

The Flag Salute Cases

by

Winston Bowman

*Associate Historian, Federal Judicial History Office,
Federal Judicial Center*

Prepared for inclusion in the project

Federal Trials and Great Debates in United States History

Federal Judicial Center

Federal Judicial History Office

2017

This Federal Judicial Center publication was undertaken in furtherance of the Center's statutory mission to "conduct, coordinate, and encourage programs relating to the history of the judicial branch of the United States government." While the Center regards the content as responsible and valuable, this publication does not reflect policy or recommendations of the Board of the Federal Judicial Center.

Contents

| | |
|--|----|
| The Flag Salute Cases—A Short Narrative, | 1 |
| Introduction, | 1 |
| The flag salute laws, | 2 |
| Jehovah’s Witness resistance, | 2 |
| The Gobitases’ resistance, | 4 |
| The <i>Gobitis</i> complaint, | 5 |
| The judge, | 6 |
| The school board’s motion to dismiss, | 6 |
| Issues for trial, | 8 |
| The trial, | 9 |
| Judge Maris’s opinion, | 10 |
| The U.S. Court of Appeals for the Third Circuit, | 10 |
| Appeal to the Supreme Court, | 12 |
| Justice Frankfurter’s <i>Gobitis</i> opinion, | 13 |
| Dissenting views on <i>Gobitis</i> , | 14 |
| The response to <i>Gobitis</i> , | 15 |
| <i>Jones v. Opelika</i> , | 17 |
| Congressional action, | 17 |
| The <i>Barnette</i> case, | 18 |
| <i>Barnette</i> before the Supreme Court, | 21 |
| Concurring opinions, | 22 |
| Justice Frankfurter’s dissent, | 22 |
| The legacy of the flag salute cases, | 23 |
| Themes and questions, | 24 |
| The Judicial Process: A Chronology, | 26 |
| The Federal Courts and Their Jurisdiction, | 29 |
| United States District Court for the Eastern District of Pennsylvania, | 29 |
| United States Court of Appeals for the Third Circuit, | 29 |
| Supreme Court of the United States, | 30 |
| United States District Court for the Southern District of West Virginia, | 30 |
| Legal Questions Before the Federal Courts, | 32 |
| Did the federal courts have jurisdiction to hear challenges to mandatory flag salutes?, | 32 |
| Did the Fourteenth Amendment “incorporate” the Free Exercise Clause against the states?, | 32 |

Did mandatory flag salutes violate the Free Exercise Clause?, 32
Did mandatory flag salutes violate the liberty protected by the Due Process Clause of the Fourteenth Amendment?, 33
Did Congress's joint resolution codifying the correct etiquette for saluting and pledging allegiance to the flag preempt state laws mandating a different ritual?, 33

Biographies, 34

The judges, 34

Albert Branson Maris, 34
William Clark, 35
Felix Frankfurter, 36
Harlan Fiske Stone, 37
John Johnston Parker, 39
Robert Houghwout Jackson, 40
Hugo Lafayette Black, 41
William Orville Douglas, 42
Frank Murphy, 44

The attorneys, 45

Olin Moyle, 45
Hayden Covington, 45
Joseph Henderson, 46
Arthur Garfield Hays, 47
Joseph Rutherford, 47
George Knowles Gardner, 48
W. Holt Wooddell, 48
William Wysong, 48

The parties, 49

The Gobitas family, 49
The Barnett family, 50

Media Coverage and Public Debates, 51

Historical Documents, 53

Testimony of Charles Roudabush, 53
Testimony of William Henry Gobitas, 59
Eleanor Roosevelt, "My Day", 61
Beulah Amidon, "Can We Afford Martyrs?", 62
"Frankfurter v. Stone", 64
"Rights and Privileges", 65
"Victory for Freedom", 66
Judge Maris's Opinion in *Gobitis v. Minersville School Dist.* (1938), 67

The Flag Salute Cases

Judge Clark's Opinion in *Minersville School Dist. v. Gobitis* (1939), 70
Letter from Justice Frankfurter to Justice Stone, May 27, 1940, 74
Supreme Court Opinion in *Minersville School District v. Gobitis*, 76
West Virginia State Board of Education Flag Salute Regulation, 83
Judge Parker's Opinion in *Barnette v. West Virginia State Board of Education*, 84
Supreme Court Opinion in *West Virginia State Board of Education v. Barnette*, 87
Bibliography, 99

The Flag Salute Cases—A Short Narrative

Introduction

Lillian Gobitas was nervous as she walked into her seventh grade class in Minersville, Pennsylvania on October 23, 1935. For some time she had wrestled with her conscience knowing that, as a Jehovah's Witness, she should not salute the flag as her school required. Though a popular girl and a good student, she worried she would become a pariah if she refused to stand, extend her arm at eye level, raise her palm to the flag, and recite the pledge of allegiance with her classmates. Even so, she plucked up the courage to speak to her teacher before class, explaining she could not continue to commit what her faith told her was an act of idolatry. Not knowing what to expect, she was relieved when her teacher hugged her and told her she respected her bravery. Lillian sat quietly through the pledge that day, but things would not remain tranquil.

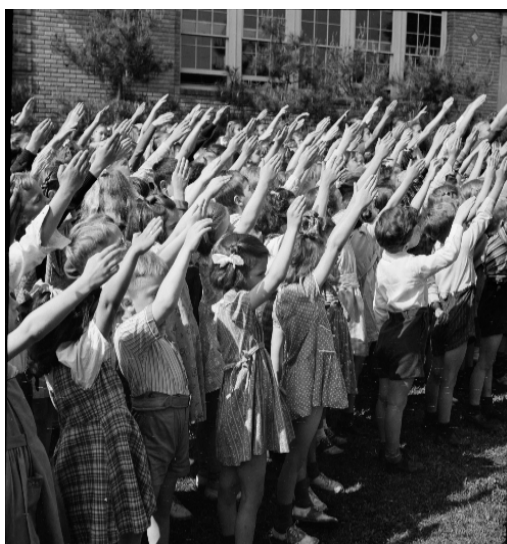
The refusal of Lillian, her younger brother William, and many other Witness children to pay homage to the flag not only resulted in their expulsion from school, it touched off a legal battle that forced Americans to reappraise the meaning of patriotism in a time of crisis and sped the transformation of constitutional law in the federal courts. Indeed, Supreme Court Justice Harlan Fiske Stone quipped in 1941 that "the Jehovah's Witnesses ought to have an endowment in view of the aid which they give in solving the legal problems of civil liberties." Stone's remark was prescient, coming as it did between the two most important flag salute cases. In the first, *Minersville School District v. Gobitis* (a clerical error resulted in the misspelling of the family name), Stone was the lone dissenter as the court reversed lower court rulings in the Gobitases' favor. In the second case, *West Virginia State Board of Education v. Barnette*, a group of Witnesses again won at trial as a federal district court took the unusual decision to disregard a recent Supreme Court precedent. This time, however, the Supreme Court followed suit, overturning its decision in *Gobitis* and invalidating mandatory flag salutes.

This rapid sea change reveals a great deal about the judicial process and the often misunderstood relationship between trial and appellate courts in the federal system. But we cannot understand it fully without an appreciation of the turbulent historical moment in which the courts heard these cases. Drawing together events occurring inside and outside the courtroom in the flag salute cases demonstrates the value of federal trials to historians and teachers by modelling how trials can distill and crystalize otherwise abstract social forces at a fixed moment in time. Adopting this approach to the flag salute cases provides teachers with a useful tool for engaging students in the complex and interrelated histories of the New Deal, World War II, and the evolution of political and civil liberties in mid-century America.

The flag salute laws

Formalized flag salute rituals began in 1892 as part of an initiative to celebrate the 400th anniversary of Christopher Columbus's voyage to the Americas. The text of the pledge associated with the flag salute was included in an article in *Youth's Companion* magazine calling on teachers to "stimulate patriotism in the schools." In 1898, acting the day after the Spanish–American War began, New York became the first state to make the flag salute compulsory, though it was joined by just four other states before World War I.

After the war, the movement was buoyed by a constellation of groups, ranging from the Daughters of the American Revolution to the Ku Klux Klan, seeking to encourage patriotism as a bulwark against Communism. The American Legion in particular made mandatory flag salutes its signal issue. Founded in 1919 to promote "one hundred percent Americanism," the Legion distributed some 14 million pamphlets on the flag salute in 1924 alone.



Connecticut schoolchildren saluting the flag
Courtesy: Library of Congress

with the rise of the Nazi party in Germany, whose distinctive salute bore an uncanny resemblance to that practiced by many American schoolchildren.

Jehovah's Witness resistance

This unhappy coincidence was linked to the genesis of American Witnesses' refusal to salute the flag. German Jehovah's Witnesses had refused to engage in the Nazi salute

on the grounds that it reflected a form of worship for a secular power. Partly because of this, they suffered atrocious persecution from Adolf Hitler's regime. The sect was officially disbanded and Witness literature and property confiscated or destroyed. Many Witnesses were placed in concentration camps and thousands died at the hands of the Nazi regime. In a 1935 address at a convention of Witnesses in Washington, D.C., the group's de facto temporal leader, Joseph Rutherford, praised the principled resistance of his German colleagues and argued that American Witnesses should similarly resist saluting or pledging allegiance to the "graven image" of the flag.

This stance was in keeping with the implacable adherence to biblical text emphasized by the group from its inception. Charles Taze Russell had founded the group originally known as the "Russellites" or the "Bible Students" in 1872 as a small bible class in Pittsburgh, Pennsylvania, that grew through the dissemination of premillennialist literature produced by Russell's Watch Tower Bible and Tract Society. The group was not formally incorporated as a church and claimed to derive from the apostles rather than from any contemporary movement or formal religious hierarchy. Based on a complex interpretation of scripture, Russell predicted the world would end in 1914. When the end did not arrive, the sect lost some followers, though some diehards convinced themselves that the start of World War I that year heralded the beginning of the Armageddon.

When Rutherford took over as President of the Watch Tower Society on Russell's death in 1916, he revived the group with a confrontational zeal. A truculent lawyer who was briefly imprisoned for criticizing America's entry into World War I, Rutherford urged members to spread their faith without delay (and frequently without much decorum). "Judge" Rutherford, as the group called him,¹ began referring to its members as "Jehovah's Witnesses" to convey their role in testifying to the world about the revelations of God's word. Under Rutherford's direction, the Witnesses' evangelism pulled no punches. They played recordings of intemperate speeches denouncing other religions on street corners, evangelized at doorsteps, and frequently told those who refused to buy or accept their literature that they were doomed. Though they eventually sought relief in the federal courts, the Witnesses also asserted the primacy of religious over secular law.

In light of their provocative beliefs and tactics, it was not surprising that some Witnesses had refused to salute the flag even before Rutherford's pronouncement. Indeed, a young Witness was expelled from a school in Washington State on these grounds as early as 1925. (A state court actually removed the child from his parents' care on the grounds that they were contributing to his delinquency, but the parents opted not to appeal because they did not recognize the authority of secular courts.) The speech, however, inaugurated a more forceful wave of resistance to the salute

1. Like many attorneys in the state, Rutherford briefly served as a "special judge" on an interim basis while a lawyer in Missouri, but he never held judicial office.

and pledge. This stance combined with the Witnesses' existing unpopularity and a wave of paranoia that attended Germany's conquest of most of continental Europe to make the Witnesses particularly vulnerable to persecution in America.

The Gobitases' resistance

Though they attended the convention, the Gobitases were not present at Rutherford's speech (Walter Gobitas apparently took his children to the zoo for the day). They were, however, aware of its content and consulted the bible for guidance. *Exodus 20:3-5* commanded that, "Thou shalt not make unto thee any graven image, nor bow down to them nor serve them for I the Lord thy God am a jealous God visiting the iniquity of the fathers upon the children unto the third and fourth generation of them that hate me." 1 *John 5:21* warned, "Little children, keep yourselves from idols." To the Gobitases, the import was clear: the flag salute violated God's law.

Lillian later recalled that her parents did not pressure the children into refusing to salute the flag. Initially, she and William went through the motions of the salute and continued to mouth the words of the pledge. After listening to Rutherford deliver a radio address praising the courage of a Massachusetts student who refused to salute the flag, however, first William and then Lillian took the same step.

William's teacher was outraged and tried to forcibly raise his arm into the salute position, but he dug his hands deep in his pockets. Though Lillian's teacher proved more understanding, her classmates and the school authorities did not. For weeks she endured bullying as students threw stones at her and snapped, "Here comes Jehovah!" as she passed by. Though neither the state nor the school board had made saluting the flag mandatory, School Superintendent Charles Roudabush was incensed by the Gobitases' defiance and ensured the board took up the issue at its next meeting.

When the board met on November 6, 1935, Walter Gobitas, his children, and the mother of another young Witness attempted to defend their position in both religious and constitutional terms. Though only in fifth grade at the time, William perhaps put the case most succinctly, writing in a letter to the board that, "I do not salute



William, Walter, and Lillian Gobitas

Courtesy: Library of Congress

the flag not because I do not love my country but [because] I love my country and I love God more and must obey His commandments.”

Minersville was not hospitable territory for such claims. A town of around 10,000 in Pennsylvania’s anthracite coal mining region, Minersville was approximately 90% Catholic and many of its residents had little patience for the Witnesses’ claims that Catholicism was a “racket” and the Mother Church a “whore.” The board acceded to Roudabush’s request and passed a regulation requiring teachers and students to participate in the salute and pledge ceremony. “[R]efusal to salute the flag,” the regulation stated, “shall be regarded as an act of insubordination and shall be dealt with accordingly.” Without waiting for the next school day to roll around, Roudabush expelled Lillian, William, and the third student on the spot. Walter promised to sue, though it would be approximately eighteen months before he did so.

Minersville, Pa.
Nov. 5, 1935

Out School Directors
Dear Sirs

I do not salute the flag because I have promised to do the will of God. That means that I must not worship anything out of harmony with God's law. In the twentieth chapter of Exodus it is stated, "Thou shalt not make unto thee any graven image, nor bow down to them, nor serve them for the Lord thy God is a jealous God visiting the iniquity of the fathers upon the children

unto the third and fourth generation of them that hate me. I am a true follower of Christ. I do not salute the flag because I do not love my country, but I love my country and I love God more and I must obey His commandments.

Your Pupil,
Billy Gobitas

William Gobitas’s note to the Minersville School Board
Courtesy: Library of Congress

The Gobitis complaint

Walter Gobitas had few good options for his children’s education after their expulsion. No public school would take them. A grocer who struggled to keep his business afloat amid the Great Depression and a boycott of his store led by a local Catholic church, he had limited funds for private education. Minersville and nearby towns housed several Catholic parochial schools, but the family’s faith was no more likely to be tolerated in those schools than it had been in the public system.

Instead, a group of Witnesses founded an improvised school in a farmhouse thirty miles away. The Gobitas children, along with twenty others attending the “Jones Kingdom School,” boarded three-to-a-bed during the week and Walter converted his truck into a school bus to take them home on weekends. During the winter months when the rural roads were impassible, the family was often separated for long stretches. Lillian soon outgrew the school’s grade structure and had to move on to a local business college that taught her basic secretarial skills. The college’s program lasted less than a year, however, and it was unclear what, if any, private education she could obtain in the area after that.

With the help of Olin Moyle, general counsel for the Watch Tower group, Walter took the only viable option available to him and sued the school district and its board members in the United States District Court for the Eastern District of Pennsylvania.

The suit, which Walter brought both in his own right and as the “next friend” to his children, sought a declaration that the school board’s regulation was invalid and an injunction (an order from the court compelling the defendants to refrain from specified conduct) against the children’s continued exclusion from school or further requirements that they salute the flag.

The judge

As a suit requesting an injunction, the case would be heard by a judge without a jury. Injunctions derive from a body of law known as “equity,” which evolved out of a different court system from the “common law” in medieval England. Equitable remedies are designed to provide flexible solutions to parties for whom simple monetary damages would be an inadequate balm. The Seventh Amendment, however, provides for a right to a civil jury trial only in “[s]uits at common law.”

The judge randomly selected to hear the case was Albert Maris. A superficial glance at Judge Maris’s background might have given hope to either side. A recent arrival on the bench, Maris was a World War I veteran who had served with distinction in Europe. He was also a Quaker – a member of a religious sect that had suffered persecution in seventeenth century Britain in part because of its members’ refusal to doff their hats as a show of reverence for secular leaders and courts. There is no indication that Judge Maris’s religion influenced his decision in the case (indeed, he stated at one point that he found the Witnesses’ interpretation of the Bible hard to understand). Nevertheless, this element of his background was consonant with his emphasis on Pennsylvania’s history of religious toleration and the dangers of presuming to understand the religious significance of an act to any given individual. Lillian subsequently remembered the judge as a calming presence in the courtroom. “He was a very agreeable person,” she recalled, “not formidable at all.”

The school board’s motion to dismiss

Shortly after the Gobitases filed suit, the defendants moved to dismiss the case, arguing the court lacked jurisdiction and that the Gobitases had failed to state a legal claim that entitled them to the declaration and injunction they sought. This second line of attack averred that, even if Judge Maris were to find all the facts the Gobitases alleged to be true, they would not be entitled to prevail because there was nothing constitutionally impermissible in requiring students to salute the flag. Judge Maris’s ruling on this motion would therefore inevitably have a major influence on the trial to come.

Although the *Gobitis* case would unambiguously fall under the remit of the federal courts today, there was some legal support for the motion to dismiss at the time it was filed. While *Gobitis* was the first federal trial involving school flag salutes, three

state courts had recently upheld the validity of comparable requirements elsewhere in the country. The Supreme Court of the United States dismissed appeals from two of these state suits while *Gobitis* was pending before the district court on the grounds that they did not present a “substantial federal question.” Moreover, recent Supreme Court precedents had rejected religious objections to analogous legislation in other fields. A 1931 decision, for instance, upheld the denial of citizenship to an immigrant who refused to pledge alliance to the United States on religious grounds. Similarly, in 1934, the court ruled against students suspended from the University of California after citing religious objections to compulsory military training courses.

These decisions were made under a different paradigm for understanding the religious rights enshrined in the First Amendment than generally prevails today. That amendment states in part that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” Prior to the adoption of the Fourteenth Amendment in 1868, this language was widely understood to restrict the actions of the federal government only. Indeed, several states supported officially sanctioned churches in the late eighteenth and early nineteenth centuries. Though some states had strong protections of religious conscience, these derived from their own constitutions and statutes, rather than from federal law. The experience of the Civil War and Reconstruction, however, demonstrated that states, as well as the federal government, posed a threat to individual liberties. As a result, section 1 of the Fourteenth Amendment contained a series of restrictions on the actions of the states: “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

Debates over the exact scope of these protections have formed a central theme of constitutional interpretation since Reconstruction. At the time the *Gobitis* case began, the courts had embarked on tentative steps toward an approach that “incorporated” the protections of the Bill of Rights against the states by including them in the definition of “liberty” protected by the Due Process Clause of the Fourteenth Amendment. In 1925, for example, the Supreme Court had held that the Free Speech Clause of the First Amendment prohibited states, as well as Congress, from passing laws suppressing speech. The court did not unambiguously incorporate the religion clauses of the First Amendment against the states until 1940, however, leaving the federal status of the *Gobitis*’ claims up for debate at the trial-court level.

Judge Maris rejected the idea that the First Amendment’s Free Exercise Clause protected the *Gobitis*’ religious rights. Nonetheless, he held the case could proceed to trial because the liberty protected by the Due Process Clause included a “liberty of conscience” as defined by state law. Drawing on Pennsylvania’s history of religious toleration, Maris defined this right broadly to include the state constitutional guarantee that “no human authority can, in any case whatever, control or interfere

with the rights of conscience.” This approach would likely strike modern lawyers as unorthodox, but it reflects the fluid nature of this area of constitutional law before a series of Supreme Court decisions defined and refined the field in the mid-twentieth century.

Judge Maris rebuffed the school board’s suggestion that the flag salute had no religious significance. “Liberty of conscience,” he posited, “means liberty for each individual to decide for himself what is to him religious.” Doubtless alluding to the rise of Nazism in Germany, Maris suggested that “[i]n these days when religious intolerance is again rearing its ugly head in other parts of the world it is of the upmost importance that the liberties guaranteed to our citizens by the fundamental law be preserved from all encroachment.”

Finally, Judge Maris left it to the trial to determine whether the court had jurisdiction. Federal courts have two major forms of jurisdiction: diversity jurisdiction and federal question jurisdiction. Diversity jurisdiction permits parties from different states to bring state-law cases before a federal court if the amount at stake in the case meets a statutory minimum. Federal question jurisdiction permits the courts to hear claims predicated on federal law. Since the Gobitases were suing officials in their own home state, they could only bring the case in federal court if it met the requirements for federal question jurisdiction set by Congress. They based jurisdiction on two such provisions: one that permitted district courts to hear allegations that a state deprived an individual of a federal constitutional right “under color” of state law, and another that granted district courts jurisdiction over cases “arising under” the Constitution of the United States provided the amount in dispute exceeded \$3,000. Judge Maris rejected the Gobitases’ claim that the court had jurisdiction under the first provision, but held the case “arose” under the federal constitution. As a result, Walter Gobitas would have to prove at trial that his expenses in sending the children to private school exceeded \$3,000.

Issues for trial

Given the breadth of the liberties Judge Maris articulated in his opinion denying the motion to dismiss, the school board’s members were probably aware that they faced an uphill battle at trial. The burden of proof in civil trials, however, falls upon the plaintiffs. Since the standard Judge Maris had articulated held that the state could not compel individuals to forgo sincerely held beliefs and swear allegiance to a symbol they considered idolatrous, the Gobitases would have to prove their objections were sincerely held religious convictions. The second major point that the plaintiffs had to prove had more to do with Mammon than God, as Walter would have to substantiate his claim that his expenses exceeded \$3,000.

In both their answer to the complaint and at trial, the defendants attacked these assertions. The answer claimed that there was no religious basis for refusing to salute

the flag and averred that the Gobitases had “knowingly and willfully dishonored and been disrespectful to their country and state and have violated its laws.” The defense lawyers argued that “religion” was an objective, legally defined term and that it was unreasonable to construe the flag salute as conveying any religious meaning. Finally, they denied that Walter’s expenses had exceeded \$3,000 and claimed that he had failed to mitigate his losses by enrolling his children in affordable parochial schools closer to home.

The trial

Trials before a judge alone, often known as “bench trials,” are usually quicker and more tightly focused than those involving a jury. This is partly attributable to the sometimes-lengthy jury selection process. Bench trials also obviate the need to provide background information to jurors, who are inevitably less familiar with the case than the judge. The *Gobitis* trial was further streamlined when the defendants agreed to stipulate to many of the facts of the case, admitting, for instance, that William and Lillian were expelled from school because of their refusal to salute the flag. Judge Maris frequently refused to hear duplicative evidence or testimony on any matters to which the parties had agreed, declining, for example, to hear testimony from the children’s teacher at the Jones Kingdom School on the grounds that Walter Gobitas had already testified to the children’s education after expulsion and Superintendent Roudabush had testified to the children’s record as students. As a consequence of this efficiency, the trial, held in Philadelphia, began and ended on February 15, 1938.

Moyle called Walter, Lillian, and William Gobitas, and Frederick Franz, a member of the Watch Tower group who subsequently became its president. Franz testified to the beliefs of the Jehovah’s Witnesses and thus to the sincerity of the Gobitases’ objections to the salute. Walter Gobitas’s evidence focused on the religious values he had taught his children and the cost of sending them to private school as a consequence of their expulsion. The children’s brief testimony focused on their religious beliefs and their objections to saluting the flag. Judge Maris frequently asked questions throughout the evidence. After the attorneys concluded their examination of William, for instance, Judge Maris followed up by asking about his views of the country and patriotism, establishing that his objections to the flag salute had nothing to do with his attitude toward the nation for which it stood.

Superintendent Roudabush was the primary witness for the defense. In many ways, his testimony was the most interesting in the case, though it seems unlikely to have helped the defendants’ cause. While he acknowledged the Gobitas children had otherwise been model students, he refused to see their objections to the flag salute as anything other than an act of insubordination towards the school and ingratitude to the nation. He similarly rejected the notion that the salute had any religious significance, even though he also asserted that the effects of the salute and pledge were

“just the same as going to Church.” Going so far as to refer to the Gobitases’ views as “perverted,” Roudabush even seemed to countenance the notion that the schools should “correct” aberrant religious views. The defense concluded its case by reading into the record a series of textbook homages to the flag that stressed its symbolic importance in a manner that Judge Maris suggested was “an acknowledgement the flag is a symbol which [Lillian and William] are asked to worship.”

Judge Maris’s opinion

Judge Maris delivered his findings of fact and legal opinion on June 18, 1938, six days before his elevation to the United States Court of Appeals for the Third Circuit (“Third Circuit”). Based primarily on Walter Gobitas’s testimony, he found the cost of Lillian’s schooling to be \$1,200 and William’s to be \$2,000. Aggregating those amounts, he held that the case had met the amount required for federal jurisdiction. He also found that the children’s objections to the salute were deeply held religious convictions the state could not restrict. “No one who heard the testimony of the plaintiffs and observed their demeanor upon the witness stand,” he stated, “could have failed to be impressed with the earnestness and sincerity of their convictions.” Although he confessed he could not see the sense in the Witnesses’ interpretation of the biblical injunctions against idolatry, Judge Maris was “nonetheless entirely satisfied that they sincerely believe that the act does have a deep religious meaning and is an act of worship which they can conscientiously render to God alone.”

Judge Maris went on to offer an eloquent rejection of Roudabush’s assertion that the flag salute was a vital means of instilling patriotism and preserving the nation’s security. “The safety of our nation,” he wrote, “surely does not depend upon the totalitarian idea of forcing all citizens into one common mold of thinking and acting or requiring them to render a lip service of loyalty in a manner which conflicts with their sincere religious convictions. Such a doctrine seems to me utterly alien to the genius and spirit of our nation and destructive of that personal liberty of which our flag itself is the symbol.”

