The Report Committee for Katharine M. Batlan
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Offense at Your Door:
Roman Catholics, Jehovah's Witnesses, Judicial Review, and *Cantwell v. Connecticut*, 1938-1940

APPROVED BY
SUPERVISING COMMITTEE:

Supervisor:

Jennifer Graber

Thomas A. Tweed

Offense at Your Door:
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by

Katharine M. Batlan, B.A., M.T.S

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Abstract

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Katharine M. Batlan, M.A.

The University of Texas at Austin, 2014

Supervisor: Jennifer Graber

Cantwell v. Connecticut (1940) marked a new moment in religious liberties in the United States. In this case the Supreme Court nationalized free exercise of religion. While many legal scholars point to this case as important for precedents used in the arguments of subsequent cases, the context from which this case emerged was also important. I argue that *Cantwell* should also be studied for what it can tell us about religious conflict at the time. In *Cantwell* the Supreme Court of the United States incorporated the free exercise of religion to states, but in doing so it obscured the real religious tensions between Roman Catholics and Jehovah's Witnesses and local efforts to adjudicate those conflicts.

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INTRODUCTION

On April 26, 1938, four Jehovah's Witnesses traveled to a Connecticut street populated by Catholics to proselytize. They sought out those Catholics, promoted Jehovah's Witnesses views, and questioned Catholicism's value. After a conflict arose, the Witnesses encountered Catholic police officers who arrested them. The Jehovah's Witnesses were found guilty of some offences at the local level, but they appealed the ruling. By 1940, this case, *Cantwell v. Connecticut*, reached the Supreme Court of the United States. It is noteworthy because Justice Owen J. Roberts's opinion in the case significantly changed the way free exercise of religion has later been interpreted by courts, legislatures, town councils, and other civic institutions. Religion scholars have mostly overlooked the significance of this case, and, more generally, underemphasized the ways that the law has mediated religious practice in the United States, even though some have been very concerned about religion in the public arena.[1] Legal scholars who are concerned with civil liberties in the United States have given *Cantwell* more attention.

[1] On religion and law see Edwin Gaustad, *Faith of the Founders: Religion and the New Nation, 1776-1826* (Waco, Tex.: Baylor University Press, 2004), Winnifred Fallers Sullivan, *Paying the Words Extra: Religious Discourse in the Supreme Court of the United States* (Cambridge, Mass.: Harvard University Press, 1994), Tisa Wenger, *We have a Religion: the 1920s Pueblo Indian Dance Controversy and American Religious Freedom* (Chapel Hill: University of North Carolina Press, 2009), Amanda Porterfield, *Conceived in Doubt: Religion and Politics in the New American Nation* (Chicago: University of Chicago Press, 2012), Isaac Weiner, *Religion Out Loud: Religious Sound, Public Space, and American Pluralism* (New York; New York University Press, 2013). On religion in the public arena see, for example, Sally M. Promey "The Public Display of Religion," in *The Visual Culture of American Religions*, eds. David Morgan and Sally M. Promey, (Berkeley: University of California Press, 2001). Leila Ahmed *A Quiet Revolution: The Veil's Resurgence from the Middle East to America* (New Haven, Conn.; Yale University Press, 2011), Diana Eck, *A New Religious America: How a "Christian Country" Has Become the World's Most Religiously Diverse Nation*, (New York: Harper San Francisco, 2001).

They have scoured the case to draw out principles to be used in subsequent cases.[2] This focus is appropriate and understandable, given their role-specific concern. But, I suggest in this M.A. Report that legal scholars' approach has obscured a good deal that might be relevant for understanding the religious history of minority faiths and for considering varying scales of analysis in legal practice. I suggest that a detailed analysis of this case has implications for thinking about how both religious historians and legal scholars do their work. As a historian of religion in the United States, I focus initially on historical events at the local level, presenting some local details and constitutional factors to establish the context, and then move on to the national case. In the conclusion, I analyze the implications of this case which shows what happens when U.S. two religious minorities, Jehovah's Witnesses and Roman Catholics, contest for believers in public space.

The Connecticut legal dispute, which is the focus of this project, was the first case dealing explicitly with inter-religious competition to make it to the Supreme Court. But the New Haven skirmish was one of many around the country in which Jehovah's Witnesses and Roman Catholics disputed where and how religious messages could be spread in public spaces. By taking this multi-scalar and multi-disciplinary approach, some discontinuities between the local and the national appear.

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[2] Vincent Martin Bonventre, "Symposium: A Second-Class Constitutional Right? Free Exercise and the Current State of Religious Freedom in the United States," *Albany Law Review* 70 (2006): 1399-1415. Walter G. DoSocio, "Protecting the Rights of Religious Cults," *Human Rights Law Journal* 38 (1979): 38-52. Eugene Volokh, "Freedom of Speech, Religious Harassment Law, and Religious Accommodation Law," *Loyola University Chicago Law Journal* 33 (2001): 57-69. Mary Barbara McCarthy, "The Application of the First Amendment to the States by the Fourteenth Amendment of the Constitution," *Notre Dame Law Review* 22 (1946): 400-411. "Religious Immunity from Police Power," *Marshall Law Quarterly* 8 (1942): 25-37.

I argue that in *Cantwell v. Connecticut,* the Supreme Court of the United States nationalized free exercise claims, but in doing so it obscured the very real religious tensions between Roman Catholics and Jehovah's Witnesses and local efforts to adjudicate those conflicts. In Connecticut, local officials enforced laws designed to allow residents to live their lives free of disturbances. The Cantwells' evangelizing foray into a largely Catholic neighborhood created a disturbance. The Supreme Court ruled not only that free exercise of religion was more important than keeping the peace, but also that even irritating proselytization is protected as free exercise. The Court's resolution of the dispute forever changed how religious liberties were dealt with in the United States**.** While a disjuncture between key concerns at the federal and local levels is understandable, the differences are striking.

I hope to advance the discussion by building on the scholarly conversation about this important case. Books and articles about the *Cantwell* case usually focus on its impact as a precedent for future state cases on the broad principle of religious freedom.[3] If religion is evaluated as a factor at all, the proselytizing Jehovah's Witnesses are examined, not their Catholic targets.[4] An encyclopedia article on this case, for example, neglects to mention the Catholics with whom the Jehovah's Witnesses jostled.[5] Jehovah's Witnesses in the 1940s and 50s actively brought numerous cases to the Supreme Court,

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3 Walter G. DoSocio, "Protecting the Rights of Religious Cults," 38-52. Eugene Volokh, "Freedom of Speech," 57-69. Mary Barbara McCarthy, "The Application of the First Amendment to the States by the Fourteenth Amendment of the Constitution," *Notre Dame Law Review* 22 (1946): 400-411. "Religious Immunity from Police Power," *Marshall Law Quarterly* 8 (1942): 25-37.

4 Shawn Francis Peters, *Judging Jehovah's Witnesses: Religious Persecution and the Dawn of the Rights Revolution* (Lawrence: University of Kansas Press, 2000): 178-202.

5 Scott A. Merriman. *Religion and the Law in America: An Encyclopedia of Personal Belief and Public Policy*, (Santa Barbara, Cal: A.B.C. C.L.I.O., Inc., 2007): 167-168.

and some studies lump these cases together in larger discussions about religious liberty for minority religious communities.[6] In a significant project on civil liberties in American history, Anthony Lewis devotes one line to the particulars of the conflict, noting that the case takes place in a "largely Catholic neighborhood." He does not spend more than a paragraph on the case as a whole and gets a fact wrong in the process.[7] It makes sense that scholars and citizens are preoccupied with how these decisions will impact lives rather than the mundane facts that precipitated the dispute or its adjudication. Legal professionals extract the general principles the Supreme Court articulated in its opinion and use them to argue for their clients' religious liberty in other, often dramatically different cases. That expansive use makes Supreme Court cases attractive to legal and religion scholars because they have broad impact and because their principles often apply to lower courts around the country. *Cantwell*, in particular, made a major impact. But, an illuminating angle of vision would come into focus if, as I have tried to do in this M.A. report, scholars also directed attention toward what was evaluated at the local trial and how the Court obscured or minimized local facts.

As we consider *Cantwell*, a new narrative emerges when the analytical focus shifts back to the criminal court of common pleas in New Haven. Instead of an account of how the Supreme Court's understanding of religious free exercise applies to states through the due process clause of the Fourteenth Amendment (a complicated concept I

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6 Ken I. Kersch, *Constructing Civil Liberties; Discontinuities in the Development of American Constitutional Law*, (Cambridge: Cambridge University Press, 2004): 283-324.

7 Anthony Lewis, *Freedom for the Thought that We Hate: A Biography of the First Amendment*, (New York: Basic Books, 2007): 111-112. He takes the assumptions of the Supreme Court that the male lay Jehovah's Witnesses can be viewed as ministers, and runs with it slightly further than the Supreme Court decision articulates.

will discuss later), *Cantwell* becomes a story of two religious minorities fighting it out in a local context for territory and souls.

This M.A. Report tells the overlooked story of that local conflict. It is organized to mirror the case's movement through the legal system. The first section deals with contextual details of Cassius Street in New Haven, Connecticut, and the incident on April 26, 1938, that prompted the case. In section two, I explicate and analyze the conflicted legal proceedings between the two religious communities at the local and state levels. This includes the *Cantwell* case's trial and first appeal, as well as some analysis of other conflicts between Jehovah's Witnesses and Catholics across the United States. These two religious minorities negotiated their place within American society through these interactions. I try to show that the Jehovah's Witness agenda in challenging previously held understandings of civil liberties is key to better understanding the conflict. In section three, I focus on the case at the national level. This naturally revolves around the Supreme Court case. I argue that the then recent history of the Court prompted Justices to extend the reach of civil liberties farther than ever before. As the case appeared only three years after President Franklin Delano Roosevelt's court packing plan failed, the Supreme Court asserting itself is noteworthy. I will also lay out the implications of the decision, pointing to some of the ways it impacted Connecticut and discussions of legal arguments related to the Bill of Rights. In the final section, I discuss some of the issues that result from the overemphasis on Supreme Court results in the U.S. court system and among legal scholars of the U.S. I end by proposing some ways for both legal scholars and religious studies scholars and to consider multiple levels of analysis in their work in order

to preserve the contextual particulars for purposes beyond asserting generalized principles. Details matter. They made a difference in the lives of the people who brought the case forward and I will show they should affect the way scholars read and analyze the case.

Chapter 1: Cassius Street, 1938: The Context of the Case

According to religion scholar Robert Orsi, "the spaces of the cities, their different topographies and demographics, are fundamental to the kinds of religious phenomena that emerge in them."[8] Local, state, and national events shape religious practice, or in this instance, religious conflict. So before analyzing the incident that began the legal process that reimagined the free exercise clause of the federal Constitution, I describe the context by considering cultural and political patterns and offering a historical reconstruction of the urban landscape and the local residents.

DEMOGRAPHICS

New Haven's Cassius Street, where the disputed events took place, was one block long. The federal census records for 1930 counted 136 residents.[9] Over half of the population had at least one parent born in Ireland (see Table 1).

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8 Robert Orsi, *Gods of the City: Religion and the American Urban Landscape* (Bloomington: Indiana University Press, 1999), 44.

9 Statistics drawn from 1930 U. S. Census, New Haven County, Connecticut, population schedule, 3rd Representative District, New Haven, enumeration district (ED) 5-28; digital images, *Ancestry.com* www.ancestry.com.

Parental Nativity	Population	Percentage
United States	38	28%
Foreign	98	72%
(Ireland)	(70)	(51%)

Table 1: Cassius Street Parent's Birthplace, U.S. or Foreign, 1930

In addition, 21 percent were foreign-born themselves, with 16 percent of the street's residents born in Ireland (see Table 2).

