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HALLOWS LECTURE

MARQUETTE UNIVERSITY LAW SCHOOL
FEBRUARY 28, 2012

***BARNETTE*, FRANKFURTER, AND JUDICIAL REVIEW**

JEFFREY S. SUTTON*

West Virginia Board of Education v. Barnette,¹ as every first-year law student learns, is the flag-salute case. It is a tale of two cases, not one. For the story must take account of the Supreme Court's astonishing about-face: The Court rejected a challenge to compelled flag salutes in 1940, in *Minersville School District v. Gobitis*,² before embracing the identical claim in *Barnette*, only three years later.

But first this is a story about people, about two American families, the Gobitas and Barnett families. When people lend their names to landmark cases, the credit is fleeting, save for the lingering acclaim that goes with attaching the family name to the constitutional principle for which the case stands.³ Not only did time soon forget the sufferings of the Gobitas and Barnett families, but the Court added the indignity of misspelling their names, forever linking the principle against compelled speech to families (or at least names) that do not exist.⁴ Although it

* Judge, U.S. Court of Appeals for the Sixth Circuit. This article is an edited version of Marquette University Law School's 2012 Hallows Lecture. The lecture annually remembers E. Harold Hallows, who served on the Wisconsin Supreme Court from 1958 to 1974 (and as chief justice during the last six of those years) and who for almost three previous decades was a lawyer in Milwaukee and a professor of law at Marquette University.

1. 319 U.S. 624 (1943).

2. 310 U.S. 586, 600 (1940).

3. Cf. Peter D. Baird, *Legal Lore: Miranda Memories*, LITIGATION, Winter 1990, at 43, 46 (discussing Ernesto Miranda's difficulties after the landmark case bearing his name and his eventual death in obscurity).

4. See SHAWN FRANCIS PETERS, JUDGING JEHOVAH'S WITNESSES: RELIGIOUS PERSECUTION AND THE DAWN OF THE RIGHTS REVOLUTION 19 (2000); see also Richard Danzig, *Justice Frankfurter's Opinions in the Flag Salute Cases: Blending Logic and Psychologic in Constitutional Decisionmaking*, 36 STAN. L. REV. 675, 678-79 (1984) (reflecting on the spelling mistake).

would be difficult to conclude that *both* cases were wrongly decided, I must start by acknowledging that both were wrongly captioned.⁵

As for the two families, let's begin with the Gobitas clan—spelled with an *a*, not with two *i*'s. Walter Gobitas held a common job and practiced an uncommon religion. He owned a local grocery store in a Pennsylvania town known as Minersville, a community indeed filled with its share of miners, and raised six children with his wife, Ruth.⁶

The Minersville school board required all teachers and children to pledge allegiance to the American flag at the beginning of each school day.⁷ The pledge was not a new idea. It started in 1892 as a patriotic way to celebrate the 400th anniversary of Columbus's discovery of America.⁸ Congress declared the day a national holiday (hence Columbus Day) and eventually codified the pledge, with these familiar words: "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."⁹ Congress would not add the words "under God" until 1954.¹⁰

The pledge, as initially conceived, was both verbal and physical. As the students recited the words, the exercise required them to extend their right hand from their heart outward and up toward the flag.¹¹

By the 1930s, this ceremony posed a problem for Jehovah's Witnesses, an evangelical Christian faith started in Pennsylvania in the 1800s.¹² In 1935, the leader of the Witnesses, Joseph Rutherford, gave a speech at the Witnesses' national convention, encouraging Witnesses not to participate in flag-salute ceremonies.¹³ As he saw it, the Bible is "the Word of God" and "is the supreme authority."¹⁴ Pledging fealty to anything but God—whether the object be a country, a leader, or a secular symbol—violated the Commandments.¹⁵

5. See PETERS, *supra* note 4, at 19.

6. *Id.* at 19–20.

7. *Gobitis*, 310 U.S. at 591.

8. RICHARD J. ELLIS, *TO THE FLAG: THE UNLIKELY HISTORY OF THE PLEDGE OF ALLEGIANCE* 19 (2005).

9. Act of June 22, 1942, Pub. L. No. 77-623, § 7, 56 Stat. 377, 380.

10. Act of June 14, 1954, Pub. L. No. 83-396, 68 Stat. 249.

11. § 7, 56 Stat. at 380; see also PETERS, *supra* note 4, at 25 (discussing this "military-style salute" given during the pledge).

12. PETERS, *supra* note 4, at 28–29.

13. *Id.* at 25.

14. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 591 (1940).

