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# VALIDITY OF COMPULSORY FLAG SALUTES IN PUBLIC SCHOOLS

By ELMER M. MILLION\*

Many and in recent years an increasing number of states and localities have adopted statutes, regulations, or customs requiring that all public schools display the United States flag and that all public school students salute and pledge allegiance to that flag.<sup>1</sup> The validity of this compulsory salute and pledge has been frequently contested in the last few years. No earlier cases on the point are reported, and virtually all of the recent disputes have involved members of a religious sect known as Jehovah's Witnesses which holds that saluting the flag and pledging allegiance to it are forms of worship, ascribing salvation to the flag or the government it represents, and hence forbidden by God as revealed in the Holy Bible,<sup>2</sup> and punishable by eternal destruction.

While the wisdom and efficacy of such compulsory ceremonies is often questioned, apparently no one asserts the existence of any constitutional objection to their enforcement against persons whose religious convictions are not involved. Provisions of both Federal and state constitutions, however, have been quoted as forbidding their enforcement against "Witnesses" who, because of religious convictions, refuse to observe them.

As all of the reported cases hereon are influenced by *Hamilton v. Regents of the University of California*,<sup>3</sup> a glance at the facts and holding of that case is proper. Three Methodist

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<sup>1</sup> A Georgia statute requires the salute and pledge for the United States flag and the state flag. Acts 1935, p. 1253.

<sup>2</sup> *Exodus*, ch. xx: 3. "Thou shalt have no other gods before me. 4. Thou shalt not make unto thee any graven image, or any likeness of any thing . . . 5. Thou shalt not bow down thyself to them, nor serve them . . ."

<sup>3</sup> 293 U. S. 245, 79 L. Ed. 343, 55 Sup. Ct. 197 (1934).

students of the University of California who had been suspended for refusal to take the military training course which that school made compulsory,<sup>4</sup> sought to compel their reinstatement as students. The Methodist General Conference had renounced war as an instrument of national policy and had petitioned the Government to exempt from military service and from college military training any Methodist student who conscientiously believed that his participation in a war was a denial of his superior allegiance to Christ. That the three suspended students conscientiously believed military training to be wrongful and un-Christian was conceded. Denied relief by the California court,<sup>5</sup> the students appealed to the United States Supreme Court, invoking the clause of the Fourteenth Amendment forbidding any state to enforce any law abridging the privileges or immunities of citizens of the United States, but were reminded by that Court that the privileges and immunities referred to were only those enjoyed as citizens of the United States rather than as citizens of a particular state, and the privilege of attending a state university was conferred on them as citizens of the particular state, so was not within the Amendment's prohibition. The "due process" and other clauses were invoked with similar fruitlessness. The Court also ruled that financial inability to attend college elsewhere was immaterial, there being no requirement that the students attend college, or that the state provide college training for all those seeking it. Referring to the students' statement that it is a "fixed principle of our Constitution, zealously guarded by our laws, that a citizen cannot be forced and need not bear arms in a war if he has conscientious religious scruples against doing so" the Court said:

"Of course there is no such principle of the Constitution, fixed or

<sup>4</sup>The University was a land grant school, required by the Morrill Act to provide military training for all eligible students. Some states interpret the act as obliging the school to *compel* students to take the training; a few others hold that it gives the state an option to compel students to take training, but requires only that the training be made available. For the latter view, see Wis. Stat. (1931) s. 36, 15; Colby, *Military Training in Land Grant Colleges* (1934) 23 Geo. L. J. 1. *Contra*: Johnson, *Military Training in the Land Grant Colleges; Optional or Mandatory?* (1929) 24 Ill. L. Rev. 271. The Supreme Court has not yet settled the question, and in the Hamilton case expressly declined to do so.