Resident Nativity	Population	Percentage
United States	108	79%
Foreign	28	21%
(Ireland)	22	16%

Table 2: Cassius Street Residents Birthplace U.S. or Foreign, 1930

Residents' national origin in 1930 also included Italy, Russia, England, Sweden, Germany and Scotland.[10] The percentage of Cassius Street residents with Irish nativity exceeded the Connecticut averages for the total state population—8 percent in 1930 and 7 percent in 1940.[11]

By 1940, when we can notice the full effects of the exclusionary immigration act of 1924, 89 percent of the 157 Cassius Street residents were born in the United States, with only 11 percent from another country (see Table 3).[12]

Resident Nativity	**Population**	**Percentage**
United States	139	89%
Foreign	18	11%

Table 3: Cassius Street Residents Birthplace U.S. or Foreign, 1940

These statistics for percentages of native vs. foreign-born residents reflected patterns for New Haven County as a whole. In 1930, 23 percent of white people in New Haven

10 Ibid.

11 *Population: Sixteenth Census of the United States, Volume II: Characteristics of the Population,* (Washington, D.C: United States Government Printing Office, 1943), 820.

12 1940 U. S. Census, New Haven County, Connecticut, population schedule, 3rd Representative District, New Haven, enumeration district (ED) 11-48; digital images, *Ancestry.com* www.ancestry.com. The 1940 census did not record the parents' place of birth.

County were born outside the United States, but by 1940, only 19 percent were foreign-born.[13] This case takes place in the midst of these shifting demographics.

Cassius Street's location within its New Haven neighborhood helps explain the environment. A police station sat on the west end of the street, at the corner of Cassius Street and Howard Avenue. Four blocks South was St. Peter's, the parish for local Catholics.[14] And four blocks northwest of Cassius Street was the New Haven train station. The streets neighboring Cassius, including Howard Avenue on the west and Cedar Street on the east, included a majority of residents whose parents came from Ireland. On the longer Howard Avenue, there were a few households from Russia, whose members probably were Jewish since the census records report they spoke Yiddish. One boarder was from China. Neighbors of Jewish and Chinese backgrounds certainly were a minority in that part of New Haven.

RELIGIOUS GROUPS

Although it was a minority religious community in the U.S. as a whole, Roman Catholics dominated the population in this area of New Haven. Court records from this case indicated that ninety percent of the residents on Cassius Street were Catholic.[15] These Catholics from Cassius Street tended to have medium paying, working-class jobs. According to Census statistics from 1940, the median income for men was $956 for the

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13 *Population: Sixteenth Census of the United States, Volume II: Characteristics of the Population,* (Washington, D.C: United States Government Printing Office, 1943), 828.

14 St. Peter's used to be located at 164 Kimberly Avenue, New Haven, but was closed in 1991 when the parish merged with St. John the Evangelist and is now part of the Sacred Heart Church, which is ten blocks away from Cassius Street. http://www.archdioceseofhartford.org/archives_closedparishes.htm

15 *Cantwell v. State of Connecticut*, 310 U.S. 296 (1940). Transcript Of Record. 5-95.

nation as a whole.[16] The employed adult males on Cassius Street on average made slightly higher than $1000. Many worked in jobs affiliated with the train station four blocks away.[17] This profile was slightly better than the status of Catholics in the United States as a whole in the 1920s through the 1940s. According to historian Philip Jenkins, "well into the twentieth century, Catholics themselves could scarcely deny that the very poor were overrepresented in the American Church."[18] It follows that Catholics tended to compete for working-class jobs.[19]

The Watch Tower Bible and Tract Society, whose practitioners are known as Jehovah's Witnesses, was the other major religious community who impacted this case. Charles Taze Russell founded the group as a Bible study in 1872 by Charles Taze Russell.[20] The Watch Tower Bible and Tract Society used the Bible as a foundational text, with an emphasis on eschatology or end times. Russell's reading of the Bible required Jehovah's Witnesses to attempt to convert as many people as possible before the end, at which time Jesus would return to save the good and condemn the wicked. During World War I, the U.S. government imprisoned Russell with other Jehovah's Witness leaders under the Sedition Act for advocating that members refuse to participate in

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16 "1940□2010 How Has America Changed?" *The U.S. Census*, https://www.census.gov/1940census/pdf/infographic1_text_version.pdf, Accessed March 31, 2014.

17 1*940*; Census Place: *New Haven, New Haven, Connecticut*; Roll: *T627_540*; Page: *12A*; Enumeration District: *11-48* from Ancestry.com. *1940 United States Federal Census* [database on-line], Provo, UT, USA: Ancestry.com Operations Inc, 2002.

18 Philip Jenkins, *The New Anti-Catholicism: The Last Acceptable Prejudice* (New York: Oxford University Press, 2003), 28.

19 Ibid., 29.

20 David L. Weddle, "Jehovah's Witnesses," in *Encyclopedia of Religion*, Vol. 7, 2nd ed. ed. Lindsey Jones. (Detroit: Macmillan Reference USA, 2005), 4820.

military service.[21] After Russell's death in 1916, Joseph Franklin Rutherford took the helm. Rutherford (1869-1942) previously had been the chief legal counsel for the community, and followers called him "Judge Rutherford."[22] Rutherford also began a stronger campaign for door-to-door proselytizing, so Jehovah's Witnesses became much more visible in communities than it had been before.[23]

THE INCIDENT AND THE LEGAL ISSUES

On April 26, 1938, a family of Jehovah's Witnesses set out to proselytize. Newton Cantwell drove with his wife, Esther, and their two teenage sons, Jesse (16) and Russell (18), from their home in Woodbridge, Connecticut, to New Haven.[24] The Cantwells parked their car on the corner of Cassius and Cedar Streets. The men got out of the car, taking with them portable phonographs, records, books, and pamphlets produced by the Watchtower Bible and Tract Society.[25] They then went door-to-door.

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21 Ibid., 4821.

22 Herbert Hewitt Stroup, *The Jehovah's Witnesses* (New York: Columbia University Press, 1945),13.

23 Jennifer Jacobs Henderson, "The Jehovah's Witnesses and Their Plan to Expand First Amendment Freedoms," *Journal of Church and State* 46, no.4 (2004): 811-832.

24 This retelling is my own reconstruction drawn from testimony found in *Cantwell v. State of Connecticut*, 310 U.S. 296 (1940). Transcript Of Record. 5-95. While more information on the Cantwell family could not be found at this time to figure out what the family did in Woodbridge when not proselytizing, some other data was found. Newton was born in Tennessee to Tennessee-born parents, while Esther was born in Missouri to a father from Virginia and a mother from Kentucky. Russell was at least their sixth child, and was born when they lived in Barter County, Arkansas. Jesse, likely their seventh child, was born when they lived in Morgan County, Tennessee. The family was involved in farming in those locations. Since I could not find a record of the family in the 1940 Federal Census, it is unclear in which industry the family was involved after 1930 or whether they remained in Connecticut or moved again. 1930 U. S. Census, New population schedule, 3rd Representative District enumeration district (ED) 5, Page: *5B*; at Ancestry.com. *1930 United States Federal Census* [database on-line]. Provo, UT, USA: Ancestry.com Operations Inc, 2002.

25 Esther waited in the car for at least two reasons. Jehovah's Witnesses had strict gender roles for members, and safety was generally a concern for women going alone door-to-door in strange neighborhoods.

The Cantwells chose New Haven's Cassius Street, this street with ninety percent Catholic residents, to proselytize.[26] According to media scholar Jennifer Jacobs Henderson, Jehovah's Witnesses at the time attempted to challenge local laws by choosing places where their message would likely cause trouble.[27] The choice of Cassius Street was consistent with what Jacobs alleged as a Jehovah's Witness practice. It is clear from the transcript of the original trial that Catholicism mattered a great deal to most residents and they found the Jehovah's Witness materials incendiary. While Catholics formed a majority on Cassius Street, they were minorities around the state and the country. The Cantwells, as Jehovah's Witnesses, were members of an even smaller religious minority.[28]

Jehovah's Witnesses went door-to-door with materials explaining that Catholicism was theologically incorrect, even pernicious. Many passages in a Jehovah's Witness book, *Riches*, highlighted what they considered the problematic nature of the Catholic hierarchy. For example, *Riches* stated that, "The Hierarchy [of the Catholic Church] is the masterpiece of the Devil's organization schemes to defame the name of Jehovah God and Christ Jesus and to turn men away from Jehovah."[29] A tract entitled, "The Cure," goes on to assert, "it [the Roman Catholic Church] has ever been known as

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26 *Cantwell v. State of Connecticut*, 310 U.S. 296 (1940). Transcript Of Record. 5-95.

27 Jennifer Jacobs Henderson, "The Jehovah's Witnesses," 811-832.

28 A small note on the Cantwell Family: According to the 1930 federal census, they lived in Morgan County, Tennessee. Newton and Esther lived with six of their children – three girls and three boys. All children were under the age of 20. Russell and Jesse were the youngest. The 1920 census mentions one more daughter. As the eldest child, and 18 by the 1930 census, she likely married, but could have also died. 1920 U. S. Census, Wilmot, Ashley, Arkansas, population schedule, enumeration district (ED) 17, page 2A, Ancestry.com. *1920 United States Federal Census* [database on-line]. Provo, UT, USA: Ancestry.com Operations Inc, 2010.

29 J.F. Rutherford, *Riches*, (Brooklyn, N.Y.: Watchtower Bible and Tract Society, 1937), 232.

an unclean thing, for the reason that many of its leaders and priests have been and are morally putrid."[30] One pamphlet focused on the then common question of Catholics' allegiance to the U.S. The pamphlet stated, "Fascism and Nazi-ism [sic] and Roman Catholicism, meaning one and the same thing under three names, operate constantly to persecute the witnesses of Jehovah, the true followers of Jesus Christ." Another passage that would only prove more sensitive after December 7, 1941, but still provoked listeners in 1938 stated, "The Roman Catholic Hierarchy has made an alliance with Japan, which people practice another religion."[31] The pamphlets, books, and phonograph records intended for a potential convert pointed out the perceived errors of other religions and then summarized the Jehovah's Witness perspective.[32] The Cantwells brought this kind of anti-Catholic material to Cassius Street. While some observers[33] might simply consider the texts and recordings as being in bad taste, the Catholics who encountered the Cantwell's missionary materials viewed them as blasphemous. The Cantwells took these materials door-to-door, attempting not only to change the minds of Roman Catholics about the validity of their tradition, but also to sell them to the residents for small fees. Sales were evidently not their only goal, as they gave some of them away, if potential converts would accept the materials but could not pay.

The Cantwell men proselytized and attempted to sell their materials without the locally required permits. A 1937 Connecticut law prohibited the solicitation of "money,

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30 J.F. Rutherford, *Cure*, (Brooklyn, N.Y.: Watchtower Bible and Tract Society, 1938), 6.
31 *Cantwell v. State of Connecticut*, 310 U.S. 296 (1940). Transcript Of Record. 45.
32 Shawn Francis Peters, *Judging Jehovah's Witnesses: Religious Persecution and the Dawn of the Rights Revolution* (Lawrence: University of Kansas Press, 2000): 1-2.
33 See the unanimous opinion in *Cantwell v. Connecticut* 310 U.S. 296 (1940).

services, subscriptions or any valuable thing for any alleged religious, charitable or philanthropic cause," from non-members of the organization unless the secretary of the public welfare council approved the cause. This law granted the secretary the power to determine "whether such cause is a religious one or is a *bona fide* object of charity or philanthropy and conforms to reasonable standards of efficiency and integrity."[34] Similar laws could be found in other states across the U.S. The asserted rationale for these laws was to protect consumers. Lawmakers occasionally cited Jehovah's Witnesses in the creation of these laws around the country. This was the case with a law passed in Waynoka, Oklahoma.[35] By requiring certificates for door-to-door salesmen, a state hoped to remove the risk of charlatans pedaling ineffective medicines, people posing as members of religious groups, or pedestrians promoting money-making schemes in the name of a charitable institution. In the Cantwell situation, the Connecticut law made it difficult for them to deliver their message without asking for permission from the government.

