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THE PROBLEM OF CHURCH AND STATE IN TERMS OF THE NONESTABLISHMENT AND FREE EXERCISE OF RELIGION

ROYAL C. GILKEY*

A BIBLICAL BASIS FOR SEPARATION

Separation of church and state is a significant factor in religious freedom. It is essentially negative in effect. It must be considered more than a limitation on government, and in fact, it amounts to a prohibition upon it.

Two realms are recognized in the Bible: One realm belongs to God and the other to Caesar. This division between spiritual and secular spheres was expressed by Christ in ancient times when he declared: "Render . . . unto Caesar the things which are Caesar's; and unto God the things that are God's."¹

The problem is to determine whether something belongs to Caesar or to God. Who has jurisdiction? There is a sharp difference among people on this question, and Judges are no exception. American courts have split in trying to resolve controversies involving the church-state issue.

THE ORIGIN OF A MEANINGFUL METAPHOR— "WALL OF SEPARATION"

A metaphor useful in deciding such cases has been "the wall of separation." Thomas Jefferson coined the term in a letter to the Danbury Baptists on the meaning of nonestablishment under the Constitution.²

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1. *Matthew* 22:21. A slight difference in phraseology is noticeable in *Mark* 12:17, which reads: "And Jesus answering said unto them [the Pharisees and Herodians]: Render to Caesar the things that are Caesar's, and to God the things that are God's."

2. Of the various sects in early America, the Baptists were the most outspoken champions of church-state separation. Roger Williams founded Providence Plantations in what is now Rhode Island on that principle. The record shows that

in the critical days of the Revolution no religious body exerted more influence in overthrowing the established churches and securing their freedom than did the Baptist. John Leland, Chairman of the Virginia Baptist General Committee, memorialized George Washington and received his promise that the Constitution would provide for religious freedom. Bishop Hawks in his *Contributions to Ecclesiastical History* gives full credit to the

The key passage containing the words "wall of separation" was originally quoted by Chief Justice Morrison R. Waite in deciding the 1878 case of *Reynolds v. United States*.³

BELIEF VERSUS ACTION AND THE REYNOLDS CASE

Reynolds tested the validity of a law against polygamy. This law had been enacted by Congress when Utah was a Mormon-dominated territory. Reynolds, a Mormon, was indicted for having violated the statute. His defense was that polygamous marriage was a matter of religious belief with the Mormons. Nonetheless, the Supreme Court, speaking through Chief Justice Waite, upheld the anti-polygamy statute. While Mormons might believe in polygamy, they could not act out their religious belief without subjecting themselves to the penalty of the law. What the Court considered immoral in the light of civilized practices among European and other states could hardly be ruled proper when proscribed by law. The defendant would not be permitted to shield himself from punishment for his crime behind the screen of religious doctrine. Congress could reach action, even if belief lay beyond its reach. The Mormon Reynolds, therefore, stood convicted of having committed the moral and legal offense of polygamy.

Within the context of this case, Chief Justice Waite took occasion to quote from Jefferson's message to the Danbury Baptist Association, to whom the President said in explaining his conception of the scope of First Amendment guarantees regarding religion:

Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for

Baptists for having achieved this victory. Isaac Backus, champion of the rights of conscience, made his way from Massachusetts to Philadelphia to present the cause to his colony's delegates at the first Continental Congress, October, 1774.

Professor W. E. Garrison, Disciple historian, says that Virginia "only under constant agitation by the Baptists (enacted) in 1786 the Statute for Religious Freedom" which Thomas Jefferson drafted and of which he was so proud he wished his authorship of it to be recorded on his tombstone.

Let it be remembered also that Baptists alone of all the denominations of that day protested against a civil tax for the support of the churches.

Harkness, *Baptist Contributions to the American Way of Life*, THE CHRONICLE, July, 1949, p. 13 (reprinted). It can be said that "their radical attitude in the early period toward the questions of the separation of church and state . . ." had an impact beyond their numbers that has persisted ever since. *Ibid*.

3. 98 U.S. 145 (1878).

his faith or his worship; that the legislative powers of the Government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their Legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof,' thus building a wall of separation between Church and State.⁴

To Chief Justice Waite, these words represented the soundest construction possible of the religion clauses on nonestablishment and free exercise. "Coming as this does from an acknowledged leader of the advocates of the measure," he wrote, "it may be accepted almost as an authoritative declaration of the scope and effect of the [First] amendment thus secured."⁵

STATES SUBSEQUENTLY SUBJECT TO RELIGIOUS GUARANTEES

The *Reynolds* case, of course, dealt with the application of a federal law to an offender. What about state laws? Were they subject to the religious guarantees in the First Amendment? Originally, no. By Chief Justice Marshall's 1833 decision in *Barron v. Baltimore*, the federal Bill of Rights was held to limit national rather than state authority.⁶ Not

4. The source of this pronouncement is President Thomas Jefferson's "Reply to Greetings from [a] Committee of the Danbury Baptist Ass'n of Connecticut," dated "January 1, 1802." *Chamberlin v. Dade County Board of Public Instruction*, 143 So.2d 21, at 25, n.8. (19).

