet three years earlier, to the date: flag salute policies that divide people and cause majority hysteria and violence against Jehovah's Witnesses should not be enforced. In that wartime moment, Jackson abjured the idea that governments in the U.S. could compel Nazi-resembling salutes.<sup>50</sup> He explained that the case concerned "the asserted [government] power to force an American citizen publicly to profess any

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<sup>48</sup> *Busey v. District of Columbia*, 129 F.2d 24 (D.C. Cir. 1942).

<sup>49</sup> 319 U.S. 624 (1943).

<sup>50</sup> *See id.* at 627–28.

statement of belief, or to engage in any ceremony of assent to one . . . ”<sup>51</sup> He declared that the Constitution grants no such power:

[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein.<sup>52</sup>

In the United States, the date on which the Supreme Court announced *Barnette*, June 14, 1943, also was “Flag Day.”<sup>53</sup> But it seems that the timing of the Court announcing *Barnette* on Flag Day was nothing that the Justices did deliberately or even noticed. To my knowledge, no evidence, including in any Justice’s archived papers, suggests that the Court timed its announcement of *Barnette* to occur on Flag Day, to explain extra-powerfully, with the holiday as the decision’s backdrop (and then, going forward, its anniversary), the unconstitutionality of government compelling persons to salute and to pledge allegiance to the American flag. It seems that the decision came down on that day simply because it was the next Supreme Court “decision day” that followed Justice Frankfurter completing, on Friday, June 11, 1943, his dissenting opinion in *Barnette*.<sup>54</sup>

One indication that Justice Jackson in particular was oblivious to the symbolism of deciding *Barnette* on Flag Day is a note that he penned to his law clerk, John Costelloe. On Saturday morning, June 12, 1943, Jackson asked Costelloe to review a couple of paragraphs that Jackson, after receiving and reading Justice Frankfurter’s draft dissent, had drafted as additions to his opinion for the *Barnette* Court. Jackson wrote:

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<sup>51</sup> *Id.* at 634.

<sup>52</sup> *Id.* at 642.

<sup>53</sup> *See supra* note 12.

<sup>54</sup> *See* Typed Diary entries of Felix Frankfurter, June 10, 1943 (“Worked until 2:00 a.m. on Flag Salute case.”), and June 11, 1943 (“Work on Flag Salute case.”), in Felix Frankfurter Papers, Library of Congress, Manuscript Division, Washington, D.C., Box 2. He provided his proposed opinion to his fellow Justices the next morning, before they met together in Conference and discussed the case for a final time. *See* Pencil note, no author identified [it was Jackson’s secretary Ruth M. Sternberg], no date (“Diss. Opn of F.F. rec’d 6-12-43 am”), in RHJL Box 127, Folder 10.

Johnny -

Here are two inserts I  
 plan to put in [No.] 591[, Barnette].  
 Look them over and I  
 will drop in [your room to talk] at lunch.  
 This stuff goes  
 Monday.

RHJ<sup>55</sup>

Note Jackson's workman-like use of "Monday"—June 14 was the next decision day, so it would be the day to get this decision out the door.

On that day, the Court announced, in addition to *Barnette*, two other decisions in Jehovah's Witnesses cases. In *Taylor v. Mississippi* and its two companion cases, the Court, in an opinion written by Justice Roberts, held unanimously that the Constitution bars a State from punishing persons who advise and urge others not to salute the flag.<sup>56</sup> In other words, given every person's constitutional right, explained by Justice Jackson for the Court moments earlier in *Barnette*, to refuse to obey State compulsion to salute the American flag, a State may not punish someone for teaching and urging exercise of that *Barnette* right.<sup>57</sup> And in *Busey v. District of Columbia*, the case regarding the constitutionality of the federal requirement that would-be magazine-sellers must purchase licenses, the Court decided 8-0, *per curiam*, to vacate the Jehovah's Witnesses' criminal convictions and remand the cases for reexamination in light of *Jones II* and *Murdock*.<sup>58</sup>

