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## Echoes from the Past: What We Can Learn About Unity, Belonging and Respecting Differences from the Flag Salute Cases

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Echoes from the Past:  
What We Can Learn About Unity, Belonging and  
Respecting Differences from the Flag Salute Cases

*Brett G. Scharffs\**

Symposium on Belonging, Families, and Family Law  
BYU Law School, January 28, 2011

I. INTRODUCTION

I am honored and daunted by the task of offering some concluding comments and reflections. I come not as an expert in family law, but as someone who spends most of his time thinking about law and religion from an international and comparative perspective, and about jurisprudence. Nevertheless, law—like life—does not exist in silos; the experiences from one precinct of the law often closely resemble those in another, seemingly distant precinct. Experience, hard won, in one precinct may illuminate controversies in another.

As I have reflected on the primary themes of the symposium—belonging, families and recognition, and the issue of exemptions from general and neutral laws—my mind has been drawn to one of the great constitutional controversies of the twentieth century: the battle over mandatory participation in saluting the flag and reciting the Pledge of Allegiance. The dispute centered on the conditions for creating and sustaining national unity at a time of peril, on the meaning and requirements of patriotism, and on the relationship between public morale and national security.

It was also about two very different visions of the American creed and of how to inculcate citizenship and belonging, about the respective roles of the family and the state in the education of children, and

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about how to accommodate conscience and difference. Although this controversy was acted out more than seventy years ago, its lessons ring remarkably contemporary not only because of recent disputes about the constitutionality of the words “under God” in the Pledge,<sup>1</sup> but much more broadly in the dialectic about coercion and conscience that are at the very heart of the controversy.

In the 1940 case *Minersville School District v. Gobitis*,<sup>2</sup> the Supreme Court, focusing on the state’s right to determine appropriate means to inculcate patriotism in children, upheld a state statute compelling flag salutes in public schools that made no exemption for religious objectors. The Court emphasized that this was a general secular regulation, and that national unity, which it said underpinned national security, was a constitutional value of the highest order.<sup>3</sup>

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1. For example, in *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004), a father, Newdow, sued his daughter’s school district alleging that the district’s policy of requiring students to recite the Pledge of Allegiance each morning was unconstitutional. *Id.* at 1. Specifically, Newdow claimed that the inclusion of the words “under God” in the Pledge amounted to a “religious indoctrination of his child” that violated the First Amendment and his right as an atheist to instruct his daughter in his views about religion. *Id.* at 5. The Ninth Circuit Court of Appeals agreed with Newdow and held that “[t]he school district’s policy . . . places students in the untenable position of choosing between participating in an exercise with religious content or protesting,” even though the student was not required to participate in reciting the Pledge. *Newdow v. United States Cong.*, 328 F.3d 466, 488 (9th Cir. 2002). The court further argued that, “The coercive effect of the policy here is particularly pronounced in the school setting given the age and impressionability of schoolchildren, and their understanding that they are required to adhere to the norms set by their school, their teacher and their fellow students.” *Id.* Finally, the court noted that,

The coercive effect of the Pledge is also made even more apparent when we consider the legislative history of the Act that introduced the phrase “under God.” These words were designed to be recited daily in school classrooms. President Eisenhower, during the Act’s signing ceremony, stated: “From this day forward, the millions of our school children will daily proclaim in every city and town, every village and rural schoolhouse, the dedication of our Nation and our people to the Almighty.” All in all, there can be little doubt that under the controlling Supreme Court cases the school district’s policy fails the coercion test.

*Id.* (quoting 100 Cong. Rec. 8618 (1954) (statement of Sen. Ferguson incorporating signing statement of President Eisenhower)). Ultimately the Supreme Court reversed the Ninth Circuit on the grounds that Newdow did not actually have standing to bring the case because his rights as his daughter’s guardian under California law were in dispute. *Elk Grove*, 542 U.S. at 17–18. By deciding on standing grounds the majority opinion avoided passing judgment on the issue of whether the phrase “under God” is a violation of the Establishment Clause. *Id.* at 18. Despite the Court’s avoidance of the issue, the case was widely discussed in the popular press and was a major source of controversy in politics. See generally Charles Russo, *The Supreme Court and Pledge of Allegiance: Does God Still Have a Place in American Schools?*, 2004 BYU EDUC. & L.J. 301 (2004). One notable result of the controversy was the “Pledge Protection Act of 2005,” which was introduced, but not enacted, as an attempt to strip the Federal Courts of jurisdiction over legal controversies involving the Pledge. Pledge Protection Act of 2005, H.R. 2389, 109th Cong. (2005).

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

3. *Id.* at 595.

Only three years later, the Supreme Court completely reversed course. In *West Virginia State Board of Education v. Barnette*,<sup>4</sup> the Court held that when state officials compelled participation in the flag salute and pledge, they “transcend[ed] constitutional limitations on their power and invade[d] the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.”<sup>5</sup> In one of the most quotable (and quoted) lines in the history of the Supreme Court, Justice Jackson, writing for the Court declared: “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.”<sup>6</sup> The story of these two great cases, as well as what transpired between them, is one of the most remarkable episodes in twentieth-century U.S. constitutional history.

## II. *GOBITIS*

### A. *Background*

The story begins in the rural, predominantly Catholic, Pennsylvania town of Minersville,<sup>7</sup> where the Gobitis family joined the Jehovah’s Witnesses in 1931.<sup>8</sup> In 1935, after one of the church’s key national leaders, Judge Joseph F. Rutherford, gave a radio address condemning flag salutes as a form of worshipping a graven image,<sup>9</sup>

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4. 319 U.S. 624 (1943).

5. *Id.* at 642.

6. *Id.*

7. That Minersville was predominantly Catholic is significant because the Jehovah’s Witness doctrine, while harshly critical of all other religions, was especially sharp in its condemnation of the Catholic Church. Joseph Rutherford, a Jehovah’s Witness and key player in the *Gobitis* case, was also a strong critic of Catholics. His radio broadcasts, in which he disparaged Catholicism, were banned by NBC in the late 1920s for his “rabid attack upon organized religion and the clergy.” 1930 INT’L BIBLE STUDENTS ASS’N Y.B. 38 (1929).

8. DAVID R. MANWARING, *RENDER UNTO CAESAR* 81–82 (1962) (“Mr. and Mrs. Gobitis became Jehovah’s Witnesses in 1931, thus terminating the disrupting effects of a mixed Catholic-Protestant marriage. At the time of the original controversy—late 1935—the Gobitis family had two children in school—Lillian, born November 2, 1923, and William, born September 17, 1925—and three younger children.”).

