

Charles Evans Hughes was one of the most influential men in American public life during the first half of the twentieth century. He was the Governor of New York (1910-1916), Associate Justice of the United States Supreme Court (1910-1916), Republican Presidential candidate (1916), Secretary of State (1921-1925), and Chief Justice of the United States Supreme Court (1930-1941). Much has been written about Hughes's accomplishments in all of these roles. Hughes's tenure as Chief Justice from 1930-1941 has for the most part been closely examined by multiple historians. Historians have devoted hundreds of pages to analyzing the struggles between members of the Hughes Court, including Hughes himself, with President Franklin D. Roosevelt. However, very few pages have been devoted to Hughes's role in advancing the cause of religious liberty during his tenure as Chief Justice.

This paper examines the church-state jurisprudence of Charles Evans Hughes during his years as Chief Justice of the Supreme Court. Special attention has been given to Hughes's religious background as a Northern Baptist. Hughes's own personal beliefs and life as a Baptist undoubtedly played an influential role in shaping his thoughts on religious liberty-related Supreme Court decisions. A study of Hughes's church-state thought will provide greater understanding to the development of the Baptist emphasis on religious liberty in the American public square as well as a more comprehensive picture of one of the most influential public figures in American history in the early twentieth century.

### **A Biographical Overview**

Born on April 11, 1862 during the Civil War in Glens Falls, New York, Charles Evans Hughes was the only child of David Charles and Mary Catherine Hughes. Young Charles quickly developed a passion for reading, writing and arithmetic. According to one biographer, Hughes was reading by the age of three. By the age of thirteen, he had graduated from the local public school. Hughes then enrolled in Madison University (now Colgate University). Two years later, Hughes

transferred to Brown University. After graduating from Brown with honors in 1881, Hughes took a job teaching Greek, Latin and Algebra at an academy in Delhi, New York in order to save money for law school. With financial assistance from his father, Hughes enrolled in Columbia Law School and graduated with highest honors in 1884.<sup>1</sup>

Upon passing the New York bar exam, Hughes took a position at a prestigious law firm in Columbia, New York. Hughes accepted a full professorship at Cornell University Law School in 1891. Two years later, he was lured back to full-time law practice. However, he continued to teach law, serving as an adjunct professor at both Cornell University Law School and New York Law School.<sup>2</sup>

In 1905, Hughes was appointed as counsel to a New York legislative committee whose purpose was to investigate the gas and electric industries. Hughes's investigation exposed significant corruption, fraud, and inflated profits. Consequently, as a result of the investigation, there was a huge reduction in gas rates for the city of New York and its citizens.<sup>3</sup> Hughes's investigative work thrust him into the public spotlight and once there his popularity soared. Due in part to the endorsement of President Theodore Roosevelt, Hughes was drafted to be the New York Republican Party's candidate for Governor in 1906. Hughes was the only state-wide Republican to win in 1906, defeating William Randolph Hearst. While Governor, Hughes pushed the legislature to adopt the nation's first compulsory workmen's compensation laws.<sup>4</sup>

In 1908, the Republican Party nominated William Howard Taft as their candidate for

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<sup>1</sup> Clare Cushman, ed., *The Supreme Court Justices: Illustrated Biographies, 1789-1993* (Washington DC: Congressional Quarterly, 1993), 306-310. See Timothy L. Hall, *Supreme Court Justices: A Biographical Dictionary* (New York: Facts on File, Inc., 2001), 247-251.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

President. Taft asked Hughes to be his running mate. However, Hughes declined in order to run again for Governor in 1910, an election that he won. Following the death of Justice David Brewer in 1910, President Taft nominated Hughes to the position of Associate Justice on the United States Supreme Court. Over the next six years, Hughes wrote 151 opinions including 32 dissents.<sup>5</sup> One of his most notable majority opinions while Associate Justice was *Bailey v. Alabama* (1911) which overturned the peonage laws of Alabama and found that holding a person criminally liable for taking money for work not performed was equivalent to indentured servitude. Indentured servitude had been outlawed by the Thirteenth Amendment.<sup>6</sup>

Hughes resigned from his position as Associate Justice in 1916 in order to accept the Republican Party's nomination for President. Hughes lost what has been described as one of the closest elections in United States history. President Woodrow Wilson won the electoral vote by a margin of 277 to 254.<sup>7</sup>

Just five years after barely losing the Presidential election, Hughes was appointed Secretary of State by President Warren G. Harding. Hughes served under President Harding until Harding's death in 1923 and served for the remainder of the term under President Calvin Coolidge. Hughes resigned shortly before the beginning of Coolidge's first full term in 1925.<sup>8</sup> Three years later, Hughes turned down an offer to become the Republican Party's Presidential nominee for the 1928 election. In 1930, Republican President Herbert Hoover tapped Hughes to succeed William Howard Taft as Chief Justice of the Supreme Court. Hughes's nomination drew strong opposition

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<sup>5</sup> Ibid.

<sup>6</sup> *Bailey v. Alabama*, 211 U.S. 452 (1908).

<sup>7</sup> Ibid. In his acceptance speech to the Republican National Convention, Hughes declared, "I have not desired the nomination. I have wished to remain on the bench. But in this critical period in our nation's history, I recognize that it is your right to summon, and that it is my paramount duty to respond."

<sup>8</sup> Ibid.

from southern Democrats who believed that Hughes was beholden to corporate interests. After a ten-day debate, Hughes was confirmed by a vote of 52 to 26 on February 13, 1930.<sup>9</sup>

Chief Justice Hughes presided over a Supreme Court that dealt President Franklin D. Roosevelt's Administration several crucial defeats. The Hughes Court struck down several key pieces of New Deal legislation aimed at helping the United States recover from the Great Depression. As Chief Justice, Hughes led the fight against President Roosevelt's attempt to expand (or pack) the Supreme Court. Despite striking down several key New Deal measures early in his tenure as Chief Justice, Hughes later adopted a friendlier attitude towards President Roosevelt's New Deal legislation. Consequently, many of Hughes's supporters accused him of abandoning his principles for pragmatism.<sup>10</sup>

While Hughes often sided with the Court's conservatives on issues relating to government regulation of the economy, his record on civil rights issues and civil liberties was generally progressive.<sup>11</sup> Hughes authored the *Stromberg v. California* (1931) decision which held that a 1919 California statute banning red flags was unconstitutional. This landmark decision extended the Fourteenth Amendment to include the First Amendment's protection of free speech from state interference.<sup>12</sup> Hughes also extended the Fourteenth Amendment to include or incorporate the First Amendment's protection of freedom of the press. Called the "first great press case," *Near v. Minnesota* (1931) held that a Minnesota law that targeted publishers of "malicious" or "scandalous"

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<sup>9</sup> Ibid. Fellow Baptist Hugo Black, a Senator from Alabama, voted against Hughes's confirmation as Chief Justice in 1930. Black was convinced that Hughes had sold out to corporate interests. He feared that Hughes would strike down progressive social legislation in favor of big business. See Dickson, 727n224. Once a Supreme Court Justice himself, Black came to regard Hughes as one of his best friends. He later described Hughes as one of the most "distinguished jurists in the land." See Merlo J. Pusey, *Charles Evans Hughes* (New York: The MacMillan Company, 1951), 2: 773.