With reference to this,

Jefferson wrote his "wall of separation" letter in response to an address expressing "the affectionate sentiments of esteem and approbation" accorded him by the Danbury, Conn., Baptist Association—a group hard pressed in a state where another denomination was the established religion.

Jules Loh, "T. Jefferson Began Church Issue in 1802: Coined Phrase in Letter to [Baptist] Group," *The Morgantown Post*, September 22, 1960, p. 14, col. 1.

The quoted passage may be found in Chief Justice Waite's opinion for the Court in *Reynolds v. United States*, *supra* note 3, at 164.

5. *Ibid.*

6. 32 U.S. (7 Pet.) 243 (18). Toward the end of this final constitutional ruling in which Chief Justice Marshall took part, he declared on behalf of his brethren on the U.S. Supreme Court:

In almost every convention by which the Constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government, not against those of the local governments.

In compliance with a sentiment thus generally expressed, to quiet fears thus extensively entertained, amendments were proposed by the required majority in Congress, and adopted by the states. These amendments contain

until the 1930's, however, did the U.S. Supreme Court get around to "absorbing" the substantive freedom guarantees in the First Amendment into the due process clause of the Fourteenth.⁷ The "incorporation" theory sufficed to bring the religion clauses into play against state encroachment.⁸

CONSCIENTIOUS OBJECTORS VERSUS MILITARY TRAINING REQUIREMENT AT STATE UNIVERSITY—HAMILTON V. REGENTS

The first case in which the religion clause was applied to the states turned out to be *Hamilton v. Regents of University of California*, decided in 1934.⁹ There the Court, speaking through Justice Butler, held that California could require military training as a condition of admission to the state university, religious objection to the contrary notwithstanding. In this instance, students having such religious scruples were not denied due process of law because they were in no way compelled to attend the university. In the course of his opinion for the Court, Butler acknowledged that the "liberty" guaranteed in the due process clause included the right of the objectors to hold the beliefs on which they based their refusal to submit to required military training at the university. Still, the obligation to undergo such training while receiving academic instruction remained.

no expression indicating an intention to apply them to the state governments. This Court cannot so apply them.

Id. at 250.

For a concise and informative comment on *Barron v. Baltimore*, *supra*, in terms of its setting and the subsequent reversal of a good part of its original effect, see R. E. Cushman in collaboration with R. F. CUSHMAN, *LEADING CONSTITUTIONAL DECISIONS* 74-75 (13th ed. 1966).

7. In *Gitlow v. New York*, 268 U.S. 652 (1925), the Court, speaking through Justice Sanford, declared in the course of a majority opinion that affirmed Gitlow's conviction under the state's Criminal Anarchy Act: "For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the states."

Not until six years later did the Supreme Court declare a state "padlock injunction" law bad as violative of free speech and press in *Near v. Minnesota*, 283 U.S. 697 (1931). This was the first such invalidation of a state statute under the "incorporation" theory. See ROBERT EUGENE CUSHMAN, *LEADING CONSTITUTIONAL DECISIONS* 157 (12th ed. 1963).

8. The absorption of Bill of Rights guarantees into the Fourteenth Amendment is a fascinating story in itself. For a scholarly discussion of how far it has carried, see Robert Fairchild Cushman, *Incorporation: Due Process and Bill of Rights*, 51 CORNELL L. Q. 467 (1966).

9. 293 U.S. 245 (1934).

A concurring opinion was filed by Justice Cardozo, who assumed that the First Amendment's guarantee of religious freedom against federal infringement likewise protected against state invasion. At the same time, he could not see how the California law would operate to inhibit the free exercise of religion. The objecting students could have gone elsewhere for their higher education. If they chose to attend an institution financed by state funds, they would have to comply with all requirements for study there. They were not directly compelled to attend the state university, but if they elected to do so, the compulsion upon them to take military drill would become effective. Cardozo's practical point of view persuaded both Brandeis and Stone to join his concurrence.