15. PETERS, *supra* note 4, at 25–26.

Consistent with Rutherford's teachings, the Gobitas children chose not to participate in the flag-salute ceremony required by the Minersville school board.¹⁶ The school board reacted by expelling Lillian Gobitas (age twelve) and her brother, William (ten).¹⁷ The father sued the school board, its members, and the superintendent in federal district court.¹⁸ The district court¹⁹ and the Third Circuit²⁰ granted the Gobitas family relief, invoking the free-exercise guarantee of the First Amendment (together with the Fourteenth), and permitted the children to return to school.

The Supreme Court was another matter. All nine Justices initially voted to reject the claim after oral argument, with just Chief Justice Charles Evans Hughes and Justice Felix Frankfurter explaining their thinking in any detail at the Justices' conference.²¹ Frankfurter circulated an opinion for the Court; just three days before its release, Justice Harlan Fiske Stone circulated a dissent.²² No one else joined the Stone dissent. By an 8–1 vote, the Court thus upheld compelled flag salutes.

The *Gobitis* decision caused problems for the Gobitas family—and worse problems for other Jehovah's Witnesses across the country. As Shawn Francis Peters details in his excellent book, *Judging Jehovah's Witnesses*, many Minersville residents led a boycott of the Gobitas grocery store.²³ Thanks to the willingness of the state police to stand guard, no violence or destruction of the store resulted.²⁴ After several months, business for the most part returned to normal.²⁵

The same was not true for Jehovah's Witnesses in other communities. As school boards across the country enacted mandatory flag-salute requirements,²⁶ Witnesses were put to the choice of sending their children to the local public schools and compromising their religious beliefs, or sending them to private schools.

16. *Id.*

17. *Gobitis*, 310 U.S. at 591.

18. PETERS, *supra* note 4, at 37–39.

19. *Gobitis v. Minersville Sch. Dist.*, 24 F. Supp. 271, 272 (E.D. Pa. 1938).

20. *Minersville Sch. Dist. v. Gobitis*, 108 F.2d 683 (3d Cir. 1939).

21. PETERS, *supra* note 4, at 51–52.

22. *Id.* at 52, 65, 237.

23. *Id.* at 70–71.

24. *Id.* at 70.

25. *Id.* at 71.

26. *See id.* at 164–65.

Making matters more difficult for Witnesses was the first peacetime draft in American history, launched in September 1940 and ramped up after the attack on Pearl Harbor in December 1941.²⁷ Male Witnesses sought exemptions from conscription on the ground that proselytizing was a central tenet of the faith and a full-time job, leaving no time for war efforts.²⁸ While the draft exempted conscientious objectors, it exempted them only from combat, not from other war-related services, which Witnesses claimed to have no time to perform.²⁹ The Witnesses' response to conscription did not sit well with draft boards across the country. Over the course of World War II, the government imprisoned 10,000 men who resisted conscription.³⁰ Forty percent of them were Witnesses.³¹

The Witnesses' resistance to the flag salute and to the wartime draft, combined with the Supreme Court's stamp of constitutionality on compelled flag salutes in *Gobitis*, unleashed a wave of persecution with few rivals in American history. *Gobitis* was decided on June 3, 1940. In the first three weeks after the decision, there were hundreds of attacks against Witnesses across the country.³² Between May and October 1940, the American Civil Liberties Union reported to the Justice Department, vigilantes attacked 1,488 Witnesses in 335 communities, covering all but four states in the country.³³

Local law enforcement often did little to deter the attacks.³⁴ When a reporter asked one sheriff why, he answered, "They're traitors—the Supreme Court says so. Ain't you heard?"³⁵

From the outset, *Gobitis* was not a popular decision in the press or the legal academy. Some 170 newspapers editorialized against it, and few favored it.³⁶ *The New Republic* and the ACLU criticized the decision fiercely—a noteworthy development because Frankfurter, the author of *Gobitis*, had helped to found both organizations.³⁷ How, they thought, could one of their own, one of the great civil libertarians of the

27. See Selective Training and Service Act of 1940, Pub. L. No. 76-783, 54 Stat. 885.

28. See PETERS, *supra* note 4, at 260–61.

29. See *id.*

30. *Id.* at 262.

31. *Id.*

32. See *id.* at 72–95 (discussing a series of these attacks against the Witnesses).

33. *Id.* at 85 (and sources cited).

34. *Id.* at 73.

35. *Id.* at 84.

36. *Id.* at 67.

37. *Id.* at 69.

2012] BARNETTE, *FRANKFURTER*, AND *JUDICIAL REVIEW* 137

day, the defender of Sacco and Vanzetti, write such a decision?