<sup>10</sup> Cushman, 306-310. See Hall, 247-251.

<sup>11</sup> Ibid.

<sup>12</sup> *Stromberg v. California*, 283 U.S. 359 (1931).

newspapers violated the First Amendment. Thus, prior restraints against the press were unconstitutional.<sup>13</sup>

Hughes sided with the majority in a 1932 voting rights decision, *Nixon v. Condon*, which found the all-white Democratic Party primary in Texas to be unconstitutional.<sup>14</sup> That same year Hughes authored a majority opinion which determined that in a capital trial the defendant must be given access to legal counsel upon his or her own request.<sup>15</sup> Another Hughes-authored opinion recognized entrapment as a legal defense.<sup>16</sup> In *Brown v. Mississippi* (1936), Hughes authored an opinion which ruled that a defendant's confession that is extracted by police violence violates the Due Process Clause of the Fourteenth Amendment and can not be entered as evidence.<sup>17</sup> Finally, in 1938 Hughes authored *Missouri ex rel. Gaines v. Canada*, an opinion that held states that provide only one educational institution must allow both blacks and whites to attend if there is no separate school for blacks.<sup>18</sup> This decision was seen as a step in the direction toward *Brown v. Board of Education* (1954) in that it struck down segregation by exclusion where the government provides just one school. Hughes's opinion marked the beginning of the Supreme Court's reconsideration of the separate but equal standard outlined in *Plessy v. Ferguson* (1896). After serving eleven years as Chief Justice, Hughes retired from the Court at age of 79. He died of congestive heart failure on August 17, 1948 at the age of 86.<sup>19</sup>

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<sup>13</sup> *Near v. Minnesota*, 283 U.S. 697 (1931).

<sup>14</sup> *Nixon v. Condon*, 286 U.S. 73 (1932).

<sup>15</sup> *Powell v. Alabama*, 287 U.S. 45 (1932).

<sup>16</sup> *Sorrells v. United States*, 287 U.S. 435 (1932).

<sup>17</sup> *Brown v. Mississippi*, 297 U.S. 278 (1936).

<sup>18</sup> *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

<sup>19</sup> *Cushman*, 306-310. See *Hall*, 247-251.

## “Charles The Baptist”

Just 100 years ago, Baptist minister Walter Rauschenbusch, the father of the Social Gospel Movement, penned a series of five brief articles titled "Why I Am A Baptist." Rauschenbusch wrote: "We may be Baptists by birth, but we must become Baptists by conviction....I began by being a Baptist because my father was, but today I am a Baptist, because, with my convictions I could not well be anything else."<sup>20</sup> Like Rauschenbusch, Charles Evans Hughes was also born in up-state New York during the Civil War. Also like Rauschenbusch, Hughes was "born Baptist" as the son of a Baptist minister. Hughes grew up in a parsonage owned by the Baptist church that his father served.<sup>21</sup> Hughes "imbibed from his parents a religiosity, discipline, and will that was almost too much of a caricature of the Calvinist work ethic to be believed."<sup>22</sup> According to Hughes, it was the "fondest hope" of his parents that he would "enter the ministry."<sup>23</sup>

After graduating from high school, Hughes enrolled in Madison University (now Colgate University), a school affiliated with the Northern Baptist Convention, in order to prepare for the ministry. Two years later, Hughes transferred to Brown University, a school in the Baptist tradition also affiliated with the Northern Baptist Convention. This decision further pleased his extremely devout Baptist parents.<sup>24</sup> While Walter Rauschenbusch followed in his father's footsteps and became a Baptist minister, Charles Evans Hughes did not. During his senior year at Brown University, Hughes wrote to his mother that he no longer felt "called" to the ministry. Hughes soon

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<sup>20</sup> Walter Rauschenbusch, "Why I Am A Baptist," *Christian Ethics Today* 1, no. 1 (April 1995), 15-20.

<sup>21</sup> William G. Ross, *The Chief Justiceship of Charles Evans Hughes, 1930-1941* (Columbia, SC: University of South Carolina Press, 2007), 5.

<sup>22</sup> Ibid.

<sup>23</sup> Cushman, 306-310. See Hall, 247-251.

<sup>24</sup> Betty Glad, *Charles Evans Hughes and the Illusions of Innocence: A Study in American Diplomacy* (Urbana, IL: University of Illinois Press, 1966), 12, 103. During this era, Madison University's status among Baptists was surpassed only by Brown University. See William H. Brackney, *A Genetic History of Baptist Thought* (Macon, GA: Mercer University Press, 2004), 300-301.

decided on a future as a lawyer.<sup>25</sup>

While preparing for the ministry at Brown University, Hughes studied under Ezekiel Robinson. Besides teaching theology and philosophy, Robinson was the President of Brown University, a post he held for seventeen years.<sup>26</sup> According to Baptist historian William Brackney, Brown University, as an institution, “experienced difficulties in maintaining generally accepted standards of Baptist orthodoxy.”<sup>27</sup> In the classroom, Robinson stressed the rational basis of Christianity and the need for freedom of thought.<sup>28</sup> Robinson moved away from proof-text theology and the intense focus on theories of inspiration. Instead, he focused on harmonizing Scripture with the claims of science.<sup>29</sup> Like most Baptists of the nineteenth century, Robinson emphasized Christian experience. According to Robinson, “A man’s creed will always be just what he has experienced and no more. The formula of his faith will be just what his intellect has gathered from his heart...[Yet] experience has no authority at all, except what it borrows from the Bible.”<sup>30</sup> Hughes’s later theological orientation seems to reflect the influence of Robinson.

Hughes also identified theologically with an old college friend, William Herbert Parry Faunce. In 1889, Hughes joined Fifth Avenue Baptist Church in New York City where Faunce, had just been named pastor.<sup>31</sup> Faunce, who graduated one year before Hughes at Brown University, has been described as “the best of evangelical liberal Protestantism of the first quarter of the twentieth

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<sup>25</sup> Cushman, 306-310.

<sup>26</sup> Brackney, 270-271.

<sup>27</sup> Ibid, 275.

<sup>28</sup> Ibid, 270-271.

<sup>29</sup> Ibid, 323-324.

<sup>30</sup> Ibid, 324.

<sup>31</sup> Pusey, 1: 110.

century.”<sup>32</sup> Faunce believed that the Bible “is not intended as a scientific treatise...Its profound moral and religious truth must be translated into the thought-forms of our generations.”<sup>33</sup> Hughes faithfully listened to the Sunday morning sermons of Faunce for a full decade. In 1899, William H.P. Faunce left Fifth Avenue to become the President of Brown University.<sup>34</sup>

Soon after joining Fifth Avenue, Faunce asked his old college friend to teach the young men’s Sunday School class. Hughes agreed but with the understanding that Faunce would not force him to follow the scheduled lesson plans. Hughes was not concerned with the “dogmas of the creeds” but instead focused on the teachings of Jesus Christ.<sup>35</sup> According to one Hughes biographer, his Sunday lessons on the “ethical and literary aspects of the New Testament” brought together a large group of young men.<sup>36</sup> The essence of Hughes’s liberal theology can be found in remarks given later to a Sunday school class at Calvary Baptist Church in Washington, D.C.:

We need to cultivate the spiritual life, not be centering our attention upon dogma or by sacrificing intellectual honesty, but by reflection upon the spiritual verities of the Sermon on the Mount. A truly Christian character is revealed in a balanced life...What does the Christian character or balanced life mean? It is this: Faith without credulity; conviction without bigotry; charity without condescension; courage without pugnacity; self-respect without vanity; humility without obsequiousness; love of humanity without sentimentality; and meekness with power. That is our ideal.<sup>37</sup>

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<sup>32</sup> J. Walter Sillen, “William H.P. Faunce: A Representative Liberal,” *Foundations* 2, no. 3 (July 1959): 239.