<sup>5</sup>Hamilton v. Regents of University of California, 219 Cal. 663, 28 Pac. (2d) 355 (1934).

otherwise. The conscientious objector is relieved from the obligation to bear arms . . . because and only because it has accorded with the policy of Congress thus to relieve him. (If Congress) . . . withhold the exemption . . . the native-born conscientious objector cannot successfully assert the privilege."<sup>6</sup>

This denial by the Court that any group, including Friends, had a constitutional right because of religious conviction to escape the duty of bearing arms in time of war was further emphasized in a concurring opinion in which Justice Cardozo declared:

"The right of private judgment has never yet been exalted above the powers and the compulsion of the agencies of the government."

The earliest reported decision involving the validity of the compulsory salute and pledge as applied to students belonging to Jehovah's Witnesses was *Hering v. State Board of Education*,<sup>8</sup> involving the New Jersey statute which required all pupils in public schools to observe the ceremonies each day. The plaintiff's two children, five and seven years old, were expelled from public school for refusing to obey the statute. In refusing to order their reinstatement, the New Jersey Supreme Court, in February, 1937, held that the state constitutional guaranty of equal free schools for all did not prohibit the legislature from requiring this patriotic ceremony in schools supported at public expense. The court flatly denied that the salute interfered with religious freedom or was in any way a religious rite, and found further that the ceremony was not really required, since students were not compelled to attend public schools, but could avoid the ceremony by going to private schools.

In April, 1937, the supreme judicial court of Massachusetts, in *Nicholls v. Mayor and School Committee of Lynn*,<sup>9</sup> rendered a similar decision, upholding the Lynn public school rule requiring the salute and pledge from all students once each week. Plaintiff, an eight year old boy in the third grade, who had performed the exercises during his first two years of school,

<sup>6</sup> *Hamilton v. Regents (etc.)*, 293 U. S. 245, 264, 79 L. Ed. 343, 353, 55 Sup. Ct. 197 (1934).

<sup>7</sup> *Id.* at 268, 79 L. Ed. at 355.

<sup>8</sup> 117 N. J. L. 455, 189 Atl. 629 (1937), *aff'd*, 118 N. J. L. 566, 194 Atl. 177 (1937), *appeal dismissed*, 303 U. S. 624, 82 L. ed. 1087, 58 S. Ct. 752 (1937).

<sup>9</sup> — Mass. —, 7 N. E. (2d) 577 (1937). Noted approvingly (1938) 36 Mich. L. Rev. 485

now refused to do so because of his religious beliefs as a "Witness." The school committee had voted to exclude him from classes until he should of his own free will be willing to comply. In refusing to compel his reinstatement, the court held the school rule to be within the general powers conferred upon local school boards as well as being expressly required by a Massachusetts statute of 1935. Moreover, the statute was upheld under both the state and Federal Constitutions, including the state constitutional prohibition against laws prohibiting free exercise of religion, its guaranty that no one should be restrained from worshipping God in the manner most agreeable to his conscience, and a statute forbidding the exclusion of any child from a public school on account of religion. The court conceded that the constitution guaranteed:

"absolute freedom as to religious belief and liberty unrestrained as to religious practices, subject only to the conditions that the public peace not be disturbed nor others obstructed in their religious worship or the general obligations of good citizenship violated."<sup>10</sup>

and admitted that the plaintiff had made no disturbance in school, but ruled that the salute and pledge in no sense related to religion, were not religious in nature, and did not interfere with his religious beliefs. Further, his refusal to obey was in contravention of the rules, and the absolute prohibition against interference with religious belief did not extend to religious practices.<sup>11</sup>

In May, 1937, the Georgia Supreme Court in *Leoles v. Landers*,<sup>12</sup> upheld the expulsion of a twelve year old girl "Witness" from the Atlanta public schools under the Georgia statute requiring the salute and pledge to both the United States flag and the Georgia flag. A Georgia statute required that all children attend either a public school or a private school which taught the ordinary courses, but the court, relying on the *Hering* decision, held that students not wishing to salute could escape by attending private school. Attendance at public school was termed a *privilege*, not a right. After noting that

<sup>10</sup> *Id.* 7 N. E. (2d) 577, 579, quoting Opinion of the Justices, 214 Mass. 599, 601, 102 N. E. 464 (1913). A semicolon following the word "belief" would clarify the quotation.