The ACLU's director at the time, Roger Baldwin, wrote a letter to Joseph Rutherford, the Witnesses' leader, promising to help limit or overrule the decision, noting his "shock" that the Court had swept "aside the traditional right of religious conscience in favor of a compulsory conformity to a patriotic ritual."³⁸ "The language" of the decision, he added, "reflects something of the intolerant temper of the moment."³⁹

The New Republic was tougher. It observed that the "country is now in the grip of war hysteria," creating the risk "of adopting Hitler's philosophy in the effort to oppose Hitler's legions."⁴⁰ As Peters recounts, the magazine even compared the decision to one by a German court punishing Witnesses who refused to honor the Nazi salute, saying it was "sure that the majority members of our Court who concurred in the Frankfurter decision would be embarrassed to know that their attitude was in substance the same as that of the German tribunal."⁴¹ Ouch.



School children in Connecticut say the Pledge of Allegiance in 1942. Library of Congress.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

That brings us to the second family, the Barnett family—whose name ends with a *t*, not with an *e*.⁴² Inspired by the *Gobitis* decision and perhaps by the bombing of Pearl Harbor one month earlier, the West Virginia Board of Education in January 1942 required all teachers and students in all West Virginia schools to participate in flag-salute ceremonies.⁴³ “[R]efusal to salute the Flag,” the state board said, would “be regarded as an act of insubordination, and shall be dealt with accordingly.”⁴⁴ The “accordingly” was expulsion, with readmission permitted only after the student agreed to salute the flag.⁴⁵ In the interim, the student would be treated as “unlawfully absent” and as a delinquent, permitting the state to prosecute the parents for truancy and to send the children to reformatories for juvenile delinquents.⁴⁶ The only way out of this bind was for the affected families to send their children to private schools, a remedy that most could not afford.⁴⁷

Marie and Gathie Barnett, age nine and eleven, attended Slip Hill Grade School, an elementary school outside Charleston, West Virginia.⁴⁸ The school was neither big nor wealthy. Until the war, indeed, it put up only a picture of a flag, not the real thing.⁴⁹ In the spring of 1942, the principal of the school stopped Marie and Gathie and asked whether they would recite the pledge and salute the flag that day.⁵⁰ In saying “no,” they explained that “pledging allegiance to a flag was an act of worship, and we could not worship anyone or anything but our God Jehovah.”⁵¹ The principal sent them home.⁵²

42. See Gregory L. Peterson et al., *Recollections of West Virginia State Board of Education v. Barnette*, 81 ST. JOHN'S L. REV. 755, 792 (2007).

43. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 626 (1943).

44. *Id.*

45. *Id.* at 629.

46. *Id.* at 629–30. The Barnett children would avoid truancy charges by presenting themselves at school each morning, only to have the principal send them home. Peterson et al., *supra* note 42, at 771.

47. See *Gobitis v. Minersville Sch. Dist.*, 24 F. Supp. 271, 273 (E.D. Pa. 1938) (calculating the cost of tuition for 1935–1938 for the two Gobitas children as totaling in excess of \$1,400). The private school—Jones Kingdom School—that the Gobitas children began attending was an old farmhouse, renovated by a sympathetic individual and serving forty students in grades one through eight. PETERS, *supra* note 4, at 43. Walter Gobitas modified a delivery truck into a bus so that the children could all ride together for the daily one-hour commute. *Id.* at 44–45.

48. Peterson et al., *supra* note 42, at 768.

49. See DAN SELIGMAN, *FROM GOBITIS TO BARNETTE: A PRIMER 2* (2006); Peterson et al., *supra* note 42, at 768.

50. Peterson et al., *supra* note 42, at 770.

51. SELIGMAN, *supra* note 49, at 1.

52. Peterson et al., *supra* note 42, at 769.

Led by Hayden Covington, the same lawyer who had worked on the *Gobitis* case, the Barnetts sought an injunction in federal court against enforcement of the law. Notwithstanding the 8–1 *Gobitis* decision, a three-judge court unanimously granted the injunction in favor of the parents.⁵³ And notwithstanding the *Gobitis* decision, the West Virginia Board of Education did not ask for a stay pending its appeal to the U.S. Supreme Court.⁵⁴ Marie and Gathie Barnett returned to school.⁵⁵

Later that school year, the Supreme Court returned to its senses. On June 14, 1943—Flag Day, as it happened—the Court held that compelled flag salutes could not be reconciled with the free-speech requirements of the First Amendment.⁵⁶

The 6–3 majority opinion was authored by one of the Court’s new appointees, Robert H. Jackson. Jackson was the last individual appointed to the Supreme Court who did not graduate from law school.⁵⁷ He attended Albany Law School for a year and never attended college.⁵⁸ In spite of all this (or, horror of horrors, perhaps because of it), his *Barnette* opinion is a gem. It explains how compelled speech cannot be reconciled with “free” speech.⁵⁹ And it contains one of the most memorable lines in American constitutional history: “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.”⁶⁰