To some contemporary readers, the ordinances restricting proselytizing on a public sidewalk might appear to be in direct conflict with the First Amendment's free speech and free exercise of religion clauses. At the time, though, the Bill of Rights, the first ten amendments to the Constitution, explicitly directed their power to the federal government and not to states. As originally interpreted, this meant that the protection of the Bill of Rights only restricted the federal government while states could conceivably

[34] General Statutes of the State of Connecticut Section 6294, 1937.
[35] Jennifer Jacobs Henderson, "The Jehovah's Witnesses," 814-815.

do the opposite.[36] For example, while the federal government could not establish Christianity, or any other faith, as the state religion, a single state could determine for itself an established religion if it so desired. Some of the original states that signed onto this Constitution originally, including Massachusetts, joined with established state churches. By 1833, all states had disestablished their official state religions, but not because the U.S. Constitution required them to do so. Many states incorporated religious freedom principles similar to those in the U.S. Constitution in their state constitutions. Connecticut was no exception. The Connecticut Constitution declared, "The exercise and enjoyment of religious profession and worship, without discrimination, shall forever be free to all persons in the state; provided, that the right hereby declared and established, shall not be so construed as to excuse acts of licentiousness, or to justify practices inconsistent with the peace and safety of the state."[37] As the language of the section implies, public order was a major concern for Connecticut. Public order considerations could limit protection of religious practice. This concept of limited rights has precedent. Occasionally, during wartime, the federal government and state governments, supported measures that restricted speech for both national security and public order.[38]

Due to this concern with public order regarding religion and speech, police officers in New Haven took issue with and arrested the Cantwells.[39] Jesse Cantwell's interaction with two young men particularly troubled police officers in that context. Jesse

[36] See *Barron v. Baltimore* 32 U.S. 243 (1833) for the interpretation that the Bill of Rights only applies to the federal government.
[37] Constitution of Connecticut, Article 1, Section 3.
[38] See *Gitlow v. New York* 268 U.S. 652 (1925).
[39] *Cantwell v. State of Connecticut*, 310 U.S. 296 (1940). Transcript Of Record. 5-95.

encountered John J. Ganley and John Cafferty, two men in their late twenties who grew up on that street, worked for steam railroad companies as a lamp man and shop hand, respectively, and attended nearby St. Peter's Catholic Church. Ganley and Cafferty allowed Jesse to play the "Enemies" record for them on the sidewalk. Ganley and Cafferty grew upset with the messages they heard. They asked Jesse to leave. Jesse then moved on to the next house and left Ganley and Cafferty behind. Ganley and Cafferty, incensed by Jesse's message, claimed during the trial that they were tempted to use force to make Jesse leave – which would have been a clear breach of peace according to Connecticut law – but did not.[40] It is unclear whether Ganley and Cafferty did not use force because Jesse left without an argument, because they did not want to get in trouble for breaching the peace themselves, or if there was some other reason.

Russell visited the Hickey residence. Alice, the young Catholic daughter of two Irish immigrants, answered the door. Although Alice did not purchase a book, Russell left a pamphlet with her. Subsequently she tore it up. Later, one of the Cassius Street residents, Anna Rigby, found Russell's message and the book's interpretation so offensive, that after he left her house, she called the police. Then, court records show, things happened quickly. Leslie Leigh, a motorcycle police officer, who was Catholic, first questioned Russell Cantwell. Russell claimed to preach the word of God. After more

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[40] General Statutes of the State of Connecticut Section 6194. "Any person who shall disturb or break the peace by tumultuous and offensive carriage, noise or behavior, or by threatening, traducing, quarreling with, challenge, assaulting or striking another, or shall disturb or break the peace, or provoke contention by following or mocking any person with abusive or indecent language, gesture or noise, or shall by any writing, with intent to intimidate any person, threaten to commit a crime against him or his property, or shall write or print and publicly exhibit or distribute, or shall publicly exhibit, post up or advertise any offensive, indecent or abusive matter concerning any person, shall be fined not more than five hundred dollars, or imprisoned in jail not more than one year or both."

discussion, Leigh called fellow police officer (and fellow Catholic), Henry Carnigan, to come with a radio car, and take Russell to the police station for more questioning. Unlike the other police officers involved, who lived much further away from their beat, Carnigan lived only five blocks away, and attended the same parish as the residents of Cassius Street. Carnigan lived one block from St. Peter's.

After Carnigan arrested Russell and dropped him off at the Howard Avenue Station a block away, he returned to the street. He found the Cantwell's car. The father, Newton, returned there and met his wife Esther who waited there for her family. When Carnigan found similar materials in the car as he had found in Russell's possession, he took Newton into custody and brought him to the Howard Avenue Police Station as well. Gladys Barry, another Catholic housewife, encountered Jesse on her porch. She saw his brother get picked up by the cops at the other end of the street and suggested that he "scram." Jesse did not get out quickly enough and was also arrested and brought into the Howard Avenue Station.

The New Haven police charged the Cantwell men with violating two Connecticut laws. First, according to the police, the Cantwells solicited for philanthropic purposes without permission.[41] In addition, the police cited a state statute on breach of peace when arresting the Cantwells.[42]

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41 General Statutes of the State of Connecticut Section 6294.
42 General Statutes of the State of Connecticut Section 6194.

ANTI-CATHOLIC SENTIMENT

Roman Catholics were the largest single denomination in the United States and Connecticut. Nevertheless, they were a minority when compared to the combined census total of the Protestant denominations in the United States. Catholics in Connecticut far outnumbered any other religious denomination in Connecticut with over 600,000 members – a huge margin in a state that only claimed slightly over one million religious memberships overall.[43] Jehovah's Witnesses, on the other hand, were not even counted in the federal religious census of 1936 because it was among new "movements and cults" not well organized enough, according to the Census Bureau, to have reliable or easily attained membership statistics.[44]

The Catholics on Cassius Street may well have been like many Catholics around the country who were still reeling from the widespread anti-Catholic sentiment of the 1920s. According to religion scholar, Thomas A. Tweed, anti-Catholic sentiment in the United States as a whole surged in the 1920s due to increased Catholic immigration.[45] Philip Jenkins claimed that all classes of American society participated in anti-Catholic rhetoric with elites critiquing the perceived lack of autonomy and repressiveness of the Catholic Church, while lower classes of generally Protestant American society vied for

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[43] *Religious Bodies: 1936: Selected Statistics for the United States by Denominations and Geographic Divisions* (Washington: United States Government Printing Office, 1941), 38-41

[44] Ibid., 2.

[45] Thomas Tweed, *America's Church: The National Shrine and Catholic Presence in the Nation's Capital*. (New York: Oxford University Press, 2011): 127.

jobs with Catholic counterparts.[46] From the somewhat unreliable data found in the Federal Census on Religious Bodies, the Roman Catholic Church experienced significant growth in the 1920s that slowed in the 1930s. From 1916 to 1926, the Catholic Church increased by 2.9 million members.[47] Anti-Catholic organizations, such as the Klu Klux, also grew. In the 1920s the Klan gained widespread support, peaking membership numbers in 1923, even north of the Mason-Dixon Line, including Connecticut.[48]

Other immigrants were feared, but for many Anglo-Saxon Protestants, Catholics were particularly problematic. Nativists worried that U.S. Catholics offered allegiance to the Pope. Many Protestants, including Jehovah's Witnesses, questioned whether Catholics could be effective and loyal citizens. Al Smith's campaign for president in 1928, as a "wet" anti-Prohibition Catholic, against a "dry" Quaker Herbert Hoover, provoked acrimonious campaigning focusing on Smith's Catholicism as a trait unacceptable in an American President.[49] During this period, Protestants opposed American Catholics' pleas for military intervention in Mexico, where the secularist government purged itself of clerical influence in government.[50]

In contrast to the growth in the first decades of the twentieth century, the Catholic population only jumped by 1.3 million from 1926 to 1936, due to immigration

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46 Phillip Jenkins, *The New Anti-Catholicism: The Last Acceptable Prejudice* (Oxford: Oxford University Press, 2003), 33.

47 *Religious Bodies; 1936, Statistics, History, Doctrine*, 530.

48 Mark S. Massa, S.J., *Anti-Catholicism in America: The Last Acceptable Prejudice* (New York: Crossroad Publishing Company, 2003), 32.

49 Ibid., 33.

50 Jenkins, *The New Anti-Catholicism*, 36.

restrictions and economic depression.[51] While the Klan's power waned by the end of the 1920s, other forms of anti-Catholicism continued. By the 1930s and beyond into the 1940s, other religions joined with Jehovah's Witnesses to accuse Catholics of being un-American and having sympathy for totalitarianism.[52] Many Protestants also perceived a "powerful Catholic tilt of both [Hitler and Franco's] regimes."[53] So the Catholics on Cassius Street likely had heard similar claims that "Fascism and Nazi-ism [*sic*] and Roman Catholicism, meaning one and the same thing under three names, operate constantly to persecute the witnesses of Jehovah, the true followers of Jesus Christ."[54] Even though such comparisons were common, however, it certainly did not mean that Catholics viewed this sentiment as benign or that they expected that message to be delivered to their doorstep. In 1938, when the Cantwells went to Cassius Street, many of the longer-term Catholic residents may have remembered those earlier days with more pervasive anti-Catholic notions, making the Cantwells' messages worrisome, even threatening. So the Cantwells found themselves in the Court of Common Pleas of New Haven County to answer the charges.

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51 Census of Religious Bodies, 1936. 348.
52 Jenkins, *The New Anti-Catholicism*, 33.
53 Ibid., 35.
54 *Cantwell v. State of Connecticut*, 310 U.S. 296 (1940). Transcript Of Record. 45.

Chapter 2: The State Court Decisions

THE NEW HAVEN TRIAL: GUILTY

The Cantwells went to trial in New Haven, Connecticut, in September 1938. They fared poorly. The narratives of the local Catholic majority dominated the record – from witnesses to police officers, even the judge deciding the case. The Cantwells were convicted of both failing to get the proper permissions to solicit and disturbing the peace.

The Cantwells received support from the Jehovah's Witness hierarchy to continue their legal battle. This case eventually became one of the 38 cases Jehovah's Witnesses brought to the Supreme Court.[55] There was little in the record of this local case to indicate that this would be the first free exercise case of all those brought forward to reach the Supreme Court. A possible explanation is that the Jehovah's Witness chief counsel, Olin R. Moyle, argued this case on behalf of the Cantwells.[56] It is unclear why Moyle took this case, rather than some of the others that emerged around the country, but it could have been due to the exemplary issues brought by the Connecticut laws that would challenge both local laws and the U.S. Constitution for other municipalities around the country. Another possibility is simply that New Haven was easily accessed by Moyle from the Jehovah's Witnesses' headquarters in Brooklyn, New York.

In any case, the Cantwells went on trial in a Connecticut court, the Court of Common Pleas of New Haven County. There, Moyle argued using principles from the

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55 Peters, *Judging Jehovah's Witnesses.*

56 *Cantwell v. State of Connecticut*, 310 U.S. 296 (1940). Transcript Of Record, 5.

Connecticut Constitution. Moyle invoked the U.S. Constitution's Fourteenth Amendment's "due process clause," a tact the U.S. Supreme Court had just begun to use in interpretation of civil liberties protected by the Constitution. The Judge at the Court of Common Pleas, Raymond J. Devlin (1898-1986) decided the case based only on the state laws cited by the prosecutors. He did not consider the Fourteenth Amendment since the Supreme Court had not yet ruled on whether the religion clauses applied to state law. Nine people testified. The witnesses included three police officers, five Cassius Street residents, and Esther Cantwell, the wife and mother of the proselytizing Cantwells. Esther could only testify with regard to her sons, as marital privilege allowed her to avoid testimony that might incriminate her husband.