<sup>33</sup> Brackney, 272-273.

<sup>34</sup> Ibid.

<sup>35</sup> Pusey, 1: 110-111.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid.

After the pressures of the legal world required Hughes to giving up his Sunday School teaching duties, the class continued under one of Hughes pupils, John D. Rockefeller Jr., the son of renowned philanthropist John D. Rockefeller Sr.<sup>38</sup>

During this period, Hughes also served as President of the Baptist Social Union in New York. On one noteworthy occasion, Hughes brought Booker T. Washington as his guest to a Baptist Social Union dinner. To the surprise of Hughes, the presence of Washington was protested by many of his Baptist brethren.<sup>39</sup>

“Charles the Baptist,” as Hughes was dubbed when he was Governor of New York for his “austere self-righteousness” was also involved in Northern Baptist denominational life. While Governor, Hughes was chosen in 1907 to be the first President of the newly formed Northern Baptist Convention. His enormous duties as Governor of New York prevented him from attending and presiding over many of the meetings, but the enormous prestige of Hughes’s name was a great help to the fledgling Baptist convention.<sup>40</sup>

When Hughes moved to Washington D.C. in 1911, the new Associate Justice of the Supreme Court joined Calvary Baptist Church. Hughes remained a committed member of Calvary for nearly forty years until his death in 1948. Regarded as the most distinguished member in the church’s history, Calvary historian Carl Tiller noted that Hughes “attended church faithfully and

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<sup>38</sup> Ibid. According to the Hughes biographer, his “disinterest in ritual and lack of orthodoxy was a continued source of grievance to his mother, and she never ceased to let him know it.” She often wrote her adult son “sermonic letters” expressing concern with Hughes’s seemingly liberal theology.

<sup>39</sup> Pusey, 1: 110. Hughes also served as a trustee of Fifth Avenue Baptist Church for many years. As a trustee, Hughes served alongside oil tycoon John D. Rockefeller Sr.

<sup>40</sup> Carl W. Tiller, *At Calvary: A History of the First 125 Years of Calvary Baptist Church, Washington, DC, 1862-1987* (Manassas, VA: Trinity Rivers Publishing, Inc., 1994), 244-245. For the almost four decades that Hughes as a member of Calvary Baptist Church in Washington D.C., Calvary was considering a leading Northern Baptist congregation. According to Calvary historian Carl Tiller, Calvary “has contributed more top leadership to the Northern/American Baptist Convention than any other church.” Two former members of Calvary’s ministerial staff have served as general secretaries of the Northern Baptist Convention (now known as American Baptist Churches USA, before that American Baptist Convention). Five of the Convention’s Presidents have been associated with Calvary including Hughes.

contributed regularly to Calvary's ministries."<sup>41</sup> At Calvary's 50<sup>th</sup> anniversary celebration in 1912, Hughes gave a tribute:

Not too much can be said of Calvary Church. I have had much to do with churches, and I have never seen a church like this...What is the spirit of this church? What is the secret of its success? Would that we could put it into words, flame those words from one end of the country to the other, for it is the lesson that the church of America must learn if they are to meet the needs of this day...the church is fortunate in the character and ability of the men who are constantly at the call of every department of church work. But they are under a leader...a man of great ability, foresight, and executive capacity, constantly on his knees before his Maker, constantly seeking, in humility, Divine help, and presenting to you...the living power of the working of the spirit of the Master.<sup>42</sup>

During the administration of Warren G. Harding, Calvary Baptist Church was the place to be on Sunday mornings. In 1921, Harding became the first Baptist to hold the office of President. On Sundays, Harding chose to join Hughes, his Secretary of State, for worship at Calvary. Washingtonians as well as out of town visitors flocked to Calvary to gawk at these two powerful men. In fact, tickets had to be issued to members and seating was limited to ticketholders until a few minutes before the worship service began.<sup>43</sup>

Another popular Baptist figure in the United States during the first half of the twentieth century was George Washington Truett. G.W. Truett, pastor of First Baptist Church of Dallas, Texas (1897-1944), was one of the most legendary Baptist ministers in the history of the Southern Baptist Convention. During his fifty-year ministry, Truett made a name for himself as one of the leading Southern Baptist voices for freedom of conscience and religious liberty. One of the legacies of Truett's career was his address, "Baptists and Religious Liberty," given on the steps of the United States Capitol in Washington, D.C. on May 16, 1920 at the seventy-fifth anniversary celebration of

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<sup>41</sup> Ibid, 249-250. At the time, there were three requirements for membership at Calvary. First, the candidate for membership had to (1) profess their faith in Jesus as Savior and Lord (2) experience believer's baptism by immersion and (3) enter into a covenant with other church members. Persons who made a public profession of faith, but who had not followed with baptism, were required to be baptized when they joined Calvary. See Tiller, 257.

<sup>42</sup> Ibid, 322.

<sup>43</sup> Ibid, 34-35.

the Southern Baptist Convention.<sup>44</sup> On the steps of the Capitol, Truett declared that Baptists "have never been a party to oppression of conscience...Christ's religion needs no prop of any kind from any worldly source, and to the degree that it is thus supported is a millstone hanged around its neck." Truett concluded, "Let us today and forever be highly resolved that the principle of religious liberty shall, please God, be preserved inviolate through all our days and the days of those who come after us."<sup>45</sup>

Two years later, Chief Justice Charles Evans Hughes gave a similar speech in defense of religious liberty at the laying of the cornerstone for the National Baptist Memorial to Roger Williams in Washington, D.C. Unlike Truett's historic speech, Hughes's address has received little if any attention from historians, including Baptist historians. Echoing Truett, Hughes described religious liberty as a "distinctive tenet" of Baptists that had become a "vital principle of our free institutions." Again like Truett, Hughes pledged that the principle of religious liberty "shall be held inviolate." Hughes stressed that the contribution of "absolute freedom of religion" is the "glory of the Baptist heritage, more distinctive than any other characteristic of belief or practice."<sup>46</sup> Honoring Roger William, Hughes stated, "Let this memorial proclaim the indebtedness in the capital of the republic where the once despised dogma has become the foundation of the civic structure." Articulating his own distinctly Baptist church-state philosophy, Hughes declared,

Men of all religious beliefs stand equal before the law. They are not to be punished by reason of their creeds or forms of worship so long as they respect the public peace and the equal rights of others. No one is exposed to civil disability either as a witness in our courts or with respect to qualification for any public office by reasons of his religious faith. Nor are the people to be taxed and public moneys to be used for the support of any sort of religion....The effort to dominate the conscience of men by the use of civil power has always

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<sup>44</sup> George Washington Truett, "Baptists and Religious Liberty," (1920). See [http://www.biblebelievers.com/truett\\_baptist\\_religious.html](http://www.biblebelievers.com/truett_baptist_religious.html).