On June 21, 1943, the Supreme Court recessed for the summer. It had, in the just-completed term, heard arguments and announced decisions in three distinct, important groups of cases involving the rights of Jehovah's Witnesses. In nine decisions—a pair, *Largent* and *Jamison*, on March 8; four more, *Jones II*, *Murdock*, *Martin*, and *Douglas*, on May 3; and a final trio, *Barnette*, *Taylor*, and *Busey*, on June 14—the Court upheld Witnesses' claims that the Constitution protected their unlicensed selling of books for religious purposes (*Largent*), unlicensed distribution of handbills on public

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<sup>55</sup> Note from Justice Robert H. Jackson to John F. Costelloe, no date [June 12, 1943], in RHJL Box 127, Folder 10.

<sup>56</sup> 319 U.S. 583 (1943).

<sup>57</sup> See *id.* at 589 ("The statute here in question seeks to punish as criminal one who teaches resistance to government compulsion to salute [the American flag]. If the Fourteenth Amendment bans enforcement of the school regulation, a fortiori it prohibits the imposition of punishment for urging and advising that, on religious grounds, citizens refrain from saluting the flag. If the state cannot constrain one to violate his conscientious religious conviction by saluting the national emblem, then certainly it cannot punish him for imparting his views on the subject to his fellows and exhorting them to accept those views.").

<sup>58</sup> See 319 U.S. 579 (1943) (*per curiam*).

streets (*Jamison*), unlicensed door-to-door sales of books for religious purposes (*Jones II*), unlicensed door-to-door sales of religious handbills (*Murdock* and *Martin*), refusals to salute the American flag or participate in the Pledge of Allegiance (*Barnette*), promoting refusal to salute the flag (*Taylor*), and unlicensed sale of magazines on public sidewalks (*Busey*).

The Witnesses' only non-victory was *Douglas*, where the Court found that it lacked jurisdiction to consider their claim.

### III. JUSTICE JACKSON ON JEHOVAH'S WITNESSES: THE AUTHOR OF *BARNETTE* WROTE FIRST, AND SIGNIFICANTLY, IN *DOUGLAS*

The Justice Jackson who wrote for the Court in *Barnette* also was the Justice Jackson who wrote for himself, mostly dissenting, just six weeks earlier, in *Douglas*.<sup>59</sup> His separate opinion in *Douglas* was an important, and maybe the central, part of his 1943 adjudication of Jehovah's Witnesses' constitutional claims.

In *Douglas*, Justice Jackson dug deeply into the record regarding the conduct that led to the arrests, prosecutions, and convictions that the Jehovah's Witnesses were challenging in *Murdock* and *Martin*. Jackson explained that, to him, the facts were very important to resolving the constitutional arguments.<sup>60</sup> And so he recounted in detail, in more than eight pages in the United States Reports,<sup>61</sup> exactly what the Jehovah's Witnesses stood for and what they had done.

I recount these facts here meaning no disrespect to Jehovah's Witnesses today. They include my friend Marie Barnett Snodgrass, who as a child was a winning litigant in *Barnette*. In adulthood, she is a very kind and admirable person, as was her late sister Gathie Barnett Edmonds.

In 1943, reviewing the record of *Barnette*, Justice Jackson plainly saw the Barnetts as impressive schoolchildren of conscience who were protected by the Constitution and deserving of judicial support. But, by contrast, he emphasized in his *Douglas* opinion that, based on Jehovah's Witnesses' literature and the factual records in the *Murdock* and *Martin* cases, he saw the adult Witnesses who had gotten arrested in Jeanette, Pennsylvania, in

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<sup>59</sup> See *Douglas*, 319 U.S. at 166 (Jackson, J., joined by Frankfurter, J., concurring in the result & dissenting in *Murdock v. Pennsylvania* and *Martin v. City of Struthers*).