Jehovah's Witnesses and "Preferred Position"

Hamilton v. Regents recognized that the First Amendment's free exercise clause operated through the Fourteenth to prevent state interference with religious belief, even if the circumstances were such that those who invoked it did so in vain. The Jehovah's Witness cases that followed kept the religious issue alive and resulted in a series of decisions that were mostly favorable to the members of that sect. In fact, a "preferred position" for religious liberty appeared well on the way to being realized.¹⁰

Actual use of the term "preferred position" occurred first in a 1942 Jehovah's Witness case, wherein Stone, who had meanwhile become Chief Justice, dissented from a majority opinion upholding municipal license taxes on booksalesmen as applied in the City of Opelika, Alabama, to Witnesses engaging in the distribution of religious literature.¹¹ Stone

10. "Preferred position" got its start in an unobtrusive footnote to Justice Stone's opinion for the Court in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), which upheld the Filled Milk Act that Congress had passed in 1923 under its power to regulate interstate commerce. Since the law in question could have been enacted by reasonable men, there was no warrant to invalidate it as a violation of Fifth Amendment due process. The law would have to be presumed valid. Right at this point, Stone added footnote 4 saying: "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth."

Not long afterward, this rather tentatively advanced and carefully qualified footnote took on the dimensions of a constitutional doctrine according a "preferred position" to civil liberty guarantees.

11. *Jones v. Opelika*, 316 U.S. 584 (1942) [hereinafter designated *Opelika I*]. Note that *Jones v. Opelika*, 319 U.S. 105 (1943) [hereinafter designated *Opelika II*], set aside

stressed that the freedom guarantees extended to nondiscriminatory as well as discriminatory attempts to restrict liberty. Therefore, application of a general tax ordinance to colporteurs should be barred because the Constitution placed freedom of speech and religion in a "preferred position."¹²

Chief Justice Stone's argument (though sharply criticized by adversaries like Justice Frankfurter who believed that religious immunity from nondiscriminatory taxation amounted to a subsidy to religion in violation of the constitutional ban on establishment) won support from other members of the Court, notably Justices Black, Douglas, Murphy, and Rutledge. These libertarian activists came to insist on higher standards in determining questions of constitutionality than the reasonable man test when civil liberties were at stake. Indeed, the "preferred position" doctrine if given extreme application would shift the burden of proof to the state which would have to overcome a presumption of invalidity in applying a statute whose effect might restrict the communication of ideas. A less extreme view of "preferred position" would only insist that case for such restriction should rest upon overwhelmingly persuasive grounds.¹³ Interpreting the Constitution by either premise would, of course, benefit Jehovah's Witnesses in their aggressive street and door-to-door campaigns to proselytize people.

the decision in *Opelika I* by a *per curiam* judgment and opinion based on a majority opinion by Justice Douglas deciding *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), on the same day, May 3rd. The reversal of *Opelika I* by *Opelika II* turned on a 5 to 4 vote holding the municipal booksellers' license tax ordinance in question unconstitutional. This reversal took place through the accident of a change of personnel on the Court. The majority of five in *Opelika I* became a minority with the resignation of Justice Byrnes. He was replaced by Justice Rutledge who sided with what had been the *Opelika I* minority (of Stone, Black, Douglas, and Murphy), thereby transforming it into the majority that controlled decision in *Opelika II*.

12. Here are Stone's exact words:

The First Amendment is not confined to safeguard freedom of speech and freedom of religion against discriminatory attempts to wipe them out. On the contrary, the Constitution, by virtue of the First and Fourteenth Amendments, has put those freedoms in a *preferred position* (emphasis added). Their commands are not restricted to cases where the protected privilege is sought out for attack. They extend at least to every form of taxation which, because it is a condition of the exercise of the privilege, is capable of being used to control or suppress it.

Dissenting opinion in *Jones v. Opelika I*, *supra* note 11, at 608.

13. See PRITCHETT, *THE AMERICAN CONSTITUTION* 393 (1959), for a precise statement as to the divergent views taken by extreme and moderate preferred positionists. Judicial restraintists like Felix Frankfurter would have nothing to do with either conception of "preferred position."