9. It is noteworthy that the Jehovah’s Witnesses’ resistance to flag salutes arose from opposition to Adolph Hitler, who banned the Jehovah’s Witnesses in Germany in 1933. MANWARING, *supra* note 8, at 30. As Manwaring describes it, in Germany, “[t]he Witnesses responded with open defiance, refusing to give the Nazi salute and vigorously denouncing Hitler’s policies. Eventually, some 10,000 Witnesses wound up in concentration camps.” *Id.* At a church convention in 1935, Rutherford gave a speech denouncing Hitler and “the command that all persons shall ‘Heil Hitler,’ which in the English language means ‘Salvation is by

two of the Gobitis family's children, Lillian (a seventh grader) and William (a fifth grader), stopped saluting the flag in school.

The children's teachers' reactions to their refusal presaged the variety of responses that would later play out across the country and upon the stage of the Supreme Court. When William refused to salute, his teacher "tried to force his arm up, but William held on to his pocket and successfully resisted."<sup>10</sup> The next day, Lillian followed suit. "Before class, her heart pounding, she went to explain her reasoning to her teacher. 'Miss Schof Stahl,' she said, 'I can't salute the flag anymore. The Bible says at Exodus chapter 20 that we can't have any other gods before Jehovah God.' The teacher hugged Lillian and said she was a 'dear girl.'"<sup>11</sup>

The controversy got off to an inauspicious start when the children's father, Walter Gobitis, and the superintendent of public schools in Minersville, Charles E. Roudabush, locked horns over the issue. In the words of David Manwaring, who has written a comprehensive history of the flag salute cases, "Roudabush's outrage that *anyone* should refuse the salute was not mellowed by Gobitis' testy rejoinder that he was a citizen not of the United States but of Heaven."<sup>12</sup> Gobitis deemed Roudabush an atheist because Roudabush

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Hitler.'" Since salvation can come only by faith in God, Rutherford continued, people of faith will "not 'Heil Hitler' nor any other creature." *Id.* at 30-31. As Manwaring notes, "This line of reasoning could apply equally well to the American flag salute." *Id.* at 31. Within a few months of Rutherford's speech, the opposition to participating in flag salutes had become a significant church doctrine for the Jehovah's Witnesses. *Id.* at 32. In a radio address on October 6, 1935, Rutherford declared, "Flags of the various nations represent the government and what the government stands for. The law of the nation or government that compels the child of God to salute the national flag compels that person to salute the Devil as the invisible god of the nation. The Christian, therefore, must choose to yield to God's enemy or to remain true to Almighty God." *Id.* at 32 (italics omitted). As Noah Feldman explains it, the movement among Jehovah's Witnesses to protest the flag salute

had emerged almost accidentally. [Judge Rutherford], one of the national leaders of the Witnesses, had given a speech earlier in 1935 denouncing the Nazi "Heil Hitler" salute: "All people who have faith in God," he said, should hail "Jehovah and Christ Jesus," not Hitler "or any other creature." After the speech, several young Witnesses around the country applied its logic to the flag salute, which at the time closely resembled the straight-arm Nazi salute, except that the palm was to be turned upward, not down. Rutherford then gave a radio address praising the students, who were standing up for their faith. Lillian and William had heard that speech and had decided as a matter of conscience that they would not salute.

NOAH FELDMAN, *SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES* 179-80 (2010).

10. FELDMAN, *supra* note 9, at 179.

11. *Id.*

12. MANWARING, *supra* note 8, at 82. As Feldman describes it, "The reaction among the Gobitises' classmates to this presumably unpatriotic act began as astonishment and quickly turned to disgust. Lillian was shunned and had to resign as class president. 'When I got to school each morning,' she later reported, 'a few boys would shout "Here comes Jehovah!" and shower me

believed in evolution, and Roudabush responded by seeking a legal opinion that under state law he had the authority to compel the students to participate in the patriotic ceremony.<sup>13</sup>

After obtaining legal opinions from school officials, at a dramatic school board meeting, the school board passed a resolution that transformed the flag salute into a legal obligation. Immediately thereafter, Superintendent Roudabush stood and expelled the Gobitis children from school for insubordination.<sup>14</sup> It was this “state action” that the Supreme Court would later uphold as “legislation of general scope not directed against doctrinal loyalties of particular sects.”<sup>15</sup>

### *B. Federal District Court and the Court of Appeals*

Gobitis filed suit in federal court, and won both at the district court and the court of appeals. The district court judge, Albert Branson Maris, was a Quaker and a veteran of World War I, who had been appointed to the bench by President Franklin Roosevelt.<sup>16</sup> Judge Maris concluded, “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.”<sup>17</sup> Also crucial was his conclusion regarding the effect of the children’s refusal to salute the flag on the state’s interests:

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. . . . 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

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with pebbles.” FELDMAN, *supra* note 9, at 180.

13. MANWARING, *supra* note 8, at 82.

14. The Minersville School Board unanimously passed the following resolution: “That the Superintendent of the Minersville Public Schools be required to demand that all teachers and pupils of the 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.” MANWARING, *supra* note 8, at 83. After the resolution was adopted, Roudabush immediately stood and announced, “I hereby expel from the Minersville schools Lillian Gobitis, William Gobitis and Edmund Waslewski for this act of insubordination, to wit, failure to salute the flag in our school exercises.” *Id.* (internal citations omitted).

15. *Gobitis v. Minersville Sch. Dist.*, 310 U.S. 586, 594 (1940).

16. MANWARING, *supra* note 8, at 91.

17. *Gobitis v. Minersville Sch. Dist.*, 24 F. Supp. 271, 273 (E.D. Penn. 1938), *quoted in* MANWARING, *supra* note 8, at 104.

lip service of loyalty in a manner which conflicts with their sincere religious convictions.<sup>18</sup>

The three judge panel at the court of appeals, comprised of William Clark,<sup>19</sup> John Biggs, Jr.,<sup>20</sup> and Harry E. Kalodner,<sup>21</sup> affirmed the decision below.<sup>22</sup> Judge Clark's opinion cited the letter from George Washington to a group of Quakers, assuring them that in light of their conscientious objection to serving in the military, he favored treating "the conscientious scruples of all men . . . with great delicacy and tenderness."<sup>23</sup> The Minersville school district, Judge Clark scolded, "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."<sup>24</sup>

### C. Arguments before the Supreme Court

School officials appealed the case to the Supreme Court. However, by the time the case reached the Court in late 1939, the political context had begun to change. The Jehovah's Witnesses were pacifists, who had opposed the United States' participation in World War I and now opposed involvement in World War II.<sup>25</sup> Germany had invaded Poland in September 1939, but the United States would not

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18. *Id.* at 274.