Justice Frankfurter was not happy. Instead of making a tactical retreat, he doubled down on his position in *Gobitis*. His method was a form of confession and avoidance. He confessed to agreeing with the underlying policy of the Court’s opinion—that it is not the government’s job to coerce faith in the country. But he avoided the conclusion that might flow from that premise by reminding the majority of the progressive critique of conservative jurists over the preceding thirty-plus years—that the Justices had no business importing their preferred policies into the Constitution. The first five sentences of his opinion

53. *Barnette v. W. Va. State Bd. of Educ.*, 47 F. Supp. 251, 255 (S.D. W. Va. 1942).

54. PETERS, *supra* note 4, at 247.

55. *Id.* at 248.

56. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 624, 642 (1943).

57. NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR’S GREAT SUPREME COURT JUSTICES 46 (2010).

58. *Id.* at 42–43.

59. See *Barnette*, 319 U.S. at 642.

60. *Id.*

capture the point, invoking the familiarity of members of his own faith (Judaism) with religious persecution:

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.⁶¹

So ends the *Barnette* story, which prompts seven loosely connected observations.

First, lost in every discussion of *Barnette* and *Gobitis* is a reality that only a lower-court judge would catch. In all three cases, the lower courts were ultimately vindicated, whether it was the (initially reversed) district court and the court of appeals in *Gobitis* or the (affirmed) three-judge court in *Barnette*. The Constitution requires one Supreme Court and permits Congress in its discretion to create "inferior" federal courts, as the Constitution painfully puts it.⁶² One lesson from the *Barnette* story, I should like to think, is that "inferior" courts are not necessarily populated by inferior judges.

Second, the Jehovah's Witnesses played a remarkable role in developing First Amendment law—in *Barnette* and elsewhere. The primary lawyer for the Witnesses, Hayden Covington, who worked on the *Gobitis* brief and argued *Barnette*, led an effort resulting in some twenty-three Supreme Court cases between 1938 and 1946 on behalf of Witnesses.⁶³ The Witnesses' objection to the flag salute, their zeal in spreading their faith, their willingness to proceed in the most hostile environments, and their omnipresent distribution of pamphlets laid the groundwork for much of what we now take for granted as first premises of First Amendment law. Consider these other landmark Witness

61. *Id.* at 646–47 (Frankfurter, J., dissenting).

62. U.S. CONST. art. III, § 1, cl. 1.

63. See PETERS, *supra* note 4, at 12–13.

decisions from the Supreme Court:

- *Lovell v. City of Griffin*,⁶⁴ a 1938 decision invalidating, as a violation of the free-speech and free-press guarantees of the First Amendment, a city ordinance that banned the distribution of printed literature without a permit;
- *Cantwell v. Connecticut*,⁶⁵ a 1940 decision incorporating the free-exercise clause against the states and invalidating a state requirement that individuals obtain a permit before soliciting religious contributions;
- *Chaplinsky v. New Hampshire*,⁶⁶ a 1942 decision establishing the fighting-words doctrine in affirming the conviction of a Witness who called a city marshal “a damned Fascist”;
- *Murdock v. Pennsylvania*,⁶⁷ a 1943 decision invalidating a municipal ordinance that required a permit (at a cost of seven dollars per week) to distribute or sell literature door-to-door; and
- *Prince v. Massachusetts*,⁶⁸ a 1944 decision upholding, against a free-exercise challenge, a state law that prohibited children from selling pamphlets door-to-door.

In this era, it would have been difficult to be a Witness and *not* be a First Amendment scholar. Without the Jehovah’s Witnesses, it is likely that First Amendment law would not be the same, and it is a certainty that it would have taken a different path.

Third, the speed with which the Court changed its mind between *Gobitis* and *Barnette* is startling and unprecedented. What is most striking about *Barnette*, and to my knowledge without counterpart in American constitutional history, is the shift in the number of votes in just three years. What starts as an 8–1 ruling against the First Amendment claim becomes a 6–3 ruling in favor of it. That is a shift of five votes in just three years, almost two lost votes per year.

From the vantage point of 2012, it is easy to second-guess the *Gobitis* majority—indeed, to wonder what it was thinking. How could the Court conclude that, in the midst of an epic struggle against fascism, it was a

64. 303 U.S. 444 (1938).

65. 310 U.S. 296 (1940).

66. 315 U.S. 568 (1942).

67. 319 U.S. 105 (1943).