<sup>60</sup> See *id.* at 166–67 (“The facts of record in the *Douglas* case and their relation to the facts of the other cases seem to me worth recital and consideration if we are realistically to weigh the conflicting claims of rights in the related cases today decided.”). See generally Jay S. Bybee, *Common Ground: Robert Jackson, Antonin Scalia, and a Power Theory of the First Amendment*, 75 TULANE L. REV. 251, 273–75 (2000) (discussing Jackson's *Douglas* dissent).

<sup>61</sup> See *id.* at 167–75.

April 1939 (the *Murdock* case defendants) and in Struthers, Ohio, in July 1940 (the *Martin* case defendants) as unsought, invasive, annoying, bothersome, pestering proselytizers who had verbally assaulted persons in what should have been the repose of home life.

Jackson highlighted the provocative, insulting content he found in Jehovah's Witnesses' literature. He quoted from John Franklin Rutherford, then the Witnesses' leader, who was the author of material that they produced and distributed. In Rutherford's book *Enemies*,<sup>62</sup> he had written that:

- “The greatest racket ever invented and practiced is that of religion.”;
- “There are numerous systems of religion, but the most subtle, fraudulent and injurious to humankind is that which is generally labeled the ‘Christian religion,’ because it has the appearance of a worshipful devotion to the Supreme Being, and thereby easily misleads many honest and sincere persons.”;
- The Roman Catholic hierarchy is “the great racket, a racket that is greater than all other rackets combined.”;
- “Referring now to the foregoing Scriptural definition of *harlot*: What religious system exactly fits the prophecies recorded in God's Word? There is but one answer, and that is, The Roman Catholic Church organization.”;
- “Jewish and Protestant clergy and other allies of the [Roman Catholic Church] Hierarchy ... tag along behind the Hierarchy at the present time to do the bidding of the old ‘whore’.”; and
- “Says the prophet of Jehovah: ‘It shall come to pass in that day, that Tyre (modern Tyre, the Roman Catholic Hierarchy organization) shall be forgotten.’ Forgotten by whom? By her former illicit paramours who have committed fornication with her.”

Jackson also quoted another Rutherford book, *Religion*.<sup>63</sup> In it, he:

- encouraged Witnesses to “set up their phonographs before the doors and windows and send the message of the kingdom right into the houses into the ears of those who might wish to hear; and while those desiring to hear are hearing, some of the ‘sourpusses’ are compelled to hear.”;

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<sup>62</sup> See *id.* at 171 *et seq.*

<sup>63</sup> See *id.* at 172 *et seq.*

- urged Witnesses to be like locusts: “Locusts invade the homes of the people and even eat the varnish off the wood and eat the wood to some extent. Likewise God’s faithful witnesses, likened unto locusts, get the kingdom message right into the house and they take the veneer off the religious things that are in that house, including candles and ‘holy water’, remove the superstition from the minds of the people, and show them that the doctrines that have been taught to them are wood, hay and stubble, destructible by fire, and they cannot withstand the heat.”; and
- attacked Catholic Church teaching: “[P]urgatory’ is a bogeyman, set up by the agents of Satan to frighten the people into the religious organizations, where they may be fleeced of their hard-earned money.”

Jackson also described the facts contained in the sparse record of the *Murdock* case. In Jeanette, Pennsylvania, on April 2 (Palm Sunday), 1939, over 100 Jehovah’s Witnesses rang doorbells or knocked on the doors of every home. The Witnesses stood in the doorways. Homeowners and tenants who answered were subjected to phonographic records blaring anti-religious messages, such as:

- “Religion is wrong and a snare because it deceives the people”; and
- “Religion is a racket because it has long been used and is still used to extract money from the people.”<sup>64</sup>

In *Martin*, which concerned events in Struthers, Ohio, Jehovah’s Witnesses also had knocked on doors on a Sunday afternoon, July 7, 1940. Residents who tried to rebuff them were not respected. A mother who refused to take a Witness’s handbill into her home was told that she was “doomed to go to hell because [she] would not let this literature into [her] home for [her] children to read.”<sup>65</sup>

To Justice Jackson, all of these words in their contexts were what the unanimous Court had, just one year earlier in *Chaplinsky*, another Jehovah’s Witness case, called “fighting words” that are not protected by the Constitution.<sup>66</sup> Jackson, in this portion of his *Douglas* opinion, thought that

<sup>64</sup> *Id.* at 167.