19. William Clark was a native of Newark, New Jersey, the recipient of three Harvard degrees, and a veteran of World War I. MANWARING, *supra* note 8, at 111. He was appointed to the Circuit Court of Appeals by President Roosevelt in 1938, but he had first drawn national attention in 1930 when he unsuccessfully challenged the constitutionality of the Eighteenth Amendment. *Id.* at 111-12.

20. John Biggs, Jr., also a Harvard graduate, was appointed to the Circuit Court of Appeals by President Roosevelt in 1938. *Id.* at 112. He was a member of the American Legion, which is particularly notable owing to the intensity with which members of the American Legion would persecute the Jehovah's Witnesses in the aftermath of the *Gobitis* decision. *Id.* at 112.

21. Harry E. Kalodner, a Philadelphia native and Pennsylvania graduate, was also a member of the American Legion. *Id.* at 112. Kalodner was not a sitting judge on the Circuit Court of Appeals, but he was called in to replace Judge Maris who had been elevated to the Circuit Court of Appeals after deciding the *Gobitis* case in the District Court and could not hear the appeal of his own decision. *Id.*

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

23. *Id.* at 693 (quoting Writings of George Washington (Sparks Ed. Vol. 12, pp. 168-69), Letter to the Religious Society Called Quakers, October, 1789) (internal quotation marks omitted).

24. *Gobitis*, 108 F.2d at 693.

25. FELDMAN, *supra* note 9, at 180 ("The Witnesses' motivation was religious. When they described the flag salute as idolatry, the Witnesses were criticizing patriotic nationalism. For them, placing the state and its symbols on a par with God was an act of blasphemy.").

formally enter the war for another two years, until after the Japanese attack on Pearl Harbor.<sup>26</sup> Nationalism and isolationism were powerful forces in U.S. politics and culture.<sup>27</sup> There were great fears of divisive foreign influences.<sup>28</sup>

Against this political backdrop, the school district found a sympathetic audience for its argument that the flag salute requirement was a generally applicable “secular regulation” designed to uphold public morale. The state argued, “Any breakdown in the *esprit de corps* or morale of this country may conceivably have a more devastating effect upon the nation than a catastrophe resulting from disease, breach of the peace, or even an invasion of the realm.”<sup>29</sup> Requiring participation in the flag salute, the school district argued, was reasonable, akin to other mandatory elements of the school program.<sup>30</sup>

Meanwhile, Olin R. Moyle, the Gobitises’ attorney and the church’s legal counsel, who had successfully pursued the case through the court of appeals, had a falling out with Judge Rutherford, was fired from the case, and was expelled from the movement. Rutherford himself then wrote and filed the brief and argued before the Supreme Court on behalf of the Gobitises.

Rutherford devoted most of his brief to an entirely new argument, that the Minersville regulation violated the religious freedom guarantee of the Pennsylvania Constitution. It is hard to imagine that this new strategy, or the tone of his argument, was helpful to his clients’ cause. As Rutherford put it,

The vital question in the instant case is this: Shall the creature man

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26. For a general history of World War II, see C. L. SULZBERGER & STEPHEN E. AMBROSE, *THE AMERICAN HERITAGE NEW HISTORY OF WORLD WAR II* (1997).

27. FELDMAN, *supra* note 9, at 180–81 (“To its proponents, the flag salute meant something different with a world war brewing and a draft in the offing than it might have done otherwise. A child’s salute has special significance when there is the prospect that the nation may go to war behind the flag. By the time Judge Rutherford argued the children’s case himself before the Supreme Court in late April 1940, comparing the children to Daniel in the lion’s den, the case had turned into controversy about wartime loyalty. France was poised to fall to Nazi Germany—and would fall just days after the opinion was handed down in June.”).

28. Before World War II a “fifth column hysteria [began] to sweep the country.” MANWARING, *supra* note 8, at 153.

29. MANWARING, *supra* note 8, at 119.

30. *Id.* at 120 (“The youth of today will be the adult citizens of tomorrow and the public schools should be permitted through patriotic exercises to inculcate in them a love of country.”); *id.* (Roudabush was cited for his “expert” opinion that dire results would follow if an exemption were permitted. “Such demonstration of disrespect to our government will influence and affect other pupils in the schools, and the morale of their respective communities, and ultimately that of the nation itself, will be shaken and demoralized.”).

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?<sup>31</sup>

In sum, Rutherford said, the issue may be stated as “[t]he arbitrary totalitarian rule of the State versus full devotion and obedience to the THEOCRATIC GOVERNMENT or Kingdom of Jehovah God under Christ Jesus His anointed King.”<sup>32</sup>

Manwaring explains that in his brief Rutherford “tried to link the Minersville regulation to the bogey of totalitarianism, noting the ceremony’s physical similarity to the Nazi salute and relating the Witnesses’ troubles in Germany.”<sup>33</sup> Manwaring’s verdict is that this was “a discouragingly bad brief.”<sup>34</sup> Not only did it ignore the most critical constitutional issues, it “seemed calculated to produce a negative emotional effect with its repeated recourse to argument *ad hominem*.”<sup>35</sup>

#### D. The Supreme Court’s Holding

##### 1. Frankfurter’s majority opinion

By an 8–1 margin the Supreme Court decided against the Witnesses and for the school district.<sup>36</sup> After lobbying Chief Justice Hughes for the assignment, Justice Felix Frankfurter wrote the majority opinion for the Court.<sup>37</sup> He focused on two principal

31. *Id.* at 122.

32. *Id.* (capitalization in original).

33. According to Manwaring, the modern flag salute ceremony started in 1892 as a mass patriotic demonstration in recognition of Columbus’ discovery of the Americas. MANWARING, *supra* note 8, at 2. Congress then declared the day a holiday and authorized the first pledge, which was, “I pledge allegiance to my flag and the Republic for which it stands, one nation indivisible, with liberty and justice for all.” *Id.* Manwaring notes that, “At the words ‘to my flag,’ the right hand was extended, palm up and slightly raised, toward the flag.” *Id.* In 1923 and 1924 the pledge was amended to be, “I pledge allegiance to the Flag of the United States of America and the Republic for which it stands; one nation, indivisible, with liberty and justice for all.” *Id.* at 2–3. In 1942, to avoid the similarity of the salute to the Nazi “Heil Hitler,” Congress changed the salute to be the right hand over the heart. *Id.*

34. *Id.* at 123.

35. *Id.*

36. Frankfurter’s majority opinion was joined by Justices Roberts, Black, Reed, Douglas, Murphy, and Chief Justice Hughes. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940). Justice McReynolds concurred in the result. Justice Harlan F. Stone was the lone dissenter. *Id.* at 601.