<sup>11</sup> A doctrine established in *Reynolds v. United States*, 98 U. S. 145, 25 L. ed. 244 (1878). See also *Davis v. Beason*, 133 U. S. 333, 33 L. ed. 637 (1890).

<sup>12</sup> 134 Ga. 580, 192 S. E. 218 (1937), *appeal dismissed*, 302 U. S. 656, 82 L. ed. 507, 58 S. Ct. 364 (1937).

the United States Constitution does not prohibit state laws concerning religion,<sup>13</sup> the court held that neither the state constitution nor the Fourteenth Amendment had been violated. Finally, the flag salute could not "by any stretch of a reasonable imagination" be deemed a religious rite.

Without identifying it by name, the *Leoles* opinion alluded to a California case as being cited by counsel, and both disapproved it and pointed out a possible distinction between its facts and the Georgia situation. Possibly<sup>14</sup> the reference was to a California superior court ruling of July 10, 1936, that the expulsion of a "Witness", nine year old Charlotte Gabrielli, from a Sacramento public grade school violated both the state and Federal Constitutions. A writ of mandate was issued to compel her reinstatement.<sup>15</sup> Subsequent to the date of the *Leoles* opinion, the California district court of appeal in *Gabrielli v. Knickerbocker*<sup>16</sup> affirmed the superior court ruling. While basing its holding on the ground that the school board acted arbitrarily and without first trying other means of correction, thereby violating the statute which gives school boards power to suspend or expel pupils for misconduct "when other means of correction have failed to bring about proper conduct", the opinion also made the following declarations:

(1) The expulsion violated the Declaration of Rights of the state constitution.<sup>17</sup> The *Hering, Nicholls*, and *Leoles* decisions were distinguished as not involving any such provision. Conceding that those decisions had established that the salute and pledge were not religious rites, the court felt that they had not touched upon the problem of the added guaranty of liberty of conscience.<sup>18</sup>

<sup>13</sup> A rule that is unimportant since the same prohibition is found in the state Constitution and since the Fourteenth Amendment as now construed prohibits such legislation by the state.

<sup>14</sup> The writer has been unable to examine the briefs in the *Leoles* case, but the above superior court ruling is the only California holding he could find which antedated the *Leoles* opinion.

<sup>15</sup> The New York *Times*, July 11, 1936, p. 17, col. 7.

<sup>16</sup> — Cal. A. —, 74 Pac. (2) 290 (Nov., 1937).

<sup>17</sup> Sec. 4 of art. 1. "The free exercise of religious . . . worship, without discrimination . . . shall forever be guaranteed . . .; but liberty of conscience . . . shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state."

<sup>18</sup> The opinion continues 74 Pac. (2d) at 292: "Those cases relate practically only to professions and form of worship. . . Liberty of conscience goes much further."

(2) The other decisions were also distinguished as relying on specific flag salute statutes, California having no such statute, the requirement being only a custom, followed in the particular school, but not universally followed even in that county.

(3) California decisions had established that the right to attend public school was fundamental, a vested legal right as much as a vested right in property, hence the due process clauses of the state and Federal Constitutions were violated.

(4) A California statute said no student should be suspended from school for more than two consecutive weeks, but no limit was fixed in suspending Charlotte, hence the suspension was excessive.

On August 31, 1938, the supreme court of California<sup>19</sup> reversed the district court of appeal and upheld the action of the school board as being reasonable or at least not clearly unreasonable. Answering the other objections in the order raised by the earlier opinion, the Supreme Court:

(1) Held that California, like other states and the Supreme Court, could under its constitution distinguish between religious beliefs and religious practices, and that Charlotte's refusal to give the pledge went beyond the question of mere belief.<sup>20</sup>

(2) Inferred that the absence of a specific California statute requiring the salute and pledge was immaterial since another statute made it the duty of the schools to train the children in good citizenship, patriotism and loyalty to state and nation.<sup>21</sup>

(3) Held that the dismissal by the United States Supreme Court of the appeals in the *Leoles* and *Hering* cases, for want of a substantial federal question, demonstrated that such expulsions did not violate the Fourteenth Amendment. While such interpretations of the United States Constitution did not require similar construction of the same clause in the state constitution,

<sup>19</sup> *Gabrielli v. Knickerbocker* 12 Cal. (2d) 85, 82 Pac. (2d) 391 (1938), *appeal dismissed*, 83 L. ed. (adv.) 765 (1939).