<sup>45</sup> Ibid.

<sup>46</sup> Charles Evans Hughes, "Address of Secretary Charles E. Hughes At The Laying Of The Corner-Stone Of The National Baptist Memorial To Religious Liberty, At Sixteenth and Columbia Road," *Religious Herald*, April 27, 1922, 6.

been destructive of civil liberty itself. If there are any who would pervert our institutions to make them servants of religious dogma, they should be regarded as enemies of both religion and the State, as the success of their endeavors would undermine both.<sup>47</sup>

According to Hughes, "the principle of Roger Williams is not only one of absolute justice with respect of equality before the law, but it is the essential principle of religious culture." Hughes asserted that "form and ritual" are not the essence of religion. Instead, the "vital breath" of religion "is the liberty of the soul in following its highest aspirations."<sup>48</sup> Only where freedom exists can error be called error. Where state-sponsors religion, the state, not the soul, ultimately dictates what is right for its citizenry. Hughes concluded his tribute to Roger Williams - "preacher, prophet, and statesman" - by stressing that it is only in the "atmosphere of religious freedom that we may hope either for protection against error and delusion or for the maintenance of that spiritual power upon which all progress depends."<sup>49</sup>

### **Church-State Decisions**

During his eleven-year tenure as Chief Justice of the Supreme Court, Charles Evans Hughes authored four key church-state opinions and voted with the majority in two additional decisions. Several of these decisions, including *Cochran v. Louisiana State Board of Education* (1930) and Hughes's dissent in *United States v. Macintosh* (1930), articulated important church-state concepts. Despite the importance of these decisions, historians have not emphasized the important role that Hughes himself had on church-state jurisprudence during the years of 1930-1941. The sections below survey Hughes's invaluable contributions to that jurisprudence.

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<sup>47</sup> Ibid.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid.

### **Child Benefit Theory**

Beginning in 1830, large numbers of European immigrants crossed the Atlantic and made their home in the United States. Many of these new immigrants were Roman Catholic. Convinced that the generic form of Protestant morality taught in most public schools was incompatible with a distinctly Catholic philosophy of education, American Catholic leaders set out to create a massive private, parochial school system. In 1884, Catholic Bishops in America required that a parochial school be built next to every Catholic church within two years. The Bishops insisted that Catholic parents enroll their children in a Catholic school. While this lofty goal was never achieved, Catholic leaders remained committed to their parochial schools.<sup>50</sup>

Unfortunately, Catholic efforts to create more and more parochial schools intensified the anti-Catholicism which pervaded American culture during the late nineteenth and early twentieth centuries. The insistence of Catholics on having their own parochial schools led some to question Catholic commitment to America. Many Protestants felt that religious primary schools prevented immigrant children from assimilating. Consequently, nativists launched an attack against Catholic parochial schools in states such as Oregon where in 1922 the state legislature passed a law requiring all students to attend public school. Three years later, the United States Supreme Court struck down the Oregon law aimed at eliminating parochial schools in *Pierce v. Society of Sisters*.<sup>51</sup> The Court in *Pierce* held that the Oregon law “unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control.”<sup>52</sup> According to the Court, “The fundamental theory of liberty upon which all governments in this Union repose

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<sup>50</sup> Flowers, Ronald B. and Robert T. Miller, *Toward Benevolent Neutrality: Church, State, and the Supreme Court* (Waco, TX: Baylor University Press, 1977), 423-424.

<sup>51</sup> *Ibid*, 423-424.

<sup>52</sup> *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925).

excluded any general power of the state to standardize its children by forcing them to accept instruction from public teachers only.”<sup>53</sup>

Once the Supreme Court affirmed that parochial schools had the constitutional right to exist, Catholic leaders continued their fight to obtain government funds for its schools. The first case challenging such funding came before the Supreme Court in 1930.<sup>54</sup> Two years earlier, the Louisiana Board of Education began a program which provided free of charge textbooks used in public schools to students in parochial schools. The constitutionality of the program was challenged on the ground that state tax money was being used for a private purpose which was said to “aid private religious, sectarian and other schools not embraced in the public educational system” in violation of the Fourteenth Amendment.<sup>55</sup>

Writing for the unanimous Supreme Court in his first significant church-state decision, newly named Chief Justice Charles Evans Hughes upheld the textbook program in *Cochran v. Louisiana State Board of Education* (1930). This opinion authored by Hughes articulated an important concept in church-state relations known as the “Child Benefit Theory.”<sup>56</sup> Hughes contended that the beneficiaries of the textbook program were not the parochial schools but instead the children of Louisiana. Thus, the Catholic churches that operated the parochial schools were not aided by the state-financed textbook program. Hughes wrote, “The schools, however, are not the

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<sup>53</sup> Ibid. Since the Court had not yet made the protections of the First Amendment applicable to the states, this decision was based upon the “liberty” protected by the Fourteenth Amendment. In 2000, Supreme Court Justice Anthony Kennedy wrote in a dissenting opinion that had *Pierce v. Society of Sisters* been decided in recent years, it “may well have been grounded upon First Amendment principles protecting freedom of speech, belief, and religion.” See *Troxel v. Granville*, 530 U.S. 57 (2000), (Kennedy, J., dissenting).

<sup>54</sup> Ronald B. Flowers, *That Godless Court? Supreme Court Decisions on Church-State Relationships* (Louisville, KY: Westminster John Knox Press, 2005), 72.

<sup>55</sup> *Cochran v. Louisiana State Board of Education*, 281 U.S. 370 (1930).

<sup>56</sup> Flowers, *That Godless Court?*, 72-73.

beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation, because of them. The school children and the state alone are the beneficiaries.”<sup>57</sup>

Hughes’s “Child Benefit Theory” was most notably applied in the 1947 landmark case *Everson v. Board of Education* just six years after his retirement from the Supreme Court. *Everson* which was authored by Hughes’s colleague and fellow former Baptist Sunday School teacher, Hugo Black, upheld a New Jersey program that reimbursed parents with children attending public schools and parochial schools for the expense of having their children transported to and from school on public buses. This reimbursement was state-financed. Applying the “Child Benefit Theory” first articulated by Hughes, Black concluded that providing bus transportation of children to public and parochial schools was a type of public welfare program similar to police and fire protection. Black found that the program did not directly aid religion. Black explained, “The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of religion, safely and expeditiously to and from accredited schools.”<sup>58</sup> According to Black, the First Amendment “requires the state to be neutral in its relations with groups of religious beliefs and nonbelievers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them.”<sup>59</sup>

Distinguished political philosopher Martha Nussbaum asserts that Hugo Black announced a neutrality principle when he applied Hughes’s “Child Benefit Theory” in his *Everson* analysis. Rooted in the idea that all citizens are equal and should be shown equal respect, this “neutrality as fairness” principle, according to Nussbaum, asserts that government must be “studiously neutral” on

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<sup>57</sup> *Cochran v. Louisiana State Board of Education*, 281 U.S. 370 (1930).

<sup>58</sup> *Everson v. Board of Education*, 330 U.S. 1 (1947).