37. According to Feldman, Frankfurter “had multiple reasons to be engaged with the

arguments: free exercise and due process. Citing the “secular regulation” rule, Frankfurter wrote:

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. The necessity for this adjustment has again and again been recognized.<sup>38</sup>

In response to the due process argument, Frankfurter brought out the heavy artillery, quoting Abraham Lincoln’s famous question, “Must a government of necessity be too *strong* for the liberties of its people, or too *weak* to maintain its own existence?”<sup>39</sup> Having thus raised the stakes to the very existence of the government, Frankfurter opined,

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. . . . The flag is the symbol of our national unity, transcending all internal differences.<sup>40</sup>

As Manwaring notes, “never has the case for ‘flag worship’ been more appealingly put.”<sup>41</sup> Frankfurter bolstered this argument about the symbolic significance of the flag to national unity with an appeal to judicial restraint and respect for the political judgments of those who enacted the Minersville regulation. As Feldman explains, “Frankfurter was proud of his opinion. He believed he had shown how liberal constitutional theory worked in practice. It respected civil liberties without interfering in legislative judgments. And it was able to recognize important political values, like the need to promote national unity.”<sup>42</sup> Deferring to the political judgment of the Pennsylvania school officials was an exercise of judicial restraint, one of the

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undertaking. As Frankfurter framed the issues, the case was an opportunity to expound the constitutional theory [of judicial restraint] he had developed. Just as important, Frankfurter was a careful student of international affairs and a Europe watcher who had identified Hitler’s threat early, and so was staunchly pro-war.” FELDMAN, *supra* note 9, at 181.

38. *Gobitis*, 310 U.S. at 594–95.

39. *Id.* at 596.

40. *Id.*

41. MANWARING, *supra* note 8, at 139.

42. FELDMAN, *supra* note 9, at 182.

lodestars in Frankfurter's constitutional galaxy.<sup>43</sup>

Perhaps most significantly, Frankfurter cited the importance of the values weighing against the Gobitis' free exercise and due process rights. "We are dealing with an interest inferior to none in the hierarchy of legal values. National unity is the basis of national security."<sup>44</sup>

Justices Black, Reed, Douglas, and Murphy (the other Roosevelt appointees to the Supreme Court), and Justices Roberts and Hughes (Hoover appointees), wholeheartedly joined Frankfurter's opinion. Justice Douglas, for example, demonstrated the high level of enthusiasm amongst the members of the majority when he called the draft "historic" and "truly statesmanlike."<sup>45</sup>

## 2. Justice Stone's dissent

Justice Harlan Fiske Stone, a holdover appointee from Calvin Coolidge, stood alone in dissent. His dissent focused on freedom of thought, spirit, expression, and most importantly, religious freedom. In his words,

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. They presuppose the right of the individual to hold such opinions as he will and to give them reasonably free expression, and his freedom, and that of the state as well, to teach and persuade others by the communication of ideas. The very essence of liberty which they guaranty is the freedom of the individual from compulsion as to what he shall think and what he shall say, at least where the compulsion is to bear false witness to his religion. If these guaranties are to have any meaning they must, I

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43. Indeed, Frankfurter, who had been a member of the national committee of the American Civil Liberties Union before joining the court, desired to have it both ways. *Id.* at 181. Frankfurter viewed himself as a civil libertarian, and the ACLU had filed a brief in the case on behalf of the Gobitis. *Id.* Frankfurter said that in his view the best way to promote national unity was not by forcing everyone to salute the flag—rather he favored tolerating such "crotchety" beliefs. *Id.* "But, Frankfurter went on to explain, the job of the Court was not to decide whether the school board had followed the best course of action. It was, instead, to ascertain whether the school board had made a reasonable choice in requiring the children to salute." *Id.* at 181–82.

44. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. at 595. As Feldman explains, in Frankfurter's view patriotism "was the glue that held the nation together: 'The flag is a symbol of our national unity, transcending all internal differences, however large, within the framework of the Constitution.'" FELDMAN, *supra* note 9, at 181. To put an exclamation point on this view, Frankfurter quoted Oliver Wendell Holmes: "We live by symbols." *Gobitis*, 310 U.S. at 596, *quoted in* FELDMAN, *supra* note 9, at 181 n.9.

45. FELDMAN, *supra* note 9, at 182.

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.<sup>46</sup>

Justice Stone's dissent has been widely recognized as a stirring defense of the individual's liberty of conscience against compelling expression of beliefs that violate one's religious convictions.<sup>47</sup> By the time *Gobitis* was reversed by *Barnette* in 1943, Justice Stone had replaced Hughes as Chief Justice, and he assigned the task of writing the *Barnette* opinion to a new member of the court, Justice Robert H. Jackson, who had been appointed in 1941.

### III. THE INTERIM

In some ways, Frankfurter's majority opinion in *Gobitis* was the high-water mark of his intellectual leadership of the group of justices appointed by Franklin D. Roosevelt.<sup>48</sup> Although Frankfurter was very proud of the decision, and would cling to its reasoning even when the majority of his brethren on the Court abandoned it, the political and legal fallout turned out to be devastating.

#### A. *The Anti-Jehovah's Witness Backlash*

What Frankfurter had not foreseen was the social, political, and legal reaction to the decision. As Manwaring recounts, and numerous other commentators have affirmed, "[t]he wave of anti-Witness persecution which swept the country after the *Gobitis* decision is legendary."<sup>49</sup> Although this was probably only partially due to the decision itself, it was undoubtedly an important contributing factor, and indeed a trigger.

Hundreds of instances of vigilantism against Jehovah's Witnesses who refused to salute the flag were reported in just the week following

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46. *Gobitis*, 310 U.S. at 604 (Stone, J., dissenting).

47. While Stone's defense of conscience in his *Gobitis* dissent is quite stirring, it is interesting to note that five years later, while serving as Chief Justice, Stone died from a cerebral hemorrhage suffered while reading a dissenting opinion from the bench in a case where he would have disallowed naturalization of a Seventh-day Adventist conscientious objector who refused to make a declaration that she would be willing to fight for the defense of the country. See *Girouard v. United States*, 328 U.S. 61, 69–79 (1946) (Stone, C.J., dissenting).

48. FELDMAN, *supra* note 9, at 185 ("It seemed right that Frankfurter should assume intellectual leadership on the newly formed Roosevelt Court. Yet this would turn out to be the momentary high point of Frankfurter's judicial influence among the Roosevelt appointees.")