The U.S. Court of Appeals for the Third Circuit

The Minersville School District opted to appeal Judge Maris’s decision to the Third Circuit, which then consisted of Delaware, New Jersey and Pennsylvania. The three judge panel hearing the appeal was composed entirely of judges recently appointed to their positions. John Biggs, Jr. was appointed to a newly-created seat in 1937. William Clark had previously served on the United States District Court for the District of New Jersey before being appointed to the Third Circuit in 1938. The Senate confirmed his elevation on the same day as Judge Maris’s. Harry Ellis Kalodner received a recess appointment to fill Maris’s seat on the Eastern District of Pennsylvania a few weeks

after his departure and was subsequently confirmed by the Senate in 1939. Judge Kalodner was sitting on the court of appeals by designation, possibly because Judge Maris could not hear the appeal from his earlier judgment.

The rapid changing of the guard on the Third Circuit mirrored a slower, but no less profound, shift in the composition of the federal bench as a whole. American legal and political thought was in an unusually plastic state in the 1930s. The New Deal's attempt to ameliorate the effects of the Great Depression through the accretion of power to federal bureaucracies offered challenges to traditional concepts of both liberal democracy and constitutional liberties. In the early years of Franklin Roosevelt's administration, federal courts struck down several components of his expansive New Deal agenda. These judges, most schooled in the legal and economic orthodoxies of the late nineteenth century, believed these laws exceeded the federal government's powers to regulate interstate commerce or unduly intervened in the economic marketplace and thus interfered with "liberty of contract."

Roosevelt responded by chastising the nation's courts for embracing a "horse and buggy" definition of commerce that hamstrung his ability to combat the Great Depression. Following his landslide reelection in 1936, Roosevelt embarked on a plan to "pack" the Supreme Court with justices more sympathetic to his cause. Though this initiative failed, both a majority of the existing Supreme Court justices and most of the 197 judges Roosevelt nominated to the federal bench (nearly as many as his three nearest predecessors combined) adopted a broader understanding of federal legislative and executive power. While the federal courts increasingly rejected a view of economic liberty that handcuffed the government's abilities to deal with the financial crisis, however, many Americans found the implications of unchecked government power troubling, particularly against the backdrop of totalitarianism abroad.

The nation's judges and justices similarly wrestled with the implications of the judiciary's changing role in the aftermath of the constitutional crisis over the New Deal. Some subscribed to an ideal of judicial restraint that emphasized that judges should not override the decisions of politically accountable officials. While their own preferences might seem more attractive than those of the judges who had invalidated economic regulation, these judges felt it best to avoid the trap of inserting their own values into the litigation process. Others felt that judges were justified in bucking legislators and administrators in cases involving political and civil liberties or discrimination against minority groups. In such cases, they reasoned, it did not make sense to defer to majorities since the purpose of the constitutional rights involved was to protect unpopular views and groups *from* the majority. These contrasting philosophies were brought to a head by the *Gobitis* appeal.

At the circuit level, the civil libertarians held sway. Writing for a unanimous court, Judge Clark upheld Judge Maris's decision. In contrast to the formalistic approach favored by earlier generations of federal judges, Clark's opinion relied on a wide range of extrajudicial sources to support his critique of the flag salute as both a matter of

constitutional doctrine and practical utility. Referencing his own experiences as a soldier in World War I, as well as Hitler's dismissive description of the Witnesses as "quacks," Judge Clark rejected the idea that the flag salute was necessary to promote national cohesion. Quoting psychological arguments about the "futility in compelling a child to salute the flag when it infringes upon his or her religious tenets," Judge Clark reasoned that "such compulsion generates resentment," rather than patriotism. In contrast to Judge Maris's approach, Judge Clarke unambiguously applied the First Amendment's Free Exercise Clause to the case. Under that rubric, he held that the school board had failed to heed George Washington's 1789 assurance to the Quakers that the government must "'treat the conscientious scruples' of all children with . . . 'great delicacy and tenderness.'"

Appeal to the Supreme Court

Unsurprisingly, Clark's approach did not impress Roudabush, who denounced it as a "hodgepodge of perverted quotations." Nevertheless, with limited resources and having lost twice, the Minersville School Board initially planned to accept the Third Circuit's ruling. On the urging, and with the financial support, of local patriot groups, however, the board members opted to make a final appeal to the Supreme Court. The court granted a writ of certiorari, a procedural mechanism by which four justices must agree to hear an appeal from a lower court. According to Justice Felix Frankfurter's subsequent opinion, the justices opted to hear the case because it reached a different outcome than the earlier state cases they had declined to hear, potentially leading to confusion as to the status of the nation's flag salute laws.

In an unusual turn of events, Rutherford took on the task of arguing the case before the Court. Shortly after arguing the case to the Third Circuit, Moyle experienced a bitter rift with Rutherford and penned an open letter of resignation denouncing what he saw as hypocrisy and corruption at the heart of the Watch Tower organization. Though Moyle announced he would temporarily stay on to continue dealing with pending cases, the Watch Tower board summarily dismissed him. Rutherford replaced him with Hayden Covington, a shrewd Texas lawyer and Witness, who would assist Rutherford with the Supreme Court appeal.

While Covington would eventually win dozens of major victories before the Supreme Court, the brief he helped Rutherford compile was unlikely to resonate with the justices. Though he was trained as a lawyer and had dealt with previous appeals, Rutherford framed the case more as a religious crusade than a lawsuit, cramming the brief with more than 60 Bible references. He stated the core question presented in the case in terms of a battle for supremacy between religious and secular law: "Shall the creature man be free to exercise his conscientious belief in God and his obedience to the law of Almighty God, the Creator, or shall the creature man be compelled to obey the law or rule of the State, which law of the State, as the creature conscientiously

believes, is in direct conflict with the law of Almighty God?” Enthusiastically urging the adoption of a “theocratic government,” this brief made the case that the Jehovah’s Witnesses’ objections sounded in biblical scripture, but did not fully articulate a theory of the constitutional protections accorded that belief. The Committee on the Bill of Rights of the American Bar Association and the ACLU assisted in the appeal, however, with George Gardner of the ACLU making these more conventional legal arguments.

Joseph Henderson, the Philadelphia lawyer who had led the board’s trial defense, and the group of lawyers assisting him devoted a substantial portion of the brief to contesting the biblical validity of the Witnesses’ belief that the flag salute was a form of idolatry. Similarly, the Board argued for a far more forceful form of power than it needed to win the appeal. It argued that the “police power,” the traditional authority of the states to legislate in service of the health, safety, morality, and general welfare of their citizens, trumped the federal constitution’s protections of religious liberty. This claim seemed particularly poorly timed when, a few days before it handed down its decision in *Gobitis*, the Supreme Court approved the incorporation of the First Amendment’s religion clauses against the states in another case involving Jehovah’s Witnesses.

The lawyers’ oral arguments before the court largely followed the patterns established by their briefs, with Rutherford focusing on the Witnesses’ religious objections to the flag salute ceremony and Gardner arguing the First Amendment merits on behalf of the Gobitases. Though both Covington and Lillian Gobitas subsequently remembered the justices being enthralled by Rutherford’s allusions to scripture, Frankfurter apparently used the time to pass a note to one or more of his brethren pointedly questioning whether the Founding Fathers really meant to include claims such as the Witnesses’ in the First Amendment’s protections of religious exercise. Henderson, meanwhile, made essentially the same arguments that had failed to gain approval at the district and circuit court levels, though he was to find a more receptive ear this time.

Justice Frankfurter’s Gobitis opinion

At the Court’s conference following the oral argument, only two justices spoke. Chief Justice Charles Evans Hughes indicated that he thought the case had nothing to do with religion; it was simply a question of whether the state had the power to require students to swear allegiance to the flag. Justice Frankfurter agreed with the Chief Justice in even more emphatic tones. A recent appointee to the Court, Frankfurter was a strong advocate of judicial restraint as a curative to what he perceived to be the excesses of the judges who had struck down New Deal legislation.

These jurisprudential leanings were consonant with Frankfurter’s personal response to the flag salute issue. An immigrant who had moved to America from Austria

at the age of 12 and risen to become an eminent professor at Harvard Law School, Frankfurter had a strong patriotic streak that was galvanized by events in Europe at the time. The nation of his birth had already been annexed by Nazi Germany, and, as the court considered the case, France was falling to a blitzkrieg invasion. Frankfurter spoke so movingly of the importance of instilling a love of country at a time of global crisis that Chief Justice Hughes assigned the opinion to him.

Justice Frankfurter's opinion for the court attempted to mediate between the strenuous assertions of state power put forward by the School Board and the theocratic vision articulated by the Witnesses. The case, Frankfurter acknowledged, called on the court to balance two important and competing interests: the individuals' liberty of religious conscience, and the state's power to promote cohesion and patriotism. He emphasized the importance of the latter, however, noting that "[c]onscientious 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." Provided the state (or in this instance the school board) was operating to further legitimate government ends, rather than attacking religious minorities, then, the law was constitutional.

It is debatable whether this description of motives and interests accurately reflected the reality of the *Gobitis* case. The Minersville flag salute regulation, after all, was created as a direct response to Lillian and William's objections to the salute. Even so, Frankfurter doubtless attempted to capture the patriotic élan of his times when he wrote that, "[w]e live by symbols.' The flag is the symbol of our national unity, transcending all internal differences, however large, within the framework of the Constitution."

Dissenting views on Gobitis

Though no other justice voiced his disagreement with Frankfurter in conference, several had qualms with the outcome of the case. Justices Hugo Black, William O. Douglas, and Frank Murphy all felt uneasy about the decision, but were so impressed by Frankfurter's zeal and erudition on the subject, they opted not to break ranks. Although all four were new to the Court, Justice Douglas explained that the others were impressed by Frankfurter's reputation as a legal academic specializing in constitutional law and "were inclined to take him at face value." Black framed the issue in even more stark terms: "Felix mesmerized us," he later recalled; "[he] was an immigrant, passionate about the flag and what it meant to him. We were so moved by his appeal that we went for it." Murphy, then the Court's newest member, drafted a dissenting opinion, but ultimately opted not to break ranks with the rest of the court to preserve what he presumed to be unity on the matter.

Justice Harlan Fiske Stone, however, did dissent. Stone, a former Attorney General and Dean of Columbia Law School, was not new to the question of dissention during

wartime. Like Frankfurter, who had worked as an advisor to Secretary of War Newton Baker, Stone had played an important role in shaping the law governing claims of conscientious objection to military induction during World War I. Frankfurter's experience had largely confirmed his belief that the federal government's administrative apparatus could flexibly accommodate a range of objectors. But Stone became increasingly concerned, during his service on the three-man Board of Inquiry which determined the validity of thousands of conscientious objector claims, that something approaching judicial review was necessary to ensure fairness for individuals who were likely to be unpopular at a moment of elevated patriotism. Stone was similarly wary of deferring to school boards and state legislatures on the flag salute issue.

That the government's goal in insisting on students saluting the flag might be valid or even laudable, Stone argued, did not mean the requirement was constitutional. "History teaches us," he wrote, "that there have been but few infringements of personal liberty by the state which have not been justified, as they are here, in the name of righteousness and the public good, and few which have not been directed, as they are now, at politically helpless minorities." This case, he argued, was not like prior instances in which neutral state laws impinged on religious beliefs by, for example, prohibiting Mormon polygamy or limiting Jewish rabbis' access to wine during Prohibition. Flag salute requirements involved active coercion: they required students to voice beliefs antithetical to their own. Stone circulated his opinion to the other justices after Douglas, Murphy and Black had indicated their willingness to join Frankfurter's opinion. None was willing to renege on that commitment at the time, though each eventually admitted regretting the decision not to do so.

The response to Gobitis

The reaction to the *Gobitis* decision beyond the Supreme Court was immediate and profound. In the aftermath of the Fall of France, concern that America would be drawn into a second world war mounted. Paranoia set in as many Americans speculated that France and the Low Countries could not have been overrun so quickly without internal enemies sabotaging the war effort from within. Concerns that America, too, might fall prey to a "fifth column" of domestic traitors led to hysteria over groups deemed insufficiently patriotic. After the flag salute controversy, Jehovah's Witnesses became the most vulnerable scapegoats for "patriots" looking to make an example of anyone insufficiently American.

Groups of Witnesses throughout the country suffered widespread persecution and violence in communities as varied as Odessa, Texas and Kennebunk, Maine. Witnesses in Wyoming were dragged from their homes at night and forced to salute the flag. A mob destroyed the Kingdom Hall and rioted in the streets in Litchfield, Illinois. A Witness in Nebraska was castrated. In one particularly telling incident, a Witness was severely injured by a mob that had secured an American flag to an automobile hood.

When he refused to salute the flag, the rioters beat his head against the flag repeatedly, claiming they would only stop when he saluted it. In many states, the incidents took place with the knowledge, or even at the behest, of law enforcement officials. When a reporter questioned one southern sheriff why he did nothing to stop a mob throwing stones and bricks at Witnesses in his town, he replied, “They’re traitors—the Supreme Court says so. Ain’t you heard?” As Lillian Gobitas, herself arrested for proselytizing, later put it, “[i]t was like open season on Jehovah’s Witnesses.”

Though patriotic groups like the American Legion appeared to tolerate or even condone this violence, it horrified many elements in the media. Frankfurter, long a hero of liberal lawyers, came in for criticism for what his clerks referred to as his “Fall of France” decision. While mobs and vigilantes beating Witnesses seem to have misunderstood (or, more likely, never read) the *Gobitis* opinion, critics argued Frankfurter’s emphasis on patriotism and deference to the will of the majority at the expense of idiosyncratic belief had fed into a dangerous paranoia over loyalty. Several law reviews and legal periodicals published damning analyses of the opinion, with scholars variously critiquing the court for abnegating the power of judicial review and abandoning minorities’ civil liberties.

Criticism of the opinion outside the legal academy, particularly in the aftermath of violence against the Witnesses, was arguably even harsher. Though the *Washington Post* initially lauded the decision not to allow a handful of dissenters to “interfere with legitimate functions of the state under the guise of practicing their religion,” many in the press found fault with Frankfurter’s opinion. *The New Republic*, a progressive periodical in whose early years Frankfurter had been an influential voice, offered a particularly stinging rebuke. “This country,” wrote the editorial board, “is now in the grip of a war hysteria; we are in great danger of adopting Hitler’s philosophy in the effort to oppose Hitler’s legions. When the Supreme Court says in effect that we must imperil religious liberty in the interest of the American state, which is worth preserving because it guarantees religious liberty, it comes dangerously close to being a victim of that hysteria.”

It is unclear whether or to what extent this response influenced subsequent judicial opinions. When Douglas explained to Frankfurter that Black was rethinking the wisdom of the *Gobitis* ruling after the Court’s summer recess, Frankfurter asked whether he had spent the break rereading the Constitution. “No,” Douglas replied, “he has been reading the papers.” Even so, Stone subsequently rejected the idea the response to *Gobitis* outside the courtroom had informed the court’s later decisions.

The Witnesses themselves responded to the opinion by offering an alternative to the conventional salute and pledge. Witnesses could stand respectfully, without saluting or placing their hands on their hearts, and recite a modified pledge:

I have pledged my unqualified allegiance and devotion to Jehovah the Almighty God and to his Kingdom for which Jesus commands all Christians to pray. I respect the flag of the United States and acknowledge it as a sym-

bol of freedom and justice for all. I pledge allegiance and obedience to all the laws of the United States that are consistent with God's law as set forth in the Bible.

This alternative pledge seems to have done little to mollify critics who claimed the Witnesses were unpatriotic. However, three events in 1942 suggested the possibility of meaningful change. On January 8th, Rutherford died. His replacement, Nathan Knorr, adopted a less confrontational approach and, at least initially, afforded Covington a freer hand in shaping Watch Tower legal strategy. The other developments took place in the more earthly forums of the Supreme Court and Congress.

Jones v. Opelika

On June 8, 1942, the Supreme Court issued its initial² opinion in *Jones v. Opelika*. The case involved an ordinance that imposed licensure requirements and tax burdens on businesses selling books on public streets or house-to-house. The Witnesses argued that the ordinance was unconstitutional as it applied to them because proselytizing through the distribution of literature was a fundamental component of their religious practice. The Court's majority held that the law was neutrally applicable to all literature sales and the Witnesses' beliefs did not exempt them from the law. As in the *Gobitis* case, now-Chief Justice Stone dissented from the majority's narrow conception of the protection of religious exercise. This time however, Justices Black, Douglas and Murphy also dissented. In a brief joint dissent that records from the Library of Congress suggest Justice Douglas wrote, these three justices acknowledged that they now believed *Gobitis* "was wrongly decided." The *Gobitis* Court, they argued, had improperly abdicated its responsibility to protect "the views of religious minorities, however unpopular and unorthodox those views may be." Frankfurter, disturbed by the prospect of *Gobitis* being overturned, responded by referring to Murphy, Douglas, and Black as "the Axis" in moments of grim jocularity.

Congressional action

Just two weeks after the Supreme Court announced *Jones*, a joint resolution of Congress codifying the practices for honoring the flag appeared to hedge toward affording objectors a means to avoid compulsory vows of allegiance. The resolution for the first time provided a national prescription of the "correct" custom for honoring the flag:

[T]he pledge of allegiance to the flag, "I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one

2. The court subsequently reheard the case, reversing its original decision approximately a month before it released the *Barnette* decision.

Nation indivisible,³ with liberty and justice for all”, be rendered by standing with the right hand over the heart; extending the right hand, palm upward, toward the flag at the words “to the flag” and holding this position until the end, when the hand drops to the side.

This form of the pledge, adopted in part at the Legion’s urging, largely replicated the practices that had cropped up in schools across the country. The resolution, however, added an important caveat that “civilians will always show full respect to the flag when the pledge is given by merely standing at attention, men removing the headdress.” Since Witnesses had always been willing to stand as a show of respect, this seemed to offer the prospect of accommodation. Witness lawyers would argue, without much success, that this federal law superseded state legislation that did not permit individuals merely to stand silently.

The Barnette case

The defection of three justices from the *Gobitis* majority in *Jones*, coupled with the arrival of new justices Robert Jackson in 1942 and Wiley Rutledge in January 1943, offered hope to Witness lawyers that the court might revisit its position on the flag salute issue. Covington wasted no time finding the perfect test case to bring that issue before the justices quickly. He developed a strategy to ensure the case would progress with unusual speed and precision, suing for an injunction against a West Virginia flag salute requirement in the U.S. District Court for the Southern District of West Virginia. This strategy helped to ensure the issue of *Gobitis*’s continued vitality would be squarely presented because the West Virginia regulation had actually incorporated several paragraphs of Justice Frankfurter’s opinion verbatim. It promised that the case would reach the Supreme Court quickly because, under federal statutes then in effect, federal suits to enjoin a state statute as invalid on its face, or a regulation of a board “created by and acting under” such a statute, were heard by a three-judge panel at the district court level. The panel’s decision was then directly appealable to the Supreme Court, bypassing the intermediate courts of appeals. Unlike most cases, moreover, appeals from three-



Gathie and Marie Barnett
Courtesy: Robert H. Jackson Center

3. The words “under God” were added in 1954.

judge panels were not subject to the filtering mechanism of the certiorari system; the Supreme Court had to hear the appeal.

Federal cases are not self-actuating mechanisms for raising legal issues. They must arise as a result of some genuine disagreement between interested parties. In this instance, Covington found three Jehovah's Witnesses whose children were subjected to the flag salute requirement. They sued the State Board of Education in their own right and on behalf of the broader "class" of West Virginia Jehovah's Witnesses.

Gathie and Marie Barnett, the daughters of lead plaintiff Walter Barnett (the family name, like the Gobitases', was misspelled in the case caption), were exemplars of the bind in which many members of this class found themselves following *Gobitis*. Shortly after that decision, the state legislature passed a statute requiring schools to teach courses "teaching, fostering and perpetuating the ideals, principles and spirit of Americanism." This process seems to have included a pledge ceremony at the small elementary school outside of Charleston that the Barnetts attended. Like many schoolrooms at the time, their class only had a picture of the flag posted on to a wall until the war broke out, when it was replaced with a real flag. Prior to that time, their teacher seems to have turned a blind eye to their discreet refusal to recite the pledge as they stood quietly.

On January 9, 1942, however, the state's Board of Education, operating under its statutory "Americanism" remit, passed a regulation that incorporated much of the *Gobitis* opinion and the Minersville School Board's insubordination language. Shortly thereafter, the Barnetts' teacher reluctantly reported them to the school's principal, who sent the girls home. This began a farcical process by which the Barnetts would travel to school each morning to avoid being punished for truancy, before being sent home for refusing to salute the flag. Eventually, the Barnetts' lawyer contacted Covington, who filed a suit with Walter Barnett as the lead plaintiff in the U.S. District Court for the Southern District of West Virginia on August 17, 1942.

Unlike the Gobitas children, the Barnetts were not called on to testify. Because the operative facts in the case were not in dispute and were substantially similar to *Gobitis*, the parties agreed to have the court rule on the pleadings, meaning the three-judge panel would not hear evidence from witnesses, but would decide the case based on the attorney's arguments and the allegations in the complaint. The board moved to dismiss the case on September 10, 1942. While Covington argued the Congressional joint resolution preempted state regulations like West Virginia's, that did not allow Witnesses to stand silently without saluting the flag, state's Attorney General William Wysong claimed that the resolution was not even Congressional legislation carrying the force of law. Though this argument seems to have rested on confusion between a joint resolution (which has the same legal effect as an act of Congress) and a concurrent resolution (which does not), Wysong was likely correct that the resolution was not designed to overturn state laws governing flag salutes in schools. In the absence of such Congressional intervention, he argued, the case should be dismissed as the

Supreme Court had already resolved the constitutionality of mandatory flag salutes just two years before.

At oral argument in mid-September 1942, however, the court made it clear that the case would not be so simply resolved. Judge John Johnston Parker of the U.S. Court of Appeals for the Fourth Circuit was the presiding judge on the panel (a federal statute required that at least one circuit judge sit on the three-judge panel). Judge Parker had once been nominated to the Supreme Court, but narrowly failed to gain confirmation in the Senate when a campaign led by the NAACP and labor activists opposed his candidacy based on a controversial labor opinion and inflammatory language Johnston had used about African Americans while unsuccessfully running for political office. Nonetheless, he proved receptive to the claims of minority groups in several cases during the 1940s.

While the school board's attorneys treated the case as a foregone conclusion because of the *Gobitis* precedent, Parker made it clear that was not so. Years later, Covington recalled that, "the Attorney General from West Virginia got up and said, 'well, it's not necessary for me to argue this case, because the Supreme Court of the United States has already decided [it.] . . . Judge Parker said, 'Mr. Attorney General, if you are relying on the *Gobitis* case, you'd better argue this case.' . . . He was flabbergasted, the Attorney General was, taken off his feet; he didn't know what to figure."

As that colloquy intimated, Judge Parker and the rest of the panel were not convinced that *Gobitis* was still good law. Contemporary news reports suggested that Judge Parker proposed the Board amend its policy to permit an exception for religious objections, but the Board declined, forcing the court to reach a decision on *Gobitis*'s continued vitality. Judge Parker's opinion for the court, delivered on October 6, 1942, admitted that "[o]rdinarily we would feel constrained to follow an unreversed decision of the Supreme Court of the United States whether we agreed with it or not." This was no ordinary situation, however. Engaging in an unusual form of predictive head counting, Judge Parker noted that four of the remaining seven justices from the *Gobitis* court had now indicated their dissatisfaction with the decision. Even though *Jones* had reached a conclusion consistent with *Gobitis*, moreover, Parker stressed that the court had refrained from relying on *Gobitis* as precedent in that case.

Turning to the merits, Parker analogized religious liberty to free speech. The Free Speech Clause, he wrote, protected language criticizing the government, or even calling for its overthrow, provided it did not create a "clear and present danger" to the government's security. The refusal of small children to salute the flag, he reasoned, surely presented far less danger to the public. "The salute to the flag," he added, "is an expression of the homage of the soul. To force it upon one who has conscientious scruples against giving it, is petty tyranny unworthy of the spirit of this Republic and forbidden . . . by the fundamental law." Though not "impressed" by Covington's argument that Congress had superseded the state regulation, then, the court found it violated the constitution.

Barnette before the Supreme Court

Unsurprisingly, the Board of Education appealed to the Supreme Court. It did not, however, seek a stay of Judge Parker's ruling in the interim, meaning the Barnetts and other Witness children in the state were able to return to school. After hearing oral argument, Chief Justice Stone assigned the opinion in the case to Justice Jackson, one of the newest justices on the court and arguably the one with the most complex understanding of the Witnesses' constitutional claims.

Jackson had previously suggested antipathy towards the Witness's confrontational approach and, in a dissenting opinion delivered shortly before the Supreme Court handed down its decision in *Barnette*, stated that the First Amendment did not "leave the conscience of a minority to fix its limits. Civil government can not let any group ride rough-shod over others simply because their 'consciences' tell them to do so." Far from suggesting the need to protect them from majority oppression, Jackson argued, "the singular persistence of the turmoil about Jehovah's Witnesses, one which seems to result from the work of no other sect, [sh]ould suggest to this Court a thorough examination of their methods to see if they impinge unduly on the rights of others. Instead of that the Court has . . . tied the hands of all local authority and made the aggressive methods of this group the law of the land."

Even so, Jackson concluded that mandatory flag salutes violated the Constitution. Unlike Chief Justice Stone's *Gobitis* dissent, however, Jackson did not see the question in purely religious terms. For him, the problem with flag salute ceremonies was that they compelled individuals to proclaim their allegiance to ideas they found repugnant. The state, Jackson reasoned, did not, as the *Gobitis* majority assumed, have the power to engage in this sort of compulsion regardless of the reasons people might have for objecting to it.