68. 321 U.S. 158 (1944).

good idea to expel from school twelve-year-old (and younger) children, whose only offense was to stand respectfully and silently as the pledge was recited? The only thing more head-snapping would be a law compelling salutes to the First Amendment before civics class.

A few initial explanations are in order. At the time, *any* First Amendment claim against a state was a relative novelty, as the free-speech clause had been incorporated against the states through the Fourteenth Amendment only in 1925—and the free-exercise clause had been incorporated just *fourteen days* before *Gobitis*.⁶⁹ At the time, Justice Frankfurter also was perceived as a leading, if not *the* leading, progressive thinker on constitutional law, and his vote in *Gobitis* was consistent with his years of advocacy *against* using the Constitution as a means of trumping the winners of the policy debates of the day.⁷⁰ So, in 1940, with Chief Justice Hughes, the Court's leading conservative, and Justice Frankfurter, the leading liberal, aligned against the claim, the Gobitis family faced a long and steep climb.

The war also may explain things. Remember that *Gobitis* was handed down just months after the fall of France in World War II, perhaps unduly sensitizing the Court to the patriotism that likely would be called upon soon to sustain America's entry into the war.⁷¹ Indeed, within the Court, Frankfurter's opinion was called the "Fall-of-France" opinion.⁷² In a letter to Justice Stone on May 27, 1940, Frankfurter indicated that the war had affected his position and suggested that it should affect Stone's.⁷³ Wartime circumstances, Frankfurter wrote, required the Court to make the delicate "adjustment between legislatively allowable pursuit of national security and the right to stand on individual idiosyncra[s]ies."⁷⁴

Oddly enough, just as the war may explain the thinking of the *Gobitis* majority, it may do the same for the *Barnette* majority. How, Jackson thought, could the country use the fight against fascism as a basis for compelling unwilling children to pledge allegiance to the flag?⁷⁵ It is sometimes said that the law sleeps during war. Perhaps the law

69. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

70. PETERS, *supra* note 4, at 55–56.

71. See *id.* at 53–54. See generally Richard Danzig, *How Questions Begot Answers in Felix Frankfurter's First Flag Salute Opinion*, 1977 SUP. CT. REV. 257.

72. PETERS, *supra* note 4, at 65.

73. *Id.* at 54–55.

74. *Id.* at 55.

75. See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 640–41 (1943).

slept through *Gobitis* but woke up in time for *Barnette*.

The criticism of *Gobitis* and the impact of the decision on Witness persecutions also help to explain the rapid switch in votes. The *Gobitis*–*Barnette* story demonstrates that flawed judicial restraint is occasionally just as dangerous as flawed judicial intervention.

Consider the two possibilities. If forced to generalize, I would suggest that, in most close constitutional cases, the Court should err on the side of deference to the elected branches—on the side of judicial restraint. More often than not, the Court poses a greater risk to the country by invalidating laws than by letting the political processes oversee them. The American people are more likely to accept the resolution of difficult social and economic issues when they have a say in the matter. While democracy is flexible, judicial review is not. While democracy is designed to adjust to new circumstances, judicial review generally is not. And while all legislative and judicial decisions will have unintended (and unknown) consequences, the elected branches are far better equipped to respond to them than are life-tenured judges. In close cases, it thus makes sense for courts to err on the side of democracy—to allow the elected branches of government to monitor, adjust to, and ultimately solve, as best they can, difficult social and economic problems.

Yet *Gobitis* illustrates the risk of generalization. One can fairly make the case that *Gobitis* took a bad situation (needless persecution of Jehovah’s Witnesses) and through inaction made it worse (by prompting increased violence against Witnesses). As Covington, the Barnetts’ lawyer, argued with only some hyperbole, *Gobitis* facilitated a “civil war against the Jehovah’s Witnesses.”⁷⁶ Judges, like doctors, should first be mindful that they do no harm—that they do not make a bad situation worse. The Court did not heed this lesson in *Gobitis*, which is surely one of the reasons the Court overruled it so quickly. Every now and then there can be harm in inaction, something that *Plessy v. Ferguson*⁷⁷ demonstrated before *Gobitis* and that *Korematsu v. United States*⁷⁸ reaffirmed after it.

Fourth, a discerning reader might wonder why Chief Justice Stone assigned the *Barnette* opinion to Justice Jackson. Stone had written the solo dissent in *Gobitis*. Jackson was a newcomer to the Court. And of course Stone by then was the Chief Justice, the first among equals on

76. PETERS, *supra* note 4, at 249.

77. 163 U.S. 537 (1896).

78. 323 U.S. 214 (1944).

the Court—and the first among non-equals when it comes to opinion assignments. I do not know the answer, but I have my suspicions.