49. MANWARING, *supra* note 8, at 163.

the decision.<sup>50</sup> These included mob beatings, burning of Jehovah's Witnesses Kingdom Halls, and attacks on houses where Jehovah's Witnesses were believed to live. As Noah Feldman has described the reaction, "To some horrified observers, it appeared that the Supreme Court, by denying the children the constitutional right to be exempt from saluting, had declared open season on the Witnesses."<sup>51</sup> One of the most notorious episodes took place in York County, Maine:

Two Witnesses were beaten in Sanford on June 8, when they refused to salute. The following day, in Kennebunk, a carload of men conveniently equipped with throwing-size rocks "just happened to stop" in front of the Jehovah's Witness Kingdom Hall which doubled as the home of the company servant. The Witnesses, already jittery from a fortnight of tension, greeted the visitors with shotgun fire, seriously wounding one. Six Witnesses were arrested for attempted murder. In the meantime, an enraged mob of 2,500, failing to reach the prisoners, sacked and burned the Kingdom Hall, then drifted over to Biddeford to attack houses suspected of containing Witnesses. . . . The well-publicized outburst in Maine may well have had as much to do with triggering persecution elsewhere as the *Gobitis* decision itself.<sup>52</sup>

Many local and state governments adopted flag-salute statutes, and as a result, scores of Witness students were expelled from school.<sup>53</sup> One of the most common occurrences of vigilantism was the arbitrary imprisonment of Jehovah's Witnesses.<sup>54</sup> Sometimes this imprisonment was for the purpose of protecting the Jehovah's Witnesses from mobs, but more often it involved authorities who were complicit in the persecutions of Jehovah's Witnesses in the aftermath of *Gobitis*.<sup>55</sup>

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50. Manwaring recounts these in detail. Among other incidents, the whole adult population of Litchfield, Illinois, gathered to attack 60 Jehovah's Witnesses; in Rawlings, Wyoming, a crowd led by the American Legion descended upon a trailer camp set up by Jehovah's Witnesses in preparation for a regional meeting and forced them across the state line; in Nebraska a Witness was lured from his house, abducted, and castrated; in Little Rock, Arkansas, armed workers from a federal pipeline project beat Witnesses, shooting two; in Klamath Falls, Oregon, a mob of a thousand townspeople stormed a Kingdom Hall. MANWARING, *supra* note 8, at 163-86. Feldman recounts, "Between June 12 and 20, 1940, the FBI received reports of hundreds of cases of anti-Witness violence, including attacks on Bible meetings." FELDMAN, *supra* note 9, at 185.

51. FELDMAN, *supra* note 9, at 185.

52. MANWARING, *supra* note 8, at 164-65.

53. *Id.* at 185.

54. *Id.* at 166 ("It became fashionable in many places to jail Witnesses on sight, 'just in case.'").

55. *Id.* ("The most disturbing aspect of the mounting persecution was the frequent involvement of local public officials.").

The political context also underwent a seismic shift between 1940 and 1943. By 1943 the U.S. was at war with Nazi Germany—“a country whose policies were aimed precisely at suppressing a religious minority.”<sup>56</sup> As Feldman explains, “To liberals, tolerance, not saluting, had become the American form of patriotism.”<sup>57</sup>

### B. *The Supreme Court*

Between *Gobitis* and *Barnette*, the Supreme Court heard numerous cases involving Jehovah’s Witnesses. Most had to do with various tax schemes that were imposed upon door-to-door solicitors, including those like the Witnesses who were distributing religious materials. One of these cases, *Jones v. Opelika*,<sup>58</sup> is noteworthy because three of the justices—Black, Douglas, and Murphy—who had joined Frankfurter’s majority in *Gobitis* took the unusual step of calling for the case to be revisited.<sup>59</sup> The dissent had nothing to do with the facts of *Opelika*, and essentially amounted to an apology for their votes in *Gobitis*.<sup>60</sup>

Also significant was the replacement of Justice James F. Byrnes, a prominent New Dealer who left the Court after just one term to head President Roosevelt’s Office of War Mobilization, by Wiley Rutledge, who had decided a license tax dispute in favor of the Jehovah’s Witnesses while on the D.C. Circuit Court of Appeals.<sup>61</sup> Justice

56. FELDMAN, *supra* note 9, at 228.

57. *Id.*

58. *Jones v. City of Opelika*, 316 U.S. 584, 623–24 (1942) (Black, Douglas, and Murphy, J., dissenting).

59. *Id.*

60. Justices Black, Douglas, and Murphy wrote,

The opinion of the Court sanctions a device which in our opinion suppresses or tends to suppress the free exercise of a religion practiced by a minority group. This is but another step in the direction which *Minersville School Dist. 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 in the *Gobitis* Case, we think this is an appropriate occasion to state that we now believe that it was also wrongly decided.

*Id.* Feldman recounts how stung Douglas, Black, and Murphy felt in response to the widespread liberal condemnation of the majority position in *Gobitis*. “[T]he liberal outcry over the case could have only one interpretation: The Court had gotten the *Gobitis* case wrong. Condemnation in the liberal media meant that they had misunderstood not only the will of the people but the true meaning of liberalism. Frankfurter had led them astray. Stone’s dissent was right. The Coolidge appointee had out-liberaled them.” FELDMAN, *supra* note 9, at 186.

61. MANWARING, *supra* note 8, at 202. Dissenting in a three-judge panel decision, Rutledge wrote,

This is no time to wear away further the freedoms of conscience and mind by nicely technical or doubtful construction. Everywhere they are fighting for life. . . . They can be lost in time also by steady legal erosion wearing down broad principle into thin

Robert H. Jackson, who would author the Court's opinion in *Barnette*, was another important new addition to the Court.<sup>62</sup>

In *Opelika*, the Court had divided closely at 5–4,<sup>63</sup> and the Supreme Court granted a petition for rehearing in *Opelika* on February 15, 1943, the day Justice Rutledge was sworn in as a justice of the Court.<sup>64</sup> On May 3, 1943, the Supreme Court reversed its holding in *Opelika*, and in the companion case, *Murdock v. Pennsylvania*, struck down a licensing scheme as a violation of Free Exercise rights.<sup>65</sup> *Murdock* was argued on March 11, 1943, the same day that the court heard argument in *West Virginia v. Barnette*.<sup>66</sup> In *Barnette*, the court dominated by Roosevelt's appointees reversed itself for the first time, a brief three years after its resounding 8–1 affirmation of compelling participation in the flag salute in *Gobitis*.

#### IV. *BARNETTE*

##### A. *Background*

West Virginia was one of the states that stiffened its laws compelling participation in patriotic observances in the wake of *Gobitis*. State law required all students to attend public schools, and in January 1942, pursuant to this law, the State School Board passed a resolution requiring students to participate in saluting the flag.<sup>67</sup> The resolution quoted Frankfurter's *Gobitis* opinion at length, emphasizing the importance of obedience to general laws that promote national unity and national security. For example, the resolution provided in

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right. Jehovah's Witnesses have had to choose between their consciences and public education for their children. In my judgment, they should not have to give up also the right to disseminate their religious views in an orderly manner on the public streets, exercise it at the whim of public officials, or be taxed for doing so without their license. I think the judgment should be reversed.