The prosecuting lawyer, Edwin S. Pickett,[57] asked each of the witnesses with which religion they affiliated. Pickett highlighted the residents' religion as particularly important to his argument that the Cantwells breached the peace by circulating anti-Catholic materials. For Pickett the local factors mattered. Through the testimonies the Judge learned that, with the exception of Esther Cantwell, the police officers and all other witnesses were Roman Catholic. Since they were neighbors and since Catholic ecclesiastical organization worked according to parish boundaries, they all attended St. Peter's, the parish located four blocks away. Many claimed to be very devout but did not expand on what that meant for them. All the witnesses stated they were lifelong

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[57] Pickett was a New Haven local, having graduated from Hopkins Grammar School and then Yale University in 1899. He served as a "high private" in the Connecticut Foot Guards for one and a half years, but worked as an attorney for the entirety of his professional career. His religious affiliation was likely Episcopalian as his son married in an Episcopal Church. "Miss Sybil Alger Bride in Church" *New York Times* Feb 23, 1941; ProQuest Historical Newspapers: The New York Times (1851-2010), pg. D3. http://search.ancestry.com/cgi-bin/sse.dll?gl=allgs&gsfn=S%20Edwin&gsln=Pickett&gss=seo&ghc=20.

Catholics. It is not clear why Pickett asked about the police officers' religious affiliation, as there was no record or insinuation of the Cantwells proselytizing to the police. Regardless of the intent, the questioning further established the local context of Cassius Street and its surrounding blocks as Roman Catholic.

Throughout his questioning of witnesses, Pickett read aloud excerpts from materials confiscated from the Cantwells as evidence. Although the defending lawyers, Otto LaMacchia and Olin R. Moyle, frequently objected to Pickett's interjections, Judge Devlin allowed Pickett to continue.[58] In these readings, Pickett quoted some of the most incendiary language. For example, he read "Fraudulently and hypocritically operating in the name of God and of Christ, the Catholic religious organization has continually carried on a campaign of intolerance toward and persecution of all persons who have tried to understand the Bible and teach its truth to others."[59]

Judge Devlin came from a Catholic background as well. He lived on a street named Parker Place, where the majority of residents, Devlin included, descended from parents born in the United States and held white-collar jobs.[60] Devlin's grandparents on both sides of his family came to the United States from Ireland. Although not all Irish immigrants were Catholic, the largest proportions were. Devlin grew up in a large family, which was common among Catholics. Both his wife and his daughter had Catholic

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58 *Cantwell v. State of Connecticut*, 310 U.S. 296 (1940). Transcript Of Record. 56.

59 J.F. Rutherford, *Cure*. (Brooklyn, N.Y.: Watchtower Bible and Tract Society, 1938), 6.

60 Ancestry.com. *1930 United States Federal Census* [database on-line]. Provo, UT, USA: Ancestry.com Operations Inc, 2002. http://search.ancestry.com/cgi-bin/sse.dll?h=9710793&db=1930usfedcen&indiv=try

burials, a rite reserved for Catholic parish members.[61] These facts suggest that that Judge Devlin also identified with Catholicism. Judge Devlin's affiliation with Catholicism was significant, because Pickett's quotations from Jehovah's Witness materials—"Satan has developed and been built up the Hierarchy of the Catholic Church"—could have offended the judge, just as it had the Catholic witnesses.[62] Judge Devlin's religious affiliation was not the only reason for finding the Cantwell men guilty. The Cantwells clearly did not have the necessary permit and their activity provoked some type of disturbance. In any event, Judge Devlin ruled that the three Cantwell men violated both laws. Judge Devlin then fined each Cantwell man ten dollars, but without any jail time, a punishment significantly lower than allowed by either law on its own, and ordered them to stop soliciting during the appeals process.[63] Despite the relatively minor penalty assessed, the case did not end with Devlin's ruling. The Cantwells' lawyers made it clear that they planned to appeal.

THE STATE APPEAL: UPHELD

With support from the Jehovah's Witnesses headquarters' legal counsel, Olin R. Moyle, the Cantwells continued their effort to reverse the judgment of the lower court by appealing to the Supreme Court of Errors of Connecticut. They contested all the charges. They also claimed that the cited laws violated both the Connecticut and United States

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61 Both Devlin's wife and daughter received Catholic burials. "Services Tuesday for Mrs. Devlin," *Bridgeport Sunday Post* March 29, 1964, D11. "Trowbridge, Dorothy Devlin." *The Hartford Courant*, June 4, 2002, B9.

62 *Cantwell v. State of Connecticut*, 310 U.S. 296 (1940). Transcript Of Record, 47.

63 General Statutes of the State of Connecticut Section 6294, 1937. General Statutes of the State of Connecticut Section 6194.

Constitutions, in line with a newly emerging form of interpretation that had not yet made it to every lower court in the country. The Supreme Court of Errors of Connecticut only saw a potential problem with the lower court decision on the disturbance of peace for Newton and Russell Cantwell. It was Jesse Cantwell, alone, who caused John Ganley and John Cafferty to have to restrain themselves from inflicting violence. Because Jesse angered witnesses to an extreme degree, the Connecticut Supreme Court agreed with the decision of Judge Devlin in convicting Jesse Cantwell on the charge of disturbing peace. Although Newton and Russell Cantwell performed many of the same actions as Jesse, no witnesses testified extreme anger and willingness to commit violence as a result of the actions of the older two Cantwells. The Connecticut Supreme Court ordered that a new trial inquire whether evidence existed to support the conviction of Newton and Russell on the charge of breaching public peace.

The new trial never occurred. The Cantwell's filed again, asking for a re-argument for the entire case, not just the public disturbance of Newton and Russell.[64] When the Connecticut Supreme Court refused to grant the Cantwell's request, the Jehovah's Witnesses sent their case to the United States Supreme Court to try to appeal to the highest court in the land and highlight First Amendment issues.[65] The case was accepted.

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64 *Cantwell v. State of Connecticut*, 310 U.S. 296 (1940). Transcript Of Record.104-105.

65 *Cantwell v. State of Connecticut*, 310 U.S. 296 (1940). Transcript Of Record. 106.

Incorporation Doctrine

The Supreme Court's analysis of the case will be discussed in greater detail below, but we must first consider why the lower courts judges did not decide that the Jehovah's Witnesses had a right to the free exercise of religion and free speech. The answer lies within the U.S. Constitution and the way the Supreme Court traditionally interpreted its first ten amendments. According to Constitutional scholar and former federal judge, Michael McConnell, "the Bill of Rights added to the Constitution in 1791 was designed to limit the power of the federal government that the Constitution had created."[66] The language of the First Amendment states, "*Congress* shall make no law…" (ital. added). The Supreme Court initially used this line of reasoning to limit its own authority to those cases dealing with laws made by the U.S. Congress. In 1833, the Supreme Court rejected a claim made against a city under just compensation of the Fifth Amendment in *Barron v. Baltimore.*[67] The court asserted it could not rule on an action by a city. Similarly, in 1845 the Supreme Court deemed the religious free exercise clause of the First Amendment as only applicable to the federal government in *Permoli v. New Orleans.* The City of New Orleans enacted an ordinance restricting where corpses could be exposed within the city – restricting them to funerary chapels.[68] A Catholic priest, Permoli, received a fine for defying this ordinance and saying prayers over a corpse in a

66 Michael Mc Connell, John H. Garvey, and Thomas C. Berg, *Religion and the Constitution*. 2nd ed. New York: Aspen Publishers (2006), 71.

67 See *Barron V. Mayor and City Council of City of Baltimore* 32 U.S. 243 (1833).

68 *Permoli v. Municipality No. 1 of the City of New Orleans*, 44 U.S. 589, 590 (1845).

non-approved location – the church in which he was a priest.[69] In spite of his claim, the Supreme Court denied Permoli's petition that the city ordinance violated Permoli's First Amendment rights since, Justice Catron stated:

> The Constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws: nor is there any inhibition imposed by the Constitution of the United States in this respect on the states.[70]

The Court in 1845 flatly denied that a city ordinance or state could violate the Free Exercise clause. This interpretation remained until the *Cantwell* case.

Cases before Cantwell that can be thought of dealing with free exercise, such as *Reynolds v. United States* from 1878, did not concern the states. The *Reynolds* case dealt with the Utah Territory and the Latter-day Saint practice at the time of plural marriage.[71] Because Congress made laws prohibiting bigamy, the Supreme Court, then, took the case to determine whether or not those laws violated the free exercise of religion protected by the Constitution for polygamists living Utah.[72] Utah was still a territory at that time. For example, if the *Reynolds* case had been in Georgia, already a state in 1878, the case would likely not have met the same fate.

This line of interpretation changed in light of the Fourteenth Amendment and new figures on the Supreme Court. The Fourteenth Amendment prohibited states from "depriv[ing] any person of life, liberty, or property, without due process of law."

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69 Ibid., 590.

70 Ibid., 609.

71 *Reynolds v. United States* 98 U.S. 145 (1878).

72 Laws included 37th Congress 126 Stat. 501 Ch. 12 (1862), 47th Congress 22 Stat. 188 Ch. 47 (1882), 49th Congress 24 Stat. 635 Ch. 3 (1887).

Although the Fourteenth Amendment was approved in 1868, it took until the twentieth century for the Supreme Court to deem that the due process clause offered a way of extending rights from the Bill of Rights to states.

The path by which the Supreme Court incorporated free exercise of religion was somewhat meandering. In 1925, the Supreme Court decided that the due process clause invalidated a compulsory public education law in Oregon that prohibited the use of parochial schools as a substitute for public schooling. This case, *Pierce v. Society of Sisters*, did not state that the Bill of Rights was applicable, but instead stated that "rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state."[73] The Court claimed that the State of Oregon needed a better reason for compelling students to attend public schools rather than any other school, as it impeded parents' decisions about training their children for a profession. Although one of the schools that petitioned in *Pierce* was a Catholic parochial school, economic liberty, not religious freedom, was the deciding factor cited.[74]

The first case in which the Supreme Court incorporated a Bill of Rights freedom was *Gitlow v. New York* in 1925.[75] Gitlow, a socialist anarchist, had been "tried, convicted, and sentenced to imprisonment," under a New York State law prohibiting anyone from advocating criminal anarchy.[76] New York defined advocating for criminal

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73 *Pierce v. Society of Sisters* 268 U.S. 510, 535 (1925).
74 Ibid.
75 *Gitlow v. New York*, 268 U.S. 652 (1925).
76 Ibid.

anarchy in an expansive way, so it included written, spoken, and published advocacy of the violent and unlawful overthrow of the government. In its decision, the Supreme Court allowed for attempts at keeping anarchy at bay. But, it found that New York State went too far in infringing upon Gitlow's right to speak. Thus, the Court concluded that:

> For present purposes we may and do assume that freedom of speech and of the press-which are protected by the First Amendment from abridgment by Congress-are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States.[77]

This statement became known as the incorporation doctrine. Through this reasoning, the Supreme Court could choose to incorporate what it deemed as "fundamental personal rights and 'liberties'" that could be applied to the states through the Fourteenth Amendment's due process clause. The Supreme Court also ruled for the incorporation of prior restraint of the press and freedom of assembly in *Near v. Minnesota* in 1931 and *DeJonge v. Oregon* in 1937 respectively.[78] In *Cantwell*, Moyle claimed from the beginning of the judicial process that the Connecticut law violated the U.S. Constitution's due process clause. This was Moyle's attempt to make judges incorporate free exercise of religion.

For the purposes of the *Cantwell* case, at the state and county levels, the issues raised in the case did not concern the U.S. Constitution, because free exercise of religion remained a federal issue. The courts that initially ruled against the Cantwells were state courts – not federal—and so it is understandable that they did not concern themselves with attempting to incorporate free exercise of religion to their own jurisdictions. These

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[77] Ibid., 666.