Although Jackson's *Barnette* opinion has come to be one of the most celebrated in the constitutional canon, it went through a complex gestation and revision period. Chief Justice Stone offered criticism at several points, admitting to a "certain feeling of revulsion" at Jackson's use of newspaper reports about the educational utility of the flag salute, for example. "[S]ome moronic children," the Chief Justice allowed, "get nothing out of the flag salute, and that is probably true of everything else they study in school." But it was not for the court to presume to tell school boards what constituted sound educational policy. He similarly encouraged Jackson to remove references to the violence following *Gobitis*. "My own guess," he predicted, "is that reversal of the *Gobitis* decision will have little effect upon the persecution of non-flag-saluters. Whatever this court says about the rights of Jehovah's Witnesses will carry little weight to the burghers of Skunk Hollow, Arkansas."

This revision process arguably paid dividends as Justice Jackson's final opinion in *Barnette*—announced on June 14 (Flag Day, no less), 1943—is fondly remembered for its lyrical defense of a broad right of individual conscience. "If there is any fixed

star in our constitutional constellation,” Jackson wrote, “it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.”

Even, or perhaps especially, at a time when America was engaged in a global conflict to vindicate the values ascribed to its national symbols, Jackson argued that states could not compel patriotism or unity. “To believe patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine,” Jackson wrote, “is to make an unflattering estimate of the appeal of our institutions to free minds.” Moreover, Jackson noted, the history of societies attempting to coerce unity “down to the fast failing efforts of our present totalitarian enemies,” demonstrated that “[t]hose who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.” As historian Lawrence Friedman notes, this reading of the protections of minority views was not an entirely accurate reflection of previous First Amendment jurisprudence, which had permitted state and federal governments substantial leeway to punish dissidents. The case arguably marked the beginning of a lengthy and complex shift in the treatment of these issues, however, with subsequent opinions often invoking Jackson’s vision, if not always employing the same legal reasoning.

Concurring opinions

Justices Douglas and Black wrote a joint concurrence explaining their decision to overturn the opinion they initially supported in *Gobitis*. Their earlier choice to side with the *Gobitis* majority, they explained, was driven by a “[r]eluctance to make the Federal Constitution a rigid bar against state regulation of conduct thought inimical to the public welfare.” However, “[l]ong reflection convinced” them that, although this general principle of judicial restraint was sound, it should not have been applied to a case trenching on such important civil liberties. Justice Murphy also wrote a brief concurring opinion. Though he joined the majority, he emphasized the importance of religious freedom more distinctly than Justice Jackson.

Justice Frankfurter’s dissent

Justice Frankfurter’s now-famous dissent in *Barnette* rebuked the court in unusually harsh terms. Long before the court decided the case, Frankfurter had begun to piece together his thoughts on the demise of his *Gobitis* opinion, writing a paragraph or two at a time and saving scraps of paper recording the more piquant remarks for subsequent compilation. According to a former law clerk, when he had collected a

critical mass of these notes, Frankfurter called his clerk to his house for dinner and, after drinking a good deal of wine, handed over the scraps of paper for assembly into the final dissent.

The finished product was a caustic and remarkably personal denouncement of the court's decision to reverse tack. "One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution," he began, insisting that his "personal attitude" was wholly in keeping "with the general libertarian views in the Court's opinion," but that his own views were irrelevant to the determination of constitutional principles. Though the laws requiring students to salute the flag and recite the pledge may not have been wise, Frankfurter argued, this did not mean they were unconstitutional. Democratically elected states and school boards had selected this means to achieve the salutary goal of promoting good citizenship. It was not for the courts to second-guess this choice. If the policies were unsound, then the proper recourse was to have the legislature amend its policy through democratic means. Frankfurter argued that "[t]he Constitution does not give us greater veto power when dealing with one phase of 'liberty' than another." If it was improper for earlier courts to strike down New Deal legislation for interfering with economic liberties, then it was no more appropriate to strike down flag salute laws for interfering with Witnesses' liberty of conscience.

Finally, Frankfurter argued that the court's decision to overturn *Gobitis* suggested a damaging innovation in the institutional history of the Supreme Court. "The Court has no reason for existence," he argued, "if it merely reflects the pressures of the day." That the court was so ready to overturn itself apparently because of a change in membership and perhaps even owing to the response to an earlier decision outside the courtroom, could give the public no confidence that the court "may not have another view a few years hence." Moreover, this reversal was, Frankfurter claimed, unique in that "never before these Jehovah's Witnesses cases . . . has this Court overruled decisions so as to restrict the powers of democratic government." In doing so in this case, he reasoned, the majority was improperly confusing what it thought best for what was constitutional.

The legacy of the flag salute cases

Notwithstanding Justice Frankfurter's protests, *Gobitis* and the repression that followed in its wake suggested to many observers the very real dangers posed by a lack of legal restraint on the powers of democratic legislatures. The World War II years were arguably a major inflection point in the development of liberal democratic theory, a period in which Americans sought to harness the power of government to act on behalf of the greater good while restraining its potential abuses. In the political sphere, this notion found voice in Franklin Roosevelt's "Four Freedoms" formulation of a new world order defined by freedom of speech and religion and freedoms

from want and fear. In the legal context, *Barnette* serves an exemplar of a parallel development: a moment when judges who largely rejected the activist approach of their forbearers to striking down laws passed by elected legislators nonetheless carved out special protections for important civil liberties.

One should not attribute too much importance to a single judicial opinion. *Barnette* did not preordain the trajectory of the rights revolutions that followed World War II. Indeed, in the years immediately following the flag salute cases, the federal courts did not uniformly vindicate every assertion of rights of conscience against government intervention. Nonetheless, the impress of the flag salute cases is visible on a host of major post-war decisions—a surprising number of which also involve schoolchildren—striking down segregation, invalidating mandatory school prayers, and affirming the rights of political dissidents.

Themes and questions

The flag salute cases raise a number of questions that can be used to illuminate major themes in history and government or civics courses. Throughout the first half of the twentieth century, both state and federal governments adopted enhanced regulatory authority to deal with the consequences of urbanization, modern technologies, and economic crises. Though many Americans considered these powers essential bulwarks against the forces of modernity and the rise of corporate power, they also came with the risk of abuse. Whereas early reform efforts focused on the administrative state as a more nimble and responsive means of resolving disputes and interpreting the law than traditional court structures, by the early 1940s, many reformers emphasized the need for access to the courts to protect fundamental liberties against arbitrary exercises of government power. This emphasis on courts as the primary guardians of individual rights offered up both new opportunities and limitations for social movements that would come to rely on the courts for support when political processes failed to secure the rights of unpopular minorities. Placed in the context of the Witnesses' struggles against school boards in the courts, these seemingly abstract developments arguably take a more tangible form, with school boards emblemizing the powers of the regulatory state.

Students often think of the rights revolutions of mid-twentieth century America in terms of the famous images of the post-World War II civil rights, anti-war, and women's movements. The flag salute cases provide a useful vehicle for broad discussions of the complex origins of these movements and enable teachers to convey a long view of the development of debates over free speech and dissidence. Likewise, history curricula often emphasize the concept of religious toleration as a major theme of colonial history, but do not always follow this thread through to modern America. The flag salute cases provide an opportunity to "look back" to earlier episodes of

religious dissent and intolerance to examine points of continuity and change over time.

Likewise, the stakes of debates over the role of the federal courts in mid-century America can elude many students. Justice Frankfurter's energetic defense of judicial restraint in the flag salute cases can vividly illustrate both the advantages and potential costs of judicial restraint. His opinions pose a potentially fruitful quandary for thoughtful students in forcing them to consider the countervailing interests of majority rule and tolerance. These opinions encourage students to ask whether it is possible to formulate a view of democratic government that can adequately account for both the will of the majority and minority rights.

Finally, the horrors perpetrated by America's opponents in World War II can make it easy to lapse into a reductive "good guys vs. bad guys" depiction of the conflict that belies the complexity of home front politics during wartime. The flag salute cases ask students to consider the potential pitfalls of extreme patriotism, even in furtherance of a "good cause." At a broader level, the cases force students to consider whether important ends like engendering patriotism during wartime justify any means, or if certain values must always be respected, regardless of the potential cost.

The Judicial Process: A Chronology

May 3, 1937

Walter Gobitas files a bill in equity on his own behalf and as “next friend” of his children Lillian and William Gobitas. The bill names the Minersville School Board and each of its members, along with Charles Roudabush, the Minersville Superintendent of Schools, as defendants.

May 27, 1937

The defendants file a motion to dismiss the bill in equity. The motion argues that the court does not have jurisdiction to hear the case. Alternatively, it argues the bill is legally insufficient as it does not properly allege any violation of the plaintiffs’ constitutional rights.

December 1, 1937

Judge Maris issues an opinion denying the defendants’ motion to dismiss. The opinion states that the question of jurisdiction will depend on the substantiation of Walter Gobitas’s damages at trial. It suggests that if the facts are as alleged in the bill of equity that Lillian and William’s expulsion may have violated their freedom of religious conscience as protected by the Due Process Clause of the Fourteenth Amendment.

December 30, 1937

The *Gobitis* defendants file an answer. The answer admits several of the key factual questions in the case but denies the sincerity and reasonableness of the children’s religious beliefs and disputes the Gobitases’ loyalty to the nation.

February 15, 1938

The *Gobitis* trial takes place in Philadelphia.

June 18, 1938

Judge Maris issues his opinion and findings of fact in the *Gobitis* case. He finds that the defendants infringed on the students’ freedom of religious conscience and thereby cost Walter Gobitas \$3,200.

August 10, 1938

The defendants appeal Judge Maris’s judgment to the U.S. Court of Appeals for the Third Circuit.

The Flag Salute Cases

November 10, 1939

The Third Circuit issues its decision on the appeal. In an opinion by Judge William Clark, the court roundly condemns the flag salute policy.

March 4, 1940

The Supreme Court grants a writ of certiorari to hear the defendants' appeal.

April 25, 1940

The Supreme Court hears oral arguments in the *Gobitis* case.

June 3, 1940

The Supreme Court rules in the *Gobitis* case. In an opinion by Justice Felix Frankfurter, the court upholds the practice of compulsory flag salutes, reasoning that a generally applicable rule designed to bring about the salutary goal of respect for the flag and the nation it represents does not violate the Gobitases' right of religious exercise no matter how sincere their belief that it forces them to engage in idolatry. Justice Harlan Fiske Stone dissents.

June 8, 1942

The Supreme Court issues its opinion in *Jones v. City of Opelika*, upholding the validity of tax on the sale of Jehovah's Witnesses' religious literature. Justices Douglas, Black, and Murphy dissent, noting that they have changed their minds on the propriety of the *Gobitis* decision.

August 17, 1942

Three West Virginia witnesses led by Walter Barnett file suit in the U.S. District Court for the Southern District of West Virginia individually and as a class alleging that the state's flag salute regulation, which incorporates a substantial body of language from the Supreme Court's *Gobitis* opinion, violates the First and Fourteenth Amendments.

September 10, 1942

The *Barnette* defendants file a motion to dismiss the complaint.

September 15, 1942

The court hears arguments on the motion to dismiss. Both parties agree to the court hearing the case based on the pleadings. The state unsuccessfully argues that the *Gobitis* precedent controls the case.

October 6, 1942

A unanimous three-judge panel of the U.S. District Court for the Southern District of West Virginia holds the mandatory flag salute unconstitutional. In an opinion by Fourth Circuit Judge John Johnston Parker, the Court declines to apply the *Gobitis* precedent, correctly predicting that the Court will overturn its earlier ruling.

October 31, 1942

The defendants appeal the district court's decision to the Supreme Court of the United States. Because the appeal is from a decision of a three-judge panel, the Supreme Court must hear the appeal.

March 11, 1943

The Supreme Court hears oral arguments in the *Barnette* case.

June 14, 1943

The Supreme Court rules in *Barnette*. In an opinion by Justice Robert Jackson, the Court overturns *Gobitis*, holding that laws compelling individuals to salute and swear allegiance to the flag violate the liberty of conscience protected by the First and Fourteenth Amendments. Justices Black and Douglas write a joint concurring opinion explaining their decision to reverse their vote from *Gobitis*. Justice Murphy writes a concurring opinion that rests in part on free exercise grounds. Justices Stanley Reed and Owen Roberts, holding to the positions advanced in *Gobitis*, dissent without issuing opinions. Justice Frankfurter writes a separate dissent that criticizes the court's reasoning and its decision to reject his *Gobitis* opinion.

The Federal Courts and Their Jurisdiction

United States District Court for the Eastern District of Pennsylvania

Walter Gobitas sued the Minersville School Board and its members in the U.S. District Court for the Eastern District of Pennsylvania, alleging his children's expulsion for refusing to salute the flag violated the federal and state constitutions. Judge Albert Maris, a recent appointee to the court, presided over the trial. Judge Maris ruled in the Gobitas' favor, but was reversed by the Supreme Court of the United States in 1940.

The U.S. district courts were established by Congress in the Judiciary Act of 1789. Although Congress has modified their jurisdiction several times since their creation, federal district courts have been in operation continuously from the passage of that act. Since 1891, they have served as the federal system's primary trial courts. They typically hear two major sets of cases: criminal and civil matters arising under the laws and Constitution of the United States and state-law civil cases between litigants from different states in which the amount in controversy exceeds a statutory minimum. The Eastern District of Pennsylvania was created in 1818, when Congress divided the former District of Pennsylvania into Western and Eastern Districts. The state's districts were further reorganized when Congress created the Middle District in 1901.

United States Court of Appeals for the Third Circuit

The Minersville School Board appealed Judge Maris's decision to the U.S. Court of Appeals for the Third Circuit. The circuit's three-judge panel affirmed the decision below in an opinion by Judge William Clark that critiqued the Board's attempt to inculcate patriotic values at the cost of children's religious freedom. By the time the court heard the case, Judge Maris had been appointed to a position on the Third Circuit, but he did not sit on the panel that heard the appeal.

The courts of appeals were established by Congress in 1891. A court of appeals in each of the regional judicial circuits was created to hear appeals from the federal trial courts, and the decisions of the courts of appeals are final in many categories of cases. When the court heard the initial *Gobitis* appeal, the Third Circuit encompassed Delaware, New Jersey, and Pennsylvania. Since 1948, it has also included the U.S. Virgin Islands.

Supreme Court of the United States

After the Minersville School District appealed the Third Circuit's decision against it, the Supreme Court reversed in an 8-1 decision penned by Justice Felix Frankfurter. The court then took the unusual step of overturning that decision just three years later in *West Virginia State Board of Education v. Barnette*. Many historians now regarded this change as a major inflection point in the Supreme Court's approach to civil and political liberties.

The Supreme Court of the United States is the nation's highest appellate court. The Constitution grants the Supreme Court original jurisdiction in cases in which states are a party and those involving diplomats, but leaves for Congress to determine the Court's size and appellate jurisdiction. The Judiciary Act of 1789 established a Supreme Court with one chief justice and five associate justices. Congress subsequently increased or reduced the number of justices several times during the early and mid-nineteenth century, though the Court has retained nine seats since 1869.

Throughout its first century, the Supreme Court was responsible for deciding most civil appeals, and the justices had little control over a docket that was increasingly overcrowded. The court gained discretionary power over the bulk of its appellate docket in 1925. However, the *Barnette* case belonged to a small class of suits decided by a three-judge panel at the district-court level that were immediately appealable to the Supreme Court as a matter of right.

United States District Court for the Southern District of West Virginia

The *Barnette* plaintiffs sued the West Virginia school board in the U.S. District Court for the Southern District of West Virginia. By asking the court to strike down a state statute that parroted the language of the *Gobitis* decision, this case effectively sought to overturn the Supreme Court's decision. Because the suit sought an injunction against a state statute on its face (as opposed to *Gobitis*, where the plaintiffs sought to enjoin a school board regulation as it applied to them), the case was heard by a three-judge panel and was directly appealable to the Supreme Court. The court decided the case on the pleadings, meaning the parties agreed to the court deciding the legal issues in the case without a trial to determine whether the facts alleged in the complaint were true.

In an opinion by Fourth Circuit Judge John Johnston Parker, the district court took the unusual step of refusing to follow a recent Supreme Court precedent. Judge Parker correctly predicted that the Supreme Court would reverse its earlier decision in the *Gobitis* case after three of the justices who had voted with the majority in that case signaled their willingness to change their votes. Parker was also critical of the intellectual underpinning and practical consequences of the *Gobitis* decision.

The Flag Salute Cases

The U.S. district courts were established by Congress in the Judiciary Act of 1789. Although Congress has modified their jurisdiction several times since their creation, federal district courts have been in operation continuously from the passage of that act. Since 1891, they have served as the federal system's primary trial courts. They typically hear two major sets of cases: criminal and civil matters arising under the laws and Constitution of the United States, and state-law civil cases between litigants from different states in which the amount in controversy exceeds a statutory minimum. Congress created the Southern District of West Virginia in 1901, when it divided the District of West Virginia into Southern and Northern districts.

Legal Questions Before the Federal Courts

Did the federal courts have jurisdiction to hear challenges to mandatory flag salutes?

Yes. The *Gobitis* bill of equity indicated that Walter Gobitas had incurred more than \$3,000 in damages because of the expense of sending his children to private school. This amount was a jurisdictional requirement for cases “arising under” the Constitution of the United States. Judge Albert Maris found that Walter’s costs amounted to \$3,200. The *Barnette* court relied on a different provision, which permitted federal jurisdiction where plaintiffs alleged their federal rights had been infringed “under color” of state law. This provision did not require any specific amount of monetary damages.

Did the Fourteenth Amendment “incorporate” the Free Exercise Clause against the states?

Yes. Judge Maris’s opinion denying the Minersville School Board’s motion to dismiss held that the First Amendment’s religious freedoms did not bind the states. Instead, he reasoned that the “liberty” protected against state infringement by the Fourteenth Amendment’s Due Process Clause included a broad protection of religious conscience evinced by the Pennsylvania state constitution. Days before issuing its opinion in *Gobitis*, however, the Supreme Court held in *Cantwell v. Connecticut* (1940) that the Free Exercise Clause was incorporated against the states by the Fourteenth Amendment. Justice Frankfurter’s opinion analyzed the case under First Amendment standards and did not mention the Pennsylvania constitutional provision that had figured heavily in the lower court proceedings.

Did mandatory flag salutes violate the Free Exercise Clause?

The answer to this question was complicated by the multiple opinions in the two cases. Justice Frankfurter’s opinion in *Gobitis* held that mandatory flag salutes did not impair the free exercise of religion. Justice Jackson’s opinion in *Barnette*, though overturning *Gobitis*, analyzed the case along slightly different lines. For Jackson and the majority of his brethren, states did not have the power to compel individuals to pronounce their loyalty to any set of ideals regardless of the religious or secular nature of their objections. Justice Murphy’s concurring opinion added that he believed, as

Justice Stone had argued in his *Gobitis* dissent, that the flag salute laws violated the Free Exercise Clause as incorporated against the states.

Did mandatory flag salutes violate the liberty protected by the Due Process Clause of the Fourteenth Amendment?

Yes. Though Justice Frankfurter's opinion in *Gobitis* held mandatory flag salutes constitutional, the *Barnette* Supreme Court held that requiring students to salute the flag violated the liberty protected by the Fourteenth Amendment. Though he referred to the Fourteenth Amendment liberty at stake as deriving from the First Amendment, Justice Jackson's opinion for the Court in *Barnette* cast this liberty as broader than any single First Amendment freedom like speech or religious exercise. Rather, Jackson held that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein." Though Justice Frankfurter's dissenting opinion questioned the validity of this standard, it was arguably consistent with Jackson's view that the state had significant power to restrict the actions of Jehovah's Witnesses because the laws doing so prohibited individuals from performing certain acts rather than requiring them to voice approval for a set of ideals.

Did Congress's joint resolution codifying the correct etiquette for saluting and pledging allegiance to the flag preempt state laws mandating a different ritual?

No. Congress passed a joint resolution codifying the rituals for saluting the flag on June 22, 1942, shortly before the *Barnette* case commenced. This law stated that "civilians will always show full respect to the flag when the pledge is given by merely standing at attention, men removing the headdress." Lawyers for the Witnesses urged that this law superseded any state or local rules requiring more. Judge Parker's opinion for the U.S. District Court for the Southern District of West Virginia indicated that the court was "not impressed" with this argument, presumably because the law by its terms was only designed to "codify and emphasize existing rules and customs," rather than to proscribe all others or otherwise occupy the field of flag salute etiquette. Though Justice Jackson's opinion for the Supreme Court in *Barnette* briefly referenced the joint resolution as a more sensible approach, it did not suggest that it had supplanted state laws.

Biographies

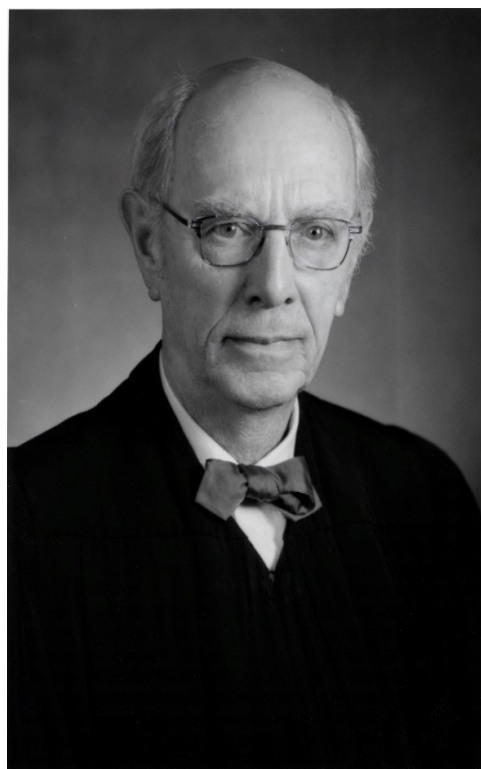
The judges

Albert Branson Maris (1893–1989)

Albert Maris was the presiding judge in the *Gobitis* trial. Though he went on to have an exceptionally long judicial career, Maris was then a relatively recent addition to the federal bench, having received his commission in 1936.

Maris was born in Philadelphia in 1893. He received his law degree from Temple University School of Law in 1918 and a degree in engineering from the Drexel Institute of Art, Science and Industry (now known as Drexel University) in 1926. After a brief period of service as an army private in World War I, Maris became Assistant Secretary to the Proportional Representation League in Philadelphia in 1918 and a member of the legal staff for the city's Bureau of Municipal Research the next year. He worked in private practice in Philadelphia from 1919 until his appointment to the United States District Court for the Eastern District of Pennsylvania in 1936. In the final two years of his practice, he also served as the editor of the *Legal Intelligencer*, a prominent Philadelphia-based legal periodical.

President Franklin Roosevelt nominated Maris to the Court of Appeals for the Third Circuit in 1938, where he served for a further 51 years. From 1942 through 1962, he also served on the Emergency Court of Appeals, serving as chief judge from 1943. This specialized court was staffed by three or more district or circuit judges selected by the Chief Justice of the United States to hear challenges to regulations promulgated by the Office of Price Administration pursuant to World-War-II era legislation designed to stabilize prices and prohibit profiteering. He also served as special master (a judge appointed by the Supreme Court to hear trials in cases brought under its original jurisdiction) in a suit between Wisconsin and Illinois over rights to water from Lake Michigan.



Judge Albert Maris

Courtesy: Albert B. Maris Papers, William Hastie Library, U.S. Court of Appeals for the Third Circuit

Though he heard a reduced caseload after assuming senior status in 1958, Maris continued to work into his nineties and issued an opinion the day before he died in 1989. While a senior circuit judge, Maris also contributed to several efforts to reform federal civil and criminal procedure, chairing the Judicial Conference of the United States' Standing Committee on Rules of Practice and Procedure from 1959 to 1974. Maris also served a major role in the reform of the judicial system and organic statute (the primary governing law of a territory) of the U.S. Virgin Islands. In recognition of these contributions, he became the first recipient of the Devitt Distinguished Service to Justice Award in 1983.

William Clark (1891–1957)

William Clark wrote the unanimous opinion upholding Judge Maris's decision to grant the Gobitas family an injunction in the United States Court of Appeals for the Third Circuit.

Clark was born in Newark, N.J., in 1891 and received bachelor's, master's, and law degrees from Harvard University. He served in the U.S. Army in both world wars. Following the First World War, Clark engaged in private practice for three years before becoming a judge on the New Jersey Court of Errors and Appeals in 1923. In 1925, Calvin Coolidge gave him a recess appointment (subsequently confirmed by the Senate) to the United States District Court for the District of New Jersey. In 1938, he was appointed to the United States Court of Appeals for the Third Circuit.

Clark rejoined the army in 1942 and resigned his judicial commission the following year. He served as the Chief Justice of the Allied Appeals Court in Nuremburg, Germany, from 1949 through 1954. Clark died in 1957.



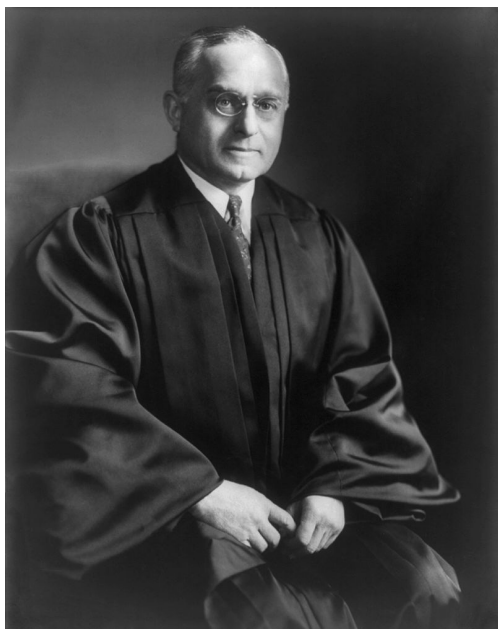
Judge William Clark

Courtesy: William Hastie Library, U.S. Court of Appeals for the Third Circuit

Felix Frankfurter (1882–1965)

Felix Frankfurter was the only jurist to write an opinion in both the *Gobitis* and *Barnette* cases, writing for the majority in the first case and dissenting from the decision to overturn it in the second.