Justice Jackson was the weakest link in the majority. As time would show, Jackson's inclinations about judicial review were closer to Frankfurter's than to Stone's.⁷⁹ No less importantly, the majority faced a doctrinal dispute that continues to this day. Was *Barnette* (as well as cases like it) about religious liberties or about free speech? To Stone and others, *Barnette* was a case about the free exercise of religion.⁸⁰ Yet to Jackson, *Barnette* was a case about compelled speech.⁸¹ He could not understand why *anyone* should be required to salute the flag, whether over faith-based objections or something else.⁸² If the *Barnette* principle applied to spiritual *and* secular objections to the pledge, it must be a free-speech case. To this day, the Supreme Court struggles with whether to review general laws that restrict speech and faith—such as the pledge requirement—under the free-exercise clause or the free-speech clause.⁸³

Fifth, the turnaround from *Gobitis* to *Barnette* occurred after President Franklin D. Roosevelt remade the Court with Democratic appointees. By 1943, only two members of the Court had not been appointed by FDR, and both were reasonably congenial to his policies.⁸⁴ Chief Justice Stone may not have been appointed to the Court by FDR, but FDR elevated him to the Chief Justiceship.⁸⁵ And Justice Owen Roberts had voted several times to uphold New Deal programs, casting (as some have characterized it) the fabled switch-in-time vote that preserved nine.⁸⁶

With this cast of seemingly like-minded Justices, one might have

79. See Russell W. Galloway, Jr., *The Roosevelt Court: The Liberals Conquer (1937–1941) and Divide (1941–1946)*, 23 SANTA CLARA L. REV. 491, 535–36 (1983) tbls.6–8 (showing the disagreement rates between and among the Justices).

80. See, e.g., *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 601 (1940) (Stone, J., dissenting).

81. See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 634 (1943).

82. *Id.*

83. See Stephen M. Feldman, *The Theory and Politics of First Amendment Protections: Why Does the Supreme Court Favor Free Expression over Religious Freedom?*, 8 U. PA. J. CONST. L. 431, 476–77 (2006).

84. See Galloway, *supra* note 79, at 508–15.

85. FELDMAN, *supra* note 57, at 203.

86. See, e.g., *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (upholding a Washington minimum wage law that fixed minimum wages for women and minors); see also BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* 84–97 (1998) (casting doubt on the conventional version of the “switch in time”).

expected a unified Supreme Court. It did not turn out that way. They remained unified, it is true, in permitting virtually unlimited exercises of the commerce power by Congress,⁸⁷ and in agreeing that the Court should not second-guess state and federal economic regulations.⁸⁸ But when it came to civil liberties, unanimity disappeared.

A little history helps to explain why. Odd though it may sound to modern ears, the first promoters of frequent and aggressive judicial review were conservatives. In the first four decades of the twentieth century, a conservative-dominated Supreme Court invoked liberty of contract and the limited and enumerated basis of congressional power to invalidate hundreds of local, state, and federal laws.

Progressives responded to these decisions with increasing skepticism over the utility and legitimacy of judicial review. The leading judicial progressives of the day—Oliver Wendell Holmes, Jr., Learned Hand, Louis D. Brandeis, Frankfurter—all decried what they perceived as an activist Court.⁸⁹

Once FDR had remade the Court with New Dealers, such as Hugo L. Black and William O. Douglas, and progressives, such as Frankfurter, the question arose as to which way the new Court would go. Should the Justices stand by the Holmesian view of judicial restraint? Or should they treat judicial review differently depending on the type of constitutional guarantee at issue?

With footnote four of *United States v. Carolene Products Co.*⁹⁰ in 1938 and other decisions, then-Justice Stone, who would become the author of the lone dissent in *Gobitis*, proposed a way to retain a progressive critique of conservative judicial activism but permit some liberal judicial activism—by distinguishing between economic rights on the one hand and civil liberties on the other.⁹¹ In addition to Stone, many of the FDR appointees—not just Black and Douglas, but Frank Murphy and Wiley B. Rutledge also—embraced this approach.

Frankfurter was an exception, and so usually was Justice Jackson. Noah Feldman put the point in his book *Scorpions* this way:

87. See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942) (holding that wheat grown by a farmer on private land for his own household's consumption was properly a subject for regulation by the Congress under the Commerce Clause).

88. See Galloway, *supra* note 79, at 528.

89. See Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CAL. L. REV. 519, 526–31, 542 (2012) (summarizing these individuals' approaches to judicial review).

90. 304 U.S. 144 (1938).