[78] *Near v. Minnesota* 283 U.S. 697 (1931); *De Jonge v. Oregon* 299 U.S. 353 (1937).

courts did not have the power to do so. It took an appeal to the Supreme Court of the United States for the Cantwells and their Jehovah's Witness legal team to force a decision as to whether or not the free exercise of religion counted as one of those "fundamental personal rights and 'liberties'" to apply to states.

Jehovah's Witnesses: Their National Agenda

Joseph F. Rutherford, the leader of the Jehovah's Witnesses, worked toward expansions in the definitions of religious freedom, speech, and public assembly for citizens of the United States, but particularly for Jehovah's Witnesses. Olin Moyle did not continue arguing the case at the Supreme Court, because of a falling out with Rutherford.[79] Hayden Covington, a lawyer from Texas, took over as the Jehovah's Witnesses' chief counsel and remained with the group as their primary lawyer for decades.[80]

Across the country, Jehovah's Witnesses between the 1930s and the 1950s brought 38 cases to the Supreme Court to gain protection through the Bill of Rights.[81] The *Cantwell* case was one of those 38 cases. They did not always win. In 1940, the same year that *Cantwell* made its way to the Supreme Court docket, Rutherford personally argued against compulsory flag salutes in front of the Supreme Court. He was forced to do this because he did not have other legal counsel at that time. Rutherford also gave the oral argument for *Minersville School District v. Gobitis*. Rutherford was not

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79 Moyle resigned in 1939. He subsequently sued the Watchtower Bible Society for libel, because after his resignation Watchtower publications denounced Moyle. The legal case that resulted can be found in Moyle v. Fred Franz et al. 267 A.D. 423 (1944).

80 Jennifer Jacobs Henderson, "The Jehovah's," 812.

81 Peters, *Judging Jehovah's Witnesses.*

without qualification, as he had served as chief counsel for Jehovah's Witnesses before gaining the presidency in 1907.[82] But, Rutherford lost the case, resulting in teachers and principals around the country compelling Jehovah's Witness school children to participate in flag salutes. Covington soon took the helm, and argued on behalf of the Cantwells before the Supreme Court, as I note when I analyze the case in greater detail below. In 1941, *Cox v. New Hampshire*, Jehovah's Witnesses conducted a parade without a permit and claimed free exercise and freedom of assembly protection. The Jehovah's Witnesses lost, because the Court stated that licenses for parades are an important part of a city's ability to regulate safety and pay for the extra policing a gathering like a parade might require.[83] *Chaplinsky v. New Hampshire* stated that restricting speech meant to incite violence or hatred in the listener was deemed to be acceptable despite free speech claims of a Jehovah's Witness.[84] They did not lose them all, however. The ruling in 1943's *Murdock v. Pennsylvania* supported the Jehovah's Witnesses' argument that their free exercise was limited by a law requiring them to *purchase* a license to solicit.[85]

These cases were part of a determined effort by Rutherford and the Jehovah's Witnesses to expand First Amendment freedoms. While individuals from other religious communities brought forward similar cases, Jehovah's Witnesses' extensive legal team uniquely aided their cause. This legal team helped push and support their cases beyond the local level of the judiciary with qualified counsel and financial backing. However, the

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82 Jennifer Jacobs Henderson, "The Jehovah's Witnesses," 816.
83 *Cox v. New Hampshire* 312 U.S. 569 (1941).
84 *Chaplinsky v. New Hampshire* 315 U.S. 568 (1942).
85 *Murdock v. Pennsylvania* 319 U.S. 105 (1943).

fight for religious freedom did not always involve the courts. As early as 1934, Judge Rutherford published pamphlets and made radio broadcasts challenging the status quo of religious freedom in the United States. In one broadcast that was later republished in pamphlet form, "Truth: Shall it be Suppressed or Will Congress Protect the People's Rights?." Rutherford challenged radio stations that banned his programs from the air and insinuated that the Catholic hierarchy had pulled the strings behind the scenes to make that happen. This fight against censorship on radio waves went before Congress. In a Congressional hearing on the issue, Jehovah's Witnesses testified that they were prohibited from purchasing airtime on major networks.[86]

In those earlier broadcasts and pamphlets, a Jehovah's Witnesses battle with Roman Catholics was apparent. Using his interpretation of the Bible, Rutherford wrote, "a conspiracy is formed by Satan and his crowd, including the Roman Catholic hierarchy and other religionists to kill those who faithfully praise the name of Jehovah."[87] Rutherford claimed that the Roman Catholic hierarchy "is now carrying on a subtle and deceptive campaign to gain complete control of the United States government."[88] And further the "Roman Catholic Hierarchy is now attempting to gain control of all the radio

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[86] Radio Broadcasting: Hearings on H.R. 7986, Before the Comm. on Marine, Radio, and Fisheries, 73rd Cong. 2 (1934) (statements of E.S. Wertz, counsel for the Watch Tower Bible and Tract Society, Anton Koerber, Washington representative for the Watch Tower Bible and Tract Society, Charles H. Carr, Sr., radio representative for the Watch Tower Bible and Tract Society, and C.J. Woodworth, member of the Watch Tower Bible and Tract Society).

[87] J.F. Rutherford, *Jehovah*, (New York: Watchtower Bible and Tract Society, 1934), 32.

[88] J.F. Rutherford, *Truth: Shall it be Suppressed or Will Congress Protect the People's Rights?* (Brooklyn, N.Y.: Watchtower Bible and Tract Society, 1934), 3.

facilities and to suppress liberty of conscience, freedom of speech and freedom of the press in the United States."[89]

Rutherford's reading of scripture, of course, differed from that of the Catholic hierarchy, as well as the lay Catholics who followed the Church's teachings. Some lay Catholics got involved in this fight around the country. The Knights of Columbus, the Catholic fraternal organization founded in New Haven in 1882, spearheaded some of these efforts.[90] In Indianapolis, a Grand Knight (a leader) helped start a protest against Rutherford's broadcasts on a local station.[91] Due to citizen protests, broadcast organizations, including many Catholic run stations in Denver, Colorado Springs, and Oklahoma City removed Jehovah's Witness material from radio waves.[92] Some clergy got involved with those protests. For example, the prolific apologist, Reverend Herbert Thurston, S.J. (1856-1934), who also warned Catholics about other new religious movements like Spiritualism, Theosophy, and Christian Science, published a 1939 pamphlet, "Rutherford and the Witnesses of Jehovah: Are They Apostles of Anarchy?"[93] Other pamphlets written by Thurston denounced Rutherford, questioned the origins of the movement, and revealed the truth behind Rutherford's common title, "Judge Rutherford." Thurston plainly denounced Rutherford by stating, "Rutherford is not a judge, nor even

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89 Rutherford, *Truth*, 4.

90 For more information on the Knights of Columbus and their New Haven origins, see Cristopher J. Kauffman, *Faith and Fraternalism: The History of the Knights of Columbus, 1882-1982* (New York: Harper & Row Publishers, 1982).

91 "Indianapolis Knights Alert," *Knights of Columbus News*, September 26, 1938.

92 "Three Radio Stations Cut Rutherford Radio Broadcast Off Air," *Knights of Columbus News*, September 26, 1938.

93 Herbert Thurston, S.J. *Rutherford and the Witnesses of Jehovah: Are They Apostles of Anarchy?* (New York: America Press, 1939).

an ex-Judge. He has never received any such official appointment."[94] Rutherford's attacks on Catholicism "take us back to the language and type of caricature favoured [*sic*] by Martin Luther and the Reformers of his day."[95] Like the Jehovah's Witnesses materials, these Catholic pamphlets were available for a small fee – ten cents.[96]

The Cantwell men continued to appeal their case after the Connecticut Supreme Court of Errors refused to decide on the basis of free exercise of religion in June of 1939.[97] Although the Cantwells' legal team filed for the case to be reargued in September to the Supreme Court of Errors of Connecticut, they were denied in October.[98] By December, the Jehovah's Witness legal team filed all the appropriate paperwork to have the U.S. Supreme Court consider the case for a writ of *certiorari* (the official term for the Supreme Court agreeing to hear a case).[99] In February, the U.S. Supreme Court granted the writ of *certiorari* and agreed to hear oral arguments. As I will show, all these details about the local, state, and national scene provide the wider cultural context for a more textured analysis of the case, but the Supreme Court's composition and history should still be considered.

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94 Herbert Thurston, S.J. *"Judge" Rutherford.* (London: Catholic Truth Society, 1940), 15.
95 Ibid., 19.
96 "New Pamphlets," *Knights of Columbus News*, September 11, 1939.
97 *Cantwell v. State of Connecticut*, 310 U.S. 296 (1940), Transcript of Record, XX.
98 Ibid., 104-105.
99 Ibid., 106.

Chapter 3: The Federal Case at the Supreme Court

RELEVANT SUPREME COURT HISTORY AND THE KEY JUSTICES

In the aftermath of the Civil War, Congress and the States added new amendments to the Constitution. One post-Civil-War addition, the Fourteenth Amendment, opened up possibilities for the Supreme Court to assert itself by incorporating sections of the Bill of Rights to the states. The question presented by the Fourteenth Amendment was how equal protection under the law for all citizens could be assured if a state or local government was free to have laws that limited those protections? But, the Supreme Court did not enter a new, activist phase in its history until the interwar period, the time between World War I and World War II. The Fourteenth Amendment had made incorporation possible, but the opportunity was not exploited until the 1930s and early 1940s.

The 1930s and 1940s were also the era of the New Deal, the massive legislative agenda that expanded the federal government and transformed the nation, though not without some opposition from the judicial branch. The Supreme Court evaluated the constitutionality of many New Deal proposals and played a significant role in controlling the new policies. During Franklin Delano Roosevelt's first term, the Supreme Court, with many conservative justices, invalidated many of the New Deal efforts he helped usher through Congress. On one single day, May 27, 1935, the Supreme Court handed down three unanimous decisions that dismantled various parts of the New Deal.[100] In an attempt

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100 See for example: *Schechter Poultry Corporation v. United States,* 295 U.S. 495 (1935), *Louisville Joint Stock Land Bank v. Radford* 295 U.S. 555 (1935)*; Humphrey's Executor v. United States* 295 U.S. 602

to control the Court, Roosevelt advocated for the Judicial Procedures Reform Bill of 1937. This legislation proposed adding a maximum of six justices to the Supreme Court -- one for every justice over the age of seventy. That meant Roosevelt could have named six justices and that would have virtually assured the Court would rule in his favor. Although this plan had been brewing in the Roosevelt White House for some time, its appearance at this moment in history was striking.[101] Roosevelt had just won reelection for a second term, receiving over 60 percent of the vote. He proposed this plan to add justices to the Court in an attempt to protect his New Deal and presidential legacy. The Court in the 1930s lost much popularity with the American public due to their opposition to key elements of New Deal. Popular news media portrayed the mostly elderly Supreme Court Justices as "nine old men," a phrase popularized by the 1936 exposé bestseller by Drew Pearson and Robert S. Allen.[102]

Historians credit Associate Justice Owen Roberts with contesting Roosevelt's plans and saving the nine-person court, rather than changing to a larger court.[103] Justice Roberts typically sided with the anti-New Deal 5-4 majority. But, one month after the announcement of the "court packing" plan, as the Judicial Procedures Reform Bill of 1937 was commonly known, Roberts switched allegiances, giving the pro-New Deal

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(1935)*; Retirement Board v. Alton Railroad Company* 295 U.S. 330 (1935), *United States v. Butler*, 297 U.S. 1 (1936).

101 William E. Leuchtenburg, "The Origins of Franklin D. Roosevelt's 'Court-Packing' Plan," *The Supreme Court Review* (1966): 347-400.