<sup>65</sup> *Id.* at 173.

<sup>66</sup> *See id.* at 180 (“Neither can I think it is an essential part of freedom that religious differences be aired in language that is obscene, abusive, or inciting to retaliation. We have held that a Jehovah’s Witness may not call a public officer a ‘God damned racketeer’ and a ‘damned Fascist,’ because that is to use ‘fighting words,’ and such are not privileged.”) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 569 (1942)).

his five brethren in the majority had ignored facts that should have been decisive.

Justice Jackson also considered, in addition to the facts of the Witnesses' behavior, the facts of lives they had affected. Jackson wrote, in an interestingly self-exposing statement, that the Witnesses were able to come into direct contact with people who were not insulated by wealth and privilege. In a footnote, he quoted Harvard Law School Professor and free speech expert Zechariah Chafee, Jr., who had "wonder[ed] whether the Justices of the Supreme Court are quite aware of the effect of organized front-door intrusions upon people who are not sheltered from zealots and imposters by a staff of servants or the locked entrance of an apartment house."<sup>67</sup>

When Jackson wrote that, he was living at his Hickory Hill home in rural, isolated McLean, Virginia. Most of his Court colleagues, by contrast, lived in Washington, D.C., homes or apartments where they did not answer their own doors and risk encountering proselytizers. But that was a fact of typical life in communities like Jeanette and Struthers.

Jackson also reproduced, in his *Douglas* opinion footnotes, census data showing how many Roman Catholics lived in those communities, and how many people were factory laborers who worked night shifts and needed to sleep during the day.<sup>68</sup> He used these facts to assess the real intrusiveness of hearing the doorbell or the knock, answering the door, and then hearing the hectoring words of proselytizers.

Jackson thus announced in his *Douglas* opinion that he was dissenting in *Murdock* and *Martin* because the Court had not properly balanced the Jehovah's Witnesses' claims against the harms they had caused to persons in their homes and communities. He accused the Court of offering, casually, absolutist descriptions of rights that were not germane to what the cases really involved. He urged instead an approach that considered the force of the Jehovah's Witnesses' press, religious, and speech rights claims against their impacts on unwilling audiences:

Our difference of opinion [with the Court] cannot fairly be given the color of a disagreement as to whether the constitutional rights of Jehovah's Witnesses should be protected insofar as they are rights. These Witnesses, in common with all others, have extensive rights to proselyte and propagandize. These of course include the right to oppose and criticize the Roman Catholic Church or any other denomination. These rights are, and should be held to be, as

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<sup>67</sup> *Douglas*, 319 U.S. at 175 n.3. (Jackson, J., joined by Frankfurter, J., concurring in the result & dissenting in *Murdock v. Pennsylvania* and *Martin v. City of Struthers*).

<sup>68</sup> *See id.* at 167 n.1.

extensive as any orderly society can tolerate in religious disputation. The real question is where their rights end and the rights of others begin. The real task of determining the extent of their rights on balance with the rights of others is not meant met by pronouncement of general propositions with which there is no disagreement.

If we should strip these cases to the underlying questions, I find them too difficult as constitutional problems to be disposed of by a vague but fervent transcendentalism.<sup>69</sup>

A final, notable dimension of Justice Jackson's *Douglas* opinion was his focus on the limits of judicial power. In his view, the Court should exercise power pragmatically, carefully, and at the level of the questions that cases really concern. That is where judging will connect with existing or probable public consensus and support. That is where a Court can teach and be obeyed and, by those measures, succeed. And, concomitantly, the Court should not make too-abstract decisions that will put it too far from real connection to the people.