<sup>20</sup> Citing *Reynolds v. United States*, *supra*, n. 11, and *Hamilton v. Regents*, *supra*, n. 3.

<sup>21</sup> School Code 5.544 ("... duty of teachers to impress... principles of patriotism; instruct in principles of a free government, and... the rights, duties and dignity of American citizenship"). The lower court opinion had cited this statute without discussing it.

no cogent reason existed for a different construction so the state would adopt the same construction.

While this argument did not expressly remark on the California holdings that children have a vested right to attend school whereas other states had held them to have only a privilege, the finding that the expulsion was reasonable satisfied the "due process" requirement and made it unnecessary to decide whether, in the last analysis, the two definitions actually differed.

The fourth argument, citing the two weeks' limitation on expulsions, was not directly answered. The court understood the expulsion order to exclude Charlotte until she chose to obey the rule. While this might exceed two weeks, it was obviously not within the meaning of the statute, as that limitation was intended to apply to punishments meted out for past offenses, not to suspensions for continuing disobedience.<sup>22</sup>

After *Leoles v. Landers*, the next flag salute case reported was in a federal court. In *Gobitis v. Minersville School District*<sup>23</sup> a Pennsylvania public school board had adopted a rule requiring the salute daily from all teachers and pupils. Plaintiff, his fifteen year old daughter and thirteen year old son, were all "Witnesses", protesting their loyalty to State and Federal Governments. The children were expelled for refusing to salute, and for a time had attended private schools. By adding the sums the plaintiff has already spent in sending each child to a private school, plus the sums he would have to spend to put both through future years of school, the court found the jurisdictional amount to be involved, so denied the school board's motion to dismiss. Conceding that neither the First Amendment nor the "privileges and immunities" clause had any application, the court felt that the rule violated the Pennsylvania constitution<sup>24</sup> and violated the due process clause

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<sup>22</sup> Just as statutes limiting the length of imprisonment for contempt should not be deemed to apply to a continuing contempt. *Ex parte Salkin*, 5 Cal. A. (2d) 436, 42 Pac. (2d) 1041 (1935).

<sup>23</sup> 21 F. Supp. 581 (E. D. Penn. 1937); Noted: (1938) 23 Corn. L. Q. 582.

<sup>24</sup> Note (1938) 86 U. Pa. L. Rev. 431, approves the decision denying the motion to dismiss, but cites two Pennsylvania superior court decisions and a 1935 Pennsylvania attorney general's opinion all upholding the right of expulsion for refusing to salute. See also 2 U. of Pittsburgh, L. Rev. 206 (1936), noting a criminal prosecution against parents for permitting children to remain away from school after expulsion.



of the Fourteenth Amendment by constituting a deprivation by *the state*, through its local school board, of religious liberty without due process. Acknowledging that the *Hering, Nicholls*, and *Leoles* decisions held that the salute could have no religious significance, the court felt that such decisions erred in not recognizing that religious liberty meant not only freedom to hold any belief but also freedom to do or refuse to do any act, on conscientious grounds, where the safety, property or personal rights of the public were not involved. *Hamilton v. Regents, supra*, was distinguished first on the ground that refusal to take military training might endanger the public safety, which a mere refusal to salute the flag could in no way do; secondly, that while attendance at college was a privilege, attendance at public schools was both a right and a duty under Pennsylvania law.<sup>25</sup> Subsequently, the court issued the injunction prayed for,<sup>26</sup> enjoining the school board from requiring the plaintiff's children to give the flag salute before permitting them to attend the public school. Adopting its previous opinion, the court added:

"... the refusal of these . . . children to salute the flag cannot even remotely prejudice or imperil the safety, health, morals, property or personal rights of their fellows. . . . The loyalty of our people is to be judged not so much by their words as by the part they play in the body politic."<sup>27</sup>