It should occasion no surprise to learn that claims to religious liberty were accorded wide latitude during the late 1930's and early '40's. In those years, the Supreme Court upheld, often over vigorous dissents, the right to solicit money for religious purposes without having to secure prior permission from the police; the right to disseminate religious pamphlets in public places; and the right to peddle religious works without paying the fee for a license that was required of all other peddlers.¹⁴ Such decisions have served to build up a body of constitutional law regarding religious liberty. This development must be credited to the missionary zeal of the Jehovah's Witnesses in spreading their gospel via the spoken and printed word accompanied by home visitation.¹⁵

In order to decide controversies provoked by such activities, the judiciary has had to explore the scope and meaning of the religion clauses. This has not been easy, causing cleavages among the judges in a bewildering array of cases. Yet, the problem of the co-existence of diverse religions in a free and open society has been aired in a salutary way. Constitutionally speaking, the country has profited from its experience with the Witnesses.¹⁶ They have caused other Americans to

14. See ROBERT EUGENE CUSHMAN, *OUR CONSTITUTIONAL FREEDOMS: CIVIL LIBERTIES—AN AMERICAN HERITAGE* 8 (1st ed. 1944).

To illustrate the rulings (favorable to Jehovah's Witnesses) therein referred to, the U.S. Supreme Court in *Lovell v. Griffin*, 303 U.S. 444 (1938), unanimously knocked out a municipal ordinance in Griffin, Georgia, that required the city manager's permission to distribute leaflets.

Similarly, in *Cantwell v. Connecticut*, 310 U.S. 296 (1940), the Court unanimously invalidated a state law that forbade soliciting funds for any charitable or religious purpose without previous approval by the secretary of the state's public welfare council.

Four years later, the High Tribunal ruled that it was unconstitutional for the South Carolina City of McCormick to apply a book vending license ordinance to peddlers of religious books, whose activity could be regarded as involving religion in such a way as to enjoy immunity from taxation. *Follett v. McCormick*, 321 U.S. 573 (1944).

15. As to home visitation, account should be taken of *Martin v. City of Struthers*, Ohio, 319 U.S. 141 (1943). There a municipal ordinance prohibited ringing doorbells, rapping on doors, or otherwise summoning occupants of dwelling places in order to pass out tracts, advertisements, handbills, or circulars. Thelma Martin, a Jehovah's Witness, challenged this Struthers ordinance as an infringement of her constitutional rights to religious liberty and freedom of the press. The majority in an opinion by Justice Black held the ordinance unconstitutional, while conceding that reasonable police regulations as to the times and manner of such distribution might be permissible where the health and well-being of society were at stake. In any event, the individual householder would have to be left free to decide whether to receive or exclude unsolicited callers.

16. See Waite, *The Debt of Constitutional Law to Jehovah's Witnesses*, 28 MINN. L. REV. 209 (1944).

reëxamine presuppositions about democracy. In consequence, *vox populi, vox dei* has been found wanting as a national credo.

THE COMPULSORY FLAG SALUTE CONTROVERSY

Majority rule can hardly monopolize the situation because of a necessary respect for minority rights, if free institutions are to survive. The lesson of the compulsory flag salute controversy was hard to learn but is unlikely to be forgotten. Indeed, it caused the Court to flip-flop on the issue before reaching a sound solution—one that would accord conscientious scruples requisite constitutional protection.

On the threshold of the Second World War, an attempt to inculcate patriotism was made by requiring daily flag salute ceremonies in the public schools. Jehovah's Witnesses refused to participate in the belief that to do so would violate God's commandments, namely:

Thou shalt have no other gods before me.

Thou shalt not make unto thee 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. . . .¹⁷

Trying to follow these words literally, Lillian and William Gobitis, 12 and 10 years of age respectively, found themselves expelled from public school in Minersville, Pennsylvania, for their refusal, as Jehovah's Witnesses, to salute, and pledge allegiance to, the American flag during their school's daily exercises. Both children regarded the Stars and Stripes as a forbidden image within the meaning of Jehovah's command not to "bow down" before it. It would be better to suffer expulsion from class than to incur God's wrath for disobedience to a divine commandment, they may well have thought—unless their father and mother did their thinking for them on this matter.¹⁸

17. *Exodus* 20:3-5 (King James Version). Compare the language of the same Scriptural source in *THE OXFORD ANNOTATED BIBLE WITH THE APOCRYPHA, REVISED STANDARD VERSION* (May & Metzger ed. 1965):

3. "You shall have no other gods before me.

4. "You shall not make for yourself a graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth;

5. you shall not bow down to them or serve them. . . ."

Exodus 20:3-5.

18. On the point of God's wrath, the Scriptures tell in *Exodus* 20:5-6 how Jehovah

Because of Pennsylvania's compulsory education law, the Gobitis children had to be placed in private school. The expenses this entailed led their father to bring suit to obtain an injunction against conditioning his children's attendance at Minersville public school on participation in the daily flag salute ceremony. The first judgment was favorable but unfortunately for Mr. Gobitis not final.