Here is how Jackson explained his view:

In these cases, local authorities caught between the offended householders and the drive of the Witnesses, have been hard put to keep the peace of their communities. They have invoked old ordinances that are crude and clumsy for the purpose. I should think the singular persistence of the turmoil about Jehovah's Witnesses, one which seems to result from the work of no other sect, would suggest to this Court a thorough examination of their methods to see if they impinge unduly on the rights others. Instead of that the Court has, in one way after another, tied the hands of all local authority and made the aggressive methods of this group the law of the land.

This Court is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added.<sup>70</sup>

Justice Jackson read his *Douglas* dissent from the bench on May 3, 1943, immediately after Chief Justice Stone had read his opinion for the Court in that case.<sup>71</sup> Earlier in that Court session, Justice Douglas had read

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<sup>69</sup> 319 U.S. at 178–79.

<sup>70</sup> *Id.* at 181.

<sup>71</sup> 1942 J. Sup. Ct. U.S. 221, 223 (1943).

the Court's *per curiam* opinion in *Jones II*,<sup>72</sup> and then his opinion for the Court in *Murdock*,<sup>73</sup> and Justice Black had read his opinion for the Court in *Martin*.<sup>74</sup> Only then did Jackson, by reading his *Douglas* opinion explaining his dissenting votes in *Murdock* and *Martin*, let the majority "have it."

Jackson's fellow dissenters knew what was coming from him. While others, probably Chief Justice Stone, were reading their opinions for the Court, Justice Roberts passed a note to Jackson: "Give 'em hell! I'm getting hotter + hotter!"<sup>75</sup> And when Jackson was done reading, Roberts passed him a second note: "You gave 'em hell! Please accept this acknowledgement of my obligation[.]"<sup>76</sup>

If Jackson sent any notes back to Roberts, it seems that they have not survived. But Jackson also exchanged notes with Justice Frankfurter while they were on the bench, after Jackson had read his *Douglas* dissent, and these Frankfurter notes are preserved in Jackson's papers.

It seems that Jackson, after he finished reading, wrote to Frankfurter to explain his decision to do so. It seems that Jackson decided on the bench, as the day's proceedings were occurring, to read his *Douglas* dissenting opinion rather than just to release it in print. Jackson explained that he had watched how closely the well-informed, thoughtful people who comprised the courtroom audience were listening to other Justices reading their pro-Jehovah's Witnesses opinions for the Court. This caused Jackson to decide to read his dissenting views to those listeners.

Justice Frankfurter responded to Jackson's explanation by penning a multi-page note of agreement. Frankfurter passed this note to Jackson, probably by handing it to a messenger for delivery rather than having the five Justices who sat on the bench between them pass it one to the next:

I wholly agree with  
you, and [it was] precisely  
because my esti-  
mate of the audience  
was the same as  
yours that I  
deemed your full  
delivery so impor-  
tant.

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<sup>72</sup> See *id.* at 222.

<sup>73</sup> See *id.*

<sup>74</sup> See *id.* at 223.

<sup>75</sup> Note from "OJR" [Justice Owen J. Roberts], one sheet of Supreme Court of the United States Memorandum pad paper, in RHJL Box 127, Folder 6.

<sup>76</sup> Note from "OJR" [Justice Owen J. Roberts], one sheet of Supreme Court of the United States Memorandum pad paper, in RHJL Box 127, Folder 6.