*Id.* (quoting *Busey v. District of Columbia*, 129 F.2d 24, 38 (D.C. Cir. 1942)).

62. Justice Robert H. Jackson had a varied and interesting career, but he was most proud of his work as the U.S. prosecutor at the Nuremberg Trials. For his first-person account of what transpired at Nuremberg, see Robert H. Jackson, *Nuremberg in Retrospect: Legal Answer to International Lawlessness*, 35 A.B.A. J. 813 (1949).

63. MANWARING, *supra* note 8, at 198.

64. *Id.* at 203.

65. *Jones v. City of Opelika*, 319 U.S. 103 (1943); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

66. MANWARING, *supra* note 8, at 207.

67. This was done pursuant to a West Virginia law that required all public and private schools to provide instruction in U.S. history and civics "for the purpose of teaching, fostering and perpetuating the ideals, principles and spirit of Americanism. . . ." W.VA. CODE § 1734 (1943), *quoted in* MANWARING, *supra* note 8, at 208.

part,

WHEREAS, the West Virginia State Board of Education recognizes 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 religious beliefs . . . that national unity is the basis of national security . . . that the public schools . . . are dealing with the formative period in the development of citizenship . . . .<sup>68</sup>

The Board resolved,

That the West Virginia State Board of Education does hereby recognize and order that the commonly accepted salute to the Flag of the United States . . . now becomes a regular part of the program of activities in the public schools . . . and that all teachers . . . and pupils in such schools shall be required to participate . . . provided, however, that refusal to salute the Flag be regarded as an act of insubordination, and shall be dealt with accordingly.<sup>69</sup>

This provision was aimed directly at Jehovah's Witness children, who were quite numerous in West Virginia.<sup>70</sup> Witness children were expelled from school throughout the state.<sup>71</sup> Some state judges tried to mitigate the effect of the expulsions, citing religious freedom grounds that the expulsion violated the West Virginia Constitution's religious freedom guarantee.<sup>72</sup>

In the wake of the dissents in *Jones v. Opelika*, the Jehovah's Witnesses' new chief legal strategist, Hayden Covington, knew it was time to bring another case testing the constitutionality of the flag salute. For strategic reasons, West Virginia was an attractive forum because a case to enjoin a statewide regulation requiring the flag salute could be brought before a three-judge District Court panel, which

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68. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 626 (1943), *quoted in* MANWARING, *supra* note 8, at 209.

69. MANWARING, *supra* note 8, at 209.

70. *Id.*

71. Brief of Plaintiffs at 6, 75, *Barnette v. W. Va. State Bd. of Educ.*, 47 F. Supp. 251 (S.D. W. Va. 1942) (No. 242), *cited in* MANWARING, *supra* note 8, at 209.

72. Manwaring notes that, "In spite of the stringent governing statutes, such actions seem to have been neither numerous nor particularly successful. . . . One factor operating was the hostility of many trial judges." MANWARING, *supra* note 8, at 209. As evidence of this, Manwaring highlights cases in Hancock and Upshar counties in which the judges acknowledged the legality of the expulsions, but maintained that any further punishment of the non-saluting children or their parents would violate West Virginia's constitutional protections of religious freedom. *Id.* at 209.

could then be appealed directly and expeditiously to the Supreme Court.<sup>73</sup>

### *B. The Lower Court Decision*

The *Barnette* case was initially heard by a three-judge tribunal made up of Federal District Court Judge Ben Moore, District Judge Harry E. Watkins, and Fourth Circuit Court of Appeals Judge John J. Parker. At a preliminary hearing, the lawyer for the state school board, Ira Partlow, admitted that he disapproved of the school board's policy, but believed it was legal.<sup>74</sup> At the initial hearing, Judge Parker was openly critical of the school board's policy and urged the board to reach a compromise with the Jehovah's Witnesses, but the next day the School Board voted against compromise.<sup>75</sup>

After another hearing, the three-judge panel decided in favor of *Barnette* and against the school officials, and issued a permanent injunction prohibiting the school board "from requiring the children of the plaintiffs, or any other children having religious scruples against such action, to salute the flag of the United States, or any other flag, or from expelling such children from school for failure to salute it."<sup>76</sup>

Reaching back to the rationale in the lower court opinions in the *Gobitis* case, Judge Parker, writing for a unanimous panel, stated the issue and legal standard as follows:

To justify the overriding of religious scruples . . . there must be a clear justification therefor in the necessities of national or community life. Like the right of free speech, it is not to be overborne by the police power, unless its exercise presents a clear and present danger to the community. . . .

Can it be said . . . 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. . . ?<sup>77</sup>

So stated, the answer to the question was easy—"to ask these

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73. *Id.* at 211.

74. *Id.* at 212.

75. *Id.*

76. *Id.* (quoting Injunction) (on file in the Federal Court Building, Charleston, West Virginia).

77. *Barnette v. W. Va. State Bd. of Educ.*, 47 F. Supp. 251, 254 (S.D. W. Va. 1942), quoted in *MANWARING*, *supra* note 8, at 213.

questions is to answer them, and to answer them in the negative.”<sup>78</sup> According to the panel, “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.”<sup>79</sup>

### C. Arguments Before the Supreme Court

In its appeal to the Supreme Court, West Virginia, on behalf of the State Board of Education, emphasized the *Gobitis* decision. The State appealed to the value of *stare decisis*, arguing that the Court must be consistent with its earlier precedents in order to garner institutional respect and in order to give people a basis for planning their affairs on an orderly manner.<sup>80</sup> At oral argument, the state’s lawyer emphasized that the flag salute regulation was a general, non-discriminatory, educational measure, precisely like the one upheld in *Gobitis*.<sup>81</sup>

The Jehovah’s Witnesses’ brief focused on three primary claims: first, that compelled flag salutes were a violation of the children’s Free Exercise rights, second, that the regulation violated the due process clause of the Fourteenth Amendment, and third, that the *Gobitis* decision had pernicious effects and should be overturned.<sup>82</sup> These arguments were a marked improvement upon those made by Rutherford in the *Gobitis* case.

### D. The Supreme Court

On Flag Day, June 14, 1943, the Supreme Court issued a 6–3 decision in favor of the Barnette children, expressly overruling *Gobitis*.<sup>83</sup> The majority opinion was written by Justice Jackson, who had taken his seat on the court after *Gobitis* had been decided. He was joined by Justices Stone, Black, Douglas, Murphy, and Rutledge. Justices Black, Douglas and Murphy, who had written the dissent in *Opelika* regretting their position in *Gobitis*, concurred separately in

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78. *Id.*, quoted in MANWARING, *supra* note 8, at 213.