Six months later in, *Johnson v. Town of Deerfield*,<sup>28</sup> a different federal district court upheld the compulsory flag salute requirement of a Massachusetts local school board, denying an injunction against its operation and upholding its validity under the United States Constitution. The school board rule was in accordance with the previously mentioned Massachusetts statute requiring all public school teachers to cause their pupils to salute and pledge allegiance. As the *Nicholls* decision had upheld the statute's validity under the state constitution, the court held that question settled. The Supreme Court's denial

<sup>25</sup> The court failed to state that a similar requirement of attendance existed in Georgia and other states which termed school attendance a privilege. Note that the final *Gabrielli* decision, which had not yet been rendered at the date of this federal opinion, upheld the expulsion despite the existence of a *right* to attend school.

<sup>26</sup> *Gobitis v. Minersville School District*, 24 F. Supp. 271 (E. D. Penn. 1938).

<sup>27</sup> *Id.* at 274.

<sup>28</sup> 25 F. Supp. 918 (D. Mass., Jan. 1939), *aff'd*, 83 L. ed. (adv.) 765 (1939).

of the appeals in the *Leoles* case and the *Hering* case similarly established the validity of such regulations under the United States Constitution.

Citing *Reynolds v. United States*<sup>29</sup> and *Hamilton v. Regents, supra*, in which the Supreme Court had held that a person cannot excuse a practice contrary to statute merely because of his religious belief, the court conceded that the statutes in those cases (one forbidding polygamy and the other requiring military training) had a more obvious public necessity than the flag statute, but accepted the judgment of the state court that the latter statute bore a reasonable relation to some legitimate state purpose.

Regarding *Gobitis v. Minersville School District, supra*, the court pointed out that the Supreme Court decisions were controlling, but that the *Gobitis* decision might even be reconciled on the ground that it involved a school rule which it held void under the state constitution, which was not the case in Massachusetts. Concerning the *right* of a student to attend public school, the court pointed out that although such a right existed it was not absolute but was subject to reasonable conditions imposed by the state.

In New York the problem reached the courts because Grace Sandstrom, a thirteen year old girl "Witness" attending a public school, was expelled for refusing to salute the flag. Her parents were convicted by a Justice court jury of violating the statute making it the duty of parents to send their children to school. The county court affirmed the conviction.<sup>30</sup> A further appeal to the court of appeals brought a reversal and dismissal of the information, the court holding that the evidence showed the parents had caused Grace to return to school each time after her expulsion for refusing to salute,<sup>31</sup> and therefore were not guilty of any wrong, although Grace would be subject to summary punishment if she persisted in her refusal.

The New York statute requiring the commissioner of education to prepare for use in the public schools a program of patriotic exercises, including the flag salute, was upheld as

<sup>29</sup> 98 U. S. 145, 25 L. ed. 244 (1878). (No Constitutional objection to forbidding the *practice* of polygamy by Mormons although they were free to retain it as a religious *belief*.)

<sup>30</sup> *People ex rel. Fish v. Sandstrom*, 167 Misc. 436, 3 N. Y. Supp. (2d) 1006 (1938). Note (1938) 13 St. John's L. Rev. 144 (approving).

<sup>31</sup> *Id.* 279 N. Y. 523 18 N. E. (2d) 840 (Jan. 1939).

constitutional and as not a religious rite. The opinion relied on *Hamilton v. Regents, supra*, and emphasized that public opinion and loyalty were as vital to good government as military training, so that the state was justified in taking measures to engender patriotism in the young. Said the court:

"The state cannot reasonably be required to defer the adoption of measures for its own peace and safety until revolutionary utterance and acts lead to actual disturbance of the public peace or imminent and immediate danger of its own destruction; but it may . . . seek to prevent evil in its incipency. *Gitlow v. People of State of New York*, 268 U. S. 652, 45 S. Ct. 625, 69 L. Ed. 1138."<sup>22</sup>