102 Drew Pearson and Robert S. Allen, *Nine Old Men* (Garden City, N.Y: Doubleday, Doran and Co. Inc., 1936).

103 Some scholars focus on the lack of support in Congress – particularly among senators, but the Justice Roberts story is the one that is dominant in the historical narrative of the court packing plan. See Barry Cushman, "The Court-Packing Plan as a Symptom, Casualty, and Cause of Gridlock," *Notre Dame Law Review* 88 (2013): 2089-2106.

justices the 5-4 majority in *West Coast Hotel Co. v. Parrish*.[104] The case was cited as the "switch in time that saved nine."[105] Given the *West Hotel Co.* decision, Roosevelt's plan lost momentum and the court's traditional nine-member construction remained. This left the Supreme Court stronger than ever.

Robert's ideological switch also marked the beginning of a new era in the Court marked by pro-New Deal decisions and an expansion of civil liberties. The Supreme Court upheld the Fair Labor Standards Act of 1938, a key New Deal law, in *United States v. F.W. Darby Lumber Company.*[106] In May of 1937, the conservative justice Willis Van Devanter resigned, allowing President Roosevelt to appoint his first candidate, Hugo Black.[107] Due to Roosevelt's long tenure in office, he eventually appointed eight men to the Supreme Court, five of whom remained on the Court by the time of the oral argument of the *Cantwell* case.

When the Court heard the *Cantwell* case in 1940, a few justices had backgrounds that might have affected the way they ruled. Because of a lack of transparency in the operations of the Court, we have no definitive proof of bias. However, the Court, although unanimous in their ruling on the *Cantwell* case, was not a monolithic or neutral arbiter. Some demographic facts and judicial trends in other decisions might help to describe the 1940 Court that heard the *Cantwell* case. The Court included seven

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104 *West Coast Hotel Co. v. Parrish* 300 U.S. 379 (1937).

105 "Roberts" In *The Supreme Court Justices: Illustrated Biographies 1789-2012* ed. Claire Cushman, (Los Angeles: CQ Press, 2013), 331-334.

106 *United States v. F.W. Darby Lumber Company*, 312 U.S. 100 (1941).

107 Lawrence S. Wrightsman, *The Psychology of the Supreme Court*, (New York: Oxford University Press, 2006), 53.

Protestants, one Jew, and one Catholic. Owen Roberts, the Justice who was credited with saving the nine-member court, wrote the *Cantwell* opinion. The opinion by that devout Episcopalian documented the position of that unanimous court and incorporated the free exercise clause to the states.[108] Of the other Protestants, two are noteworthy. James C. McReynolds was a fundamentalist Disciples of Christ member and an ardent anti-Semite who treated fellow Jewish Supreme Court Justices with contempt. It is unclear whether that vitriol extended to Catholicism or Jehovah's Witnesses, the religions involved in *Cantwell*.[109] In contrast, Harlan F. Stone was known for supporting minority rights. In a 1938 case concerning interstate milk shipments, Justice Stone argued for a "more searching judicial inquiry" in cases of prejudice against religious, national, or racial minorities.[110] In the same year as *Cantwell*, only Justice Stone sided with the Jehovah's Witnesses on another case, *Minersville School District v. Gobitis.* In the *Gobitis* case, the majority upheld compulsory flag salutes in schools to the chagrin of Jehovah's Witness children and parents. This religious minority interpreted flag salutes as a form of idolatry. Justice Stone gave the only dissent, arguing that school boards could employ other means to instill patriotism other than an act that violated the religious conscience of

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108 Felix Frankfurter, "Mr. Justice Roberts," *University of Pennsylvania Law Review* 104.3 (1955): 315; George Wharton Pepper, "Owen J. Roberts: The Man," *University of Pennsylvania Law Review* 104.3 (1955), 373.

109 McReynolds wrote the majority opinion of *Pierce v. Society of Sisters* that nullified a compulsory schooling law that prohibited Catholic schooling from being considered to be an adequate substitute for public schooling. This perhaps, leads to the conclusion that McReynolds was at least somewhat sympathetic to Catholicism. However, McReynolds did not delve into the issue of the Catholicism of the school, but focused on free enterprise and the rights of parents to choose education for their children. See *Pierce v. Society of Sisters* 268 U.S. 510 (1925).

110 *United States v. Carolene Products Company* 304 U.S. 144 (1938), footnote 4.

some students.[111] (He was vindicated three years later when the Supreme Court overturned *Gobitis* in *West Virginia State Board of Education v. Barnette*.)[112]

Frank Murphy, the only Catholic on the Court, joined in 1940. Roosevelt nominated Murphy, which was not surprising since the new Justice had previously shown his loyalty to the New Deal and Roosevelt's efforts through his work as mayor of Detroit and later U.S. Attorney General. Murphy created the Civil Rights Division of the Department of Justice. He ended up on the Supreme Court after the Court decided to hear the *Cantwell* case, but before the oral argument and decision were made. Historians grant that Murphy, unsure about his own qualifications for the Court, did not become a strong character on the court until 1941, when he self-consciously claimed that his position required him "to enlarge men's freedoms and make them content with justice."[113]

So the *Cantwell* case arrived at the recently strengthened Supreme Court in front of these predominantly Protestant justices. Their religious backgrounds contrasted with the overwhelmingly Catholic heritage of those involved in the Connecticut ruling. Additionally, with several of the justices who had opposed the New Deal now off the Court and five of Roosevelt's picks serving, the federal Court was empowered to take the Constitution into a new phase of interpretation with the Fourteenth Amendment to fortify it.

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111 *Minersville School District v. Walter Gobitis, et al.* 310 U.S. 586 (1940).

112 *West Virginia State Board of Education v. Barnette* 319 U.S 263 (1943).

113 "Frank Murphy," In *The Supreme Court Justices: Illustrated Biographies 1789-2012* ed. Claire Cushman, (Los Angeles: CQ Press, 2013): 363.

WHY THIS CASE REACHED THE SUPREME COURT

Why the Supreme Court takes some cases and refuses others has often baffled observers. As unlikely as it might have seemed to some contemporaries, these seemingly trivial events in New Haven, Connecticut, reached the Supreme Court and changed the way the United States assured free exercise of religion. Jehovah's Witnesses, as I have suggested, were particularly litigious in many parts of the United States at the time. Under the direction of their leader, Judge Rutherford, Witnesses attempted to push the limits of acceptable religious practice and speech in the public sphere. The Justices of the Supreme Court did not take the case, nor did the Jehovah's Witnesses hierarchy support the appeal to overturn a $10 fine imposed on a family. The Jehovah's Witnesses hierarchy backed the Cantwell family and assigned their chief counsel to the case to protect their right to proselytize, which they held as critical to their ability to freely exercise their religion. The Cantwell family's troubles were merely the vehicle to pursue that broader political agenda.

At the same time, the Supreme Court was on a new trajectory; it had a more expansive view of First Amendment freedoms. In 1925's *Gitlow* case, the Supreme Court incorporated freedom of speech and press to states.[114] In 1938, the year New Haven police officers arrested the Cantwells for distributing religious messages without a permit and disturbing peace, the Supreme Court upheld freedom of the press as an important principle for states to follow in another Jehovah's Witness case, *Lovell v. City of*

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114 *Gitlow v. New York* 268 U.S. 652 (1925).

Griffin.[115] In *Lovell*, that Georgia's city ordinance required written permission from the city manager to distribute literature for free or fee. Chief Justice Hughes wrote the only opinion of *Lovell*. He stated that the Griffin ordinance was too broad, covering virtually any type of press distribution. Hughes claimed that, "its character is such that it strikes at the very foundation of the freedom of the press by subjecting it to license and censorship."

In 1939, some Jehovah's Witnesses were back in front of the Supreme Court as one party in *Schneider v. State of New Jersey*, a case that combined four similar appeals from New Jersey, California, Wisconsin, and Massachusetts. In each location, ordinances prohibited the public distribution of pamphlets, handbills, and flyers. Only Clara Schneider, in New Jersey, was a Jehovah's Witness. Like the Cantwells, Schneider went door to door with pamphlets published by the Watchtower Society, urging readers to join the movement. The other conjoined cases did not include religious components at all. Instead, they involved pamphlets for a butcher's union, a labor protest meeting dealing with unemployment insurance, and a program with testimonies from people who advocated against General Francisco Franco in the Spanish Civil War.[116] The Supreme Court took these four cases together. Justice Owen Roberts, who later authored the *Cantwell* opinion, wrote the *Schneider* opinion. Roberts echoed Hughes' sentiment in the *Lovell* case. Roberts reiterated that freedoms of speech and the press were important

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115 *Lovel v. City of Griffin, Georgia* 303 U.S. 444 (1938).

116 *Schneider v. State of N J, Town of Irvington*, 308 U.S. 147 (1939). TRANSCRIPT OF RECORD. File Date: 3/1/1939. 26 pp. *U.S. Supreme Court Records and Briefs, 1832-1978*. Gale, Cengage Learning. University of Texas at Austin - Law. 17 March 2014 http://galenet.galegroup.com/servlet/SCRB?uid=0&srchtp=a&ste=14&rcn=DW3908181862,

liberties, and that the ordinances involved in all four cases before the Supreme Court were too expansive to be beneficial. According to Roberts, individuals had a right to be on the streets and disseminate information that expressed their views. If cities incurred problems from excess trash from the papers distributed, Roberts asserted, the cities had to bear that cost in order to preserve the more important rights of free speech and free press. Only Justice McReynolds, the frequently crabby conservative justice, dissented, but he did not write an opinion explaining his perspective. We cannot be sure if McReynold's notoriety for opposing New Deal efforts with labor issues could have affected his dissent.[117]

The *Cantwell* case arrived at the court in this cultural and political context and had parallels with both the *Lovell* case and the *Schneider* case. As in *Lovell* and *Schneider*, the Cantwell men distributed Jehovah's Witness pamphlets by going door-to-door. The Cantwell's situation differed slightly because the ordinances involved were much more specifically written than the previous cases. In those earlier cases, the Supreme Court had found unconstitutional prohibitions of distributing printed materials of any kind. In Connecticut, the lawmakers drew the laws more narrowly, only specifying solicitation for "religious, charitable or philanthropic cause."[118] This was a less generalized law and could have appeased Chief Justice Hughes' concerns expressed in the *Lovell* case. Because *Schneider* had included non-religious pamphlets, the Connecticut case also brought to bear interesting new issues dealing with religion

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[117] *Schneider v. State of New Jersey, Town of Irvington,* 308 U.S. 147 (1939).

[118] Connecticut General Statutes Section 6294

specifically. In light of the burgeoning field of incorporation, the *Cantwell* case proved intriguing enough for the Supreme Court to accept it – granting it *certiorari* only three months after the *Schneider* case opinion was made public.

ARGUMENT AT THE SUPREME COURT

In their appeal to the Supreme Court, the Cantwells' argument stated that Connecticut law and Constitution violated the Cantwell's free exercise of religion as protected by the First Amendment of the U.S. Constitution, when impact of the due process clause of the Fourteenth Amendment was considered. While that was also the original argument in the Connecticut cases, the judges had not considered that argument at all. Hayden Covington, chief counsel of the Jehovah's Witnesses and lawyer for the Cantwells, claimed that the Connecticut laws requiring a license to solicit for religious purposes and limiting speech to prevent disruptions of the public order violated the constitutions of both Connecticut and the United States. According to Covington, Connecticut unconstitutionally restricted the Cantwell's right to worship God as protected by free exercise clauses in those constitutions. When Chief Justice Hughes asked if there was "no limit at all on what you can do because you think you are worshipping God," Covington replied, "there is no limit."[119] Justice Murphy, the only Catholic on the Court, remained mostly silent during oral arguments but asked if the principal purpose of going door to door was solicitation or "dissemination of ideas." Although, the lower courts convicted the Cantwell's because they violated Connecticut's laws concerning door-to-

119 "Respect Right Of All Faiths, Hughes Says," *The Washington Post,* Mar 30, 1940, 2.

door solicitation, Covington claimed that the Cantwell's primary purpose was "dissemination of ideas." According to Covington and the Cantwell's written appeal to the Court, the religious worship activity of going door-to-door did not include "receipt of money." Covington further argued that if public order limits on free speech were left in place, Republicans and Democrats could no longer speak out against one another.[120]

Because the lower courts did not deal with the U.S. Constitution, the lawyers representing Connecticut made additional arguments to the Supreme Court Justices.[121] When arguing about the need for a certificate to solicit, the defense claimed "the purpose of the statute is to protect the public from fraud in solicitation of money or other valuables under the guise of religion."[122] This meant, the Connecticut lawyers suggested, that the Connecticut law did not deal with free speech, or inhibit "freedom to worship." The defense also narrowly defined free exercise as "freedom to worship." The defense argued that solicitation was not a "worship activity" and, therefore, that the Cantwells' free exercise of religion – that is, freedom to worship—remained intact despite the certificate legislation.