91. See *id.* at 152–53 n.4.

As the other liberals on the Court shifted ground, Frankfurter—to his astonishment—found himself transformed into a conservative. Frankfurter's critics, then and later, have tried to explain how it could be that the country's best-known liberal became its leading judicial conservative. But the source of the change was not Frankfurter, whose constitutional philosophy remained remarkably consistent throughout his career. It was the rest of liberalism that abandoned him and moved on once judicial restraint was no longer a useful tool to advance liberal objectives.⁹²

Gobitis is the seed, and *Barnette* the first fruit, of that division.

To this day, a struggle lingers over what a progressive or liberal jurisprudence should look like. Judicial conservatives, you might say, face a similar dilemma. Many of today's conservative Justices came of age and defined themselves in opposition to what they perceived as an unrestrained Warren Court. Now that they possess a majority, they must decide what their theory of judicial review is and what it should be. On top of all this, as Chief Judge Frank H. Easterbrook reminds us, even a Court filled with nine like-minded individuals, indeed nine clones, eventually will splinter, whether along lines currently known or yet to be imagined.⁹³ The Stone Court is Exhibit A in proving the point, as exemplified by the *Gobitis*–*Barnette* transformation.

Sixth, what of the possibility that Frankfurter was right in *Gobitis*? The defense requires advocacy skills I do not possess. But a few points complicate the picture.

To start, there was a chance that democracy would have solved the problem. The Justice Department, it is true, was not helpful in responding to the widespread vigilantism prompted by *Gobitis*.⁹⁴ But Congress responded. Between *Gobitis* and *Barnette*, Congress passed a law establishing that standing silently at attention during the flag salute is all that local governments could ask of their citizens.⁹⁵ The law was designed to preempt contrary local laws, and it was a law the Witnesses were willing to live with.⁹⁶ In *Barnette*, the Court had a chance to rely on this law, but it did not.

In civil-liberties debates, moreover, it sometimes is worth asking this

92. FELDMAN, *supra* note 57, at 232.

93. Frank H. Easterbrook, *Foreword* to ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS*, at xxiv–xxv (2012).

94. PETERS, *supra* note 4, at 98, 113, 141.

95. Act of June 22, 1942, Pub. L. No. 77-623, § 7, 56 Stat. 377, 380.

96. PETERS, *supra* note 4, at 246.

question: Would you rather live in a country in which a majority of a nine-member Supreme Court protects the rights of dissenters or a country in which a majority of its citizens do so? What, for example, is more important to the protection of racial and religious minorities in this country: Court decisions such as *Brown*⁹⁷ or legislation such as the Civil Rights Act of 1964?⁹⁸ There is something to Frankfurter's insight that civil liberties are best protected when they become part of our political culture and part of what we Americans do for each other, not what the Supreme Court does for us.⁹⁹ Every time the Court protects the people from their own mistakes, it risks cheapening self-government and undermining the polity's capacity to steel itself against the next misbegotten policy urge of the moment.

No one can fairly doubt that the laws at issue in *Gobitis* and *Barnette* went against Frankfurter's policy preferences. Before joining the Court, he had devoted his career to protecting civil liberties.¹⁰⁰ Yet, as he appreciated, no judicial philosophy is worth its salt if it does not hurt from time to time, if it does not force the judge to rule against preferred causes here and there. Frankfurter may have been wrong in *Gobitis*, but he was right to bury his policy preferences. We do not have a judiciary filled with blue-robed judges and red-robed judges, and Frankfurter was surely correct to resist any suggestion to the contrary and indeed to devote a professional lifetime to proving the point.

Consistency is a virtue, not a vice, when it comes to judicial philosophy. Having spent his formative years as a lawyer and a professor writing about and criticizing conservative Justices for imposing their economic and political views on the country, Frankfurter was not about to sanction the same conduct by a Court suddenly dominated by liberals. He was rightly skeptical of the idea that constitutional rights could be neatly divided into economic and liberty rights, and indeed there is some support for this point in the modern era. Is it really true, for example, that the Supreme Court's 2005 *Kelo v. City of New London*¹⁰¹ decision—permitting the use of eminent domain over a

97. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

98. Pub. L. No. 88-352, 78 Stat. 241; see also GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 39-156 (1991) (considering relative importance of *Brown* and the 1964 legislation in accomplishing desegregation); Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7 (1994) (same).

99. Cf. FELDMAN, *supra* note 57, at 234 (elaborating on the view).

100. PETERS, *supra* note 4, at 56.

101. 545 U.S. 469 (2005).

middle-class family's home for the purpose of economic development by a large corporation—is a case about property rights as opposed to liberty rights? One may fairly disagree with Frankfurter's application of this philosophy in *Gobitis*, but it is hard to criticize his principled consistency on the appropriate role of judicial review in American government.