While Judge Maris of the federal District Court afforded relief, the U.S. Supreme Court by an 8-1 decision¹⁹ cancelled it by reversing the judgment below. In delivering the Court's opinion, Justice Frankfurter declared that religious liberty was not absolute. Some compromises might become necessary, he said, to cultivate a national feeling of unity upon which to base the nation's security. He regarded the courtroom as an improper forum to determine educational policy. Judges were hardly competent to pronounce upon educational psychology and pedagogical policy, not being experts in either field. In any event, Minersville's board of education was better equipped than the U.S. Supreme Court to deal with the question of requiring a flag salute in the classroom.

The Supreme Court's opinion shocked libertarians and evoked widespread criticism.²⁰ Several members of the Court even began to have second thoughts about the ruling. These misgivings found expression in 1942 when in an unprecedented public recantation, Justices Black,

reminded the people of severe sanctions behind his commandments and the reward for keeping them in these words:

5. . . . 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;

6. And shewing mercy unto thousands of them that love me, and keep my commandments.

19. Justice Frankfurter rendered the Court's opinion. Justice McReynolds concurred in the result without opinion. Justice Stone submitted a vigorous dissenting opinion. *Minersville School District v. Gobitis* 310 U.S. 586 (1940).

20. To illustrate the nature of the criticism, Professor Robert Eugene Cushman wrote in April of the year following the controversial *Gobitis* decision:

All of the eloquence by which the majority extol the ceremony of flag saluting as a free expression of patriotism turns sour when used to describe the brutal compulsion which requires a sensitive and conscientious child to stultify himself in public. The decision in the case is disheartening for three reasons: first, because it is a departure from a long line of decisions protecting fundamental civil liberties; second, because it is an eight-to-one decision; third, because the opinion of the Court was written by Mr. Justice Frankfurter, long associated in the public mind with the vigorous defense of civil liberty.

Cushman, *Constitutional Law in 1939-1940*, 35 AM. POL. SCI. REV. 250, 271 (1941).

Murphy, and Douglas revealed that they had become convinced of the Court's error in deciding the *Gobitis* case the way it did.²¹

The leading ideas set forth in Justice Stone's classic dissent in *Gobitis* very likely had more than a little to do with swinging people away from Felix Frankfurter's position on the question of the compulsory flag salute toward another disposition of that explosive issue. Stone pointed out that the compulsory flag salute suppressed free speech and religious liberty in the process of coercing school children into expressing what they could not believe. That alone was stultifying to one's conscience. To use the power of government to force people to affirm what ran counter to their religious training could hardly be justified by talk about instilling a sense of unity. Indeed, the opposite would result from the bitterness engendered. Surely, the ingenuity encouraged by free government would be able to make use of other devices to foster unity than what to some could be little more than a meaningless gesture. It was difficult for Justice Stone to perceive how government here would suffer injury from letting unorthodox religionists adhere to their particular beliefs. There was nothing to be gained from riding roughshod over a politically helpless minority's religious sensibilities. The Court, Stone insisted, had the duty to intervene when legislative judgments placed in jeopardy liberties guaranteed in the federal Bill of Rights. Otherwise, it would abdicate its responsibility as a guardian of the Constitution, to whose upholding all judges were bound by oath or affirmation. The state's interest in maintaining classroom discipline was scarce-

21. This the three justices did as part of the dissent submitted in *Opelika* I, wherein they jointly declared:

The opinion of the Court sanctions a [tax] device which in our opinion suppresses or tends to suppress the free exercise of a religion practiced by a minority group [of Jehovah's Witnesses]. This is but another step in the direction which *Minersville School District v. Gobitis* . . . took against the same religious minority and is a logical extension of the principles upon which that decision rested. Since we joined in the opinion of the *Gobitis* case, we think this is an appropriate occasion to state that we now believe that it was also wrongly decided. Certainly our democratic form of government functioning under the historic Bill of Rights has a high responsibility to accommodate itself to the religious views of minorities however unpopular and unorthodox those views may be. The First Amendment does not put the right freely to exercise religion in a subordinate position. We fear, however, that the opinions in . . . [the instant controversy] and in the *Gobitis* case do exactly that.

Memorandum of retraction submitted on June 8, 1942 by Justices Black, Douglas, and Murphy as a supplement to their *Opelika* I dissent, *Jones v. Opelika*, *supra* note 11 at 623-24.

ly of such dimension as to outweigh the people's stake in the preservation of their liberties, including religious freedom.