To argue that the Cantwells breached the peace, the Connecticut lawyers claimed that breaches of peace do not actually need to provoke violence. Instead, the defense cited several lower court cases where disruptions occurred despite a lack of violence.[123] Finally, the defense argued that religious justifications for breaching peace were

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120 Ibid.

121 The Attorney General and Assistant Attorney General of Connecticut joined Pickett's prosecuting team in the national arena.

122 *Cantwell v. Connecticut* 310 U.S. at 298.

123 *Cantwell,* 310 U.S. at 296.

illegitimate. In order to support the claim that good order surpassed acts "claimed to have been motivated by religious belief," the plaintiffs cited *Reynolds v. United States*.[124] In the 1878 *Reynolds* case, the Supreme Court decided the free exercise clause did not excuse a Latter-day Saint's practice of polygamy in the Utah territory in defiance of federal anti-bigamy laws. Here, the Court had made a distinction between belief and action, allowing the former and restricting the latter in particular cases.

The questions for all involved in *Cantwell* were twofold. Would the Supreme Court decide that there was enough danger posed by the threat of violence by a sixteen year old to two Catholic men in their twenties to justify limiting speech? Did the Cantwell's proselytizing count as a type of religious activity potentially protected by the free exercise clause on the national stage? As we have seen, the Supreme Court began incorporating various parts of the Bill of Rights to states, and *Cantwell* was an opportunity to continue that trend. By accepting this case with religious freedom issues, when taken in context with the previous incorporation of free speech in *Gitlow* and freedom of the press in *Schneider*, a ruling on the free exercise of religion clause appeared inevitable.

THE SUPREME COURT DECISION

In a unanimous decision articulated by Justice Owen Roberts, the Supreme Court decided in favor of the Cantwell men. Yet this decision was not sweeping; it allowed certain restrictions on religious free exercise. Roberts echoed principles from the

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[124] *Cantwell,* 310 U.S. at 297.

Reynolds case where an earlier Supreme Court had ruled that religious freedom of action was not absolute. In reference to the First Amendment, Justice Roberts wrote, "the Amendment embraces two concepts, freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be."[125] For Justice Roberts, freedom of religion was primary, and any other right the state had to regulate must be weighed against the primary right of religious free exercise. Roberts described free exercise of religion as part of the "fundamental law" of the United States.[126]

In his opinion, Justice Roberts maintained that states could regulate "the times, the places, and the manner of soliciting upon the streets," as well as "safeguard the peace, good order, and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment."[127] Justice Roberts did not agree with Covington that freedom of religious practice ought to be unlimited. However, Roberts found that the statute concerning the certificate to solicit placed the power to determine what constituted a legitimate religion into the hands of the secretary of public welfare. By the terms of the statute, Justice Roberts stated, the secretary of public welfare was granted too much power to distinguish a religious and a non-religious cause.[128] Further, because the statue did not allow solicitation of funds from nonmembers, it prohibited proselytizing activities without a certificate. Justice Roberts viewed a potential rejection of a certificate as inhibiting the propagation of religious communities: "Such a censorship

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125 *Cantwell,* 310 U.S. at 303-304.
126 *Cantwell,* 310 U.S. at 307.
127 *Cantwell,* 310 U.S. at 304.
128 *Cantwell,* 310 U.S. at 306.

of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment and included in the liberty which is within the protection of the Fourteenth."[129]

On the matter of the Connecticut statute on breaching peace, Justice Roberts reached a different conclusion than the courts below. After a preamble stating that, for the most part, the Supremes defer to the judgment of lower courts on more narrowly defined legislation, Justice Roberts proceeded to overturn the lower court decision on the grounds that the Connecticut statute was too broadly written. He pointed out that the *Cantwell* case dealt with "a statute sweeping in a great variety of conduct under a general and indefinite characterization, leaving to the executive and judicial branches too wide a discretion with regard to its application." Justice Roberts more narrowly defined the statute for Connecticut to tell them what breach of peace did not include. He claimed that Jesse Cantwell "was upon a public street, where he had a right to be." After asking two pedestrians to play a record, and receiving permission, Jesse played the record. Afterward, the hearers testified, as I noted earlier, that they "felt like hitting Cantwell" and wanted to "throw Cantwell off the street." Although Justice Roberts acknowledged that the contents of the recording attacked the Roman Catholic Church in particular, he did not mention the listeners' Catholicism. Roberts claimed that Jesse Cantwell did not "intend to insult or affront the hearers by playing the record," and meant "no intentional discourtesy, no personal abuse."[130] Roberts instead claimed "it is plain that he [Jesse

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129 *Cantwell,* 310 U.S. at 304.
130 *Cantwell,* 310 U.S. at 297.

Cantwell] wished only to interest them [John Ganley and John Cafferty] in his propaganda."[131] Although Justice Roberts admitted "the hearers were highly offended," it made no difference to Justice Roberts' decision making. Unlike judges in the lower courts who placed emphasis on the testimonies from offended Catholics, Justice Roberts did not focus on the feelings or beliefs of the local Catholics. He was far more concerned with Jesse Cantwell's conduct rather than "the effect of his communication upon his listeners."[132] Justice Roberts shrugged off the vilification of the Catholic Church on Jesse Cantwell's record and implied that it was an "exaggeration." "To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement."[133] Justice Roberts implied that the Cantwells' message about Roman Catholicism was incorrect and that the Cantwells knew it. They simply used the vilification of Catholicism as a way to persuade their audience. Justice Roberts closed his argument by articulating his general understanding of the protection of conflicting religious opinions as "essential to the enlightened opinion and right conduct on the part of the citizens of a democracy."[134]

In his decision, Justice Roberts did not address the question of the Connecticut Constitution. Jurisdiction of the Supreme Court historically lies in federal issues, not in state matters, but in some circumstances the Supreme Court does rule on state issues. By

131 Ibid.
132 *Cantwell,* 310 U.S. at 310.
133 Ibid.
134 Ibid.

limiting the scope, Roberts immediately obscured part of the local environment. Roberts did not address the questions of whether the laws were inconsistent with the Connecticut Constitution or if the Connecticut Constitution violated the U.S. Constitution. By not responding, Justice Roberts did not evaluate those sections in the Connecticut Constitution. He also did not rule whether the Connecticut legislature acted consistently with its own state constitution. Of particular note, Justice Roberts left unanswered what freedom of religion means when limited by a clause in Connecticut's Constitution protecting religious freedom yet prohibiting "practices inconsistent with the peace and safety of the state."[135] That phrase remains in the Connecticut Constitution today. Religious freedom with an explicit safety clause could have led to a different society than that developed through use of the religious freedom language in the First Amendment of the U.S. Constitution.[136]

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135 Constitution of Connecticut, Article 1, Section 3.

136 This type of restriction on religious freedom could result in many different ways, including how Connecticut worked out their arrangement. For Connecticut, the peace and safety clause meant that religious activity could be regulated more directly. In this case, this meant that a permitting process regulated door-to-door religious distribution of materials, and that any person's proclivity to violence in the face of religious messages could affect whether or not those religious messages would be deemed acceptable or illegal. Any qualifier on a civil liberty freedom guarantee serves to limit that freedom. This means that a peace and safety restriction on religious freedom makes legislators, law enforcement officials, judges, and community members much more likely to look for how a religious activity could be deemed to disturb peace and safety. Theoretically, if a Jehovah's Witness family proselytized on Cassius Street today, the Connecticut Constitution still indicates it could be prosecuted if the activity led to disturbance of the peace. The inconsistency with the U.S. Constitution as interpreted in Cantwell could have been clarified. It is a particularly complex nuance in language, but the nuance could have major real world implications.

THE IMPLICATIONS: WHAT WE CAN LEARN FROM *CANTWELL*

In *Cantwell*, Justice Roberts, writing for the Supreme Court, made precedent-setting arguments about religious liberty and free speech in the United States. The case had great impact: it formed the basis for the majority of free exercise court cases that followed.[137] However, Justice Roberts's written opinion ignored some of the facts of the case considered most crucial in the lower court decisions. Some of this can be attributed to the way the Supreme Court operated and continues to operate. Supreme Court Justices read briefs and listened to short oral arguments by specially trained lawyers. Justices interrupted those lawyers with questions and the lawyers never fully orally delivered their carefully planned arguments. The Justices limited the discussion to those points that impacted their interest in the case.

Justices focused on what constituted religious worship and, therefore, were subject to protections of free exercise in *Cantwell*. This enabled Justices to largely push aside the facts and context that created the local dispute and the resulting legal case. The Supreme Court Justices and legal scholars who later analyzed the Supreme Court opinion were most interested in articulating precedents to be used in related cases. This meant that the detail about religious conflict only mattered insofar as they allowed Justice Roberts to articulate the point the Court wanted to make about one particular constitutional principle – that free exercise was a primary right and should be

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137 Many cases, including: *Sherbert v. Verner* 374 U.S. 398 (1963). *Employment Division, Department of Human Resources of Oregon v. Smith* 494 U.S. 872 (1990). *Church of Lukumi Babalu Aye v. City of Hialeah* 508 U.S. 520 (1993).

incorporated to the states. To the degree that the local detail did not help Justice Roberts articulate that constitutional principle, he and the other Justices were unconcerned if those facts were lost. Although he referenced some of the facts of the case in his opinion, Justice Roberts largely ignored the claims of the participants involved in the earliest days of the dispute over the Cantwells' actions.

Reconstructing local detail, as I have tried to do in my analysis of *Cantwell v. Connecticut*, could enrich scholarly interpretation of cases by both scholars of U.S. law and scholars of U.S. religion. This case set a major precedent -- the incorporation of free exercise and free speech from the First Amendment of the Constitution to state jurisdiction. Nevertheless, the precedent grew from an interesting case surrounding the events that occurred when Newton Cantwell drove with his wife and two teenage sons from Woodbridge, Connecticut, to Cassius Street in neighboring New Haven, Connecticut to proselytize.

IMPLICATIONS FOR U.S. LEGAL SCHOLARS: LOCAL CONTEXT MATTERS

By reconstructing the local context in *Cantwell*, problems raised by the Connecticut Constitution emerged. Yet no judge at any level of the judicial system addressed those concerns. In *Cantwell* at the Supreme Court, justices overturned state law, but did not overturn or even address the state constitution. The state constitution could be read to enable such laws that strive to protect the public safety, even if they impinge upon free exercise in the state. The Supreme Court could have addressed this section of the Connecticut Constitution. Federal judges wield that power. This issue has become even more salient. For example, in recent years, federal judges invalidated state

constitutional amendments, including controversial cases moving through the court system currently, about the constitutionality of amendments to state constitutions prohibiting same-sex marriage.