<sup>59</sup> *Ibid.*

religious matters, “favoring or disfavoring no particular conception, not even religion over nonreligion.”<sup>60</sup> Nussbaum notes that Black’s “neutrality as fairness” principle with its origins in Hughes’s “Child Benefit Theory,” can be traced back to the political thought of Roger Williams, founder of the first Baptist church in America. Nussbaum explains that Williams’s principle of impartiality or neutrality holds that a “good [state] is one that does not show partiality to majority religious interests, but is fair to all, majority and minority.”<sup>61</sup> Nussbaum notes that Williams’s principle of neutrality along with his emphasis on protecting the individual conscience has formed “the distinctive American approach to religious fairness.”<sup>62</sup> It should then come as no surprise to see Baptists such as Charles Evans Hughes and Hugo Black drew deeply from the well of their Baptist forefather and adopt an approach to fairness that can also be described as distinctly Baptist.

### **Conscientious Objection**

During the eras of World War I and World War II, the Supreme Court addressed the religious liberty claims of pacifists who had an objection to war. In *Arver v. United States* (1918), the Supreme Court ruled that the 1917 Selective Draft Act passed by Congress during World War I did not violate the free exercise clause nor the establishment clause of the United States Constitution despite arguments from the petitioner that the Selective Draft Act privileged religious pacifists over nonreligious pacifists and preferred some religious pacifists over others.<sup>63</sup> A little

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<sup>60</sup> Martha Nussbaum, *Liberty of Conscience: In Defense of America’s Tradition of Religious Equality* (New York: Basic Books, 2008), 282-285.

<sup>61</sup> *Ibid*, 57.

<sup>62</sup> *Ibid*, 66-68.

<sup>63</sup> *Arver v. United States*, 245 U.S. 366 (1918).

over a decade later in *United States v. Schwimmer* (1929), the Supreme Court denied citizenship to an atheist pacifist from Hungary who was unwilling to “take up arms in defense of her country.”<sup>64</sup>

Two years later, the Supreme Court again had a chance to address the issues of naturalization and conscientious objection in *United States v. Macintosh* (1930). Douglas Clyde Macintosh was a Northern Baptist minister and a theology professor at Yale Divinity School who served as a chaplain with the Canadian Army during World War I. Macintosh’s application for naturalization was denied due to the fact that he refused to state in advance that he would not fight in any war in which the United States was involved.<sup>65</sup> Macintosh explained that he would only participate in a morally justified war. In a 5-4 decision, the Supreme Court denied Macintosh’s application for naturalization and held that naturalization was a privilege, to be given, qualified or withheld by Congress. Writing for the majority, Justice Sutherland concluded that the duty of citizens to bear arms whenever the necessity arose was “a fundamental principle of the Constitution.”<sup>66</sup>

Chief Justice Charles Evans Hughes, a Northern Baptist like Douglas Macintosh, wrote a vigorous and impassioned dissent which was joined by Justices Holmes, Brandeis and Stone. Arguing for a statutory interpretation that would protect religious liberty, Hughes noted that Congress had in the past made exemptions for conscientious objectors in draft acts. Hughes observed that there were “other and most important methods of defense, even in time of war, apart from the personal bearing of arms” that would satisfy the statutory requirement of support for the Constitution against its enemies. Drawing a close comparison between the naturalization oath and

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<sup>64</sup> *United States v. Schwimmer*, 279 U.S. 644 (1929). Ironically, Schwimmer as a fifty-one year old female was not even eligible for military service.

<sup>65</sup> *United States v. Macintosh*, 283 U.S. 605 (1931).

<sup>66</sup> *Ibid.* See William G. Ross, *The Chief Justiceship of Charles Evans Hughes, 1930-1941* (Columbia, SC: University of South Carolina Press, 2007), 186-189.

the general oath of office, Hughes concluded that to interpret the general oath as “disregarding the religious scruples of these citizens” would be “generally regarded as contrary not only to the specific intent of the Congress but as repugnant to the fundamental principle of representative government.”<sup>67</sup> Hughes observed,

The battle for religious liberty has been fought and won with respect to religious beliefs and practices, which are not in conflict with good order, upon the very ground of the supremacy of conscience within its proper field. What that field is, under our system of government, presents in part a question of constitutional law, and also, in part, one of legislative policy in avoiding unnecessary clashes with the dictates of conscience.<sup>68</sup>

Consequently, Hughes concluded that there is no ground “for the exclusion of Professor Macintosh because his conscientious scruples have particular reference to wars believed to be unjust.” In the historic tradition of Baptist-styled theological dissent, Hughes emphasized that “the mere holding of religious or conscientious scruples against all wars should not disqualify a citizen from holding office, or an applicant otherwise qualified from being admitted to citizenship.”<sup>69</sup>

The decision in *Macintosh* caused an uproar in theologically progressive circles. Prominent mainline ministers mentioned the *Macintosh* decision in their Sunday sermons. Dr. Harry Emerson Fosdick, pastor of the historic Riverside Church in New York City, affirmed Hughes’s dissent and stressed that he, like Douglas Macintosh, would not support a morally unjust war. Fosdick stressed that the *Macintosh* decision “announced in a particularly obnoxious form the doctrine of the nation’s right to conscript conscience....The nation in war time will conscript our children, conscript our property, conscript our business....Has the nation, however, so taken the place of God

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<sup>67</sup> Ibid.

<sup>68</sup> Ibid.

<sup>69</sup> Ibid. See Samuel Hendel, *Charles Evans Hughes and the Supreme Court* (New York: Kings Crown Press, 1951), 141-144.

Almighty that it can conscript our consciences?"<sup>70</sup> In addition to the sermons, a group of influential religious leaders inspired by Reinhold Niebuhr composed and signed a statement to be sent to the President and Congress expressing their disapproval with the *Macintosh* decision. Notable signatories included Chief Justice Hughes's own pastor, W.S. Abernethy of Calvary Baptist Church in Washington D.C., Henry Sloane Coffin, Harry Emerson Fosdick, and many other leaders from mainline denominations. In this publicized petition, these clergymen affirmed Hughes's dissent and agreed with his conclusion that in the arena of conscience, duty to a moral power higher than the state must always be recognized and respected.<sup>71</sup>

Several denominations expressed their displeasure with the *Macintosh* decision by passing resolutions. Baptist groups including the Seventh Day Baptist General Convention, the Connecticut Baptist Convention, the South Carolina Baptist Convention and the Baptist General Convention of Texas all spoke out against the majority opinion in *Macintosh*.<sup>72</sup> South Carolina Baptists refused "to acknowledge the right of any government to sit in judgment upon the conscience of any individual citizen whose religious convictions forbid him to sanction war."<sup>73</sup> Affirming Hughes's dissent, the Baptist General Convention of Texas pledged to "work for the reversal of this decision with its unchristian implications."<sup>74</sup> The official publication of the Northern Baptist Convention even weighed in. The *Baptist* declared, "In the event of another war, it is likely, under the law as the Supreme Court has defined it, that the jails will be filled to overflowing. There may come a

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<sup>70</sup> Ronald B. Flowers, *To Defend The Constitution: Religion, Conscientious Objection, Naturalization, and the Supreme Court* (Lanham, MD: The Scarecrow Press, Inc., 2003), 174-177.

<sup>71</sup> Flowers, *To Defend the Constitution*, 425-426.

<sup>72</sup> *Ibid.*, 191n111.

<sup>73</sup> B.F. Hasty, "Carolina Baptists Uphold Rights of Conscience," *The Christian Century*, March 23, 1932, 388.