79. *Id.*, quoted in MANWARING, *supra* note 8, at 213.

80. Brief for Appellants, *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (No. 591), cited in MANWARING, *supra* note 8, at 216.

81. MANWARING, *supra* note 8, at 212.

82. Brief of Appellee, *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (No. 591), cited in MANWARING, *supra* note 8, at 217.

83. *Barnette*, 319 U.S. at 640.

two additional opinions. Justices Reed and Roberts dissented, stating simply that in their opinion *Gobitis* remained good law, as did Justice Frankfurter, who wrote a long, vigorous dissenting opinion that Reed and Roberts declined to join.<sup>84</sup>

### 1. Justice Jackson's majority opinion

Justice Jackson's opinion contained a point-by-point rebuttal to the arguments made three years earlier in Justice Frankfurter's majority opinion in *Gobitis*.<sup>85</sup> Most importantly, in response to Frankfurter's arguments in favor of judicial restraint, Jackson advanced a strong formulation of "preferred freedoms," including the freedom of speech, the press, and religion, which were to be weighed differently than restrictions on economic interests.<sup>86</sup> These freedoms, Jackson wrote, "are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect."<sup>87</sup> According to Jackson, the "very purpose of the *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."<sup>88</sup> Language like this would become commonplace in Supreme Court opinions over the next

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84. *Id.* at 646–71.

85. *Id.* at 636–42. Justice Jackson first addressed Frankfurter's characterization of the issue as being either a government that is too strong to support liberty or too weak to exist, and countered that "[g]overnment of limited power need not be anemic government" because "observance of the limitations of the Constitution will not weaken the government in the field appropriate for its exercise." *Id.* at 636–37. Jackson then rejected the argument that the Supreme Court ought not interfere with the authority of the school boards, noting that "[t]he Fourteenth Amendment . . . protects the citizen against the State itself and all of its creatures—Boards of Education not excepted." *Id.* at 637. Next Jackson dismissed the argument that this was an issue better left to the political processes. He argued, "The very purpose of the *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 . . . freedom of worship . . . may not be submitted to vote; [it] depend[s] on the outcome of no elections." *Id.* at 638 (italics in original). Finally, Jackson attacked the national unity argument and noted that, "[n]ational unity as an end which officials may foster by persuasion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement." *Id.* at 640. Jackson argued that it was not constitutionally permissible, and coined his famous observation that "[i]f 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." *Id.* at 640–62.

86. *Barnette*, 319 U.S. at 639, cited in MANWARING, *supra* note 8, at 226.

87. *Id.*, quoted in MANWARING, *supra* note 8, at 226.

88. *Id.* at 638. Jackson continued, "fundamental rights may not be submitted to a vote; they depend on the outcome of no elections." *Id.* at 638.

forty years, but in 1943 this was a relatively new and resounding articulation of the protections afforded by the Bill of Rights.

Jackson then responded to Frankfurter's central argument that national unity is needed to preserve national security:

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. . . . Those who begin coercive elimination of dissent soon find themselves exterminating dissenters."<sup>89</sup>

This is a deft inversion of Frankfurter's concern about national unity and security. These values are not viewed as a grave and present danger that would justify compelling everyone to salute the flag; rather, compelling unity itself is what would constitute a grave national catastrophe.

In Jackson's view, coercing uniformity is no way to generate unity, because forcing people into a showdown between conscience and following the law creates a scenario with no winners. Furthermore, when doctrines are imposed on everyone, the battle over which doctrine to impose becomes embracing. The final logic of such a contest is the extermination of dissenters by those who insist upon eliminating dissent.

For Jackson, one of the fundamental lessons of our constitutional democracy is that the government, whether national, state, or local, must stay out of the business of coercing orthodoxy in matters of opinion. In his formulation, this involved protecting free speech for everyone, not just religious dissenters:

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

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89. *Id.* at 641, *quoted in* MANWARING, *supra* note 8, at 228.

of the First Amendment to our Constitution to reserve from all official control.<sup>90</sup>

According to Jackson's formulation, compelling the flag salute violates the most basic protection of conscience—the sphere of mind and heart—afforded by the First Amendment. In contrast to what might be called Frankfurter's orthodox secularism, in which the right way is right for everyone, Jackson offers up a vision of pluralism bounded by a framework of secularity.<sup>91</sup>

In their concurring opinions, Black, Douglas, and Murphy strive to set out what the appropriate test should be for measuring claims of religious conscience. Black and Douglas propose a test that would require obedience when “either imperatively necessary to protect society as a whole from grave and pressingly imminent dangers,” or in the event that the regulations “merely regulate time, place or manner of religious activity.”<sup>92</sup>

Justice Murphy begins his concurring opinion with a strong endorsement of the principle of religious freedom. “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.”<sup>93</sup> He proposed approving limits only “insofar as essential operations of government may require it for the preservation of an orderly society,” such as the requirement that someone give evidence in court.<sup>94</sup>

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90. *Id.* at 642, *quoted in* MANWARING, *supra* note 8, at 229.

91. I contrast at length the difference between secularism and secularity in Brett G. Scharffs, *Four Views of the Citadel: The Consequential Distinction between Secularity and Secularism*, RELIGION & HUM. RTS. (forthcoming) (internal citations omitted):

Both secularity and secularism are linked to the general historical process of secularization, but as I use the terms, they have significantly different meanings and practical implications. By “secularity” I mean an approach to religion-state relations that avoids identification of the state with any particular religion or ideology (including secularism itself) and that endeavors to provide a neutral framework capable of accommodating a broad range of religions and beliefs. By “secularism”, in contrast, I mean an ideological position that is committed to promoting a secular order. Secularity is a more modest concept, committed to creating what might be called a broad realm of “constitutional space” in which competing conceptions of the good (some religious, some not) may be worked out in theory and lived in practice by their proponents, adherents, and critics. Secularism, in contrast, is itself a positive ideology that the state may be committed to promoting, an ideology that may manifest itself as opposition to religiously-based or religiously-motivated reasons by political actors, hostility to religion in public life and an insistence that religious manifestations, reasons, or even beliefs be relegated to an ever-shrinking sphere of private life, or even an aggressive proselytizing atheism, or what has been called “secular fundamentalism.”

92. *Id.* at 643–44, *quoted in* MANWARING, *supra* note 8, at 229.

93. *Id.* at 645.