Justice Stone's way of looking at the problem had the future on its side. Libertarians lauded him for challenging all alone the majority's position. They were convinced that his ringing appeal for protection to the still, small voice of conscience lay in the best tradition of the literature championing individual freedom and predicted that his dissenting opinion in the *Gobitis* case would outlast what it was protesting against, and become a classic among liberty-loving peoples.²²

The votes of the recanting three judges added to that of the lone dissenter in the *Gobitis* case had swollen the minority position on the flag-salute issue to four out of nine. One more vote on Stone's side of the question would produce a majority in favor of reversing the 1940 precedent set in the *Minersville School District* case. That vote was forthcoming from Justice Rutledge who had replaced Justice Byrnes during February 1943.²³

If the reversal of the first U.S. Supreme Court decision upholding the compulsory flag salute might have been anticipated, it took until June 14, 1943 for this to occur. The judicial line-up against it at that time turned out to be more than a bare majority. Six judges voted to invalidate West Virginia's requirement for pupils and teachers alike to salute the flag in public schools.²⁴ Justice Jackson spoke for a Court that was now dominated by a differently-minded majority from the one that had determined the Pennsylvania precedent against the *Gobitis* children only three short years before.²⁵

22. Compare Professor Robert E. Cushman's statement: "Mr. Justice Stone's opinion deserves a place in the classic literature of civil liberty. It seems . . . to dispose effectively of the reasoning of the majority opinion." Cushman, *supra* note 20, at 271.

23. Wiley B. Rutledge, whose father was an itinerant Baptist preacher, had been named by President Franklin D. Roosevelt to the U.S. Court of Appeals for the District of Columbia in 1939. He served as such for four years, during which his judicial voting record showed him disposed to hold invalid legislation that had a restrictive effect on Jehovah's Witnesses. It was, therefore, apparent that his elevation by President F.D.R. to the federal Supreme Court in early 1943 would produce additional judicial support for the constitutional claims of that sect.

24. The judges so voting included Black, Murphy, Douglas, Jackson, Rutledge, JJ., and Stone, Ch. J.

25. Robert H. Jackson had been appointed an associate justice in June 1941, one year after the *Minersville School District* case had been decided on June 3, 1940. His constitutional viewpoint with reference to the claims of Jehovah's Witnesses was less predictable than that of his colleague on the Court, Rutledge. It should be noted that Jackson had voted with the opposite side from Stone's libertarian group in the *Opelika* controversies on the question of applying a nondiscriminatory municipal ped-

While Jackson spoke for the Court in *West Virginia State Board of Education v. Barnette*,²⁶ others spoke for themselves, with Frankfurter doing all the talking in dissent.²⁷ The facts of the controversy that pro-

dlers tax to Jehovah's Witnesses seeking to sell sectarian books and pamphlets as part of a "conversion" campaign.

Hard to be pegged, Justice Jackson constantly wrestled with the difficult problem of accommodating the conflict between claims to individual liberty and the demands of order under the rule of law. Compare the following quotation from "Resolutions" addressed to the U.S. Supreme Court on April 4, 1955 under the caption "In Memory of Honorable Robert Houghwout Jackson," deceased:

"His opinions show a deep concern over the difficult problem of accommodating the sometimes conflicting purposes of maintaining freedom of the individual and, at the same time, a stable order of society under the reign of a rule of law. But he was generally on the side of full application of the Bill of Rights until he was convinced that the rule of law was seriously threatened."

75 S.Ct. 11, 21. (Page numbers italicized in original because preliminary to pagination for reported cases.)

26. 319 U.S. 624 (1943).

27. More specifically, Justice Jackson delivered the Court's opinion. A joint concurring opinion was submitted by Justices Black and Douglas. Justice Murphy filed a concurring opinion. Justices Roberts and Reed stated their adherence to the opinion rendered by Justice Frankfurter for the Court in the 1940 *Gobitis* case. Justice Frankfurter produced a lengthy dissenting opinion.

It should be noted that Justice Jackson's opinion for the Court represented the views of Chief Justice Stone and Justice Rutledge. As for the others voting to overrule the *Gobitis* decision, John Raeburn Green has pointed out that

... Justices Black and Douglas declined to follow Mr. Justice Jackson, who gave the opinion of the Court in placing the decision upon invasion of the "freedom of silence," their concurrence in the result being solely upon the free exercise of religion . . .

Note, *The Supreme Court, the Bill of Rights and the States*, 97 U. PA. L. REV. 623, n.68 (1949).

Justice Frankfurter's dissenting opinion went further than the one that represented the Court's view in *Gobitis*. Presumably, that is why it failed to attract the concurrence of any of his colleagues. Justices Roberts and Reed, also in dissent, preferred simply to state that they adhered to the Court's opinion (earlier rendered by Justice Frankfurter) in the *Gobitis* case.