Widely considered one of the most influential jurists in twentieth-century America, Frankfurter was born in Vienna, Austria, in 1882. He moved to New York City in 1894, where he quickly mastered the English language and developed a strong sense of patriotism that was to drive some of his later decisions. After attending the City College of New York, Frankfurter studied law at Harvard Law School, where he established a reputation as a brilliant student.



Justice Felix Frankfurter
Courtesy: Library of Congress

After graduating from Harvard in 1906, Frankfurter worked as an assistant U.S. attorney for the Southern District of New York for three years before joining Henry Stimson's campaign for governor of New York in 1910. When Stimson lost the election, President William Howard Taft appointed him Secretary of War and Frankfurter followed Stimson into the Department of War, working as a law officer for the Bureau of Insular Affairs from 1911 to 1914.

In 1914, Frankfurter returned to Harvard as a professor, teaching courses in constitutional law and the emerging field of administrative law. When the United States joined World War I in 1917, Frankfurter joined the Army Judge Advocate General Department, attaining the rank of major. He served in the army for three years before returning to Harvard, where he developed a reputation as a leading critic of the conservative Taft Court throughout the 1920s.

While at Harvard, Frankfurter took on several high-profile cases in which he represented unpopular figures advocating radical political causes. These cases, combined with his criticisms of the Supreme Court, his irascible personality, and, possibly, his Jewish faith, led to a perception by some that Frankfurter was himself a dangerous radical. This belief ensured Frankfurter was a controversial appointment to the Supreme Court when his friend Franklin Roosevelt nominated him to replace Benjamin Cardozo in 1939.

Frankfurter's legal career and judicial philosophy were more complex than this reductive public image suggested, however. Although his status as an immigrant Jew seemed to give credence to the impression he was an outsider, Frankfurter was at the center of respectable American law and politics in the first half of the twentieth century. His protégés, colloquially known as "hot dogs," proliferated in innumerable government departments, and he had forged important alliances with Stimson, Roosevelt, and his legal mentors, Justices Louis Brandeis and Oliver Wendell Holmes, Jr. Like Brandeis, Frankfurter was deeply invested in the progressive movement's push for efficiency and order in government systems. And like Holmes, Frankfurter was a strong advocate of judicial restraint. Frustrated by what he perceived to be judges' obstructionist stance toward economic legislation passed by the Roosevelt administration in response to the Great Depression, Frankfurter insisted that judges should defer to elected legislatures wherever possible.

While this stance had made Frankfurter seem radical to his critics before his arrival on the Supreme Court, he eventually became known as the court's leading conservative as many other justices adopted an increasingly proactive role in protecting minority groups over the course of the 1940s, '50s, and '60s. Several scholars have pointed to the flag salute cases as a pivotal moment in establishing this trend, with Frankfurter's model of judicial restraint initially triumphing in *Gobitis*, before being rejected in *Barnette*.

Frankfurter frequently quarreled with his brethren on the Supreme Court, some of whom resented his attempts to lecture the justices on constitutional doctrine in conference. His relationship with Hugo Black was particularly volatile. Frankfurter also became known for a series of increasingly sharp rebukes to the court's perceived liberal turn following the arrival of Chief Justice Earl Warren in 1953. Even so, Frankfurter remained widely respected for his intellectual rigor and willingness to champion unpopular causes on principle.

Frankfurter retired from active service on the court in 1962 following a stroke suffered in his chambers. He died of a heart attack in 1965.

Harlan Fiske Stone (1872–1946)

As an associate justice of the Supreme Court in 1940, Harlan Fiske Stone was the lone dissenter in the *Gobitis* decision. When the Court reversed *Gobitis* three years later, Stone was in the majority as Chief Justice of the United States.

Stone was born in 1872 in Chesterfield, N.H. He received bachelor's and master's degrees from Amherst College, before earning his law degree from Columbia Law School in 1898. After graduating, he taught at Columbia for several years while pursuing a private practice on a part-time basis. In 1905, he resigned his position at Columbia owing to disagreements with the university's president. After students petitioned the president to allow Stone to return, he was offered a position as dean

of the law school but ultimately rejected the offer over the president's refusal to allow him to select the faculty. He did return as dean in 1910, however, holding the position until 1923. Stone was also a well-regarded teacher and scholar and mentored several eminent lawyers and jurists, including future Supreme Court colleague William O. Douglas.

After a brief return to private practice in 1923, Calvin Coolidge appointed Stone Attorney General the following year. Although his tenure in this position was short, Stone was an important reformer in a Justice Department that had been plagued by scandal, replacing several corrupt officials and engaging in a thorough overhaul of the FBI that included selecting the young J. Edgar Hoover as the bureau's new director. In 1925, Coolidge nominated Stone to the Supreme Court. Despite his popularity as Attorney General, some Senators questioned his prosecution of antitrust suits in that capacity and suggested his ties to Wall Street were too strong. To answer these criticisms, Stone became the first Supreme Court nominee to testify in public congressional hearings on his nomination.



Chief Justice Harlan Fiske Stone
Courtesy: Library of Congress

Once confirmed, Stone confounded critics who argued he would be too friendly to corporate interests, frequently opposing decisions striking down New Deal economic legislation. Unlike Felix Frankfurter, however, Stone was not a doctrinaire adherent of judicial restraint. In a footnote to a 1938 case upholding economic legislation, he outlined a now-famous distinction between economic legislation, toward which judges should generally exercise restraint, and laws interfering with political or civil liberties or discriminating against “discrete and insular minorities,” which required more rigorous scrutiny. This bifurcated formulation of constitutional review became increasingly influential in the court's decisions, with *Barnette* an early exemplar.

In 1941, Franklin Roosevelt nominated Stone to assume the position of Chief Justice of the United States, making him only the second sitting justice to be appointed Chief Justice. His time as Chief Justice has often been characterized as a failed effort to unify warring factions and personalities on the court. Stone died in 1946 after suffering a stroke moments after reading his final dissent from the bench.

John Johnston Parker (1885–1958)

John Johnston Parker wrote the unanimous opinion for a three-judge panel of the United States District Court for the Southern District of West Virginia declaring the state's flag salute law invalid in *Barnette*.



Judge John Johnston Parker
Courtesy: Library of Congress

Parker was born in Monroe, North Carolina, to a poor family, but managed to work his way through school, earning both bachelor's and law degrees at the University of North Carolina, Chapel Hill. After just two years of private practice, Parker ran for the U.S. House of Representatives in 1910. As a Republican in an overwhelmingly Democratic state, Parker's bid was unsurprisingly unsuccessful, as were his campaigns for state attorney general and governor in 1916 and 1920 respectively.

In 1923, Parker took on a temporary assignment as a special assistant to the Attorney General of the United States, prosecuting fraud cases deriving from World War I. After Parker impressed in this position, President Calvin Coolidge nominated him to the United States Court of Appeals for the Fourth Circuit, which included the states of Maryland,

North Carolina, South Carolina, Virginia and West Virginia. Parker was confirmed by the Senate and served on the court until his death in 1958.

In 1930, Coolidge nominated Parker to the Supreme Court of the United States, but his nomination narrowly failed to gain approval in the Senate after a concerted effort by labor and civil rights groups. Labor advocates were angered by a controversial decision Parker issued against a coal union. Based on a statement he made while running for governor about the desirability of African Americans entering politics, the National Association for the Advancement of Colored People argued Parker was a racist and could not rule fairly on racial issues that might come before the court. Though he supported the "separate but equal" doctrine, Johnston's subsequent record on the Fourth Circuit did not indicate that he was reflexively hostile to the claims of racial minority groups and, indeed, he struck down all-white primaries in two major cases.

Parker's judicial philosophy contended that judges had to interpret the law flexibly to accommodate changing times. "Law is not a static thing bound down by prior decisions and legislative enactments," he wrote in a 1936 opinion. He brought this flexibility to bear in *Barnette*, holding that the district court was not bound by the Supreme Court's prior decision in *Gobitis* because of intervening decisions and the changing composition of the Supreme Court's personnel.

Robert Houghwout Jackson (1892–1954)

Robert H. Jackson's opinion invalidating mandatory flag salutes in *Barnette* marked one of the high points of a varied and distinguished legal career. Jackson was born in Pennsylvania, but his family moved to western New York when he was five. Though he would eventually serve on a court boasting several of the nation's preeminent legal scholars, Jackson had just a year of post-secondary education, having left Albany Law School to read law (effectively an apprenticeship leading to a legal career). He was the last Supreme Court justice not to hold a law degree.

After joining the bar in 1913, Jackson forged a successful private practice in western New York, where he was involved in Democratic politics and became an advisor to Franklin Roosevelt during his tenure as the state's governor. Jackson joined Roosevelt's presidential administration in 1934, serving in several senior legal positions before being appointed Solicitor General in 1938. He was highly regarded as a Supreme Court advocate, with Justice Louis Brandeis remarking that Jackson's tenure as Solicitor General should be extended for life. Roosevelt did not heed this advice, promoting Jackson to Attorney General in 1940 before nominating him to take the Supreme Court vacancy created by Justice Harlan Fiske Stone's elevation to the Chief Justice position the next year.

Prior to his arrival on the court, Jackson had written a book praising the restraint of Roosevelt's other judicial appointees, and he quickly demonstrated a willingness to



Justice Robert H. Jackson
Courtesy: Library of Congress

follow in a similar vein, writing several important opinions upholding broad exercises of government power, particularly at the federal level. Jackson's view of this power was not monolithic, however, and he penned notable warnings about the danger of wartime governments oppressing minorities in both *Barnette* and his dissent from a controversial case upholding Japanese-Americans' internment.

In the aftermath of World War II, Jackson took a sabbatical from his duties as a justice to serve as the United States' chief prosecutor at the Nuremberg Trials, securing the convictions of several of the highest-ranking members of the Nazi regime in Germany. Stone died while Jackson was in Germany, leaving a vacancy in the Chief Justice position. Segments of the press speculated that President Harry Truman would appoint Jackson to the position, but reports allegedly circulated by Justice Hugo Black questioned his suitability for the role. This prompted an unseemly public row between the two justices and Truman nominated Treasury Secretary Fred Vinson to assume the Chief Justiceship.

In April 1954, Jackson suffered a heart attack but unexpectedly appeared in court the next month for the announcement of the unanimous decision in *Brown v. Board of Education*. He died of a subsequent heart attack in October of that year.

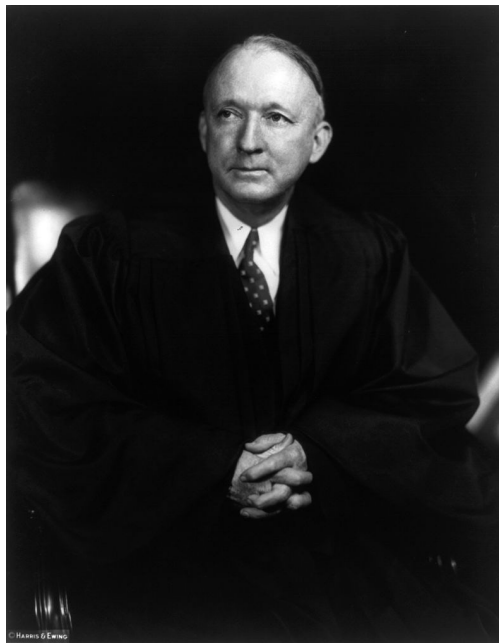
Hugo Lafayette Black (1886–1971)

Hugo Black was one of three recently appointed justices to reverse his decision to side with the majority in *Gobitis*. Black was born in Clay County, Alabama in 1886. Though he grew up in a poor area, his father left him a modest inheritance acquired through real estate dealings. After abandoning medical school, Black graduated from the University of Alabama School of Law in 1906. On joining the bar, Black pursued a career as a plaintiff's attorney and prosecutor, interrupted briefly by service in the military during World War I.

Black successfully campaigned for the U.S. Senate in 1926, securing a surprise victory in a three-way primary that virtually assured success in the general election because of the Democratic Party's dominance in Alabama. In the Senate, Black eventually established himself as a critic of the Hoover administration's attempts to battle the Great Depression and subsequently became an ally of Franklin Roosevelt's New Deal administration. In the Senate, Black generally supported government interventions in the economy and distrusted the power of corporations, but opposed measures designed to secure racial justice.

When Roosevelt nominated Black to the Supreme Court in 1937, the latter's previous opposition to federal antilynching legislation only briefly held up his confirmation hearings and he was confirmed by a 63–16 majority. The subsequent revelation that Black had once been a member of the Ku Klux Klan, however, caused a more sustained political uproar and forced Black to take the unusual step of making a radio address to the nation to explain his past.

Black's 34-year tenure on the court belied accusations that he was a racist, as he became a respected civil libertarian and incurred the wrath of his native south in decisions supporting desegregation and banning mandatory school prayer. Perhaps ironically, some scholars have speculated that Black's southern Baptist upbringing informed his judicial philosophy, which was predicated on an insistence on fidelity to the literal meaning of the Constitution's text (indeed, Black carried a copy of the Constitution in his pocket everywhere he went). Though only fully articulated after the *Barnette* case, Black's "absolutist" reading of the Free Speech Clause provides a salient example of this approach. He posited that the language "Congress shall make no law... abridging the freedom of speech" should be read literally to ban absolutely *any* government interference with speech while mere "conduct," such as symbolic protest, was not similarly protected.



Justice Hugo L. Black
Courtesy: Library of Congress

Black's views occasionally led to clashes with his colleagues. His relationships with Felix Frankfurter and Robert Jackson proved particularly tumultuous. Similarly, in his later years, as the court's majority adopted an increasingly capacious reading of the Constitution's rights-bearing provisions, Black also became noted for his stern dissents.

Black retired from active service on the court in 1971 following a series of strokes. He died a few days later.

William Orville Douglas (1898–1980)

The longest-serving justice in Supreme Court history, William O. Douglas is widely regarded as one of the central figures in the court's transformation from a conservative body hostile to social and economic legislation in the 1930s, to an institution associated with the protection of political and civil liberties in the decades following World War II.

Douglas was born in 1898 in Minnesota, but his family soon relocated to a rural area near Yakima, Washington. As a young boy, Douglas contracted polio, but succeeded in warding off the symptoms. Douglas claimed he did so partly by climbing nearby mountains, an account that may have been apocryphal, but which suggests

the mythos surrounding his western upbringing and the rugged individualism that would form an important component of his public persona.

Douglas attended Whitman College and briefly worked as a high school teacher before going to Columbia Law School. He excelled at Columbia and became an acolyte of the legal realist jurisprudence for which the school became known. After a brief stint in private practice, Douglas became a professor at Columbia and then Yale Law School, another major center of realist jurisprudence. At Yale, Douglas established a reputation as one of the nation's leading scholars on corporate and bankruptcy law.

In 1934, Douglas joined the newly formed Securities and Exchange Commission (SEC), initially as the director of a temporary study group. He eventually became an SEC commissioner and, in 1937, the commission's chairman. While at the SEC, Douglas became an advisor to Franklin Roosevelt, who nominated him to the Supreme Court in 1939, making him the youngest justice since 1811. Douglas maintained his close connections to Roosevelt during his early tenure on the court and was considered for the Vice Presidency in 1944, a position many thought tantamount to president-in-waiting as Roosevelt's health declined. Harry S Truman, who was appointed Vice President over Douglas at that time, later offered Douglas the Vice Presidency, but he chose to remain on the court.

Douglas's views evolved quickly once he reached the court. He initially affiliated himself with the ideal of judicial restraint that had animated critiques of the court's decisions striking down New Deal legislation. Over the course of the 1940s and '50s, however, he became one of the court's most vocal champions of civil liberties and equality, eventually advocating a more robust vision of desegregation, freedom of expression, and criminal procedure protections than most of his colleagues.

In some ways, Douglas's actions in the flag salute cases are a microcosm of this broader pattern. Though he initially joined Justice Felix Frankfurter's opinion in *Gobitis*, Douglas quickly reversed his views, indicating he thought the decision mistaken in 1942 and siding with the majority in overturning the case the next year.

Though idolized by many on the political left, Douglas was no stranger to controversy. He was married four times, including two marriages to women approximately



Justice William O. Douglas
Courtesy: Library of Congress

forty years his junior that scandalized Washington society. Unlike many justices, he continued to advocate for political and social causes in his extrajudicial writings, becoming a major voice in the environmental movement. In his later years on the court, he was also a strident opponent of the Vietnam War and “establishment” politics.

Members of the House of Representatives twice tried to impeach Douglas. The first of these initiatives was a response to his unpopular decision to stay the execution of alleged Soviet spies Julius and Ethel Rosenberg. The second, spearheaded by future President Gerald Ford, was likely motivated by the perception that Douglas’s views were too radical. Some biographers have argued this attempt ironically persuaded the obstinate Douglas to stay on the court despite previous plans to retire.

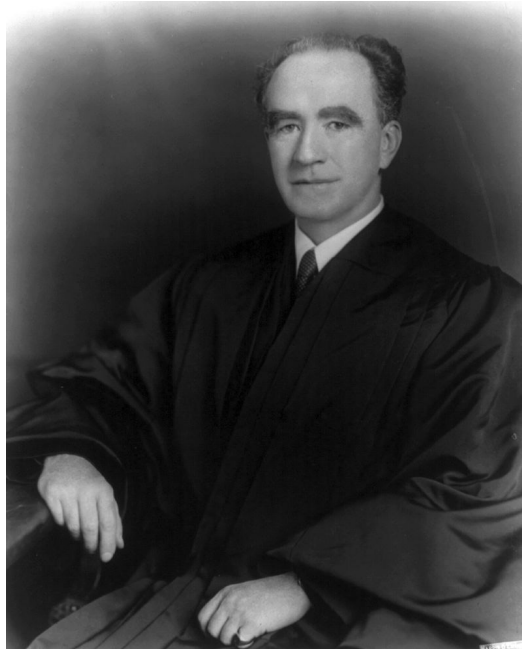
Douglas suffered a stroke on New Year’s Eve 1974 that limited his ability to continue judicial work. He retired from active service in 1975 and died in 1980.

Frank Murphy (1890–1949)

Frank Murphy was a recent appointee to the Supreme Court when it heard the *Gobitis* case. He had misgivings about Justice Frankfurter’s majority opinion and drafted a dissenting opinion, though he ultimately sided with the majority. He subsequently reversed his position in *Barnette*.

Murphy was born in Sand Beach (now Harbor Beach), Michigan, in 1890. He received his bachelor’s and law degrees from the University of Michigan before entering private practice in 1914. He served in the U.S. Army from 1917–1919, before returning to Michigan to become a federal prosecutor. In 1920, he ran unsuccessfully for the U.S. House of Representatives. In 1923, he became a judge of the Recorder’s Court in Detroit, holding the post for seven years before becoming the city’s mayor in 1930.

As mayor, Murphy stumped for Franklin Roosevelt in the 1932 election and was rewarded with an appointment as the Governor General of the Philippines the next year. As Governor General, Murphy worked with Philippine leaders to create a transition to independence, becoming High Commissioner of the Philippines when it entered a ten year transitional period as a commonwealth



Justice Frank Murphy
Courtesy: Library of Congress

in 1935. At Roosevelt's request, Murphy returned to Michigan in 1936 to run for governor.

After serving as governor for a single term, Murphy lost a bid for reelection in 1938, but was appointed U.S. Attorney General shortly thereafter. As Attorney General, Murphy initiated the Justice Department's first civil rights unit and acquired a reputation as a "law and order" crusader. Nevertheless, when Roosevelt appointed Murphy to the Supreme Court in 1940, some critics doubted his credentials for the position. After making few major decisions in his early terms, Murphy eventually established himself as one of the Court's leading civil libertarians, advocating a robust set of protections for dissidents and minority groups during wartime.

Murphy died of coronary thrombosis in 1949.

The attorneys

Olin Moyle

Olin Moyle was legal counsel to the Watch Tower Bible and Tract Society from 1935 to 1939. In that capacity, he successfully argued the trial and initial appeal of the *Gobitis* case. However, after arguing the case to the U.S. Court of Appeals for the Third Circuit (but before the court delivered its opinion in the case), Moyle had a bitter falling out with the organization's leader, Joseph Rutherford. Moyle wrote an open letter of resignation accusing Rutherford of greed and hypocrisy and claiming that the faith's leadership had embraced a lifestyle of drinking and swearing. Though he had initially intended to stay on to conclude work on several pending cases, the Watch Tower board dismissed him immediately after the letter came to light. Moyle was "disfellowshipped," the equivalent of excommunication, and denounced in Watch Tower publications, which compared him to Jesus's betrayer Judas Iscariot. He subsequently successfully sued the organization for libel.

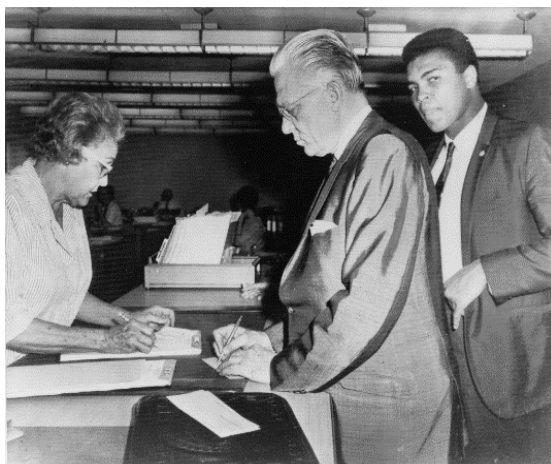
Hayden Covington

Hayden Covington was the general counsel for the Jehovah's Witnesses' Watch Tower Bible and Tract Society from 1939 to 1963. In that capacity, he helped to write the Supreme Court brief in *Gobitis* and argued the *Barnette* case at both the district and Supreme Court levels. Covington was born and raised in Texas, the son of a Texas Ranger who urged him to pursue a political career. Though he showed little interest in politics, Covington pursued a successful private legal practice focusing mainly on business cases, though he did defend several fellow Witnesses on a pro bono basis.

After Moyle broke with the Watch Tower organization in 1939, Rutherford called on Covington to become the organization's general counsel. Covington subsequently

argued dozens of cases successfully before the Supreme Court, winning 36 of the 45 appeals he argued before the justices.

In the aftermath of Rutherford's death in 1942, Covington became vice president of the organization. Its leader, Nathan Knorr, initially gave Covington freer license to run the Witnesses' legal campaign, but the two men eventually fell out. Covington resigned his vice presidency in 1945, though he continued to serve as general counsel until 1963, when he was disfellowshipped from the Witnesses.



Covington (center) with client Muhammad Ali
Courtesy: Library of Congress

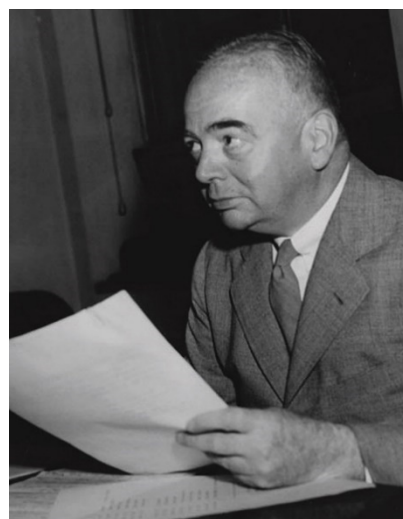
After leaving the inner circle of the Watch Tower organization, Covington represented heavyweight boxing champion Muhammad Ali in his attempts to oppose military induction during the Vietnam War on religious grounds. In his later years, Covington seemingly lost his enthusiasm for the law and descended into a period of

alcoholism. Shortly before his death, however, Covington reengaged with the Witnesses and actively participated in evangelical work.

Joseph Henderson

Joseph Henderson was the lead attorney for the Minersville Board of Education at all phases of the *Gobitis* case. Henderson was a partner in the Philadelphia firm of Rawle and Henderson, the oldest law firm in the United States. He argued that the flag salute was a purely secular exercise that did not trigger constitutional protections of free religious exercise. He likewise advocated for a strong view of state powers to inculcate patriotism.

Henderson lost the trial and initial appeal in the case, but eventually prevailed before the Supreme Court. The court subsequently overturned its decision in *Barnette*. Henderson went on to become the president of the American Bar Association from 1943–1944.



Joseph Henderson
Courtesy: Rawle and Henderson, LLP

Arthur Garfield Hays

General counsel and founding member of the American Civil Liberties Union, Arthur Garfield Hays assisted in the Supreme Court appeals in both *Gobitis* and *Barnette*, aiding George Gardner on the brief in *Gobitis* and writing an amicus brief on behalf of the ACLU in *Barnette*. In his 25 years as general counsel for the ACLU, Hays earned a reputation as a champion of civil liberties and unpopular minorities. He was involved in several of the most famous state and federal trials of that period, including the Sacco and Vanzetti murder case in Massachusetts and the Scopes “Monkey” Trial in Tennessee. He also represented Communists in Germany accused of burning down the Reichstag. From 1923 to 1952, he argued or penned amicus briefs in more than 200 federal trials and appellate cases, including landmark decisions striking down school desegregation and mandatory school prayer.



Arthur Garfield Hays addresses a crowd in 1938

Courtesy: Library of Congress

Joseph Rutherford

Joseph Rutherford was the de facto leader of the Jehovah’s Witnesses from 1917 to 1942, having taken over from Charles Taze Russell, the group’s founder. A combative lawyer who was imprisoned for opposition to World War I until his conviction was overturned, Rutherford initiated a period of aggressive and confrontational proselytizing by the Witnesses that helped to grow the group’s ranks but also made them unpopular with the unconverted.

After Olin Moyle was dismissed over his feud with Rutherford, the latter assumed responsibility for the *Gobitis* appeal to the Supreme Court, working with Moyle’s replacement, Hayden Covington, on an unorthodox brief that focused on theological arguments. He then unsuccessfully argued the case before the justices at oral argument.



Joseph Rutherford (circa. 1910)

Produced by the Watch Tower Bible and Tract Society, public domain

Rutherford died on January 8th, 1942, opening up the prospect of a less provocative approach from the Witnesses and giving Covington a freer hand to shape the group's legal strategy.