<sup>74</sup> Flowers, *To Defend the Constitution*, 420-421.

time when it will be a disgrace for a Baptist, with his spiritual heritage, to be out of jail."<sup>75</sup>

However, not a peep was heard from the Northern Baptist Convention itself. In light of the Northern Baptist Convention's failure to speak out against the *Macintosh* decision and in support of Chief Justice Hughes their "most honored Baptist layman," the popular periodical *Christian Century* penned an editorial entitled "Have Baptists Lost Their Courage?" The editorial asked:

How can the failure of a convention of Baptists to take action on such a resolution be explained? Are Baptists cowards? Are they, too, worshiping the pagan god of nationalism? Do they imagine that they can long keep the liberty of conscience for which their fathers suffered, and which has been the glory of Baptist history, if the supreme court's decision that the will of God is authoritatively revealed by congress is allowed to stand as the law of the land?<sup>76</sup>

Though the Northern Baptist Convention remained silent, one of its leading congregations did not. Hughes's own church, Calvary Baptist Church in Washington D.C., unanimously adopted a resolution affirming Hughes's dissent. Calvary's resolution urged the passage of a bill pending in Congress which provided that an individual's belief concerning war should never be made a test of fitness for citizenship<sup>77</sup>

Relying on the *Macintosh* decision, the Supreme Court also denied the citizenship application of Marie Averil Bland in 1931. Bland was an Episcopalian from Canada who refused to take the oath of allegiance due to her pacifism. Bland was willing to swear the oath if the words "as far as my conscience as a Christian will allow" were included. The Supreme Court applied the legal

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<sup>75</sup> Ibid, 177-178.

<sup>76</sup> "Have Baptists Lost Their Courage?," *The Christian Century*, July 1, 1931, 862-863. See Flowers, *To Defend the Constitution*, 192n112.

<sup>77</sup> Tiller, 224-225. During World War II, pastor Clarence Cranford initiated a Freedom of Conscience Committee at Calvary. This committee consisting of church members met monthly to give support to persons especially Baptists who refused military conscription on the grounds of conscientious objection.

reasoning in *Macintosh* and denied Bland's application for citizenship. Chief Justice Hughes again filed a dissent which was joined by Justices Holmes, Brandeis and Stone.<sup>78</sup>

Fifteen years later in *Girouard v. United States* (1946), the Supreme Court reversed course and adopted Hughes's argument from his passionate *Macintosh* dissent. James Louis Girouard was born in Canada and converted from Catholicism to the Seventh-day Adventist Church at the age of 21. Due to his religious beliefs, Girouard was willing to serve in the military but only as a noncombatant. Adopting the themes found in Hughes's *Bland* and *Macintosh* dissents, Justice William O. Douglas held that the oath of naturalization does not actually require applicants to promise to bear arms. Douglas found that the oath of naturalization was virtually identical to that required of all native-born government officeholders who are allowed to be conscientious objectors. He concluded that there are numerous other ways a citizen can assist in defending the nation in times of war.<sup>79</sup> According to Douglas, "The effort of war is indivisible; and those whose religious scruples prevent them from killing are no less patriots than those whose special traits or handicaps result in their assignment to duties far behind the fighting front."<sup>80</sup> As a result of the legal reasoning found in Hughes's *Macintosh* dissent and its adoption by Justice Douglas in *Girouard*, currently applicants for citizenship who have objections to war based on their religious belief may swear to an alternative form of the naturalization oath.<sup>81</sup>

### **Distribution of Religious Materials**

Alma Lovell was arrested in the mid-1930s for violating a local ordinance in Griffin, Georgia which forbade the distribution of any type of literature without first acquiring written permission from the City Manager. Lovell was convicted and sentenced to prison for fifty days

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<sup>78</sup> *United States v. Bland*, 283 U.S. 636 (1931).

<sup>79</sup> Flowers, *That Godless Court?*, 61-63.

<sup>80</sup> *Girouard v. United States*, 328 U.S. 61 (1946).

<sup>81</sup> Flowers, *That Godless Court?*, 61-63.

because she did not pay the fifty-dollar fine. Lovell was a member of the Jehovah's Witnesses, a religious group known for their proselytizing zeal. She did not apply for a permit to distribute her religious tracts "as she regarded herself as sent 'by Jehovah to do His work' and that such an application would have been an act of disobedience to His commandment." At her trial, Lovell argued that Griffin's ordinance "abridges the freedom of the press" and "prohibits the free exercise of religion and the practice thereof" contrary to the First Amendment through the Due Process Clause of the Fourteenth Amendment.<sup>82</sup>

Writing for a unanimous Court, Chief Justice Hughes decided that the Griffin ordinance was unconstitutionally overbroad because it prohibited the distribution of literature of any kind, at any time, at any place, and in any manner without a permit from the City Manager. Such an ordinance, Hughes said,

Is invalid on its face. Whatever the motive which induced its adoption, its character is such that it strikes at the very foundation of the freedom of the press by subjecting it to license and censorship. The struggle for the freedom of the press was primarily directed against the power of the licensor....Legislation of the type of the ordinance in question would restore the system of license and censorship in its baldest form. The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets.<sup>83</sup>

Although Hughes did not address Lovell's free exercise of religion argument, this decision was clearly a big victory for the freedom of the press. Lovell was especially a huge victory for minority religious groups such as the Jehovah's Witnesses who engaged in public proselytizing. Because of Hughes's opinion in Lovell, these groups now received greater protection from laws that suppressed their right to freely practice their evangelistic religion by distributing religious materials in public.<sup>84</sup>

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<sup>82</sup> Hendel, 152-155. See also *Lovell v. City of Griffin, Georgia*, 303 U.S. 444 (1938).

<sup>83</sup> *Lovell v. City of Griffin, Georgia*, 303 U.S. 444 (1938).

<sup>84</sup> Hendel, 152-155. See also *Lovell v. City of Griffin, Georgia*, 303 U.S. 444 (1938).

## The Flag Salute

In 1936, twelve-year-old Lillian Gobitis and her ten-year-old brother William were expelled from the local public school in Minersville, Pennsylvania for refusing to salute and pledge allegiance to the United States flag. The Gobitis family were Jehovah's Witnesses and like their coreligionists they believed that the saluting and pledging allegiance to any flag was a form of false worship prohibited by Exodus 20:4-5 (also known as the Second Commandment). To compel Lillian and William to participate in the flag-salute ceremony, the Gobitis family argued, was a violation of their religious freedom or liberty of conscience. Walter Gobitis put his children in private schools but this was ultimately too expensive. As a consequence, Gobitis sued for damages and sought to prohibit the school board from requiring his children to salute and pledge allegiance to the flag as a condition of attendance.<sup>85</sup>

The Supreme Court heard *Minersville v. Gobitis* in 1940 and upheld the mandatory flag salute, declining to make itself "the school board for the country." Writing for the majority, Justice Felix Frankfurter found that the Minersville school district's interest in creating national unity was sufficient to allow them to require students to salute the American flag.<sup>86</sup> According to Frankfurter, saluting and pledging allegiance to the American flag was a primary means of creating national unity. "National unity is the basis of national security....The ultimate foundation of a free society is the binding tie of cohesive sentiment....'We live by symbols.' The flag is the symbol of our national unity, transcending all internal differences, however large, within the framework of the Constitution."<sup>87</sup>

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<sup>85</sup> John Witte, Jr., *Religious and the American Constitutional Experiment: Essential Rights and Liberties* (Boulder, CO: Westview Press, 2000), 131. See Flowers, *That Godless Court?*, 27-28. Leo Pfeffer, *Church, State, Freedom* (Boston: The Beacon Press, 1953), 520-523.