By this time [in my judicial career]  
 I can feel the  
 emanations of  
 an audience  
 when it was  
 as clear[,] deep  
 and uniform as [what]  
 I'd bet my  
 right hand  
 was the judgment  
 of what you  
 rightly call an  
 informed + critically  
 qualified body.<sup>77</sup>

Jackson also must have written his concern that he had spoken too long. Frankfurter responded to this by penning a second, pun-filled note of disagreement and passing it to Jackson:

As my God is  
my witness –  
 it was not too  
 long. Really, I  
 would not, if I  
 had been empowered,  
 have omitted a  
single minute of your delivery.

FF

P.S.  
 Some things are  
 important –  
 + these Jehovah  
 cases were of that  
 importance which  
 called for “testifying.”

FF<sup>78</sup>

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<sup>77</sup> Note from “FF” [Justice Felix Frankfurter], four sheets of Supreme Court of the United States Memorandum pad paper, *in* RHJL Box 127, Folder 6.

<sup>78</sup> Note from “FF” [Justice Felix Frankfurter], two sheets of Supreme Court of the United States Memorandum pad paper (emphases in original), *in* RHJL Box 127, Folder 6.

#### IV. CONCLUSION: SOME LIFE ROOTS OF JUSTICE JACKSON'S VIEWS ON JEHOVAH'S WITNESSES AND OTHERS

I will finish where I began, on a few biographical dimensions of Robert H. Jackson. These are ones that seem to connect to the votes he cast as a Supreme Court Justice and the opinions he wrote in the Jehovah's Witnesses cases.

Jackson knew of religious variety and small, non-conforming sects from western Pennsylvania and western New York State—his boyhood landscape was filled with iconoclastic, idiosyncratic practices and beliefs. Joseph Smith discovered the Mormon faith, and then encountered persecution and began his trek, in western New York. Spiritualist and transcendentalist movements flourished at times near Frewsburg, where Jackson grew up. Kiantone movement adherents, for example, lived during the 19<sup>th</sup> century in nearby woods, and Jackson as a boy and later studied them and explored that site. Lily Dale, located like Frewsburg in Chautauqua County, was a spiritualist community and is to this day. In 1910, as Jackson was graduating from Jamestown High School, over 5,000 Bible students—later they came to be called Jehovah's Witnesses—met in Celoron, New York, adjacent to Jamestown at the foot of Chautauqua Lake, for a nine-day convention. In these direct senses, Jackson knew Jehovah's Witnesses and people like them, and people unlike them, long before he became a judge.

Jackson also knew the experience, from youth forward, of being outside the mainstream of unorthodox belief. He and his family were Democrats, a political minority in their places and times. They also were not churchgoers, unlike most of their neighbors—the Jacksons had a Bible in the house and some religious beliefs, but they were generally agnostic tending toward atheism. And what they experienced from their neighbors and in their communities was live-and-let-live tolerance.

Robert Jackson had also direct experiences, which he remembered with chagrin, of acting intolerantly, ignorantly, toward people whose faiths differed from his own. On one boyhood occasion, when Robert, repeating ugliness that he had heard from some bigot, criticized Catholicism to an Irish girl who was working for his family, he was overheard by his mother and he got spanked. On another occasion, when Jackson, early in high school, attended a religious revival meeting and, with friends, behaved disrespectfully and annoyed the crowd, his father heard about it and cussed Robert out. He was raised not only to be idiosyncratic, but also to show respect for the unique beliefs of others.

Jackson also remembered an experience of dealing with a preacher at the door. It involved both toleration and control of one's domain. Robert was about age 12, home with his grandfather and baby sister. A fiery preacher

came to call. This predated the screen door, so the opened door meant unmediated contact. The preacher asked to pray for the grandfather's soul. The old man, not much of a believer, said yes—but he also asked the preacher to keep it down, so as not to wake the baby.

I do not think that it is stretching too far to see in these Jackson life moments some roots of the pragmatism, the balancing, the legal non-doctrinalism, and the inclination to value every individual's space and peace that one finds in his *Douglas* and *Barnette* opinions, a connected pair concerning where and the how the Constitution protects both Jehovah's Witnesses and others.