George Knowles Gardner

George Knowles Gardner was a Harvard Law School professor who argued the *Gobitis* case before the Supreme Court of the United States on behalf of the American Civil Liberties Union. A Harvard graduate, Gardner's scholarly work primarily focused on contract and admiralty law, though he wrote law review articles on free speech and schoolchildren's rights in the years following *Gobitis*. While not a formalist, Gardner opposed some of the administrative innovations of the New Deal as potential threats to civil liberties and the separation of powers.

With Joseph Rutherford's arguments focusing primarily on religious matters, Gardner bore much of the responsibility for arguing the *Gobitis*' constitutional case to the Supreme Court. He argued that the state could not condition the students' education on giving up their rights to religious belief and exercise. "[N]o practical consideration," he asserted, "justifies soiling our national emblem 'with the tears of a little child.'" Though Gardner's argument was unsuccessful in *Gobitis*, the Court eventually adopted a similar view three years later in *Barnette*.

W. Holt Wooddell

W. Holt Wooddell argued the *Barnette* case before the Supreme Court of the United States. An assistant attorney general of West Virginia, Wooddell took over responsibility for the case when Attorney General William Wysong left office. He unsuccessfully argued the Supreme Court should preserve its holding in *Gobitis*.

William Wysong

William Wysong served less than a year as the attorney general of West Virginia, having been appointed to the position on May 25, 1942, to fill a vacancy caused by resignation. He was replaced following an election later that year. During his brief tenure, Wysong argued the *Barnette* case before a three-judge panel of the U.S. District Court for the Southern District of West Virginia. He unsuccessfully argued that the *Gobitis* precedent governed the case as the court took the unusual step of declining to follow the Supreme Court's prior opinion.

The parties

The Gobitas family

Walter Gobitas sued the Minersville School Board on behalf of himself and his children, Lillian and William, more than a year after they were expelled from school for refusing to salute the flag. Walter ran a small family grocery store. He inherited his mother's grocery store, which he ran with the children's help. At the time they refused to salute the flag, Lillian was twelve and William was ten. The family suffered reprisals for their defiance. William was beaten up by bullies and Lillian was ostracized and teased. A local church briefly boycotted Walter's store.



The Gobitases used their grocery store truck as a “school bus” for Witness children

Courtesy: Library of Congress

After the children's expulsion from school, Walter attempted to educate the children through an informal arrangement with a private tutor, but local officials notified him that his children would be sent to a reformatory if he did not place them in an appropriately certified school. Walter eventually sent his children to the Kingdom School, a makeshift boarding school for Witnesses set up in a farmhouse thirty miles from Minersville, though that arrangement ultimately proved untenable. Walter sought an injunction requiring the local school district to permit his children to re-enroll in the public system. Although the family won in both the district court and the Court of Appeals for the Third Circuit, the children never returned to the Minersville public schools as Judge Maris stayed his judgment pending appeal and the Supreme Court ultimately reversed his decision in 1940.

As adults, both William and Lillian worked for the Watch Tower headquarters in New York. William later worked in the insurance industry and as a part-time piano tuner in Wisconsin, while Lillian continued missionary work in Europe. There she met and married her husband, who relocated to America and started a successful business in New York before the couple moved to the Atlanta area. William died in 1989, Walter in 1990, and Lillian in 2014.

The Barnett family

After his children Marie and Gathie were sent home from school for refusing to salute the flag, Walter Barnett sued the West Virginia Board of Education. Barnett was the lead plaintiff in the case, although two other Jehovah's Witnesses (including the children's uncle, Paul Stull), also sued. Barnett prevailed at both the district court and Supreme Court levels, an outcome that overturned the *Gobitis* precedent.

The Barnetts lived just outside of Charleston, West Virginia, where Marie (aged eight at the time of her suspension) and Gathie (aged nine) attended a small public school. Walter, who became a Witness around the time of his children's birth, worked as a pipe fitter for the E.I. du Pont chemical company. Gathie later remembered her father as a devout member of the faith but not "a crusader." When the state board of education adopted a regulation in 1942 requiring school children to salute the flag and recite the pledge of allegiance, the girls declined to comply on the grounds that they had been taught saluting the flag "was like . . . bowing down and giving reverence to it . . . like an idol." Although the Barnett children were not permanently expelled from school, as the *Gobitases* had been, they were repeatedly sent home after their parents continued to take them to school.

As adults, Marie worked as a secretary at the Union-Carbide chemical company and Gathie became a homemaker. Both occasionally spoke out about issues related to the flag and religion in schools, as for example when Vice President George H.W. Bush raised the possibility of requiring teachers to lead the pledge of allegiance during the 1988 presidential campaign. In the early 2010s, Marie unsuccessfully campaigned in support of a student barred from distributing religiously-themed candy canes at school. Gathie died in 2012; as of 2017, Marie is retired and living in Florida.

Media Coverage and Public Debates

From the beginning of the *Gobitis* case, the flag salute controversy attracted intense media coverage and generated national debate. Judge Maris's decision to deny the board's motion to dismiss, by way of illustration, made the front page of the *New York Times*. Though the Witnesses were not a popular group, the preponderance of editorial coverage supported their right not to salute the flag. In the aftermath of the Supreme Court's *Gobitis* decision, several outlets critiqued Justice Felix Frankfurter's refusal to second guess the judgements of politically accountable school boards.

This criticism intensified following several acts of violence targeting Witnesses. The Witnesses' proselytizing tactics had long alienated or annoyed many of the unconverted. Because the Witnesses fervently believed their interpretation of the Bible was an absolute truth and a matter of the utmost urgency, they often abandoned traditional standards of polite behavior. The Witnesses frequently referred to other religions, particularly the Catholic Church, as "rackets" or "snares." And their strategy of descending on towns in large groups to spread the word and convert those ignorant of the true meaning of the bible made them an obvious target. These factors were aggravated by the Witnesses' objections to saluting the flag at a time of impending crisis over the specter (and then reality) of American involvement in World War II. As a result, the Witnesses became the primary victims of fears of a "fifth column" of traitors who would undermine America from within.

The Supreme Court's controversial decision in *Gobitis* seemed to be the spark that ignited this combustible mixture. According to sociologist James Penton, thousands of Jehovah's Witnesses were arrested between the late 1930s and early '50s. During that time, Penton reports around 1,500 instances of mob violence against Witnesses, most of which coming in the immediate aftermath of *Gobitis*. Days after the *Gobitis* decision, mobs launched successive aggressive attacks on Kingdom halls in Maine, likely aggravated by some Witnesses firing guns to defend themselves. According to the *Boston Globe*, a group of American Legion members ransacked and incinerated the Kingdom hall in Kennebunk, "affix[ing] a small American flag to the charred front of the hall." Also in Maine, a mob attempted to tar and feather a Witness in Biddleford. In Wells, they mistakenly confronted a non-Witness at his home and forced him to salute the flag. Although he did so, the mob refused to believe he was not a Witness and began attacking his home. When the man fired a warning shot, he injured two of the protestors. The *New York Herald Tribune* denounced the rash of violence in Maine as being "in the best Ku Klux Klan tradition." The paper directly attributed the chaotic scenes to the *Gobitis* decision:

This conservative old New England state has seen little lynching or other lawlessness; but the Supreme Court's recent decision that the Jehovah's Witnesses must salute the flag seems to have convinced several hundred

Maine rustics that this is their personal responsibility to see this decree carried out.

It is difficult to know how much of the violence and persecution of Jehovah's Witnesses was genuinely attributable to the Supreme Court's 1940 decision. Beyond a few anecdotal situations, mobs seldom cited the case as they beat up Witnesses or chased them out of town. Though he dissented against the decision when it was written and campaigned for it to be overturned amongst his brethren, Justice Stone hypothesized that the violence would have occurred with or without *Gobitis*. Moreover, the Witnesses also won several victories in the Supreme Court during the early 1940s and violence against the Witnesses had begun before the Court announced its decision. Two days earlier, for instance, 60 Witnesses in Odessa, Texas, were arrested and some of them beaten by the local sheriff who referred to them as Nazi spies.

Nevertheless, several papers and periodicals accused Frankfurter's opinion of inviting the repression of dissenting voices in the name of patriotism and the will of the majority. Though the *Washington Post* initially celebrated the opinion for striking a balance between handcuffing legislatures and trampling on civil liberties, it too eventually called for the decision to be overturned.

When the Court did overturn its earlier decision in 1943, the media coverage was broadly positive. *Time*, for instance, ran an article with the headline "Blot Removed." Noting that "the reversal was a vindication and a triumph" for Stone, the magazine commended the Court's majority for "reaffirming its faith in the Bill of Rights—which, in 1940, it had come perilously close to outlawing."

Historical Documents

Testimony of Charles Roudabush

Charles Roudabush was the superintendent of the Minersville School District when the Gobitas children were expelled from school for refusing to salute the flag in 1935. His testimony was designed to establish the importance of the flag salute and the potential disruption caused by nonconformity. Lillian Gobitas later recalled that “Dr. Roudabush was very feisty on the stand, very angry and hostile.” Roudabush’s strenuous rejection of the Gobitases’ religious views, however, seems to have backfired.

[Document Source: *Walter Gobitis v. Minersville School District, et al.*, Case Files, U.S. District Court, Eastern District of Pennsylvania, National Archives and Records Administration, Philadelphia, “Index and Transcript of the Trial Record,” 62–65.]

BY MR. HENDERSON:

Q: Doctor Roudabush, how long have you been superintendent of the schools in Minersville?

A: Twenty-three years.

Q: You are at present the superintendent?

A: Yes, sir.

Q: And you are the superintendent who was there when this unfortunate experience with the Gobitas children occurred?

A: I was, yes, sir.

Q: Now, Doctor, without going into great length into the Pennsylvania law as to maintaining public school systems, and as to their various teachings, I only want to refer you to one particular duty that is devolved upon the public schools by the State Legislature, and specifically that passage that all public schools and private schools in this state shall teach enumerated subjects in which is included, “Civics, including loyalty to the State and National Government[.]” [Citation omitted].

Now, the particular method by which civics and loyalty to the State and National Government is to be taught has not been designated by the Legislature. That, apparently, has been left to the discretion of the local school boards. Will you kindly explain to His Honor and this Court, among other things, what part saluting of the flag plays in that teaching? If you will, just explain it in full, if you please.

A: We feel that every citizen and every child in the public schools should have the proper regard for the emblem of the Country, the flag. We have never required the salute of the flag, yet everyone in our school system for twenty-three years, and even longer, has given the salute voluntarily, willingly. The salute of the flag, we believe, is

a means of helping to inculcate in the children a love for country, the institutions of the country, and for that reason we have expected the salute from the teachers and the children.

Q: Doctor, would you kindly explain to us just exactly what you do in connection with this salute? It has been admitted, practically, in the pleadings, but it might be amplified just a little, if you please.

A: In some of the schools –

Q: Just in this school in which were the Gobitas children, exactly what occurred?

A: Sometimes I believe in our school where these children were enrolled they sing the salute, they rise and sing, “I pledge allegiance to my flag and the Republic for which it stands, one nation indivisible, with liberty and justice for all.”

Q: Doctor, exactly what is the nature of the salute? Would you mind demonstrating it to us?

A: Standing –

Q: Right hand over the chest?

A: Yes. “I pledge allegiance to my flag –”

Q: When you say, “my flag,” extending your right hand towards the flag with the palm upraised. Doctor, in your opinion, what is the effect when a few children do not salute the flag and others do, so far as your school system is concerned?

A: It would be demoralizing to the whole group.

Q: Why?

A: The tendency would be to spread. In our mixed population where we have foreigners of every variety, it would be no time until they would form a dislike, a disregard for our flag and country. May I say that the thing that goes very hard with us when someone refuses to salute the flag is to refuse to pledge allegiance to the country for which it stands.

Now, I believe when we make a citizen out of an alien the first thing that we require is they have to denounce their allegiance to the country in which they want to become citizens.

BY THE COURT:

Q: Just a minute. Is there any arrangement, Doctor, for any children who explain that they refuse to salute the flag because of religious reasons, to pledge their allegiance separate from the salute?

A: No, we have never made any provisions; we feel it is not a religious exercise in any way and has nothing to do with anybody’s religion.

Q: Do you feel these views to the contrary here held by these two pupils are not sincerely held?

A: I feel they were indoctrinated.

Q: Do you feel that their parents' views were not sincerely held?

A: I believe they are probably sincerely held, but misled; they are perverted views.

Q: I suppose you would say the same thing about a Mohammedan, wouldn't you, or a Hindu?

A: No, that is a whole –

Q: In other words, anyone who didn't agree with your religious views and mine would be indoctrinated, or hold perverted views, because he doesn't believe with you?

A: As I see it, Your Honor, I feel that this is not a matter of religion at all, it has nothing to do with religion, and I think the objection taken by the Jehovah's Witnesses is uncalled for. . . .

BY THE COURT:

Q: Is it your daily experience or not that this daily exercise repeated every day tends to become somewhat of a formalistic matter, a matter of form with a lot of children?

A: I believe it does, just the same as going to Church, or anything else, I think it would be just the same, some people would regard it that way. But there comes a time when there will be a thinking back to the lessons that were inculcated in the public schools.

BY MR. HENDERSON:

Q: Doctor, of course, the flag of the United States is a symbol thereof. Do you or do you not feel that disrespect to the flag is disrespect to the Government, to its institutions and ideals?

A: I do feel it is.

Q: Of course, those who reside within the Commonwealth receive the protection and benefits afforded to them, and, naturally, must obey its laws, and should show due respect to the Government, its institutions and ideals. In your opinion, is the failure to salute the flag any disrespect?

A: I think it is, yes, sir.

Q: And, following that, is it –

BY THE COURT:

Q: Would you say that if the declination to salute the flag was based on sincere religious grounds that that is disrespect?

A: I can't admit –

Q: Without admitting it, admitting that a misguided person sincerely feels he must weaken his whole religious conscience to do it, would you say that is disrespect to our flag?

A: I would. I feel he should be put right. They should show the proper reverence of the country and the flag.

Q: Do I understand you to mean the public schools should see their religious beliefs are changed?

A: Try to correct the thing that exists and that is wrong.

BY MR. HENDERSON:

Q: Doctor, is or is not your opinion that a proper salute of the flag of your country is just part of a patriotic ceremony, an act of respect to the institutions and ideals of the land, and affording a safe place to live in?

A: That is my opinion.

Q: In other words, I gathered from what you stated you did not consider that a religious rights is involved at all; that is your opinion?

A: That is my opinion, sir.

BY THE COURT:

Q: What you mean, I suppose, is that it has no religious significance to you; in your mind, it has no religious significance, isn't that really what you mean?

A: Yes.

Q: You are not prepared to get into someone else's mind and to say what is in their mind with respect to it?

A: No.

BY MR. HENDERSON:

Q: Doctor, are you familiar with the parochial schools around Minersville?

A: I am, yes, sir.

Q: And there are parochial schools there?

A: We have four parochial schools in Minersville furnishing grade education up to and including the 8th grade and in Pottsville four miles away, we have a parochial high school that is equivalent to any in the country.

Q: Doctor, do you know of your own knowledge that they take Protestants in those schools?

A: They do.

MR. MOYLE: May it please the Court, this is all objected to as immaterial and irrelevant.

THE COURT: Objection overruled.

Q: Doctor, are you familiar at all with the expense of going to these schools?

A: I am not – I couldn't give you the exact figures, but I know that many of them go by just mere subscription, wherever they are able to pay. Many go for nothing. . . .

BY THE COURT:

Q: Do they have a compulsory flag salute ceremony?

A: Indeed, I am not able to say.

Q: You don't know?

A: I don't know. . . .

CROSS-EXAMINATION

BY MR. MOYLE:

Q: You believe, Doctor, in the principles of religious freedom as set forth in the Pennsylvania Constitution?

A: I do, sir.

Q: Do you believe in the statement in that constitution, Section 3, Article 1, that no human authority can in any case control or interfere with the rights of conscience?

A: They say so.

Q: I am asking you.

A: I don't know, I couldn't answer the question.

Q: You wouldn't say whether it does or does not?

A: No. . . .

Q: You have set forth in the Answer filed by you, Doctor, that the act of saluting the National Flag is a necessary and reasonable method of teaching loyalty to the state and so on. You believe that, do you?

A: Yes, sir.

Q: And it is absolutely necessary to salute the flag in order to teach loyalty?

A: Oh, no, one of the means, it is one of the means of teaching loyalty.

Q: Then you admit that loyalty could be taught –

A: It is taught otherwise. . . .

Q: Then you admit loyalty could be taught without the flag salute, is that right?

A: Yes, sir. I will not admit, though, that we do not have the right to ask –

Q: I understand.

THE COURT: That is a legal question.

MR. HENDERSON: That is the whole point; you required it, and that is the case.

BY MR. MOYLE:

Q: Outside of the flag salute issue, there are no other acts of disobedience on the part of these children?

A: None at all, very good children.

Q: You do state that the public welfare and safety involving the citizens would be harmed by reason of the fact that some of the pupils refuse to salute the flag, even on conscientious grounds, is that right?

A: Yes, sir.

Q: Isn't it a fact, Doctor, that there would be harm to the public welfare and safety by applying that regulation to one who conscientiously objects to it?

A: I cannot admit a conscientious objection.

Q: Just for the sake of argument, you would admit it would be possible, wouldn't you?

A: No, I think there should not be any conscientious objection.

Q: But if there were, Doctor, if one should conscientiously object and he was forced to stifle his conscience and commit this act which he believes morally wrong, wouldn't that be detrimental to the public welfare and safety?

A: May I ask a question?

Q: No, I would like to have you answer my question.

A: As I see it, there is no justification for the objection; therefore, I can't answer your question.

MR. MOYLE: I ask that answer be stricken out, it is not responsive. I would like to have an answer.

THE COURT: He says he cannot answer the question.

MR. MOYLE: All right; that's all. . . .

DEFENDANTS' EVIDENCE IN SURREBUTTAL

MR. HENDERSON: We have some of the public school books here, and I want to see if any of them play any part. It might be helpful.

There are about three paragraphs in the books that were used at the time in this school, and these books, I understand, are used generally throughout the United States, and I would like to put on the record about three paragraphs. . . .

THE COURT: You may put on the record what you wish.

[Dr. Roudabush was recalled to the stand].

BY MR. HENDERSON:

Q: As far as "Behave Yourself" is concerned, it was a book in use at that time?

A: Yes, sir.

Q: And they were taught as follows, on page 149, at the top of which are "The Stars and Stripes Forever," being a picture of the American Flag with a young man with his hat off in his right hand and pressing it against his heart:

"Respect and reverence for the American Flag are expected from every decent citizen. It is the symbol of the masses, and any disrespect is a reflection upon the society in which you live. The artificial rules of etiquette that have grown up, and have come to be recognized as the basis for proper recognition of it, all have their foundation in the fact that it is a symbol, that it represents something. It isn't a piece of cloth; it is the Pilgrims at Plymouth Rock, the signers of the Declaration of Independence, the fighters on the frontier, the soldiers, sailors, statesmen, the rich and poor; all who

have made the United States. And it is not the past alone, or the present. It is the future, whatever that future is to be. The Flag stands for all that we have been, all that we are, all that we are to be.”

This book has been written by Allen and Briggs. It is the property of the Minersville Public Schools at Minersville.

THE COURT: That really is supporting the plaintiffs’ case.

MR. HENDERSON: We have no objection, whatever it does.

THE COURT: I mean it is an acknowledgement the Flag is a symbol which they are asked to worship. . . .

Testimony of William Henry Gobitas

William Gobitas was ten years old when he refused to salute the flag at his elementary school. His testimony, though brief, offers an insight into the major issues at trial.

[Document Source: *Walter Gobitis v. Minersville School District, et al.*, Case Files, U.S. District Court, Eastern District of Pennsylvania, National Archives and Records Administration, Philadelphia, “Index and Transcript of the Trial Record,” 81–100.]

BY MR. MOYLE:

Q: How old are you, William?

A: 12.

Q: You attended the Minersville Public Schools up to November, 1935?

A: Yes.

Q: Since that time you have been attending school at Andreas?

A: Yes.

Q: You refused to salute the flag and were expelled from the school?

MR. HENDERSON: Now, if Your Honor please –

MR. MOYLE: I am just leading up to this.

MR. HENDERSON: What is the use of cluttering up the record with all this? All these things are admitted.

THE COURT: Yes, they are admitted.

BY MR. MOYLE:

Q: Are you one of the Jehovah’s Witnesses?

A: Yes, sir.

Q: Who are they?

A: They are people who have consecrated their time to Jehovah in proclaiming His messages, and who obey His Commandments.

Q: Why didn't you salute the flag in the school?

A: Because it is contrary to God's law.

Q: What law of God do you believe it is contrary to?

A: In Exodus, Chapter 20, Verses 4 to 7.

Q: What does that say, if you will, or would you rather find it?

A: I could find it. . . .

Q: What is the statement in the Bible which you believe prohibits saluting the flag?

A: Here I have it: "Thou shalt not make unto thee any graven image, or any likeness of any thing that is in heaven above, or that is in the earth beneath, or that is in the water under the earth;

Thou shalt not bow down thyself to them, nor serve them: for I the Lord thy God am a jealous God, visiting the iniquity of the fathers upon the children unto the third and fourth generation of them that hate me;

And showing mercy unto thousands of them that love me, and keep my commandments."

Q: Have you consecrated yourself to the Lord?

A: Yes.

Q: What do you mean by that?

A: Devoting your time to him and preaching the Gospel.

Q: Do you believe the Bible?

A: Yes.

Q: Do you believe it contains God's law?

A: It is God's law.

Q: And that you should obey His Commandments?

A: Yes.

Q: That is why you refuse to salute the flag, is it?

A: Yes.

MR. MOYLE: Cross-examination.

MR. HENDERSON: No questions.

BY THE COURT:

Q: William, you were born in this country?

A: Yes, sir.

Q: You love this country?

A: Sure.

Q: You want to be a good citizen?

A: Yes.

Q: You want to do everything you can, do you, to be a good citizen of the United States?

A: Yes.

MR. MOYLE: That's all.

Eleanor Roosevelt, "My Day"

First Lady Eleanor Roosevelt wrote a popular syndicated newspaper column six days a week from late 1935 until shortly before her death in 1962. Included in up to 90 newspapers, Roosevelt's "My Day" reached millions of Americans on a daily basis. In this column, Roosevelt warns of the danger of patriotic groups attempting to ferret out and punish so-called fifth columnists, including the Witnesses.

[Document Source: *The Eleanor Roosevelt Papers* Digital Edition (2017), The George Washington University.]

June 21, 1940

NEW YORK, Thursday—something curious is happening to us in this country and I think it is time we stopped and took stock of ourselves. Are we going to be swept away from our traditional attitude toward civil liberties by hysteria about "Fifth Columnists," or are we going to keep our heads and rid ourselves of "Fifth Columnists" through the use of properly constituted government officials?

If we violate the rights of innocent people or even of guilty people, we lose our long established liberties because of our desire to curtail the activities of those who are dangerous as groups or as individuals, by trying to curtail them in unconstitutional and ill considered ways.

On page one of a newspaper this morning there appear three articles showing the heat and lack of consideration with which many people are acting. One heading reads: "Crowds Force Sect Members to March with Flag in Wyoming." The story tells how six people of a certain religious sect were dragged from their homes and forced to pledge allegiance to the flag.

In public places at this time we might exact this of all people, and the most dangerous Fifth Columnists would be the first to conform. Must we drag people out of their homes to force them to do something which is in opposition to their religion?

In another article it is reported that the Attorney General has had to explain to Congress that a bill approved by the House will, if it becomes a law, constitute a historic departure from an unbroken American practice and tradition for 150 years. This bill is perhaps the best example of abridging our liberties in order to protect

ourselves from one individual, who can easily be rendered harmless by far less dangerous methods.

The third article is one which states that a leader of great prominence in Catholic Youth, Boy Scouts and Boys Club of America, is going to lead the fight on what he considers subversive elements in a youth-led organization. One of the first things he suggests is that he will demand that this organization advocate the suspension of civil liberties in this country as far as Communists are concerned. He is quoted as saying: "I don't think it is any time to pamper those who are bent on destroying our country. These birds (meaning the Communists) are saboteurs. I fought in one war and I will fight in another to defend my country, but I don't want to do it with a lot of saboteurs at my back."

The gentleman in question is forty-two years old. The people in the youth-led organization are likely to be dead in the front line of battle before he is even called. If they happen to feel that our Constitution should be adhered to, unless it should be changed, they seem to be thinking along the same lines as the Attorney General of the United States.

E.R.

Beulah Amidon, "Can We Afford Martyrs?"

The Survey Graphic was an influential periodical focusing on contemporary trends and events from a sociological perspective from 1921 to 1952.

[Document Source: *Survey Graphic* (Sept. 1940): 457–60.]

A Survey editor reports on some of the sectors where civil liberties may be threatened in this grave period of our history. Miss Amidon has recently traveled in the Deep South, and was on the sidelines in Washington during the Department of Justice conference with state officials.

THEY WERE A SORRY LITTLE PROCESSION AS THEY STRAGGLED down the village street, four women and seven men, with bundles and suitcases, plodding along under the blazing July sunshine of the Deep South. One woman tried to shield her head with her arm, one of the men limped, and there was a patch of blood on his trouser leg. The crowd that followed them, in the road and along the sidewalks, jeered and shouted and occasionally threw pieces of wood or rubble from the roadside. "Git out of here . . ." "We got no room for dirty traitors here . . ." "Hurry up." "Yah, that got him . . ." "Damn their dirty hides . . ." "Git out . . ."

A shirt-sleeved sheriff, a gun on his hip, leaned against a telephone pole, watching the scene. He made no move to join the crowd, or to check it. A half brick hit one of the women between her shoulders. She gasped and staggered. Two of the men

caught her and dragged her along. The crowd jeered, then the jumbled voices blended in the deep, rhythmic bay of the mob. The victims began to shuffle more quickly, to glance right and left in quick terror.