John Raeburn Green's analysis offers this explanation of why Justice Frankfurter found himself virtually alone in the *Barnette* case:

[W]hereas his opinion in the *Gobitis* case had commanded concurrence of six members of the Court, his much more profound opinion in the *Barnette* case now failed to receive the concurrence of any; two of the former six, Justices Roberts and Reed, preferring to state simply that they adhered to the earlier opinion. Here may perhaps lie one clue to the infirmity of the unanimous [or near-unanimous] opinion. Presumably it must pay for the support it commands by the acceptance of compromising modifications. And the opinion suggests another consideration. While Mr. Justice Frankfurter expressed the view of the Court more adequately in the

duced such a split among the justices in reversing themselves between 1940 and 1943 were simple, even if provocative of fine-line distinctions in attitude. West Virginia's legislature authorized the teaching of courses designed to foster and perpetuate Americanism. The State Board of Education then adopted a resolution containing recitals from Frankfurter's majority opinion in the *Gobitis* case. This resolution required flag-salute ceremonies in the schools, accompanied by a pledge of allegiance to be taken by all pupils and teachers. Refusals to participate would be tantamount to insubordination punishable by expulsion. By statutory provision, those expelled could gain readmittance only upon compliance. Pending compliance, whoever was expelled would be considered illegally absent from school and hence chargeable with delinquency. That could lead to a fine and jail term for the parent or guardian responsible.

An action was brought by Jehovah's Witnesses in federal district court to enjoin the enforcement of these rules against members of their sect. West Virginia's State Board of Education moved to dismiss the complaint, which was based on allegations that the compulsory flag-salute law and regulations under it violated constitutional guarantees of religious liberty and free speech. The plaintiffs were successful before the three-judge district court in obtaining a judgment that enjoined enforcement of the flag-salute requirement against Jehovah's Witnesses. The case then went on direct appeal to the U.S. Supreme Court, which affirmed the judgment below.

The majority on the High Bench thought that to require people to salute the flag and recite the pledge of allegiance amounted to compelling them to affirm a belief. That constituted a forbidden invasion of spirit and mind which the First and Fourteenth Amendments were meant to preserve from governmental control. The Constitution placed this sphere beyond the control of officials. Besides, coerced conformity was no way to foster national unity. That could be accomplished most effectively by example and persuasion. Resort to force would only be self-defeating.

Under the Constitution, people had the right to differ about things

Gobitis case, nevertheless when he wrote as a dissenter, with his back to the wall, his opinion rose to new heights. In the field of law, at least, it appears that formidable opposition has a strengthening effect upon the opinion.

Id. at 623. Apparently, nobody else on the Bench was willing to go all the way with Justice Frankfurter in dissent on the compulsory flag-salute question. Thus, his final pronouncements as a dissenter on the issue amounted to a solo performance.

going to the heart of the social order. Orthodoxy might not be compelled in politics, economics, nationalism, or religion. Matters of faith and belief lay beyond the reach of public authority. In Justice Jackson's words: "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 enforce citizens to confess by word or act their faith therein."²⁸ The spokesman for the Court could think of no exception to that principle. He feared that any attempt to unify opinion would begin with coercing dissenters and end with their extermination. Accordingly, he warned: "Those who begin coercive elimination of dissent soon find themselves exterminating dissenters."²⁹ The horror of Hitler's gas chambers to that end was all too real during the war against the Nazis. Had it not been gruesomely demonstrated beyond all doubt, inquired the man who was later to prosecute the Nazi war criminals at Nürnberg (Nuremberg) in Germany, that "compulsory unification of opinion achieves only the unanimity of the graveyard"?³⁰ America under the Constitution had no place for any equivalent to the German dictator's *ein Volk, ein Reich, ein Führer*. The application of any such formula here must surely destroy the open multi-group society flourishing in the United States. To say *It Can't Happen Here* in the words of the title of a novel by Sinclair Lewis would be tempting fate to prove once again that eternal vigilance is the price of liberty. Experience teaches a dear school, but fools will learn in no other.

Reflections like these may well have led the U.S. Supreme Court to lower the boom decisively on the compulsory flag salute. It acted on the strength of its commission rather than by the authority of its competence in such matters, said the Court's spokesman. Upon the judiciary lay the awesome responsibility of giving meaning to the words of the Constitution. It would not shirk its duty to keep what the Bill of Rights was meant to safeguard beyond the vicissitudes of political controversy.

Religious opinion was not a matter for the majority to decide. The beliefs of a minority enjoyed an immunity from popular control. The state would have to stay out of an area that belonged to God rather than Caesar. Any restriction would lack legitimacy unless clearly warranted by immediate and grave danger to interests lawfully entrusted to the state's care.