Frankfurter's career calls to mind the story, likely apocryphal, of the young lawyer who worked for an elected state court official. The lawyer asked his boss how he handled matters that involved patrons who had helped support him along the way, whether with financial contributions, promotions, introductions, or other forms of support. The answer was straightforward: "I must follow the law where it takes me, whether it takes me in the direction of my political friends or not." It came with one caveat: "Of course, if it is a 50-50 call, I will side with my friends." That sounded reasonable enough, the young lawyer thought at the time. But after looking back on several years of service with the elected official, the young lawyer noticed a lot of 50-50 calls.

Say what you will about Justice Frankfurter, whether about his *Gobitis* and *Barnette* opinions or about his tenure on the Court, but he did not rationalize himself into making a lot of 50-50 calls. No political party or interest group kept a halter on Frankfurter once he joined the Court.

Seventh, Frankfurter nonetheless erred in *Gobitis* and should have admitted as much in *Barnette*. Not even James Bradley Thayer and Holmes, the two people most responsible for influencing Frankfurter's thinking, thought that judicial review had no role to play.¹⁰² They thought instead that the same restrained theory of judicial review applies to *all* provisions of the Constitution—all rights, all structure.¹⁰³ And Frankfurter never took the position that there was no role for judicial enforcement of civil liberties. He embraced the Holmes and Brandeis dissent in *Abrams v. United States*,¹⁰⁴ a 1919 case in which the Court upheld criminal convictions for distributing antiwar literature. He applauded the Court's 1925 decision in *Pierce v. Society of Sisters*,¹⁰⁵ which struck down a ban on private schooling. And he later joined—and wrote—many such decisions as a Justice.

102. Posner, *supra* note 89, at 523, 526–27.

103. See, e.g., James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 152 (1893).

104. 250 U.S. 616 (1919).

105. 268 U.S. 510 (1925).

Judges are not known for admitting their mistakes, and perhaps that is a tradition that should change. In any given year, I sit on roughly ten to twenty cases that reverse decisions of district court judges. Is it not possible that appellate judges and justices have similar rates of error? It of course helps that they sit in groups of three or nine, which diminishes the risk of error. But that reality does not eliminate the risk.

As one Justice of the United States Supreme Court aptly put the point: “Wisdom too often never comes, and so one ought not to reject it merely because it comes late.”¹⁰⁶ The appellate courts might be well served to follow that advice. The source of this advice was Frankfurter himself.

But even if Frankfurter did not learn the right lesson from *Gobitis* by the time of *Barnette*, it is unfair to say that he remained rigidly opposed to judicial review thereafter. He of course played a significant role in the unanimous decision of *Brown v. Board of Education*.¹⁰⁷ So while wisdom may indeed have come late for Frankfurter, it did come. One wonders what would have become of Frankfurter’s legacy if it had come earlier—if he had been the first member of the Court to realize the misstep in *Gobitis*, if he had written the *Barnette* majority, if he had used the opinion to explain how and why judicial restraint need not mean judicial abdication, and if he had begun *that* opinion by talking about the law’s and wisdom’s delays.

Let me close by mentioning a modest connection between *Barnette* and Marquette Law School. Almost thirty years after *Barnette*, an important religious-liberties case arose in Wisconsin: *Wisconsin v. Yoder*.¹⁰⁸ Amish families in Green County, about 100 miles southwest of Milwaukee, challenged a Wisconsin law requiring all children to attend school through the age of sixteen. The Amish faith required children to stop attending school after the eighth grade. The U.S. Supreme Court held that the state law violated the free-exercise rights of the families and struck it down.¹⁰⁹ The decision under review came from the Wisconsin Supreme Court. It is quite good. The Wisconsin Supreme Court’s opinion begins: “No liberty guaranteed by our constitution is more important or vital to our free society than is a religious liberty

106. *Henslee v. Union Planters Nat’l Bank & Trust Co.*, 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting).

107. 347 U.S. 483 (1954).

108. 406 U.S. 205 (1972).

109. *Id.* at 234–35.

protected by the free exercise clause of the first amendment.”¹¹⁰ It then invokes *Barnette*, noting that, just as an exemption for Jehovah’s Witnesses had no great impact on other citizens or on the policy underlying the flag-salute law, so the same would be true with an exemption for Amish children and parents from the compulsory-education law.¹¹¹ The author of the Wisconsin Supreme Court decision, quite fittingly, was one of Marquette’s own professors: Chief Justice E. Harold Hallows, whom we remember with this lecture.

110. *State v. Yoder*, 49 Wis. 2d 430, 434, 182 N.W.2d 539, 540 (1971).

111. *Id.* at 442, 182 N.W.2d at 544.