“What is it all about?” I asked the sheriff as the ugly scene passed down the street toward the cotton fields beyond the town.

“Jehovah’s Witnesses,” he said. “They’re running ‘em out of here. They’re traitors— the Supreme Court says so. Ain’t you heard?”

As they reached the edge of town, the crowd tired of its sport. A last volley of missiles, a final burst of epithets, and the forty or fifty boys and men turned back. Jehovah’s Witnesses went on, slowly vanishing figures in the heat waves that shimmered across the road.

“They’ll sweat plenty before they get to G,” said the sheriff. “That’s the first place they can get a bus or train. Do ‘em good.”

Contrary to this sheriff’s summary of its eight-to-one decision, the Supreme Court of the United States did not hold that the members of this peculiar sect are “traitors,” but that their children may be required by school authorities to participate in the daily flag salute, even though they “had been brought up conscientiously to believe that such a gesture of respect for the flag was forbidden by command of Scripture.”

A little congregation of the sect who had come together in that southern town to play their exasperating gramophone records and sell their tracts became the local scapegoats for the intolerance that is a common human reaction in times of tension and anxiety. North and South, East and West, the Court decision has served to kindle mob violence against Jehovah’s Witnesses. Some communities have contented themselves with “running them out of town.” In others, American mobs have flogged, as “disloyal,” representatives of a religious body which has more than five thousand members in German concentration camps because they will no more “Heil Hitler” than they will salute the flag. Jehovah’s Witnesses are today a symbol of the fear-bred intolerance which can engulf the rights not only of helpless minorities but of all the peoples of a free land. It is well to stop, while it still is possible to stop, and ask ourselves whether we can afford to make martyrs by persecuting those we disagree with, distrust, or dislike.

“Frankfurter v. Stone”

The New Republic was founded in 1914 by Walter Lippman and other Progressive thinkers as a thoughtful, liberal periodical. Prior to his arrival on the Supreme Court, Felix Frankfurter had written articles for the publication and was seen as a model of the *New Republic*'s breed of political liberalism. In this article, however, the publication's editorial staff offer a stinging rebuke to Frankfurter's opinion in *Gobitis* that draws parallels between Frankfurter's reasoning and Hitler's.

[Document Source: *New Republic* (June 24, 1940): 843–44.]

We hope our readers will examine carefully the majority Supreme Court decision in the “flag salute” case, by Mr. Justice Frankfurter, and the minority decision by Mr. Justice Stone, published in this issue beginning on page 852. They will find both of them written with unusual felicity of style and dealing with questions of the highest moment to citizens of this republic. Since we have for many years admired the abilities and character of Mr. Justice Frankfurter, and have usually agreed with his views whether on legal problems or others, it is with particular regret that we are forced to say we think Mr. Justice Stone is right and Mr. Justice Frankfurter and the seven other Justices who concurred are wrong.

Mr. Justice Stone's argument seems to us conclusive and to need no gloss by us or anyone else. He recognizes the fact that civil rights are not absolute, that government may infringe upon them to ensure its own survival and presumably to protect public morals, safety, health and order. But this right in turn is not absolute; the question is one of adjustment between the power of government and the constitutional rights of the citizen. The government is in no desperate and critical situation that can be solved only by compelling school children to salute the flag in what is for them a ceremony in violation of religious conscience. As Mr. Justice Stone wisely says, there are other and better ways to teach loyalty and patriotism. Moreover, “there have been but few infringements of personal liberty by the state which have not been justified, as they are here, in the name of righteousness and the public good, and few which have not been directed, as they are now, at politically helpless minorities.”

Those seem to us brave and true words. This country is now in the grip of a war hysteria; we are in great danger of adopting Hitler's philosophy in the effort to oppose Hitler's legions. When the Supreme Court says in effect that we must imperil religious liberty in the interest of the American state, which is worth preserving because it guarantees religious liberty, it comes dangerously close to being a victim of that hysteria.

“Rights and Privileges”

Founded in 1877, the Washington Post has long been one of America’s leading newspapers. Below are two Post editorials on Jehovah’s Witnesses’ rights. In the first article, the Post’s editorial board offers a defense of the Gobitis decision that praises Justice Frankfurter’s attempts to balance the interests of the state and minorities. The second editorial, published shortly before the Supreme Court delivered its Barnette decision, suggests a changing of the tides.

[Document Source: *Washington Post*, June 4, 1940, p. 6.]

In periods of public excitement the fine line between liberty and license acquires a special significance. There is grave danger, on the one hand, that civil rights guaranteed by the Constitution will be recklessly suppressed as a means of promoting public safety. At the other extreme there is danger that complete freedom in the exercise of assumed rights may interfere with the effective functioning of democracy.

A delicate line between these two positions was skillfully drawn by the Supreme Court yesterday in its decision that local authorities may require children attending public schools to salute the American flag. The opinion written by Justice Frankfurter did not indorse or condemn the practice of requiring pupils to salute the flag. Some regulations designed to stimulate a “common feeling for the common country,” the court said, may seem harsh and others foolish. But the court insisted that the State Legislatures have a right to exercise their discretion in such matters without interference from the courts.

Justice Stone’s solitary dissent was based on the assumption that compulsory saluting in the public schools coerces Jehovah’s Witnesses into expressions of sentiments they do not entertain and which violate their religious convictions. But this view seems to overlook the fact that children are not compelled to attend public schools. Saluting the flag becomes essential only if they claim the privilege of a free education offered by the State. Parents who do not wish their children to pledge alliance to the flag have the alternative of sending them to private schools.

So it does not appear that the saluting requirement, arbitrary though it may be, violates a basic right. Obviously it has no connection with freedom of religion. If the United States supported a state church, a case could be made for refusal to salute the flag on religious grounds. But with our complete separation of church and state, there can be no religious or antireligious implications to a salute to the flag.

Long ago, the Supreme Court decided that freedom of worship does not give a sect a right to indulge in every practice which it may regard as part of its religion. Freedom of religion extends only to the realm of spiritual belief and ritualistic practice. It does not permit any group to interfere with legitimate functions of the state under the guise of practicing their religion.

“*Victory for Freedom*”

[Document Source: *Washington Post*, May 5, 1943, p. 14.]

The question of whether the guarantees of religious freedom embodied in the First Amendment – and, incidentally, incorporated into our war aims – are absolute or limited has been raised several times within the past few years by the behavior of members of the sect called Jehovah’s Witnesses. Both the tenets and the evangelical practices of the Witnesses are distinctly unpopular with many Americans in many sections of the country. The question, however, is not whether the Witnesses have invited persecution but whether religious liberty can be said to exist where the suppression of any sect, however fanatical, is given a legal sanction.

The question came first before the Supreme Court in a test case arising out of the refusal of children of the sect to offer the customary salute to the flag in their school classrooms. Mr. Justice Frankfurter, supported by all but one of his colleagues, ruled that a child accepting free education from the state may be forced to salute the flag even though the action represents to him a violation of conscience. However, three of the justices who concurred in this decision – Messrs. Black, Douglas, and Murphy – nearly two years later issued a manifesto in which they declared they had changed their minds and believed the case had been wrongly decided.

Last June the Court upheld the right of local authorities to control or limit the evangelical activities of Jehovah’s Witnesses or of any religious group. This time, however, the vote was 5 to 4. Chief Justice Stone, who had dissented from the majority opinion in the *Gobitis* or flag saluting case, was now supported by Justices Black and Douglas. Chief Justice Stone’s dissenting opinion in this case was a masterpiece of logic. He pointed out that the way had now been opened not only for the restriction of religious freedom but also for the nullification by local authorities of the other guarantees in the Bill of Rights. Justice Murphy in a separate and more involved opinion reached a similar conclusion.

On Monday the Court made a complete about face on the whole question. This time four justices, including the newest member of the Court, Justice Rutledge, supported the Chief Justice in reversing the previous decision. At the same time Justice Douglas, similarly supported, handed down another opinion upholding the Witnesses in their conflict with local authorities at Jeanette, Pa.

In short, the wisdom of Chief Justice Stone has prevailed. The probability that the Court will also reverse its decision in the *Gobitis* case now appears very strong. Monday’s action by the Court is of tremendous historical importance. It not only reaffirms the traditional American concept of the relationship of church and state but it is counter to the tendency of all modern states to extend their control over all human activity, physical and spiritual.

Judge Maris's Opinion in Gobitis v. Minersville School Dist. (1938)

Judge Albert Maris's opinion in the Gobitis case began a string of victories for Jehovah's Witnesses protesting flag salutes in the lower federal courts. For purposes of clarity and concision, the case has been abridged and most internal citations removed.

[Document Source: *Gobitis v. Minersville School Dist.*, 24 F. Supp. 271 (E.D. Pa. 1938).]

. . . On November 6, 1935 at a regular meeting of the Board the following school regulation was adopted: "That the Superintendent of the Minersville Public Schools be required to demand that all teachers and pupils of said schools be required to salute the flag of our country as a part of the daily exercises. That refusal to salute the flag shall be regarded as an act of insubordination and shall be dealt with accordingly."

Lillian and William having failed to salute the national flag at the daily exercises of the Minersville Public School, defendant Charles E. Roudabush on November 6, 1935, at the direction of the Board and immediately after the adoption of the regulation above quoted, publicly announced: "I hereby expel from the Minersville Schools Lillian Gobitis, William Gobitis and Edmund Wasliewski for this act of insubordination, to wit, failure to salute the flag in our school exercises." Since that date Lillian and William have not been permitted to attend the Minersville Public School.

Lillian and William and their father, Walter Gobitis, are members of an association of Christian people calling themselves Jehovah's Witnesses. Each of the plaintiffs as a member of that association has covenanted with Jehovah God to do His will and to obey His commandments. They accept the Bible as the word of God and conscientiously believe that a failure to obey the precepts and commandments laid down therein will in due time result in their eternal destruction. . . .

The enforcement of defendants' regulation requiring the flag salute by children who are sincerely opposed to it upon conscientious religious grounds is not a reasonable method of teaching civics, including loyalty to the State and Federal Government, but tends to have the contrary effect upon such children.

From the last week of December, 1935, to the end of May, 1937 (except for holidays and vacation periods), Lillian attended the Jones Kingdom School at Andreas, Pennsylvania, and from September, 1937 to the date of hearing, February 15, 1938 (except for holidays and vacation), she attended the Pottsville Business College. From the last week of December, 1935 to the date of hearing, February 15, 1938 (except for holidays and vacation periods), William attended the said Jones Kingdom School. Both the Jones Kingdom School and the Pottsville Business College are private

schools whose patrons are required to pay for the tuition of the children attending them.

Up to the present time Walter Gobitis has expended for the education of Lillian since November 6, 1935 a sum in excess of \$600 and he will be required to expend for her education in the future during the period she is required by the Pennsylvania School Code, 24 P.S.Pa. § 1421 et seq., to remain in school a sum not less than \$600, or \$1,200 in all. Up to the present time Walter Gobitis has expended for the education of William since November 6, 1935 a sum in excess of \$800 and he will be required to expend for his education in the future during the period he is required by the Pennsylvania School Code to remain in school a sum not less than \$1,200, or \$2,000 in all. . . .

This suit . . . is based upon the ground that the enforcement of this regulation as a condition of the exercise of their right to attend the public schools, infringed the liberty of conscience guaranteed them by the Fourteenth Amendment to the Federal Constitution, U.S.C.A.Const. Amend. 14.

The . . . liberty guaranteed by the Fourteenth Amendment includes liberty to entertain any religious belief and to do or refrain from doing any act on conscientious grounds, which does not prejudice the safety, health, morals, property or personal rights of the people. [T]he minor plaintiffs have a right to attend the public schools and . . . to require them, as a condition of the exercise of that right, to participate in a ceremony which runs counter to religious convictions sincerely held by them, would violate the Pennsylvania Constitution and infringe the liberty guaranteed them by the Fourteenth Amendment, unless it should appear that the public safety, health or morals or the property or personal rights of their fellow citizens would be prejudiced by their refusal to participate.

. . . No one who heard the testimony of the plaintiffs and observed their demeanor upon the witness stand could have failed to be impressed with the earnestness and sincerity of their convictions. While the salute to our national flag has no religious significance to me and while I find it difficult to understand the plaintiffs' point of view, I am nevertheless entirely satisfied that they sincerely believe that the act does have a deep religious meaning and is an act of worship which they can conscientiously render to God alone. Under these circumstances it is not for this court to say that since the act has no religious significance to us it can have no such significance to them. . . . [As stated in the court's opinion denying the defendants' motion to dismiss,] "[t]o permit public officers to determine whether the views of individuals sincerely held and their acts sincerely undertaken on religious grounds are in fact based on convictions religious in character would be to sound the death knell of religious liberty."

I think it is also clear from the evidence that the refusal of these two earnest Christian children to salute the flag cannot even remotely prejudice or imperil the safety, health, morals, property or personal rights of their fellows. While I can-

not agree with them I nevertheless cannot but admit that they exhibit sincerity of conviction and devotion to principle in the face of opposition of a piece with that which brought our pioneer ancestors across the sea to seek liberty of conscience in a new land. Upon such a foundation of religious freedom our Commonwealth and Nation were built. We need only glance at the current world scene to realize that the preservation of individual liberty is more important today than ever it was in the past. The safety of our nation largely depends upon the extent to which we foster in each individual citizen that sturdy independence of thought and action which is essential in a democracy. 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. Our country's safety surely does not depend upon the totalitarian idea of forcing all citizens into one common mold of thinking and acting or requiring them to render a lip service of loyalty in a manner which conflicts with their sincere religious convictions. Such a doctrine seems to me utterly alien to the genius and spirit of our nation and destructive of that personal liberty of which our flag itself is the symbol.

It follows that the regulation in question, however valid and reasonable it may be when applied to others, cannot constitutionally be applied to the plaintiffs as a condition of the right of Lillian and William to attend the public schools and of their father to have them do so.

A question of jurisdiction remains to be considered. In our former opinion we held that the case is one arising under the Constitution of the United States of which this court has jurisdiction under subdivision (1) of Section 24 of the Judicial Code, 28 U.S.C.A. § 41(1), if the matter in controversy exceeds the sum or value of \$3,000. The bill contained a clear averment that the jurisdictional amount was involved. This, however, was controverted by the answer. The amount involved is to be measured by the value of the right to be protected. In this case the right involved is the right to attend the public schools and its value may be measured by the cost of obtaining an equivalent education at private institutions. I have found that cost in the case of Lillian to be \$1,200 and in the case of William to be \$2,000.

The defendants urge that the rights of Lillian and William are separate rights, the value of which must be separately considered for jurisdictional purposes, and since neither reaches \$3,000 the jurisdictional amount is not involved and the bill must be dismissed. The defendants, however, overlook the fact that the obligation to provide for the education of these two children rests upon their father, the plaintiff Walter Gobitis, who is a proper party to the suit, since his right to have his children educated in the public school is also affected. Furthermore he is required, by Section 1414 of the Pennsylvania School Code as amended (24 P.S.Pa. § 1421), to send his children to school, and under Section 1423 (24 P.S.Pa. § 1430) is guilty of a misdemeanor if he fails to comply with the provisions of the act regarding compulsory school attendance. The amount involved in the suit, so far as he is concerned is, therefore, \$1,200 plus \$2,000. These amounts he may aggregate for the purpose of

determining jurisdiction. . . . This court, therefore, has jurisdiction of the bill as to him and consequently as to the minor plaintiffs also. . . .

Judge Clark's Opinion in Minersville School Dist. v. Gobitis (1939)

Judge Clark's opinion for the U.S. Court of Appeals for the Third Circuit was more elliptical than Judge Maris's. The unedited opinion was crammed with a dizzying variety of quotations and allusions to philosophy, history and the social sciences. This edited version of the opinion gives some flavor, however, of Judge Clark's approach to the case and to legal reasoning. For purposes of clarity and concision, the case has been abridged and most internal citations removed.

[Document Source: *Minersville School Dist. v. Gobitis*, 108 F.2d Supp. 683 (3d Cir. 1939).]

Eighteen big states have seen fit to exert their power over a small number of little children ("and forbid them not"). The method of exercise has sometimes been by their representatives in solemn conclave assembled and sometimes, as here, by an administrative agency (School Board). The matter of exercise is in that field where, above all, or so we had supposed, power must yield to principle. In other words, the area of action is within the aura of conscience. . . .

Those who attended the training camps of World War No. 1 will remember our staff of life, the manuals of Colonel Moss. That distinguished officer, now retired, has also written extensively on the American flag. In his latest book, we find him taking a secular position remarkably like that of the plaintiff-appellees. He says:

"Another form that false patriotism frequently takes is so-called 'Flag-worship' - blind and excessive adulation of the Flag as an emblem or image, - superpunctiliousness and meticulousness in displaying and saluting the Flag - without intelligent and sincere understanding and appreciation of the ideals and institutions it symbolizes. This, of course, is but a form of idolatry - a sort of 'glorified idolatry', so to speak. When patriotism assumes this form it is nonsensical and makes the 'patriot' ridiculous."

. . . These little children ("suffer them") are asking us to afford them the protection of the First Amendment (Bill of Rights) to the Constitution and to permit them the "free exercise" of their "religion." That supplication raises, as we see it, two questions. First, do they bring themselves within the meaning of the word "religion" as used in the Constitution; and second, is there any limitation on the adjective "free" in the constitutional phrase "free exercise"? [Judge Clark analyzed the first question and concluded that the Witnesses were a religion within the meaning of the constitution.] . . .

The noun religion is specific and has therefore what might be called historical and institutional limitations. The adjective free is general and its limitations, if any, must therefore be constitutional and politically scientific. . . . A man may die for the right to express his opinion. He has died or suffered worse than death for the right to worship according to his conscience. That is implicit in . . . the long history of the struggle for religious liberty before the law. . . . That history [is] undoubtedly taught in this very school at Minersville and are so well-known anyway that we shall only encumber this opinion with a few references and quotations. . . . Three wise men of American public life have put into these words the concepts to which that mechanism is geared.

“Religion is a subject on which I have ever been most scrupulously reserved. I have considered it as a matter between every man and his Maker, in which no other, and far less the public, had a right to intermeddle”. Thomas Jefferson, Letter to Richard Rush in 1813.

“The love of religious liberty is a stronger sentiment than an attachment to civil or political freedom. That freedom which the conscience demands, and which men feel bound by their hopes of salvation to contend for, can hardly fail to be attained. Conscience in the cause of religion, and the worship of the Deity, prepares the mind to act and suffer beyond almost all other causes. History instructs us that this love of religious liberty a compound sentiment in the breast of man, made up of the dearest sense of right and the highest conviction of duty, is able to look the sternest despotism in the face”. Daniel Webster, Speech in Commemoration of the First Settlement of New England, Plymouth, 1820.

“ . . . There is abundant room for enforcing the requisite authority of law as it is enacted and requires obedience, and for maintaining the conception of the supremacy of law as essential to orderly government, without demanding that either citizens or applicants for citizenship shall assume by oath an obligation to regard allegiance to God as subordinate to allegiance to civil power”. Mr. Chief Justice Hughes dissenting in *United States v. Macintosh*, 283 U.S. 605, 634, 51 S.Ct. 570, 578, 75 L.Ed. 1302. . . .

We have then to balance the two intangibles [the public good and religious freedom] and determine to which arm of the scale the weight of our decision must be added. . . .

As indicated by their decisions, our courts consider that the peace and good order of the community must prevail over conscience, (a) wherever its mental or physical health is affected, (b) wherever a violation . . . makes a breach of the peace reasonably foreseeable, and (c) wherever the “defense of the realm” is imperiled. So in the broad category of physical and mental health, we have cases which defer the dictates of individual scruple to the exclusion of obscene literature from the

mails, the use of obscene language, the vaccination, and the physical examination of school children, the physical examination of prospective brides and grooms, the medical qualification of physicians (faith healing etc.), the limitation of the amount of sacramental wine consumable under the Prohibition Act, the elimination of drug addiction, the preservation of quiet, the suppression of mail frauds, and kindred schemes (Spiritualism-exorcisement of evil spirits[,] astrology).

Reverence is manifestly something deeper than law. The mere creation by fiat of a particular moral standard would not mean that its violation might reasonably be expected to arouse the passions productive of peace breaches. There are, however, certain "ethics" whether furnished with legal sanctions or not, that do plumb those reaches of our emotions. So in a monogamous civilization polygamy shocks and is forbidden. In a deistic civilization blasphemy shocks and is forbidden. In a Christian civilization disrespect for the Sabbath shocks and is forbidden. It might be noted that the cases on these last seem to take an unduly sectarian position and further that the observance of Sunday is now generally placed on the basis of health. . . .

All but two classes of the cases are in negative form. In most of them, the religious objector is prohibited from propitiating the Deity in a certain way; he is not forced to commit a sacrilege. For instance, the Mormon is not damned for monogamy, the astrologist or spiritualist for personally consulting the stars or the spirits, or the Salvationists for using the soft pedal. The character of the field of health, of arms, and of the case at bar requires compulsion rather than prohibition. In the last named, the inoculation is against a spiritual indifference or disloyalty to country instead of a physical disease. . . .

We do not doubt that children can and have been forced to learn Latin or eat spinach and so eventually to love them. But this pedagogical victory has more often than not been won at the price of resentment towards the disciplinarian. In our particular circumstance, then, that resentment clashes with and cancels the very affection sought to be instilled. In recognition of this logical absurdity, we find students of educational psychology warning against overemphasis of the flag salute. Thus it is said: "The wisdom of exacting a salute to the American flag in contravention of the saluter's religious beliefs has been assailed by many editorials in newspapers throughout the land. There is a psychological futility in compelling a child to salute the flag when that impinges upon his or her religious tenets; such compulsion generates resentment, and is calculated to produce a precisely antithetical result to that which was planned by the authors of the flag-saluting ceremony. A salute to the flag under such circumstances is an affront to the principles for which the flag stands; to essay to engender love of country in this wise is a paradox too discordant to be suffered. Patriots cannot be [molded] in the matrix of a legislative fiat, for patriotism is an imponderable."

. . . Some sensing of which may have led the school superintendent of Minersville to admit in his testimony that flag saluting, although an appropriate one, is not

the only method of teaching loyalty. The salute, therefore, unlike the other exercises of the police power, negative and positive, which we have mentioned, is of at least doubtful efficacy and, as applied to appellees, plainly lacking in necessity. . . .

A fourth and last distinction exists in the age of the target. In all but the medical cases the victims are adults. It is elementary to recognize disability of infants with respect to their contracts, torts, and to some extent crimes. . . .

Here, nevertheless, that disability is not only not recognized, but is exploited. Children are faced with the alternative of conforming to their parents' view of religion or foregoing the privilege of education. That is true, of course, in the medical cases. There again, however, we are saved by the logic of the clear and present danger test. Little children with smallpox are as infectious as their elders.

To summarize our analysis: compulsory flag saluting is designed to better secure the state by inculcating in its youthful citizens a love of country that will incline their hearts and minds to its more willing defense. That particular compulsion happens to be abhorrent to the particular love of God of the little girl and boy now seeking our protection. One conception or the other must yield. Which is required by our Constitution? We think the material and not the spiritual.

Compulsion rather than protection should be sparingly exercised. Harm usually comes from doing rather than leaving undone, and refraining is generally not sacrilege. We do not find the essential relationship between infant patriotism and the martial spirit. That essence we have borrowed from the settled law of another and cognate part of this same provision of the Bill of Rights. A fortiori departure from a recently evolved ritualistic norm of patriotism is not clear and present assurance of future cowardice or treachery. And that is especially so, where compulsory adherence to that norm is neither logically consistent with, nor pedagogically indispensable to, the dissemination of courage or loyalty. Equally important, we think, is the School Board's mistake in the domain where they are not supposed to make mistakes. They misunderstand and therefore misapply a fundamental of education. Children, as well as "birds and animals" . . . are entitled to the benefits of humane treatment.

We conclude with two examples from the history of the "small sects" of Pennsylvania's early days. The state was colonized and founded by William Penn. He came to the new country because his refusal to subordinate religious scruples to educational coercion led to his expulsion from Oxford University in the old.

George Washington, the almost universal character of whose wisdom always freshly surprises, a century later wrote a letter to the descendants of those whom William Penn brought with him. In it General Washington said:

"Government being, among other purposes, instituted to protect the persons and consciences of men from oppression it certainly is the duty of rulers, not only to abstain from it themselves, but according to their stations to prevent it in others.

“I assure you very explicitly, that in my opinion the conscientious scruples of all men should be treated with great delicacy and tenderness; and it is my wish and desire, that the laws may always be as extensively accommodated to them, as a due regard to the protection and essential interests of the nation may justify and permit”.

The appellant School Board has failed to “treat the conscientious scruples” of all children with that “great delicacy and tenderness”. We agree with the father of our country that they should and we concur with the learned District Court in saying that they must.

Letter from Justice Frankfurter to Justice Stone, May 27, 1940

*At the Supreme Court’s conference following oral arguments in *Gobitis*, none of the justices indicated he intended to dissent from the consensus that the flag salute was constitutional. When Justice Harlan Stone indicated he intended to dissent shortly before the Court released an opinion written by Justice Felix Frankfurter, however, Frankfurter wrote the following private letter to Stone.*

[Document Source: Harlan Fiske Stone Papers, Manuscripts Division, Library of Congress, Washington, D.C., box 65.]

Dear Stone:

Were [*Gobitis*] an ordinary case, I should let the opinion speak for itself. But that you should entertain doubts has naturally stirred me to an anxious re-examination of my own views, even though I can assure you that nothing has weighed as much on my conscience, since I have come on this Court, as has this case. Your doubts have stirred me to a reconsideration of the whole matter, because I am not happy that you should entertain doubts that I cannot share or meet in a domain where constitutional power is on one side and my private notions of liberty and toleration and good sense are on the other. After all, the vulgar intrusion of law in this domain of conscience is for me a very sensitive area. For various reasons – I suspect the most dominant one is the old colored man’s explanation that Moses was just raised that way – a good part of my mature life has thrown whatever weight it has had against foolish and harsh manifestations of coercion and for the amplest expression of dissident views, however absurd or offensive these may have been to my own notions of rationality and decency. I say this merely to indicate that all my bias and predisposition are in favor of giving the fullest elbow room to every variety of religious, political, and economic view. . . .