<sup>86</sup> *Minersville School District v. Gobitis*, 310 U.S. 586 (1940).

<sup>87</sup> *Ibid.*

On the issue of religious liberty, Frankfurter concluded that “the freedom to follow conscience” is not unlimited. Freedom to follow the dictates of one’s conscience must be reconciled with other freedoms and interests. Frankfurter emphasized that, “The religious liberty which the Constitution protects has never excluded legislation of a general scope not directed against doctrinal loyalties of particular sects.”<sup>88</sup> He noted that, “Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs.” Frankfurter insisted that, “The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities.”<sup>89</sup>

Chief Justice Hughes was one of the seven other Supreme Court Justices who joined Justice Felix Frankfurter’s majority opinion in *Minersville v. Gobitis* (1940). In fact, Hughes assigned Frankfurter to write the majority opinion. During the Supreme Court’s conference, Hughes stressed that a state had the right to prescribe its own curriculum in public schools. Requiring students to salute the American flag, a symbol of liberty, was not an encroachment upon religious liberty, according to Hughes. He pointed out that “religious scruples or belief will not give a citizen immunity from payment of taxes or instruction in military science.” Hughes explained to his colleagues that the Fourteenth Amendment prohibited laws and requirements aimed at religion.<sup>90</sup> Consequently, the Court must determine whether the state’s regulation is actually reasonable. Hughes concluded that the state could insist on “inculcation of loyalty.” According to Hughes, “It would be extraordinary if in this country the state could not provide for respect for the flag of our

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<sup>88</sup> Ibid.

<sup>89</sup> Ibid.

<sup>90</sup> Dickson, 430-431.

land.” Finally, Hughes adamantly declared, “There is no legitimate impingement on religious belief here. What is required of those who salute the flag is a legitimate object.”<sup>91</sup>

Respected church-state scholar Martha Nussbaum recently wrote that *Minersville v. Gobitis* is “one of the low-water marks of twentieth century Supreme Court jurisprudence. Along with cases such as *Dred Scott* and *Korematsu*, it is widely regarded (and was regarded already at the time) as a huge blunder, in which a climate of public anxiety got the better of constitutional liberty.”<sup>92</sup> Just three years after the *Minersville* decision was handed down, Justice Harlan Stone’s dissent in *Minersville* became the law of the land. Justices Black, Douglas, and Murphy dramatically reversed their previous conclusion and joined a new majority in striking down a West Virginia flag-salute requirement.<sup>93</sup> In an ironic turn of events, the majority opinion authored by Justice Robert Jackson relied heavily on Hughes’s reasoning in the famous free speech case *Stromberg v. California* (1931) which extended the Fourteenth Amendment to include the First Amendment’s protection of symbolic speech from state infringement. Jackson ruled that the flag salute was a form of expression and that the state may not force one to say what one does not believe.<sup>94</sup>

Despite Justice Jackson’s reliance on one of Hughes’s most notable decisions, Hughes stood firm even in retirement. Hughes felt so strongly that the Court had erred in *West Virginia v.*

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<sup>91</sup> Ibid. During the Supreme Court’s conference on this decision, Hughes emphasized that “under the Fourteenth Amendment, the state cannot establish a religion or church – the question here is one of the free exercise of religion.” At this point in Supreme Court history, neither the Establishment Clause nor the Free Exercise Clause of the First Amendment had been incorporated through the Due Process Clause of the Fourteenth Amendment and formally applied to the states. Nonetheless, Hughes suggests here – several weeks before the Free Exercise Clause was incorporated and seven years before the Establishment Clause was incorporated – that the protections of both religion clauses of the First Amendment apply to the states.

<sup>92</sup> Nussbaum, 208.

<sup>93</sup> Pusey, 2: 729.

<sup>94</sup> *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). When Justice Harlan Fiske Stone replaced Charles Evans Hughes as Chief Justice in 1941, President Franklin D. Roosevelt appointed Jackson to the resulting vacant seat on the Supreme Court.

*Barnette* that he broke his self-imposed rule not to discuss current decisions of the court in order to write a letter of congratulations to Justice Frankfurter on his dissenting opinion. According to one Hughes biographer, the *Gobitis* case was the only instance in which the Chief Justice has been accused of voting against civil liberties.<sup>95</sup> Regardless, Hughes's vote to side with the *Minersville* majority was inconsistent with his past decisions defending religious liberty. It is unfortunate to see such a strong Baptist advocate of religious liberty stake a position against a majority opinion that has been described as "one of the most eloquent articulations of...liberty of conscience in our tradition."<sup>96</sup> Pragmatism in this case triumphed over principle.

### **The Incorporation of the Free Exercise Clause**

Newton Cantwell and his two sons were Jehovah's Witnesses. The Cantwells traveled to New Haven, Connecticut in 1938 to "witness" or proselytize in a heavily Catholic neighborhood. After playing a vehemently anti-Catholic phonograph for two Catholic men, the Cantwells received threats of bodily harm. Fortunately for the Cantwell, they chose to quietly walk away from the confrontation. However, they were later arrested by the New Haven police, charged and convicted for inciting a breach of the peace and failing to apply for a license to distribute their religious material. After losing at both the trial court and state Supreme Court levels, the Cantwells asked the United States Supreme Court to hear their case.<sup>97</sup>

In *Cantwell v. Connecticut* (1940), the Court reversed the state's conviction of the three Jehovah's Witnesses on grounds of religious liberty. For the first time, the Supreme Court incorporated the protections of the First Amendment's Free Exercise Clause into the Fourteenth

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<sup>95</sup> Pusey, 2: 729. Hughes concluded that Frankfurter had "knocked out one of the main props of the decision in pointing out that the State, under the unanimous decision in *Pierce v. Society of Sisters* and other cases, could not constitutionally make attendance in its public schools compulsory."

<sup>96</sup> Nussbaum, 212-214.

<sup>97</sup> *Cantwell v. Connecticut*, 310 U.S. 296 (1940). See Witte, 112-113. *Toward Benevolent Neutrality*, 298-299. Ross, 186-189.

Amendment. Never before had the Free Exercise Clause been applied to state law. Writing for the unanimous Court, Justice Own Roberts explained:

We hold that the statute, as construed and applied to the appellants, deprives them of their liberty without due process of law in contravention of the Fourteenth Amendment. The fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws. The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the chosen form of religion. Thus 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. Conduct remains subject to regulation for the protection of society....In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.<sup>98</sup>

The *Cantwell* decision opened the door to federal litigation over Free Exercise Clause claims made against the states. In fact, most of the Supreme Court decisions since 1940 have involved such claims.<sup>99</sup> While Chief Justice Hughes did not author the *Cantwell* opinion, he did endorse the opinion by joining this unanimous decision. Hughes also, in his role as Chief Justice, selected Justice Roberts to author the *Cantwell* opinion. Unlike the *Minersville* decision which was also decided in 1940, Hughes's endorsement of Justice Roberts's *Cantwell* opinion was completely consistent with his past decisions and speeches in support of religious liberty and freedom of conscience.