Observing that it is the patriotic devotion evidenced by the salute rather than the compulsory ceremony itself which the statute seeks to develop, the court suggested that before treating Grace summarily for refusing, the school authorities should try reasoning and persuasion, coupled with tact. Sympathetic treatment, the court felt, would soon obtain obedience since the salute statute:

". . . has in substance been upon the statute books since 1898, a period of forty years. This is the first time that any trouble has arisen regarding its enforcement. . . ."<sup>23</sup>

Judge Lehman, concurring separately, conceded that the flag salute was not a religious rite, but felt that the constitutional guaranty of religious freedom and liberty of conscience forbade compelling the salute by anyone *thinking* it to be a religious rite. Forcing Grace to choose between obeying her school teacher or obeying what she understood to be the command of God, even though all judges agreed that no reasonable person could object to the salute and even though Episcopalians, Methodists, Presbyterians, Baptists, Catholics, and Jews all saluted unprotestingly, seemed inexcusable to Judge Lehman and not intended by the legislature. Emphasizing the futility of flag salutes where unaccompanied by the love and respect they are supposed to symbolize, he concluded:

"The flag cherished by all our hearts should not be soiled by the tears of a little child. The Constitution does not permit, and the Legislature never intended, that the flag should be so soiled and dishonored."<sup>24</sup>

<sup>22</sup> *Id.* 18 N. E. (2d) at 842.

<sup>23</sup> *Id.* 18 N. E. (2d) at 844.

<sup>24</sup> *Id.* 18 N. E. (2d) at 847. Judge Lehman's arguments are those of the district court of appeal in *Gabrielli v. Knickerbocker*: The existence of a vested right to attend school, freedom of religious *practices* except where inconsistent with the peace or safety of the state,

Many other controversies arose between "Witnesses" and school authorities seeking to enforce the flag salute, but most of them did not or have not yet reached the appellate courts. First becoming noticeable in 1935, the contests arose in many sections. Newspaper accounts included stories of the enactment of flag salute statutes by additional states, resolutions by patriotic and other groups in favor<sup>35</sup> of or opposed<sup>36</sup> to such statutes, regulations by school boards requiring such salutes even in the absence of statutes,<sup>37</sup> a ruling by the Arizona attorney general that students were subject to expulsion for refusal to salute,<sup>38</sup> and a ruling by the Washington attorney general that school authorities had no authority to expel students for refusing to salute.<sup>39</sup> In addition to the children involved in the reported cases already discussed, many other public school pupils, "Witnesses", were expelled. In 1935, although Connecticut had no flag statute, a Norwalk, Connecticut, high school boy was suspended from the school assemblies until he should join willingly in the assembly salute,<sup>40</sup> a Lakewood, New Jersey, football-playing student was expelled permanently after the expiration of one week of grace in which he remained absent from school rather than salute,<sup>41</sup> at least six grade school pupils in Saugus, Massachusetts, refused to salute<sup>42</sup> as had one teacher at Lynn, Massachusetts,<sup>43</sup> at least nine pupils having been expelled in that state by mid-November,<sup>44</sup> and a thirteen year old objector had been denied admittance to a Massachusetts academy.<sup>45</sup> In 1936, three Massachusetts students ranging

and no such danger threatened by mere refusal to salute the flag. The New York Constitutional guaranty of liberty of conscience is identical with the California provision which the court of appeal had sought to distinguish from the Massachusetts, Georgia, and New Jersey provisions.

<sup>35</sup> *New York Times*, Nov. 1, 1935, p. 23, col. 8 (Veterans of Foreign Wars, in Northern Ohio).

<sup>36</sup> *Id.* Oct. 19, 1935, p. 34, col. 4 (Six thousand Massachusetts school teachers in convention).

<sup>37</sup> *Id.* Nov. 1, 1935, p. 23, col. 7 (Chicago school board decree that all public school pupils must sing the National Anthem, salute and pledge allegiance to the flag every school day).

<sup>38</sup> *Id.* Feb. 10, 1939, p. 17, col. 2.

<sup>39</sup> Spokane (Wash.) *Daily Chronicle*, Mar. 18, 1939, p. 1, col. 8.