28. 319 U.S. at 642.

29. *Id.* at 641.

30. *Ibid.*

Local school boards could hardly regard themselves as outside the purview of the Fourteenth Amendment. Its limitations applied to all agencies of state authority. Like the state, they remained accountable for observing the freedom guarantees in the federal Constitution. There was no excuse for not doing so in the instant case. Accordingly, the compulsory flag salute would have to go. No level of government could sanction it any longer. The Constitution forbade it.

Justice Frankfurter disagreed. Elaborating upon his opinion for the Court in the *Gobitis* case, he explained that the place to remedy foolish legislation was in the legislature rather than the courtroom. Education in the abandonment of unwise legislation would best come through the electoral processes. States should be left free to experiment. If a law should prove unsound, the responsibility of getting rid of it should lie with the lawmakers responding to pressures generated among the voters.

The judiciary properly had other functions to perform in a democracy than those of a school board or superlegislature for the whole nation. Its job was not to make policy, but to interpret and apply the law in particular circumstances. Being an appointive oligarchy, it could hardly take the place of a legislative body.

If legislators could in reason resolve upon a course of action, it was not for the Court to say them nay. The old common law touchstone of reasonableness furnished the most reliable standard. Under the circumstances, the legislative judgment as to the need for inculcating patriotism by way of flag-salute ceremonies in the public schools met the test of rationality at a time when war clouds were rolling up over the horizon. Public schools represented a vital symbol of national unity for a nation drawn from many sources. To require pupils to pledge alliance and salute the flag as part of their public school education would enhance the spirit of unity necessary for national survival in a warring world. A legislative determination to that end passed the reasonable-man test.

To Frankfurter, no other basis for challenge to the validity of the compulsory flag salute existed. The suggestion of a preferred position for freedom of conscience aroused only a negative response in him. He could find nothing in the Constitution to warrant according some rights a preferred position over others. Was it not a happenstance that the substantive freedoms guaranteed by the federal Bill of Rights had ended up in the First Amendment rather than in another? More than ten amendments were among those originally proposed for a federal bill of

rights. That not all were adopted is a matter of historical fact. By fortuitous circumstance, then, the liberty guarantees were provided for first. This was no basis to accord preference to a claim of conscience over some other right, like that of property.

If the doctrine of a preferred position for the freedom guarantees lacked soundness, so did the idea of testing alleged infringements by "clear and present danger." Justice Holmes had originated and subsequently employed those words as a felicitous phrase or literary allusion without intending them to become a criterion of constitutionality. Allowing "clear and present danger" to become such a criterion would have the unfortunate consequence of leading to a mechanical jurisprudence. Justice Frankfurter wanted none of that. He therefore could not accept what Justice Jackson as the Court's spokesman had to say on the score of a different standard (from the test of rationality) to adjudge limitations on freedom of expression.

In elaborating his views on the compulsory flag salute, Justice Frankfurter made it clear that his personal feelings lay with the Jehovah's Witnesses claiming exemption from the requirement. As one who belonged to the most vilified minority in history, he would be the last to favor a policy of conformity at the expense of dissenters. It was because he believed that judicial intervention on behalf of the Witnesses in the flag-salute cases would exceed the Court's proper role in a democracy that his position took an illibertarian turn.

A champion of judicial restraint on the Bench, he felt himself obliged to defend his stand on the ground that liberty would find its maximum security in community sensitivity to its claims rather than in a courtroom. The community must learn to shoulder responsibility rather than "pass the buck" to courts. It should be allowed to do so by trial and error in keeping with the pragmatic processes of working out solutions to social problems. Community enlightenment, so important to the successful operation of democracy, would only come that way. For the Court to play "Big Brother" would have the effect of preventing self-government from realizing its full potential.

From beginning to end of the compulsory flag-salute controversy, Justice Frankfurter remained convinced that the claims of liberty would have their best and ultimate vindication outside the courtroom because the final repository of the most precious values of civilization lay in the community itself. There and there alone would the battle be won against unabated efforts to shackle the free spirit of mankind. In this conception of things lay a noble idealism regarding the way to deal

with the dilemma of majority rule and minority rights.³¹ Yet, in the face of the persuasive power of Felix Frankfurter's eloquence, a gnawing doubt about the practicality of his fine-spun theory generated a feeling among many of his compatriots that the Supreme Court's final resolution of the compulsory flag-salute controversy would stand as the right one because most truly expressive of the American heritage of religious freedom as against the countervailing claims of public authority.

31. See COMMAGER, *MAJORITY RULE AND MINORITY RIGHTS* (1943).