### **Concluding Thoughts**

During the first half of the twentieth century, few men in American public life were as influential as Charles Evans Hughes. As the twice-elected Governor of New York, Hughes was viewed as a progressive reformer. Hughes was an extremely successful lawyer. Today his law

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<sup>98</sup> *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

<sup>99</sup> Flowers, *That Godless Court?*, 23-25.

firm, Hughes Hubbard & Reed, remains ranked as one of the top ten law firms in America. While Associate Justice of the Supreme Court (1910-1916), Hughes authored over 150 majority opinions. Hughes came within 3800 votes in California from becoming the twenty-ninth President of the United States. Historians consider Hughes to be one of the greatest and most successful Chief Justice's of all time. Despite presiding over one of the most ideologically divided benches in the history of the Supreme Court, Hughes was able to keep the dissent rate under fifteen percent. While not every Supreme Court Justice was fond of his style, Chief Justices Earl Warren, Warren Burger and William Rehnquist have all consciously sought to emulate Hughes in leading the Court.

Though most historians have focused almost exclusively on Hughes's views on economic regulations (New Deal legislation), more attention should be given to his emphasis on liberty of conscience. According to one historian, "Hughes's entire record in this field makes him one of the greatest modern exponents of civil liberties." Another historian has noted that as early as 1934, Hughes had shown "greater fondness for the Bill of Rights than any Chief Justice this country ever had." Under Hughes's leadership, the Court made the First Amendment protections of freedom of press, freedom of speech, freedom of assembly and the free exercise of religion binding upon the states.

Unfortunately, historians have generally neglected Hughes's contributions to protecting the free exercise of religion and freedom of conscience during his tenure as Chief Justice. Hughes's "Child Benefit Theory" was notably applied by Hugo Black in the landmark decision of *Everson v. Board of Education*. According to respected political philosopher Martha Nussbaum, Hughes's Child Benefit Theory as applied by Black in *Everson* articulated an important "neutrality as fairness" principle. This principle emphasized that government must always be neutral on religious matters, favoring or disfavoring no particular conception of religion, not even religion over non-religion. This specific neutrality principle has guided the Court in multiple cases throughout the

years and continues to be affirmed by church-state scholars and religious liberty watchdogs. In the *United States v. Macintosh*, Hughes took a bold stand against the status quo and wrote a passionate dissent in defense of the "supremacy of conscience." The legal reasoning found in Hughes's *Macintosh* dissent would be adopted fifteen years later by a majority of the Supreme Court. Thanks mostly to Hughes's *Macintosh* dissent and a sensible Supreme Court, applicants for citizenship who have objections to war based on their religious belief may swear to an alternative form of the naturalization oath. In 1938, Hughes struck down an ordinance as unconstitutional which made it difficult for religious groups especially to evangelize in public.

For the first eight years of his tenure as Chief Justice, Hughes demonstrated a great respect for what his Baptist forefather Roger Williams called soul liberty. In all of the cases mentioned above, Hughes displayed a significant appreciation for the rights of the individual conscience in religious matters. However, Hughes departed from his usual conscience-respecting course when he voted with the majority in *Minersville v. Gobitis* (1940) to uphold a law requiring that students to salute and pledge allegiance to the United States flag. Unlike other religious liberty advocates, Hughes did not view the mandatory pledge requirement as a "legitimate impingement on religious belief." How Hughes could reconcile such a position with his past positions supporting the free exercise of religion is impossible to understand. Nussbaum's explanation offers the best insight into Hughes's glaring inconsistency. She explains that Hughes and the other eight Supreme Court Justices were caught up in a "climate of public anxiety" during World War II which "got the better of constitutional liberty." Despite Hughes's blunder, he redeemed himself by voting with the majority in the 1940 decision of *Cantwell v. Connecticut*, a landmark decision that applied for the first time the protections of the First Amendment's Free Exercise Clause to the states.

Most historians agree that Charles Evans Hughes was a unique individual who had been significantly shaped by his background and experiences. However, these historians have failed to

explore the extent to which Hughes's religious beliefs and backgrounds shaped his thought. Charles Evans Hughes was thoroughly Baptist. He was born into a Baptist family, served in Baptist leadership roles and died a Baptist. His father was a Baptist minister. Hughes himself felt "called" to the ministry until his senior year of college. He pursued that "call" at two of the most respected Baptist universities in America, Madison University and Brown University. His undergraduate education was distinctly Baptist. The Baptist higher education that Hughes received was committed to the Baptist distinctives of religious liberty and freedom of conscience while also focused on accommodating Scripture with the claims of science. It is quite clear that Hughes's Baptist education instilled in him a strong dislike of creeds and distrust of those overly concerned with dogma.

Hughes was theologically situated in the evangelical liberal tradition of Northern Baptist leaders, Walter Rauschenbusch and William H. P. Faunce. As a Sunday school teacher, Hughes expressed this dislike of creeds and distrust of dogmatists by focusing exclusively on the teachings of Jesus Christ with special emphasis given to the Sermon on the Mount. In 1907, Hughes became the first President of the Northern Baptist Convention. Hughes's name attached to the new Baptist convention helped Northern Baptists attain greater national prominence. While living and working in Washington D.C., Hughes joined Calvary Baptist Church. "Charles the Baptist" remained a committed and faithful member of Calvary until his death in 1948.

As a life-long Baptist, Hughes knew what Baptists had historically believed. While he was a Northern Baptist liberal, Hughes, like Rauschenbusch, demonstrated a great appreciation for the best of the Baptist tradition. Hughes's speech honoring Roger Williams demonstrated that he was quite familiar with Baptist history and had studied the writings of Williams. Hughes's speech also echoed several of the same themes voiced by G.W. Truett just two years prior on the steps of the United States Capitol. Without a doubt, the distinctly Baptist beliefs concerning soul liberty,

absolute religious freedom and respect for the conscience of each and every individual showed up in Hughes's church-state decisions when he Chief Justice of the Supreme Court. The principles of neutrality and freedom of conscience that Hughes articulated can be gleaned from the writings of many of his Baptist forefathers, most prominently Roger Williams.

The question then begs, why have Baptist historians not recognized the contributions of this renowned Baptist layman towards religious liberty? Of the most popular Baptist historians, just three have mentioned Charles Evans Hughes. These historians devote but a mere sentence to Hughes's election as President of the Northern Baptist Convention.<sup>100</sup> Charles Evans Hughes deserves a prominent place in Baptist history texts alongside fellow Baptist Sunday school teacher Jimmy Carter for his positive contributions to religious liberty and freedom of conscience in the political arena. Hopefully, future Baptist historians will take the time to recover forgotten but immensely important Baptist leaders such as Charles Evans Hughes.

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<sup>100</sup> Bill J. Leonard devotes one sentence to Hughes. See Bill J. Leonard, *Baptist Ways: A History* (Valley Forge: PA, Judson Press, 2003), 391. Doug Weaver also briefly mentions Hughes. See C. Douglas Weaver, *In Search of The New Testament Church: The Baptist Story* (Macon: GA, Mercer University Press, 2008), 120. See also Everett C. Goodwin, *Down by the Riverside: A Brief History of Baptist Faith* (Valley Forge: PA, Judson Press, 2002).