<sup>40</sup> *New York Times*, Oct. 20, 1935, p. 37, col. 2.

<sup>41</sup> *Id.* Nov. 6, 1935, p. 29, col. 4; Nov. 14, p. 24, col. 2.

<sup>42</sup> *Id.* Oct. 9, 1935, p. 25, col. 5; Oct. 10, 1935, p. 27, col. 3.

<sup>43</sup> *Id.* Nov. 14, 1935, p. 24, col. 2.

<sup>44</sup> *Ibid.*

<sup>45</sup> *Id.* Oct. 19, 1935, p. 34, col. 7 (Arms Academy, Shelburne Falls).

from nine to fifteen years of age, who for two weeks had refused to salute and pledge allegiance were convicted of delinquency and committed to the training school for the duration of their minority or until discharged according to law.<sup>46</sup> Newspaper accounts during 1939 include the expulsion in Fort Lee, New Jersey, of two high school "Witnesses", sons of a wounded World War veteran,<sup>47</sup> and the expulsion of two rural Arizona grade school pupils,<sup>48</sup> and the veto by Governor Olson of the California flag salute statute.

Instances are reported of seemingly excessive conduct on both sides. The mayor of Monessen, Pennsylvania, was reported as having fined sixty-eight women and girls and eighty men and boys, all "Witnesses", the sum of five dollars each for coming to town to arouse public opinion against him for closing a private school conducted for children of the sect.<sup>49</sup> The father of the boy whose expulsion was upheld in *Nicholls v. Mayor (etc.) of Lynn, supra*, had attended the school with a "friend" and sat through the ceremony in which the son refused to take part. Both men were jailed for disturbing school,<sup>50</sup> and each was fined twenty-five dollars. Both fines were paid.<sup>51</sup>

Of the decisions passing on the salute all of the state courts of last resort have upheld it, as has one federal district court, with only one federal district court decision to the contrary reported.<sup>52</sup> The dismissal by the Supreme Court for lack of a substantial federal question, of the appeals in

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<sup>46</sup>Gardner and Post, *Constitutional Questions Raised by the Flag Salute and Teacher's Oath Act in Massachusetts* (1936), 16 B. U. L. Rev. 803 (adding that the three children had appealed).

<sup>47</sup>New York Times, April 15, 1939, p. 19, col. 1.

<sup>48</sup>The Spokesman-Review (Spokane, Wash.), March 26, 1939, p. 2.

<sup>49</sup>The New York Times, May 26, 1936, p. 2, col. 3.

<sup>50</sup>*Id.* Oct. 1, 1935, p. 9, col. 2. The "friend" had not known Nicholls previously and was not himself a "Witness"; but, as an enemy of tyranny, accompanied him to the school and encouraged him in his opposition.

<sup>51</sup>The "friend" did not appeal his own conviction, because of injuries received in the Sacco-Vanzetti case years before. *Id.* Oct. 10, 1935, p. 27, col. 3. Nicholls said he dropped his appeal because the sect opposes the instigation of trouble as well as homage to man-made symbols. New York Times, Oct. 22, 1935, p. 23, col. 4. Different as the two men were by nature and in purpose, it seems likely that both were guilty of the offense charged against them, independently of the propriety of the expulsion of the boy, because they had entered the school, sat through the pledge and although ordered to leave by the teacher, refused to go and were removed by police.

<sup>52</sup>*Gobitis v. Minersville School District*, 24 F. Supp. 271 (E. D. Penn. 1938). A Supreme Court ruling on this case, if upholding the school authorities, should certainly put the question at rest.

*Leoles v. Landers*, *Hering v. State Board of Education*, and *Gabrielli v. Knickerbocker*, and its memorandum affirmance of *Johnson v. Deerfield*, would seem sufficient proof of Court approval of the legality of the compulsory salute and pledge, even in the absence of a statute expressly requiring it.