One way to address state laws and constitutions could have been through the Supremacy Clause. The Supremacy Clause of the U.S. Constitution established the U.S. Constitution, federal laws, and U.S. treaties as "the supreme law of the land." In Article 6, Section 2, the Supremacy Clause says, "the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." As early as 1819, the Supreme Court articulated that it had the power to invalidate any state action that conflicted with the U.S. Constitution, federal law, or treaties.[138] Why did the Supreme Court not invoke this in the *Cantwell* case? This question has not sparked scholarship in the past, so we await more research before we can be more certain. There are, however, at least two plausible reasons that the Supreme Court did not use the Supremacy Clause: the Supreme Court had never previously cited the Supremacy Clause in cases dealing with the Bill of Rights, or the Supreme Court's own precedents at the time made it easier to make decisions about incorporation using the Fourteenth Amendment Due Process Clause.

As in this case, Supreme Court Justices have frequently invoked the authority of precedents and this could have been another reason the process obscured the local context in *Cantwell*. Precedents, according to legal scholars Ryan Black and James Spriggs, are defined as legal principles that have articulated "legal consequences or tests that follow

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[138] See *McCulloch v. Maryland* 17 U.S. 316 (1819).

from particular sets of factual circumstances."[139] Although not always followed, precedents have been an important way for Supreme Court Justices to justify decisions. This tendency for Justices to follow the lead of previous decisions came from the legal principal of *stare decisis*. *Stare decisis* emerged out of the British common law system, upon which the U.S. legal system was based. Literally meaning, "let the decision stand," *stare decisis* is "the policy of courts to abide by or adhere to principles established from earlier cases."[140] It implies that courts should start with principles set up by previous rulings articulated by the Supreme Court. Precedents have not usually changed quickly. Major revisions are rare and usually accompany a significant shift in interpretation. Some precedents have been completely overruled. The *Barron v. Baltimore*'s precedent—that the Supreme Court could not rule on an action of a city in 1833— was eventually overturned in the twentieth century. The abandonment of the *Barron* precedent can also be attributed to the addition of the Fourteenth Amendment and its impact on the Constitution as a whole. In proposing that free exercise applied to the states, the Supreme Court established a major new precedent. Still, even that new precedent was based on the *stare decisis* principle, because it was in line with how they were deciding similar cases about First Amendment freedoms in light of the Fourteenth and about information dissemination cases from the previous two years. This meant that the local case only nominally mattered to how the case would be decided and justified. Taking the local-

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139 Ryan Black and James Spriggs, "The Citation and Depreciation of U.S. Supreme Court Precedent," *Journal of Empirical Legal Studies* 10 no.2 (2013): 325-358.

140 "Stare decisis," *Gale Encyclopedia of American Law*, ed. Donna Batten, 3rd ed. Detroit: Gale, 2010:336.

centered approach I have advocated in this study could help legal scholars be more critical of the justices' tendency to rely on precedent and *stare decisis* because that practice tends to obscure the facts of the case.

Some scholars of U.S. law attend carefully to theoretical discourse, while others pay greater attention to some religious practitioners, but few give sufficient attention to historical context. Christopher Eisgruber and Lawrence Sager, respected legal scholars, pay great attention to the theoretical undergirding of decisions, but miss many of the particular contextual details in order to produce a prescriptive analysis that helps inform the legal scholars with a normative bend.[141] That approach is important, but more scholars of U.S. law should take the lead of Noah Feldman, who deals with religion in a more evenhanded way and cares more deeply about historical context. Unfortunately the main point Feldman emphasizes is prescriptive and he also falls into the trap of focusing on precedents. But the historical reconstruction is there.[142]

IMPLICATIONS FOR RELIGIOUS HISTORIANS: LAW MATTERS

Another reason for focusing on the local context is to take seriously the religious claims of the participants That attention has been a strength of the few religious historians who have taken law seriously.[143] As I have tried to demonstrate in this case study, religious studies scholars who focus on the U.S. might benefit from learning more about

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141 Christopher L. Eisgruber and Lawrence G. Sager, *Religious Freedom and the Constitution*, (Cambridge, Mass.: Harvard Universty Press, 2007).

142 Noah R. Feldman, *Divided by God: America's Church-State Problem - And What We Should Do About It* (Farrar, Straus & Giroux 2005).

143 See Edwin Gaustad, *Faith of the Founders*, Winnifred Fallers Sullivan, *Paying the Words Extra*, Tisa Wenger, *We have a Religion*, Amanda Porterfield, *Conceived in Doubt*, Isaac Weiner, *Religion Out Loud*.

how non-specialists of religion have dealt with religion in the public sphere. That would enrich their historical work as well as help to fill in the gaps in understanding of religious issues by legal scholars. Better understanding of theology, practice, and religious identity can make for a more complete and nuanced analysis of cases.

The reverse is also true. By understanding how the law mediates religious practice, religious studies scholars can better understand the actions and interactions of religious people at different moments in history. Some scholars trained in both fields, like Sarah Barringer Gordon, are able to do this particularly well.[144] More religious studies scholars need to follow the lead of Gordon, Tisa Wenger, and Isaac Weiner and take careful notice of where law affected U.S. religious history.[145] Even if law is not the subject of inquiry for a given project, looking at the legal structure within which religious participants operate could help historical studies. While some studies, like mine, clearly intersect with law, others only do so in a tangential manner. The Jehovah's Witnesses in this case directly challenged the status quo in the legal sphere because of a perceived new opening in Constitutional interpretation. Context matters and the legal context can be a particularly salient feature.

As a scholar of religion, I find it deeply disturbing that Justice Roberts intimated that Jesse Cantwell, or even Judge Rutherford, who created the record that offended listeners on Cassius Street, might have been exaggerating to persuade listeners. To Justice Roberts' Episcopalian ears, the Jehovah's Witness' perspective on Catholic hierarchy

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144 Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth Century America* (Chapel Hill: University of North Carolina Press, 2001).
145 Tisa Wenger, *We have a Religion*, and Isaac Weiner, *Religion Out Loud*.

might have seemed overblown, but it sounded very similar to language of a slightly earlier era. The anti-Catholic rhetoric of the Jehovah's Witnesses would have been familiar to the mostly Protestant court and most adults who lived through the "tribal twenties," to use the phrase Martin Marty popularized to describe the ethnic and religious intolerance of the era.[146] In any case, the Catholics who heard the message reacted as if it was religiously bigoted. These facts make a difference in the story of religious history in the United States. Thus the intervention of religious studies scholars, I hope, can help by providing the adequate context for a richer interpretation, one that recovers the beliefs and practices of all the participants.

Other cases raise similar issues. For example, in *Bowen v. Roy* (1986), Native American parents petitioned to not have a Social Security number assigned to their child because they believe that the number will "rob the spirit of [their] daughter and prevent her from attaining greater spiritual power."[147] In direct contradiction to the petitioner's claim, Chief Justice Burger claimed, "The Federal Government's use of a Social Security number for Little Bird of the Snow does not itself in any degree impair Roy's 'freedom to believe, express, and exercise' his religion."[148] Of course, these decisions were likely difficult to make, as the Court ended up with plurality opinions in *Bowen*, meaning that the Justices did not agree on how to decide the case. Nevertheless, this complexity in

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146 Martin Marty, *Modern American Religion, Volume 2: The Noise of Conflict, 1919-1941*, (Chicago: University of Chicago Press, 1991), 16. Marty cites this term from John Higham, *Strangers in the Land: Patterns of American Nativism, 1860-1925* (New Brunswick, N.J.: Rutgers University Press, 2002; 1st ed. 1954), 264.

147 *Bowen v. Roy* 476 U.S. 697 (1986).

148 Ibid.

determining what mattered to people religiously and deciding whether those religious concerns were most important was a difficult task for Supreme Court Justices and others in the legal profession.[149]

Similarly, while Justice Roberts' legal principles were likely sound in *Cantwell*, his brushing aside of the listeners' offense was problematic. Free exercise of religion in this case only provided free exercise of religion *for* the Jehovah's Witnesses. It did not protect the Catholics' free exercise of religion *from* the free exercise of the Jehovah's Witnesses. Of course, that could have opened many other issues with which the Court did not want to deal. Taking seriously the religious practices and rights of all citizens involved, not just those who were arrested, could be another way for scholars of religion to contribute to legal history.

Currently the Supreme Court is considering a case in which the court is being asked to decide whose rights triumph. The Supreme Court heard arguments over the Affordable Care Act's requirement of employers to provide certain types of preventative reproductive care for women. In *Sebelius v. Hobby Lobby Stores, Inc.* and *Conestoga Wood Specialties Corp. v. Kathleen Sebelius*, the owners of these two corporations objected on religious grounds to providing certain types of birth control required by the Affordable Care Act. In the oral argument, some Justices questioned lawyers about the rights of the workers. These Justices raised questions of whether there was an imposition

149 For a major critique of the legal field's inadequacies on religion see, Winifred Sullivan's *Impossibility of Religious Freedom*, (Princeton, N.J.: Princeton University Press, 2005).

by the employer on the employees in addition to the law's imposition on the employer.[150] The court could side strictly with the employer, strictly with the law and employee, attempt to craft a compromise, or duck the issue due to legal technicalities, as has been known to happen in other cases.[151] In a few months when the Supreme Court releases opinions we will see. From the precedents formulated by the *Cantwell* case, it would seem that the employees' rights would not be addressed. Those precedents may not hold. It is now seventy-four years later, there is an entirely new court, and the rights of freedom *from* the free exercise of others could be considered.

The *Cantwell* case brought together two religious minorities battling for influence and prestige in the 1930s, and a rich account of what happened depends on reconstructing the contextual particulars. The period mattered, the place mattered, and the people mattered. The ways in which different judicial levels responded to the incidents surrounding *Cantwell* and the huge impact that each made on the legal field is instructive. In learning more through this case study, a better picture emerges of the religious and legal situation of the 1930s. Connecticut tried to protect the local Catholics from the disruption caused by the visiting Cantwells. The Supreme Court protected the Cantwells' right to proselytize without significant regard to the rights of the Catholics to be protected

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[150] *Kathleen Sebelius v. Hobby Lobby Stores, Inc.* and *Conestoga Wood Specialties Corporation v. Kathleen Sebelius* Nos. 13-354 and 13-356, argued on March 25, 2014, accessed March 26, 2014, http://www.supremecourt.gov/oral_arguments/argument_transcripts/13-354_3ebh.pdf.

[151] For a technicality decision, see *Elk Grove Unified School District v. Newdow* 542 U.S. 1 (2004), where a challenge on the constitutionality of the words "under God" in the Pledge of Allegiance were averted due to the lack of standing. The Supreme Court ruled that Michael Newdow did not have standing to challenge the pledge. Newdow brought the suit on behalf of his daughter, who attended a school that began each day with the Pledge. However, since Newdow did not have custody of his daughter, the Supreme Court did not decide the case on whether or not the Pledge was constitutional with the words "under God," but instead claimed Newdow did not have proper standing to bring the case in the first place.

from abuse. It will be interesting to see if the rights of free exercise of Hobby Lobby and Conestoga Wood owners are protected, even if they impact employees. The Cantwells and their religious community were the clear victors in their case.[152] The Catholic residents of Cassius Street were the clear losers. Hopefully, the current court will dig in to the local context and consider the rights of both the owners and employees in the *Hobby Lobby* and *Conestoga Wood* case. No matter how the case turns out, I hope that scholars of religion and law will search not only for precedents and principles, but also try to reconstruct the complex interactions of religious actors in their particular time and place.

[152] This is not to discount the other "winners" who got their day in federal court due to incorporation of the free exercise clause, including *Wisconsin v. Yoder* 406 U.S. 205 (1972) and *Church of Lukumi Babalu Aye v. City of Hialeah* 508 U.S. 520 (1993).

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Vita

Katharine M. Batlan received the degree of Bachelor of Arts from Texas Christian University in Fort Worth, Texas in 2010. Next, she attended Harvard Divinity School in Cambridge, Massachusetts, finishing her degree of Master of Theological Studies in 2012. In August 2012, she entered the Graduate School at the University of Texas at Austin.

Permanent email: kbatlan@utexas.edu

This report was typed by the author.