What weighs with me strongly in this case is my anxiety that, while we lean in the direction of the libertarian aspect, we do not exercise our judicial power unduly, and as though we ourselves were legislators by holding with too tight a rein the organs of popular government. In other words, I want to avoid the mistake comparable to that made by those whom we criticized when dealing with the control of property. . . .

I cannot rid myself of the notion that it is not fantastic, although I think foolish and perhaps worse, for school authorities to believe – as the record in this case explicitly shows the school authorities to have believed – that to allow exemption to some of the children goes far towards disrupting the whole patriotic exercise. And since certainly we must admit the general right of the school authorities to have such flag-saluting exercises, it seems to me that we do not trench on an undebatable territory of libertarian immunity to permit the school authorities a judgment as to the effect of this exemption in the particular setting of our time and circumstances. . . .

[M]y intention – and I hope my execution did not lag too far behind – was to use this opinion as a vehicle for preaching the true democratic faith of not relying on the Court for the impossible task of assuring a vigorous, mature, self-protecting and tolerant democracy by bringing the responsibility for a combination of firmness and toleration directly home where it belongs – to the people and their representatives themselves. . . .

This is not a case where confinement either of children or of parents is the consequence of non-conformity. It is not a case where conformity is exacted for something that you and I regard as foolish – namely, a gesture of respect for the symbol of our national being – even though we deem it foolish to exact it from Jehovah's Witnesses. It is not a case, for instance, of compelling children to partake in a school dance or other scholastic exercise that may run counter to this or that faith. And, above all, it is not a case where the slightest restriction is involved against the fullest opportunity to disavow – either on the part of the children or of their parents – the meaning that ordinary people attach to the gesture of respect. The duty of compulsion being as minimal as it is for an act, the normal legislative authorization of which certainly cannot be denied, and all channels of affirmative free expression being open to both children and parents, I cannot resist the conviction that we ought to let the legislative judgment stand and put the responsibility for its exercise where it belongs. In any event, I hope you will be good enough to give me the benefit of what you think should be omitted or added to the opinion.

Faithfully yours,
Felix Frankfurter

Supreme Court Opinion in *Minersville School District v. Gobitis*

The Supreme Court's decision in Gobitis upheld mandatory flag salute rules. Justice Frankfurter's opinion emphasized the importance of majority will in holding that religious beliefs could not trump otherwise valid laws designed to further legitimate interests like patriotism. Frankfurter likewise reasoned that judges should avoid interfering with the policy decisions of politically accountable legislatures and school boards wherever possible. Justice Stone's dissenting opinion argued the flag salute improperly compelled children to avow ideas inimical to their religious beliefs. For purposes of clarity and concision, the case has been abridged and most internal citations removed.

[Document Source: *Minersville School District v. Gobitis*, 310 U.S. 586 (1940).]

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

A grave responsibility confronts this Court whenever in course of litigation it must reconcile the conflicting claims of liberty and authority. But when the liberty invoked is liberty of conscience, and the authority is authority to safeguard the nation's fellowship, judicial conscience is put to its severest test. Of such a nature is the present controversy. . . .

Centuries of strife over the erection of particular dogmas as exclusive or all-comprehending faiths led to the inclusion of a guarantee for religious freedom in the Bill of Rights. The First Amendment, and the Fourteenth through its absorption of the First, sought to guard against repetition of those bitter religious struggles by prohibiting the establishment of a state religion and by securing to every sect the free exercise of its faith. So pervasive is the acceptance of this precious right that its scope is brought into question, as here, only when the conscience of individuals collides with the felt necessities of society.

Certainly the affirmative pursuit of one's convictions about the ultimate mystery of the universe and man's relation to it is placed beyond the reach of law. Government may not interfere with organized or individual expression of belief or disbelief. Propagation of belief — or even of disbelief — in the supernatural is protected, whether in church or chapel, mosque or synagogue, tabernacle or meeting-house. Likewise the Constitution assures generous immunity to the individual from imposition of penalties for offending, in the course of his own religious activities, the religious views of others, be they a minority or those who are dominant in government.

But the manifold character of man's relations may bring his conception of religious duty into conflict with the secular interests of his fellow-men. When does the constitutional guarantee compel exemption from doing what society thinks necessary

for the promotion of some great common end, or from a penalty for conduct which appears dangerous to the general good? To state the problem is to recall the truth that no single principle can answer all of life's complexities. The right to freedom of religious belief, however dissident and however obnoxious to the cherished beliefs of others — even of a majority — is itself the denial of an absolute. But to affirm that the freedom to follow conscience has itself no limits in the life of a society would deny that very plurality of principles which, as a matter of history, underlies protection of religious toleration. . . . Our present task, then, as so often the case with courts, is to reconcile two rights in order to prevent either from destroying the other. But, because in safeguarding conscience we are dealing with interests so subtle and so dear, every possible leeway should be given to the claims of religious faith.

. . . The religious liberty which the Constitution protects has never excluded legislation of general scope not directed against doctrinal loyalties of particular sects. Judicial nullification of legislation cannot be justified by attributing to the framers of the Bill of Rights views for which there is no historic warrant. 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. 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. . . . We are dealing with an interest inferior to none in the hierarchy of legal values. National unity is the basis of national security. To deny the legislature the right to select appropriate means for its attainment presents a totally different order of problem from that of the propriety of subordinating the possible ugliness of littered street to the free expression of opinion through distribution of handbills.

Situations like the present are phases of the profoundest problem confronting a democracy — the problem which Lincoln cast in memorable dilemma: "Must a government of necessity be too *strong* for the liberties of its people, or too *weak* to maintain its own existence?" No mere textual reading or logical talisman can solve the dilemma. And when the issue demands judicial determination, it is not the personal notion of judges of what wise adjustment requires which must prevail. . . .

The ultimate foundation of a free society is the binding tie of cohesive sentiment. Such a sentiment is fostered by all those agencies of the mind and spirit which may serve to gather up the traditions of a people, transmit them from generation to generation, and thereby create that continuity of a treasured common life which constitutes a civilization. "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. This Court has had occasion to say that ". . . the flag is the symbol of the Nation's power, the emblem of freedom in its truest, best sense. . . . it signifies government resting on the consent of the governed; liberty regulated by law; the

protection of the weak against the strong; security against the exercise of arbitrary power; and absolute safety for free institutions against foreign aggression.” . . .

The precise issue, then, for us to decide is whether the legislatures of the various states and the authorities in a thousand counties and school districts of this country are barred from determining the appropriateness of various means to evoke that unifying sentiment without which there can ultimately be no liberties, civil or religious. To stigmatize legislative judgment in providing for this universal gesture of respect for the symbol of our national life in the setting of the common school as a lawless inroad on that freedom of conscience which the Constitution protects, would amount to no less than the pronouncement of pedagogical and psychological dogma in a field where courts possess no marked and certainly no controlling competence. The influences which help toward a common feeling for the common country are manifold. Some may seem harsh and others no doubt are foolish. Surely, however, the end is legitimate. And the effective means for its attainment are still so uncertain and so unauthenticated by science as to preclude us from putting the widely prevalent belief in flag-saluting beyond the pale of legislative power. It mocks reason and denies our whole history to find in the allowance of a requirement to salute our flag on fitting occasions the seeds of sanction for obeisance to a leader.

The wisdom of training children in patriotic impulses by those compulsions which necessarily pervade so much of the educational process is not for our independent judgment. Even were we convinced of the folly of such a measure, such belief would be no proof of its unconstitutionality. For ourselves, we might be tempted to say that the deepest patriotism is best engendered by giving unfettered scope to the most crotchety beliefs. Perhaps it is best, even from the standpoint of those interests which ordinances like the one under review seek to promote, to give to the least popular sect leave from conformities like those here in issue. But the courtroom is not the arena for debating issues of educational policy. It is not our province to choose among competing considerations in the subtle process of securing effective loyalty to the traditional ideals of democracy, while respecting at the same time individual idiosyncrasies among a people so diversified in racial origins and religious allegiances. So to hold would in effect make us the school board for the country. That authority has not been given to this Court, nor should we assume it.

. . . What the school authorities are really asserting is the right to awaken in the child’s mind considerations as to the significance of the flag contrary to those implanted by the parent. In such an attempt the state is normally at a disadvantage in competing with the parent’s authority, so long — and this is the vital aspect of religious toleration — as parents are unmolested in their right to counteract by their own persuasiveness the wisdom and rightness of those loyalties which the state’s educational system is seeking to promote. Except where the transgression of constitutional liberty is too plain for argument, personal freedom is best maintained — so long as the remedial channels of the democratic process remain open and unobstructed —

when it is ingrained in a people's habits and not enforced against popular policy by the coercion of adjudicated law. . . .

The preciousness of the family relation, the authority and independence which give dignity to parenthood, indeed the enjoyment of all freedom, presuppose the kind of ordered society which is summarized by our flag. A society which is dedicated to the preservation of these ultimate values of civilization may in self-protection utilize the educational process for inculcating those almost unconscious feelings which bind men together in a comprehending loyalty, whatever may be their lesser differences and difficulties. That is to say, the process may be utilized so long as men's right to believe as they please, to win others to their way of belief, and their right to assemble in their chosen places of worship for the devotional ceremonies of their faith, are all fully respected.

Judicial review, itself a limitation on popular government, is a fundamental part of our constitutional scheme. But to the legislature no less than to courts is committed the guardianship of deeply-cherished liberties. Where all the effective means of inducing political changes are left free from interference, education in the abandonment of foolish legislation is itself a training in liberty. To fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies rather than to transfer such a contest to the judicial arena, serves to vindicate the self-confidence of a free people.

Reversed.

MR. JUSTICE McREYNOLDS concurs in the result.

MR. JUSTICE STONE, dissenting:

I think the judgment below should be affirmed.

Two youths, now fifteen and sixteen years of age, are by the judgment of this Court held liable to expulsion from the public schools and to denial of all publicly supported educational privileges because of their refusal to yield to the compulsion of a law which commands their participation in a school ceremony contrary to their religious convictions. They and their father are citizens and have not exhibited by any action or statement of opinion, any disloyalty to the Government of the United States. They are ready and willing to obey all its laws which do not conflict with what they sincerely believe to be the higher commandments of God. It is not doubted that these convictions are religious, that they are genuine, or that the refusal to yield to the compulsion of the law is in good faith and with all sincerity. It would be a denial of their faith as well as the teachings of most religions to say that children of their age could not have religious convictions.

The law which is thus sustained is unique in the history of Anglo-American legislation. It does more than suppress freedom of speech and more than prohibit the free exercise of religion, which concededly are forbidden by the First Amendment

and are violations of the liberty guaranteed by the Fourteenth. For by this law the state seeks to coerce these children to express a sentiment which, as they interpret it, they do not entertain, and which violates their deepest religious convictions. . . .

Concededly the constitutional guaranties of personal liberty are not always absolutes. Government has a right to survive and powers conferred upon it are not necessarily set at naught by the express prohibitions of the Bill of Rights. It may make war and raise armies. To that end it may compel citizens to give military service and subject them to military training despite their religious objections. It may suppress religious practices dangerous to morals, and presumably those also which are inimical to public safety, health and good order. But it is a long step, and one which I am unable to take, to the position that government may, as a supposed educational measure and as a means of disciplining the young, compel public affirmations which violate their religious conscience.

The very fact that we have constitutional guaranties of civil liberties and the specificity of their command where freedom of speech and of religion are concerned require some accommodation of the powers which government normally exercises, when no question of civil liberty is involved, to the constitutional demand that those liberties be protected against the action of government itself. The state concededly has power to require and control the education of its citizens, but it cannot by a general law compelling attendance at public schools preclude attendance at a private school adequate in its instruction, where the parent seeks to secure for the child the benefits of religious instruction not provided by the public school. And only recently we have held that the state's authority to control its public streets by generally applicable regulations is not an absolute to which free speech must yield, and cannot be made the medium of its suppression any more than can its authority to penalize littering of the streets by a general law be used to suppress the distribution of handbills as a means of communicating ideas to their recipients.

In these cases it was pointed out that where there are competing demands of the interests of government and of liberty under the Constitution, and where the performance of governmental functions is brought into conflict with specific constitutional restrictions, there must, when that is possible, be reasonable accommodation between them so as to preserve the essentials of both and that it is the function of courts to determine whether such accommodation is reasonably possible. In the cases just mentioned the Court was of opinion that there were ways enough to secure the legitimate state end without infringing the asserted immunity, or that the inconvenience caused by the inability to secure that end satisfactorily through other means, did not outweigh freedom of speech or religion. So here, even if we believe that such compulsions will contribute to national unity, there are other ways to teach loyalty and patriotism which are the sources of national unity, than by compelling the pupil to affirm that which he does not believe and by commanding a form of affirmance which violates his religious convictions. Without recourse to such compulsion the

state is free to compel attendance at school and require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guaranties of civil liberty which tend to inspire patriotism and love of country. I cannot say that government here is deprived of any interest or function which it is entitled to maintain at the expense of the protection of civil liberties by requiring it to resort to the alternatives which do not coerce an affirmation of belief.

The guaranties of civil liberty are but guaranties of freedom of the human mind and spirit and of reasonable freedom and opportunity to express them. . . . If these guaranties are to have any meaning they must, I think, be deemed to withhold from the state any authority to compel belief or the expression of it where that expression violates religious convictions, whatever may be the legislative view of the desirability of such compulsion.

History teaches us that there have been but few infringements of personal liberty by the state which have not been justified, as they are here, in the name of righteousness and the public good, and few which have not been directed, as they are now, at politically helpless minorities. The framers were not unaware that under the system which they created most governmental curtailments of personal liberty would have the support of a legislative judgment that the public interest would be better served by its curtailment than by its constitutional protection. I cannot conceive that in prescribing, as limitations upon the powers of government, the freedom of the mind and spirit secured by the explicit guaranties of freedom of speech and religion, they intended or rightly could have left any latitude for a legislative judgment that the compulsory expression of belief which violates religious convictions would better serve the public interest than their protection. The Constitution may well elicit expressions of loyalty to it and to the government which it created, but it does not command such expressions or otherwise give any indication that compulsory expressions of loyalty play any such part in our scheme of government as to override the constitutional protection of freedom of speech and religion. And while such expressions of loyalty, when voluntarily given, may promote national unity, it is quite another matter to say that their compulsory expression by children in violation of their own and their parents' religious convictions can be regarded as playing so important a part in our national unity as to leave school boards free to exact it despite the constitutional guarantee of freedom of religion. The very terms of the Bill of Rights preclude, it seems to me, any reconciliation of such compulsions with the constitutional guaranties by a legislative declaration that they are more important to the public welfare than the Bill of Rights.

But even if this view be rejected and it is considered that there is some scope for the determination by legislatures whether the citizen shall be compelled to give public expression of such sentiments contrary to his religion, I am not persuaded that we should refrain from passing upon the legislative judgment "as long as the remedial channels of the democratic process remain open and unobstructed." This seems to

me no less than the surrender of the constitutional protection of the liberty of small minorities to the popular will. We have previously pointed to the importance of a searching judicial inquiry into the legislative judgment in situations where prejudice against discrete and insular minorities may tend to curtail the operation of those political processes ordinarily to be relied on to protect minorities. And until now we have not hesitated similarly to scrutinize legislation restricting the civil liberty of racial and religious minorities although no political process was affected. Here we have such a small minority entertaining in good faith a religious belief, which is such a departure from the usual course of human conduct, that most persons are disposed to regard it with little toleration or concern. In such circumstances careful scrutiny of legislative efforts to secure conformity of belief and opinion by a compulsory affirmation of the desired belief, is especially needful if civil rights are to receive any protection. Tested by this standard, I am not prepared to say that the right of this small and helpless minority, including children having a strong religious conviction, whether they understand its nature or not, to refrain from an expression obnoxious to their religion, is to be overborne by the interest of the state in maintaining discipline in the schools.

The Constitution expresses more than the conviction of the people that democratic processes must be preserved at all costs. It is also an expression of faith and a command that freedom of mind and spirit must be preserved, which government must obey, if it is to adhere to that justice and moderation without which no free government can exist. For this reason it would seem that legislation which operates to repress the religious freedom of small minorities, which is admittedly within the scope of the protection of the Bill of Rights, must at least be subject to the same judicial scrutiny as legislation which we have recently held to infringe the constitutional liberty of religious and racial minorities.

With such scrutiny I cannot say that the inconveniences which may attend some sensible adjustment of school discipline in order that the religious convictions of these children may be spared, presents a problem so momentous or pressing as to outweigh the freedom from compulsory violation of religious faith which has been thought worthy of constitutional protection.

West Virginia State Board of Education Flag Salute Regulation

*In 1942, the West Virginia State Board of Education adopted a flag salute regulation that borrowed much of its language from Justice Frankfurter's opinion in *Gobitis*. This regulation was the subject of the constitutional challenge in *Barnette*.*

[Document Source: *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 626 (1943), n.2.]

WHEREAS, The West Virginia State Board of Education holds in highest regard those rights and privileges guaranteed by the Bill of Rights in the Constitution of the United States of America and in the Constitution of West Virginia, specifically, the first amendment to the Constitution of the United States as restated in the fourteenth amendment to the same document and in the guarantee of religious freedom in Article III of the Constitution of this State, and

WHEREAS, The West Virginia State Board of Education honors the broad principle that one's convictions about the ultimate mystery of the universe and man's relation to it is placed beyond the reach of law; that the propagation of belief is protected whether in church or chapel, mosque or synagogue, tabernacle or meeting house; that the Constitutions of the United States and of the State of West Virginia assure generous immunity to the individual from imposition of penalty for offending, in the course of his own religious activities, the religious views of others, be they a minority or those who are dominant in the government, but

WHEREAS, The West Virginia State Board of Education recognizes that the manifold character of man's relations may bring his conception of religious duty into conflict with the secular interests of his fellowman; that conscientious scruples have not in the course of the long struggle for religious toleration relieved the individual from obedience to the general law not aimed at the promotion or restriction of the religious beliefs; that the mere possession of convictions which contradict the relevant concerns of political society does not relieve the citizen from the discharge of political responsibility, and

WHEREAS, The West Virginia State Board of Education holds that national unity is the basis of national security; that the flag of our Nation is the symbol of our National Unity transcending all internal differences, however large within the framework of the Constitution; that the Flag is the symbol of the Nation's power; that emblem of freedom in its truest, best sense; that it signifies government resting on the consent of the governed, liberty regulated by law, protection of the weak against the strong,

security against the exercise of arbitrary power, and absolute safety for free institutions against foreign aggression, and

WHEREAS, The West Virginia State Board of Education maintains that the public schools, established by the legislature of the State of West Virginia under the authority of the Constitution of the State of West Virginia and supported by taxes imposed by legally constituted measures, are dealing with the formative period in the development in citizenship that the Flag is an allowable portion of the program of schools thus publicly supported.

Therefore, be it RESOLVED, That the West Virginia Board of Education does hereby recognize and order that the commonly accepted salute to the Flag of the United States — the right hand is placed upon the breast and the following pledge repeated in unison: 'I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands; one Nation, indivisible, with liberty and justice for all' — now becomes a regular part of the program of activities in the public schools, supported in whole or in part by public funds, and that all teachers as defined by law in West Virginia and pupils in such schools shall be required to participate in the salute, honoring the Nation represented by the Flag; provided, however, that refusal to salute the Flag be regarded as an act of insubordination, and shall be dealt with accordingly.

*Judge Parker's Opinion in *Barnette v. West Virginia State Board of Education**

*Judge John Johnston Parker's opinion for the three-judge panel of the U.S. District Court for the Southern District of West Virginia explained the court's unusual refusal to follow the recent Supreme Court precedent in *Gobitis*. For purposes of clarity and concision, the case has been abridged and most internal citations removed.*

[Document Source: *Barnette v. West Virginia State Board of Education*, 47 Supp. 251 (S.D. W. Va. 1942).]

Ordinarily we would feel constrained to follow an unreversed decision of the Supreme Court of the United States, whether we agreed with it or not. It is true that decisions are but evidences of the law and not the law itself; but the decisions of the Supreme Court must be accepted by the lower courts as binding upon them if any orderly administration of justice is to be attained. The developments with respect to the *Gobitis* case, however, are such that we do not feel that it is incumbent upon us to accept it as binding authority. Of the seven justices now members of the Supreme Court who participated in that decision, four have given public expression to the view that it is unsound, the present Chief Justice in his dissenting opinion rendered

therein and three other justices in a special dissenting opinion in *Jones v. City of Opelika*. . . . The majority of the court in *Jones v. City of Opelika*, moreover, thought it worth while to distinguish the decision in the *Gobitis* case, instead of relying upon it as supporting authority. Under such circumstances and believing, as we do, that the flag salute here required is violative of religious liberty when required of persons holding the religious views of plaintiffs, we feel that we would be recreant to our duty as judges, if through a blind following of a decision which the Supreme Court itself has thus impaired as an authority, we should deny protection to rights which we regard as among the most sacred of those protected by constitutional guaranties.

There is, of course, nothing improper in requiring a flag salute in the schools. On the contrary, we regard it as a highly desirable ceremony calculated to inspire in the pupils a proper love of country and reverence for its institutions. And, from our point of view, we see nothing in the salute which could reasonably be held a violation of any of the commandments in the Bible or of any of the duties owing by man to his Maker. But this is not the question before us. Admittedly plaintiffs and their children do have conscientious scruples, whether reasonable or not, against saluting the flag, and these scruples are based on religious grounds. If they are required to salute the flag, or are denied rights or privileges which belong to them as citizens because they fail to salute it, they are unquestionably denied that religious freedom which the Constitution guarantees. The right of religious freedom embraces not only the right to worship God according to the dictates of one's conscience, but also the right "to do, or forbear to do, any act, for conscience sake, the doing or forbearing of which, is not prejudicial to the public weal".

Courts may decide whether the public welfare is jeopardized by acts done or omitted because of religious belief; but they have nothing to do with determining the reasonableness of the belief. That is necessarily a matter of individual conscience. There is hardly a group of religious people to be found in the world who do not hold to beliefs and regard practices as important which seem utterly foolish and lacking in reason to others equally wise and religious; and for the courts to attempt to distinguish between religious beliefs or practices on the ground that they are reasonable or unreasonable would be for them to embark upon a hopeless undertaking and one which would inevitably result in the end of religious liberty. There is not a religious persecution in history that was not justified in the eyes of those engaging in it on the ground that it was reasonable and right and that the persons whose practices were suppressed were guilty of stubborn folly hurtful to the general welfare. The fathers of this country were familiar with persecution of this character; and one of their chief purposes in leaving friends and kindred and settling here was to establish a nation in which every man might worship God in accordance with the dictates of his own conscience and without interference from those who might not agree with him. The religious freedom guaranteed by the 1st and 14th Amendments means that he shall have the right to do this, whether his belief is reasonable or not, without interfer-

ence from anyone, so long as his action or refusal to act is not directly harmful to the society of which he forms a part. . . .

Religious freedom is no less sacred or important to the future of the Republic than freedom of speech; and if speech tending to the overthrow of the government but not constituting a clear and present danger may not be forbidden because of the guaranty of free speech, it is difficult to see how it can be held that conscientious scruples against giving a flag salute must give way to an educational policy having only indirect relation, at most, to the public safety. Surely, it cannot be that the nation is endangered more by the refusal of school children, for religious reasons, to salute the flag than by the advocacy on the part of grown men of doctrines which tend towards the overthrow of the government.

The suggestion that the courts are precluded by the action of state legislative authorities in deciding when rights of religious freedom must yield to the exercise of the police power would, of course, nullify the constitutional guaranty. It would not be worth the paper it is written on, if no legislature or school board were bound to respect it except in so far as it might accord with the policy they might choose to follow. For the courts to so hold would be for them to abdicate the most important duty which rests on them under the Constitution. The tyranny of majorities over the rights of individuals or helpless minorities has always been recognized as one of the great dangers of popular government. . . .

Can it be said by the Court, then, in the exercise of the duty to examine the regulation here in question, that the requirement that school children salute the flag has such direct relation to the safety of the state, that the conscientious objections of plaintiffs must give way to it? Or to phrase the matter differently, must the religious freedom of plaintiffs give way because there is a clear and present danger to the state if these school children do not salute the flag, as they are required to do? It seems to us that to ask these questions is to answer them, and to answer them in the negative. . . .

The salute to the flag is an expression of the homage of the soul. To force it upon one who has conscientious scruples against giving it, is petty tyranny unworthy of the spirit of this Republic and forbidden, we think, by the fundamental law. This court will not countenance such tyranny but will use the power at its command to see that rights guaranteed by the fundamental law are respected. We are not impressed by the argument that the powers of the School Board are limited by reason of the passage of the joint resolution of June 22, 1942, pertaining to the use and display of the flag; but we are clearly of opinion that the regulation of the Board requiring that school children salute the flag is void in so far as it applies to children having conscientious scruples against giving such salute and that, as to them, its enforcement should be enjoined. . . .

Supreme Court Opinion in West Virginia State Board of Education v. Barnette

Justice Robert Jackson's opinion for the Court striking down Gobitis has become a famous defense of the right of individual conscience. The opinion places little emphasis on the religious significance of the flag salute and instead focuses on the danger of permitting states to compel individuals to proclaim their allegiance to ideals they do not share. Justice Frank Murphy's concurring opinion emphasized the importance of religious freedom, while Justices William Douglas and Hugo Black wrote separately to explain their decision to reverse their votes in just three years. Justice Felix Frankfurter's dissenting opinion lambasts the Court for rejecting the restrained approach he championed in Gobitis and for overturning a decision so quickly seemingly in response to external pressures. For purposes of clarity and concision, the case has been abridged and most internal citations removed.