As to the validity of such statutes or regulations in the remaining states, it is submitted that no sound basis exists for invalidating them on the ground that the particular state recognizes that children have a *right* to attend school rather than a *privilege*. Some states upholding the statutes do hold that the pupil has only a privilege, not a vested right, but other states holding the pupil to have a *right* to attend school nevertheless have upheld the validity of the statutes<sup>53</sup>, or the regulations made by school boards in the absence of statute.<sup>54</sup> Furthermore, even the states which term school attendance a privilege do not permit it to be withdrawn arbitrarily from a given individual, and the states calling it a *right* consistently hold it to be subject to reasonable regulations. This leaves little or no difference between the two positions. The requirement that children attend public school reveals a difference between these cases and the decision of *Hamilton v. Regents*, but no ground for distinction exists, as most of the decisions already upholding the compulsory salute arose in states where the children involved were required to attend school. Nor should financial inability to attend a private school be material. The presence in the state constitution of a clause guaranteeing liberty of conscience does not warrant a different result from that reached in a state having merely a guaranty of freedom of worship, California and New York having squarely held adversely to any such distinction. Whether the courts were correct in holding that the salute is absolutely not a religious rite, it must be conceded that "Witnesses" are privileged to believe otherwise, however irrational that belief. But the refusal to salute goes beyond mere belief and becomes a matter of religious practice, which can be regulated where public welfare requires. Since public welfare always requires true patriotism, validity of the compulsory salute turns on whether it is a reasonable

<sup>53</sup> *Nicholls v. School Committee*, *supra*, n. 9, and *Johnson v. Deerfield*, *supra*, n. 28.

<sup>54</sup> *Gabrielli v. Knickerbocker*, 12 Cal. (2d) 85, 82 Pac. (2d) 391 (1938), *appeal dismissed*, 83 L. ed. (adv.) 765, 59 S. Ct. 786 (1939).

means of attempting to develop patriotism, and whether the dangers lurking in the refusal to salute are so grave or potentially grave as to justify such regulation. The courts have answered affirmatively.

The desirability and wisdom of such compulsion is another matter. For states wishing to leave that decision to the local communities but fearing that lack of a statue might cause courts to question the need of or authority for such regulation, statutes permitting local school boards to require the salute might be desirable. Or the statutes might exempt people having religious scruples, or give the local authorities authority to exempt them. Conscientious objectors might even be excused from the school room during the ceremony, just as children having religious scruples against hearing the Bible read in school have been permitted to leave during such instruction. Objection to exemption might arise because the presence of non-participating spectators would be offensive to some patriots, as well as giving no indication as to whether those exempted had any loyalty at all. Excusing from the room would remedy the first but not the second of those objections.

A further concession, in keeping with the American tradition of comparatively unlimited freedom of religious activity, would be the provision of salute and pledge substitutes for such objectors which would serve to express their loyalty in some way acceptable alike to them and to the public generally, much as other conscientious objectors have been permitted to affirm instead of swearing oaths.

An invitation by the state authorities for the leaders of Jehovah's Witnesses to propose suitable substitutes might well bring about a solution worthy of the highest American tradition and satisfactory to all save the most extreme patrioteer, professional malcontent, or thirster for the martyr's crown.

ADDENDUM.—Since the foregoing was written, these further developments have been reported by the New York Times, citations to which appear in parenthesis:

Vivian Hering, after her expulsion in 1935, attended private school for a time, later returning to Secaucus, where she was again expelled, September 21, 1939, for again refusing to salute or pledge allegiance. (Oct. 3, p. 25, col. 2).

On November 10, 1939, the Third Circuit Court of Appeals

unanimously affirmed *Gobitis v. Minersville*, supra note 23, and quoted a 1789 declaration by George Washington that "conscientious scruples of all men should be treated with great delicacy and tenderness. (Nov. 11, p. 17, col. 3). An appeal to the Supreme Court is probable.

On November 30, 1939, three school pupils, all Witnesses, were expelled from the Union City, New Jersey, schools, for refusing to salute. One of those expelled was Vivian Hering! (Dec. 1, p. 12, col. 4).

England has reportedly exempted from military service its Jehovah's Witnesses who asserted their religious convictions against war.



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