[Document Source: *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).]

MR. JUSTICE JACKSON delivered the opinion of the Court.

... This case calls upon us to reconsider a precedent decision, as the Court throughout its history often has been required to do. Before turning to the *Gobitis* case, however, it is desirable to notice certain characteristics by which this controversy is distinguished.

The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin. But the refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so. Nor is there any question in this case that their behavior is peaceable and orderly. The sole conflict is between authority and rights of the individual. The State asserts power to condition access to public education on making a prescribed sign and profession and at the same time to coerce attendance by punishing both parent and child. The latter stand on a right of self-determination in matters that touch individual opinion and personal attitude.

...

There is no doubt that, in connection with the pledges, the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design. The State announces rank, function, and authority through crowns and maces, uniforms and black robes; the church speaks through the Cross, the Crucifix, the altar and shrine, and clerical raiment. Symbols of State often convey

political ideas just as religious symbols come to convey theological ones. Associated with many of these symbols are appropriate gestures of acceptance or respect: a salute, a bowed or bared head, a bended knee. A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn.

Over a decade ago Chief Justice Hughes led this Court in holding that the display of a red flag as a symbol of opposition by peaceful and legal means to organized government was protected by the free speech guaranties of the Constitution. Here it is the State that employs a flag as a symbol of adherence to government as presently organized. . . .

It is also to be noted that the compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind. It is not clear whether the regulation contemplates that pupils forego any contrary convictions of their own and become unwilling converts to the prescribed ceremony or whether it will be acceptable if they simulate assent by words without belief and by a gesture barren of meaning. It is now a commonplace that censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish. It would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence. But here the power of compulsion is invoked without any allegation that remaining passive during a flag salute ritual creates a clear and present danger that would justify an effort even to muffle expression. To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind.

Whether the First Amendment to the Constitution will permit officials to order observance of ritual of this nature does not depend upon whether as a voluntary exercise we would think it to be good, bad or merely innocuous. . . .

Nor does the issue as we see it turn on one's possession of particular religious views or the sincerity with which they are held. While religion supplies appellees' motive for enduring the discomforts of making the issue in this case, many citizens who do not share these religious views hold such a compulsory rite to infringe constitutional liberty of the individual. It is not necessary to inquire whether non-conformist beliefs will exempt from the duty to salute unless we first find power to make the salute a legal duty.

The *Gobitis* decision, however, *assumed*, as did the argument in that case and in this, that power exists in the State to impose the flag salute discipline upon school children in general. . . . We examine rather than assume existence of this power and, against this broader definition of issues in this case, reexamine specific grounds assigned for the *Gobitis* decision. . . .

Government of limited power need not be anemic government. Assurance that rights are secure tends to diminish fear and jealousy of strong government, and by mak-

ing us feel safe to live under it makes for its better support. Without promise of a limiting Bill of Rights it is doubtful if our Constitution could have mustered enough strength to enable its ratification. To enforce those rights today is not to choose weak government over strong government. It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end. . . .

It was also considered in the *Gobitis* case that functions of educational officers in States, counties and school districts were such that to interfere with their authority would in effect make us the school board for the country.

The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures — Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

Such Boards are numerous and their territorial jurisdiction often small. But small and local authority may feel less sense of responsibility to the Constitution, and agencies of publicity may be less vigilant in calling it to account. The action of Congress in making flag observance voluntary and respecting the conscience of the objector in a matter so vital as raising the Army contrasts sharply with these local regulations in matters relatively trivial to the welfare of the nation. There are village tyrants as well as village Hampdens, but none who acts under color of law is beyond reach of the Constitution. . . .

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a "rational basis" for adopting. But freedoms of speech and of

press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect. It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case. . . .

Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity. As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.

It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.

The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own. Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.

The decision of this Court in *Minersville School District v. Gobitis* and the holdings of those few *per curiam* decisions which preceded and foreshadowed it are overruled, and the judgment enjoining enforcement of the West Virginia Regulation is Affirmed.

MR. JUSTICE ROBERTS and MR. JUSTICE REED adhere to the views expressed by the Court in *Minersville School District v. Gobitis*, 310 U.S. 586, and are of the opinion that the judgment below should be reversed.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS, concurring:

We are substantially in agreement with the opinion just read, but since we originally joined with the Court in the *Gobitis* case, it is appropriate that we make a brief statement of reasons for our change of view.

Reluctance to make the Federal Constitution a rigid bar against state regulation of conduct thought inimical to the public welfare was the controlling influence which moved us to consent to the *Gobitis* decision. Long reflection convinced us that although the principle is sound, its application in the particular case was wrong. . . .

Words uttered under coercion are proof of loyalty to nothing but self-interest. Love of country must spring from willing hearts and free minds, inspired by a fair administration of wise laws enacted by the people's elected representatives within the bounds of express constitutional prohibitions. These laws must, to be consistent with the First Amendment, permit the widest toleration of conflicting viewpoints consistent with a society of free men.

Neither our domestic tranquility in peace nor our martial effort in war depend on compelling little children to participate in a ceremony which ends in nothing for them but a fear of spiritual condemnation. If, as we think, their fears are groundless, time and reason are the proper antidotes for their errors. The ceremonial, when enforced against conscientious objectors, more likely to defeat than to serve its high purpose, is a handy implement for disguised religious persecution. As such, it is inconsistent with our Constitution's plan and purpose.

MR. JUSTICE MURPHY, concurring:

I agree with the opinion of the Court and join in it. . . .

A reluctance to interfere with considered state action, the fact that the end sought is a desirable one, the emotion aroused by the flag as a symbol for which we have fought and are now fighting again, — all of these are understandable. But there is before us the right of freedom to believe, freedom to worship one's Maker according to the dictates of one's conscience, a right which the Constitution specifically shelters. Reflection has convinced me that as a judge I have no loftier duty or responsibility than to uphold that spiritual freedom to its farthest reaches.

The right of freedom of thought and of religion as guaranteed by the Constitution against State action includes both the right to speak freely and the right to refrain from speaking at all, except insofar as essential operations of government may require it for the preservation of an orderly society, — as in the case of compulsion to give evidence in court. Without wishing to disparage the purposes and intentions of those who hope to inculcate sentiments of loyalty and patriotism by requiring a declaration of allegiance as a feature of public education, or unduly belittle the benefits that may accrue therefrom, I am impelled to conclude that such a requirement is not essential to the maintenance of effective government and orderly society. To many it is deeply distasteful to join in a public chorus of affirmation of private belief. By some, including the members of this sect, it is apparently regarded as incompatible with a primary religious obligation and therefore a restriction on religious freedom. Official compulsion to affirm what is contrary to one's religious beliefs is the antithesis of freedom of worship which, it is well to recall, was achieved in this country only after what Jefferson characterized as the "severest contests in which I have ever been engaged."

I am unable to agree that the benefits that may accrue to society from the compulsory flag salute are sufficiently definite and tangible to justify the invasion of freedom and privacy that is entailed or to compensate for a restraint on the freedom of the individual to be vocal or silent according to his conscience or personal inclination. The trenchant words in the preamble to the Virginia Statute for Religious Freedom remain unanswerable: ". . . all attempts to influence [the mind] by temporal punishments, or burdens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, . . ." Any spark of love for country which may be generated in a child or his associates by forcing him to make what is to him an empty gesture and recite words wrung from him contrary to his religious beliefs is overshadowed by the desirability of preserving freedom of conscience to the full. It is in that freedom and the example of persuasion, not in force and compulsion, that the real unity of America lies.

MR. JUSTICE FRANKFURTER, dissenting:

One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution. Were my purely personal attitude relevant I should wholeheartedly associate myself with the general libertarian views in the Court's opinion, representing as they do the thought and action of a lifetime. But as judges we are neither Jew nor Gentile, neither Catholic nor agnostic. We owe equal attachment to the Constitution and are equally bound by our judicial obligations whether we derive our citizenship from the earliest or the latest immigrants to these shores. As a member of this Court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard. . . . The only opinion of our own even looking in that direction that is material is our opinion whether legislators could in reason have enacted such a law. In the light of all the circumstances, including the history of this question in this Court, it would require more daring than I possess to deny that reasonable legislators could have taken the action which is before us for review. Most unwillingly, therefore, I must differ from my brethren with regard to legislation like this. I cannot bring my mind to believe that the "liberty" secured by the Due Process Clause gives this Court authority to deny to the State of West Virginia the attainment of that which we all recognize as a legitimate legislative end, namely, the promotion of good citizenship, by employment of the means here chosen. . . .

The admonition that judicial self-restraint alone limits arbitrary exercise of our authority is relevant every time we are asked to nullify legislation. The Constitution does not give us greater veto power when dealing with one phase of "liberty" than with another, or when dealing with grade school regulations than with college regulations that offend conscience, as was the case in *Hamilton v. Regents*, 293 U.S. 245. In neither situation is our function comparable to that of a legislature or are we free to act as though we were a super-legislature. Judicial self-restraint is equally necessary whenever an exercise of political or legislative power is challenged. There is no warrant in the constitutional basis of this Court's authority for attributing different roles to it depending upon the nature of the challenge to the legislation. Our power does not vary according to the particular provision of the Bill of Rights which is invoked. The right not to have property taken without just compensation has, so far as the scope of judicial power is concerned, the same constitutional dignity as the right to be protected against unreasonable searches and seizures, and the latter has no less claim than freedom of the press or freedom of speech or religious freedom. In no instance is this Court the primary protector of the particular liberty that is invoked. This Court has recognized, what hardly could be denied, that all the provisions of the first ten Amendments are "specific" prohibitions. But each specific Amendment, in so far as embraced within the Fourteenth Amendment, must be equally respected,

and the function of this Court does not differ in passing on the constitutionality of legislation challenged under different Amendments. . . .

The reason why from the beginning even the narrow judicial authority to nullify legislation has been viewed with a jealous eye is that it serves to prevent the full play of the democratic process. The fact that it may be an undemocratic aspect of our scheme of government does not call for its rejection or its disuse. But it is the best of reasons, as this Court has frequently recognized, for the greatest caution in its use.

. . .

Under our constitutional system the legislature is charged solely with civil concerns of society. If the avowed or intrinsic legislative purpose is either to promote or to discourage some religious community or creed, it is clearly within the constitutional restrictions imposed on legislatures and cannot stand. But it by no means follows that legislative power is wanting whenever a general non-discriminatory civil regulation in fact touches conscientious scruples or religious beliefs of an individual or a group. Regard for such scruples or beliefs undoubtedly presents one of the most reasonable claims for the exertion of legislative accommodation. It is, of course, beyond our power to rewrite the State's requirement, by providing exemptions for those who do not wish to participate in the flag salute or by making some other accommodations to meet their scruples. That wisdom might suggest the making of such accommodations and that school administration would not find it too difficult to make them and yet maintain the ceremony for those not refusing to conform, is outside our province to suggest. Tact, respect, and generosity toward variant views will always commend themselves to those charged with the duties of legislation so as to achieve a maximum of good will and to require a minimum of unwilling submission to a general law. But the real question is, who is to make such accommodations, the courts or the legislature? . . .

Conscientious scruples, all would admit, cannot stand against every legislative compulsion to do positive acts in conflict with such scruples. We have been told that such compulsions override religious scruples only as to major concerns of the state. But the determination of what is major and what is minor itself raises questions of policy. For the way in which men equally guided by reason appraise importance goes to the very heart of policy. Judges should be very diffident in setting their judgment against that of a state in determining what is and what is not a major concern, what means are appropriate to proper ends, and what is the total social cost in striking the balance of imponderables. . . .

The essence of the religious freedom guaranteed by our Constitution is therefore this: no religion shall either receive the state's support or incur its hostility. Religion is outside the sphere of political government. This does not mean that all matters on which religious organizations or beliefs may pronounce are outside the sphere of government. Were this so, instead of the separation of church and state, there would be the subordination of the state on any matter deemed within the sovereignty of

the religious conscience. Much that is the concern of temporal authority affects the spiritual interests of men. But it is not enough to strike down a non-discriminatory law that it may hurt or offend some dissident view. It would be too easy to cite numerous prohibitions and injunctions to which laws run counter if the variant interpretations of the Bible were made the tests of obedience to law. The validity of secular laws cannot be measured by their conformity to religious doctrines. It is only in a theocratic state that ecclesiastical doctrines measure legal right or wrong. . . .

The subjection of dissidents to the general requirement of saluting the flag, as a measure conducive to the training of children in good citizenship, is very far from being the first instance of exacting obedience to general laws that have offended deep religious scruples. Compulsory vaccination, food inspection regulations, the obligation to bear arms, testimonial duties, compulsory medical treatment — these are but illustrations of conduct that has often been compelled in the enforcement of legislation of general applicability even though the religious consciences of particular individuals rebelled at the exaction.

Law is concerned with external behavior and not with the inner life of man. It rests in large measure upon compulsion. Socrates lives in history partly because he gave his life for the conviction that duty of obedience to secular law does not presuppose consent to its enactment or belief in its virtue. The consent upon which free government rests is the consent that comes from sharing in the process of making and unmaking laws. The state is not shut out from a domain because the individual conscience may deny the state's claim. The individual conscience may profess what faith it chooses. It may affirm and promote that faith — in the language of the Constitution, it may "exercise" it freely — but it cannot thereby restrict community action through political organs in matters of community concern, so long as the action is not asserted in a discriminatory way either openly or by stealth. One may have the right to practice one's religion and at the same time owe the duty of formal obedience to laws that run counter to one's beliefs. Compelling belief implies denial of opportunity to combat it and to assert dissident views. Such compulsion is one thing. Quite another matter is submission to conformity of action while denying its wisdom or virtue and with ample opportunity for seeking its change or abrogation.

. . .

Parents have the privilege of choosing which schools they wish their children to attend. And the question here is whether the state may make certain requirements that seem to it desirable or important for the proper education of those future citizens who go to schools maintained by the states, or whether the pupils in those schools may be relieved from those requirements if they run counter to the consciences of their parents. Not only have parents the right to send children to schools of their own choosing but the state has no right to bring such schools "under a strict governmental control" or give "affirmative direction concerning the intimate and essential details of such schools, entrust their control to public officers, and deny both owners and patrons

reasonable choice and discretion in respect of teachers, curriculum, and textbooks.” Why should not the state likewise have constitutional power to make reasonable provisions for the proper instruction of children in schools maintained by it?

When dealing with religious scruples we are dealing with an almost numberless variety of doctrines and beliefs entertained with equal sincerity by the particular groups for which they satisfy man’s needs in his relation to the mysteries of the universe. There are in the United States more than 250 distinctive established religious denominations. In the State of Pennsylvania there are 120 of these, and in West Virginia as many as 65. But if religious scruples afford immunity from civic obedience to laws, they may be invoked by the religious beliefs of any individual even though he holds no membership in any sect or organized denomination. Certainly this Court cannot be called upon to determine what claims of conscience should be recognized and what should be rejected as satisfying the “religion” which the Constitution protects. That would indeed resurrect the very discriminatory treatment of religion which the Constitution sought forever to forbid. . . .

We are told that a flag salute is a doubtful substitute for adequate understanding of our institutions. The states that require such a school exercise do not have to justify it as the only means for promoting good citizenship in children, but merely as one of diverse means for accomplishing a worthy end. We may deem it a foolish measure, but the point is that this Court is not the organ of government to resolve doubts as to whether it will fulfill its purpose. Only if there be no doubt that any reasonable mind could entertain can we deny to the states the right to resolve doubts their way and not ours.

That which to the majority may seem essential for the welfare of the state may offend the consciences of a minority. But, so long as no inroads are made upon the actual exercise of religion by the minority, to deny the political power of the majority to enact laws concerned with civil matters, simply because they may offend the consciences of a minority, really means that the consciences of a minority are more sacred and more enshrined in the Constitution than the consciences of a majority.

The right of West Virginia to utilize the flag salute as part of its educational process is denied because, so it is argued, it cannot be justified as a means of meeting a “clear and present danger” to national unity. In passing it deserves to be noted that the four cases which unanimously sustained the power of states to utilize such an educational measure arose and were all decided before the present World War. But to measure the state’s power to make such regulations as are here resisted by the imminence of national danger is wholly to misconceive the origin and purpose of the concept of “clear and present danger.” To apply such a test is for the Court to assume, however unwittingly, a legislative responsibility that does not belong to it. To talk about “clear and present danger” as the touchstone of allowable educational policy by the states whenever school curricula may impinge upon the boundaries of

individual conscience, is to take a felicitous phrase out of the context of the particular situation where it arose and for which it was adapted. . . .

The flag salute exercise has no kinship whatever to the oath tests so odious in history. For the oath test was one of the instruments for suppressing heretical beliefs. Saluting the flag suppresses no belief nor curbs it. Children and their parents may believe what they please, avow their belief and practice it. It is not even remotely suggested that the requirement for saluting the flag involves the slightest restriction against the fullest opportunity on the part both of the children and of their parents to disavow as publicly as they choose to do so the meaning that others attach to the gesture of salute. All channels of affirmative free expression are open to both children and parents. Had we before us any act of the state putting the slightest curbs upon such free expression, I should not lag behind any member of this Court in striking down such an invasion of the right to freedom of thought and freedom of speech protected by the Constitution.

I am fortified in my view of this case by the history of the flag salute controversy in this Court. Five times has the precise question now before us been adjudicated. Four times the Court unanimously found that the requirement of such a school exercise was not beyond the powers of the states. Indeed in the first three cases to come before the Court the constitutional claim now sustained was deemed so clearly unmeritorious that this Court dismissed the appeals for want of a substantial federal question. . . .

What may be even more significant than this uniform recognition of state authority is the fact that every Justice — thirteen in all — who has hitherto participated in judging this matter has at one or more times found no constitutional infirmity in what is now condemned. Only the two Justices sitting for the first time on this matter have not heretofore found this legislation inoffensive to the “liberty” guaranteed by the Constitution. And among the Justices who sustained this measure were outstanding judicial leaders in the zealous enforcement of constitutional safeguards of civil liberties — men like Chief Justice Hughes, Mr. Justice Brandeis, and Mr. Justice Cardozo, to mention only those no longer on the Court.

One’s conception of the Constitution cannot be severed from one’s conception of a judge’s function in applying it. The Court has no reason for existence if it merely reflects the pressures of the day. Our system is built on the faith that men set apart for this special function, freed from the influences of immediacy and from the deflections of worldly ambition, will become able to take a view of longer range than the period of responsibility entrusted to Congress and legislatures. We are dealing with matters as to which legislators and voters have conflicting views. Are we as judges to impose our strong convictions on where wisdom lies? That which three years ago had seemed to five successive Courts to lie within permissible areas of legislation is now outlawed by the deciding shift of opinion of two Justices. What reason is there to believe that they or their successors may not have another view a few years hence?

... Of course, judicial opinions, even as to questions of constitutionality, are not immutable. As has been true in the past, the Court will from time to time reverse its position. But I believe that never before these Jehovah's Witnesses cases (except for minor deviations subsequently retraced) has this Court overruled decisions so as to restrict the powers of democratic government. Always heretofore, it has withdrawn narrow views of legislative authority so as to authorize what formerly it had denied.

In view of this history it must be plain that what thirteen Justices found to be within the constitutional authority of a state, legislators can not be deemed unreasonable in enacting. Therefore, in denying to the states what heretofore has received such impressive judicial sanction, some other tests of unconstitutionality must surely be guiding the Court than the absence of a rational justification for the legislation. But I know of no other test which this Court is authorized to apply in nullifying legislation. . . .

The uncontrollable power wielded by this Court brings it very close to the most sensitive areas of public affairs. As appeal from legislation to adjudication becomes more frequent, and its consequences more far-reaching, judicial self-restraint becomes more and not less important, lest we unwarrantably enter social and political domains wholly outside our concern. I think I appreciate fully the objections to the law before us. But to deny that it presents a question upon which men might reasonably differ appears to me to be intolerance. And since men may so reasonably differ, I deem it beyond my constitutional power to assert my view of the wisdom of this law against the view of the State of West Virginia.

... The attitude of judicial humility which these considerations enjoin is not an abdication of the judicial function. It is a due observance of its limits. Moreover, it is to be borne in mind that in a question like this we are not passing on the proper distribution of political power as between the states and the central government. We are not discharging the basic function of this Court as the mediator of powers within the federal system. To strike down a law like this is to deny a power to all government. . . .

Of course patriotism can not be enforced by the flag salute. But neither can the liberal spirit be enforced by judicial invalidation of illiberal legislation. Our constant preoccupation with the constitutionality of legislation rather than with its wisdom tends to preoccupation of the American mind with a false value. The tendency of focusing attention on constitutionality is to make constitutionality synonymous with wisdom, to regard a law as all right if it is constitutional. Such an attitude is a great enemy of liberalism. Particularly in legislation affecting freedom of thought and freedom of speech much which should offend a free-spirited society is constitutional. Reliance for the most precious interests of civilization, therefore, must be found outside of their vindication in courts of law. Only a persistent positive translation of the faith of a free society into the convictions and habits and actions of a community is the ultimate reliance against unabated temptations to fetter the human spirit.

Bibliography

Secondary Sources

Flynn, Patrick J. “Writing their Faith into the Laws of the Land: Jehovah’s Witnesses and the Supreme Court’s Battle for the Meaning of the Free Exercise Clause,” 1939–1945, *Texas Journal on Civil Liberties and Civil Rights*, vol. 1 (2004): 1–36.

Gordon, Sarah Barringer. *Spirit of the Law: Religious Voices and the Constitution in Modern America*. Cambridge, MA: Harvard University Press, 2010.

Henderson, Jennifer Jacobs. “Hayden Covington, The Jehovah’s Witnesses and their Plan to Expand First Amendment Freedoms.” Ph.D. diss., University of Washington, 2002.

_____. “Conditional Liberty: The Flag Salute before *Gobitis* and *Barnette*,” *Journal of Church and State*, vol. 47, issue 4 (Autumn 2005): 747–68.

Irons, Peter. “Lillian *Gobitis v. Minersville School District*,” in Peter Irons, *The Courage of their Convictions: Sixteen Americans who fought their way to the Supreme Court*. New York: Penguin, 1988.

Jaffe, Louis L. “The Judicial Universe of Mr. Justice Frankfurter,” *Harvard Law Review*, vol. 62 (Jan. 1949): 357–412.

Manwaring, David. *Render unto Caesar: The Flag Salute Controversy*. Chicago: University of Chicago Press, 1962.

Penton, James M. *Apocalypse Delayed: The Story of the Jehovah’s Witnesses*. 2d ed. Toronto: University of Toronto Press, 1997.

Peters, Shawn Francis. *Judging Jehovah’s Witnesses: Religious Persecution and the Dawn of the Rights Revolution*. Lawrence, KS: University of Kansas Press, 2000.

Sutton, Jeffrey S. “*Barnette*, Frankfurter, and Judicial Review,” *Marquette Law Review*, vol. 96 (2012): 133–50.

Tsai, Robert. “Reconsidering *Gobitis*: An Exercise in Presidential Leadership,” *Washington University Law Review*, vol. 86, issue 2 (2008): 363–444.

Court Records

Walter Gobitis v. Minersville School District, et al., Case Files, U.S. District Court, Eastern District of Pennsylvania, National Archives and Records Administration (Philadelphia) available at <https://catalog.archives.gov/id/279031>.

Barnette, et al. v. West Virginia State board of Education, Case Files, U.S. District Court, Southern District of West Virginia, National Archives and Records Administration (Philadelphia) available at <https://catalog.archives.gov/id/279127>.

Other Unpublished Sources

William O. Douglas Papers, Manuscript Division, Library of Congress.

Felix Frankfurter Papers, Manuscript Division, Library of Congress.

William Gobitas Papers, Manuscript Division, Library of Congress.

Hon. Albert Branson Maris Papers, Third Circuit Libraries.

Robert Houghwout Jackson Papers, Manuscript Division, Library of Congress.

Frank Murphy Papers, Manuscript Division, Library of Congress.

Harlan Fiske Stone Papers, Manuscript Division, Library of Congress.

The Federal Judicial Center

Board

The Chief Justice of the United States, *Chair*

Magistrate Judge Tim A. Baker, U.S. District Court for the Southern District of Indiana

Judge Curtis L. Collier, U.S. District Court for the Eastern District of Tennessee

Chief Judge Barbara J. Houser, U.S. Bankruptcy Court for the Northern District of Texas

Judge Kent A. Jordan, U.S. Court of Appeals for the Third Circuit

Judge Kimberly J. Mueller, U.S. District Court for the Eastern District of California

Judge George Z. Singal, U.S. District Court for the District of Maine

Judge David S. Tatel, U.S. Court of Appeals for the District of Columbia Circuit

James C. Duff, Director of the Administrative Office of the U.S. Courts

Director

Judge Jeremy D. Fogel

Deputy Director

John S. Cooke

About the Federal Judicial Center

The Federal Judicial Center is the research and education agency of the federal judicial system. It was established by Congress in 1967 (28 U.S.C. §§ 620–629), on the recommendation of the Judicial Conference of the United States.

By statute, the Chief Justice of the United States chairs the Center's Board, which also includes the director of the Administrative Office of the U.S. Courts and seven judges elected by the Judicial Conference.

The organization of the Center reflects its primary statutory mandates. The Education Division plans and produces education and training for judges and court staff, including in-person programs, video programs, publications, curriculum packages for in-district training, and Web-based programs and resources. The Research Division examines and evaluates current and alternative federal court practices and policies. This research assists Judicial Conference committees, who request most Center research, in developing policy recommendations. The Center's research also contributes substantially to its educational programs. The Federal Judicial History Office helps courts and others study and preserve federal judicial history. The International Judicial Relations Office provides information to judicial and legal officials from foreign countries and informs federal judicial personnel of developments in international law and other court systems that may affect their work. Two units of the Director's Office—the Information Technology Office and the Editorial & Information Services Office—support Center missions through technology, editorial and design assistance, and organization and dissemination of Center resources.