94. *Id.* at 645–46, *quoted in* MANWARING, *supra* note 8, at 230. Justice Murphy

## 2. *Justice Frankfurter's dissent*

According to Manwaring,

Justice Frankfurter's lone dissenting opinion in *Barnette* is best described as a prolonged and very personal cry of outrage. Not only had the majority decided wrongly and maligned a Frankfurter opinion; they had violated the proprieties of judging itself. Frankfurter lectured his brethren—the tone of the opinion precludes any other description—on the law and their duty as judges in a manner reminiscent of his classroom days at Harvard.<sup>95</sup>

Noah Feldman concurs: “Frankfurter took the reversal of his *Gobitis* opinion as a professional and personal calamity.”<sup>96</sup> Frankfurter's dissent is, in Feldman's words, “the most agonized and agonizing opinion recorded anywhere in the U.S. reports.”<sup>97</sup> In one sentence Frankfurter begins with an extremely personal reflection upon his Jewish identity, quickly summarizes his view about judicial restraint and the proper limited role of judges, and ends with a defensive invocation of his *bona fides* as a civil libertarian:

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.<sup>98</sup>

Justice Frankfurter saw the case turning on the role of the judiciary in the legislative process. In this case, as in *Gobitis*, he argued, reasonable men could differ as to the necessity of a compulsory flag salute as a way of promoting good citizenship, but it is not the role of the judiciary to deem a law unconstitutional when the legislature could have had a reasonable basis for passing it. For Frankfurter, his *Barnette* dissent, like his *Gobitis* majority opinion

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concludes, “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 . . . .” *Barnette*, 319 U.S. at 646.

95. MANWARING, *supra* note 8, at 230.

96. FELDMAN, *supra* note 9, at 229 “It was bad enough that the Court had rejected the philosophy of judicial restraint on which he had built his reputation. But it was much worse that the Court was using the flag salute as a metaphor for the Nazis' oppression of Jews.” *Id.*

97. *Id.*

98. *Barnette*, 319 U.S. at 646–47 (1943) (Frankfurter, J., dissenting).

before it, became an opportunity to propound his philosophy of judicial restraint.<sup>99</sup>

He specifically rejected the “preferred freedoms” doctrine: “The Constitution does not give us greater veto power when dealing with one phase of ‘liberty’ than with another.”<sup>100</sup> Frankfurter also embraced a new formulation of the “secular regulation” rule, which held that laws that burden religious exercise are constitutional. According to Frankfurter,

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. . . . 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 is only in a theocratic state that ecclesiastical doctrines measure legal right or wrong.<sup>101</sup>

For Frankfurter, the flag salute statutes were non-discriminatory laws. Taking religion into account is something that would only be done in a theocratic state. This can only be described as willful blindness to the history and purpose of the adoption of the mandatory flag salute measures. They were most certainly not non-discriminatory laws; rather they were specifically targeted at a particular religious minority, in an effort to extract conformity from them.

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99. According to Feldman,

Although he sensed it only incompletely, Frankfurter was facing the most important crossroads of his judicial career. For more than a quarter of a century, while conservatives controlled the Supreme Court, Frankfurter had argued that judges must allow democratic majorities to act as they pleased, even when their decisions were fundamentally flawed. Now liberals had a majority on the Supreme Court—and they were arguing that the Court should intervene to protect the rights of minorities. Frankfurter realized that if he remained a stalwart of judicial restraint, he would be condemned by the liberals whom he had hoped to lead. But having made a career arguing against judicial interference in the majority’s decisions, Frankfurter chose to stick to his guns.

FELDMAN, *supra* note 9, at 231–32. The irony was that as a result of his principled consistency, Frankfurter was transformed from a liberal 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.

*Id.* at 232.

100. *Barnette*, 319 U.S. at 648, *quoted in* MANWARING, *supra* note 8, at 231.

101. *Barnette*, 319 U.S. at 653–54, *quoted in* MANWARING, *supra* note 8, at 233.

In all, it took the Jehovah's Witnesses six trips to the Supreme Court to secure the conscientious right to be free from coercion with respect to the Pledge of Allegiance.<sup>102</sup>

## V. IMPLICATIONS FOR THE MEANING OF BELONGING

It is hard not to be struck by the resonance of these decisions for our current political moment, when strong forces promoting equality, unity, and uniformity are aligned against powerful claims of conscience. What we might call the Frankfurter/*Gobitis* conception of unity is based upon trusting the state and its political institutions to inculcate, and if required, to impose the necessary values upon the citizenry that will generate national unity and its corollary, security. Under this vision, general and neutral laws (or those that can be so construed) that treat everyone equally have a strong presumption in their favor. Equality trumps freedom. The Jackson/*Barnette* conception, in contrast, is based upon a pluralism that is far more tolerant of dissent and difference. Conscience is protected and vindicated, except when the most pressing state interests are jeopardized.

### A. *Belonging in Gobitis*

#### 1. *Justice Frankfurter's view*

Implicit in Frankfurter's opinion is a very clear picture of, to use Professor Robert Burt's phrase, belonging to America.<sup>103</sup> The image of belonging "to" is more powerful than the image of belonging "in" because there is a sense of ownership and inclusion that is richer than merely being present in or a part of the group.

In Frankfurter's view of belonging, significant trust is placed in political institutions, and there is considerable deference to their "authority to safeguard the nation's fellowship."<sup>104</sup> Courts are to exercise considerable restraint and must not substitute their policy judgments for those of the majoritarian institutions. Frankfurter

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102. MANWARING, *supra* note 8, at 249.

103. Robert A. Burt, Alexander M. Bickel Professor of Law, Yale University, Address at the Brigham Young University Symposium on Belonging: Belonging in America: How to Understand Same-Sex Marriage (Jan. 28, 2011) (Professor Burt's address was presented by Steve Averett, Brigham Young University faculty member).

104. This is the phrase Frankfurter uses in the first paragraph of his *Gobitis* opinion, where he contrasts this authority with liberty, including the "liberty of conscience." 310 U.S. at 591.

conceives of the claims of conscience being individual—the “pursuit of one’s convictions about the ultimate mystery of the universe”<sup>105</sup> or “his conception of religious duty”<sup>106</sup>—whereas the interests on the other side are viewed as being communal—the “felt necessities of society”<sup>107</sup> or “the secular interests of his fellow men.”<sup>108</sup> Not surprisingly, so conceptualized, the generalized interests of the many outweigh the quixotic interests of the individual.

At the heart of Frankfurter’s view of belonging is “national cohesion,” which requiring participation in the flag salute is designed to promote.<sup>109</sup> According to Frankfurter, “We are dealing with an interest inferior to none in the hierarchy of legal values. National unity is the basis of national security.”<sup>110</sup> Thus, belonging rests upon unity, and unity is fostered when everyone is treated equally and is subject to the same requirement to salute the flag.

The significance of the flag is that it is the very symbol of our national unity. Quoting Justice Oliver Wendell Holmes, Frankfurter declares, “We live by symbols” and the “flag is the symbol of our national unity, transcending all internal differences, however large, within the framework of the Constitution.”<sup>111</sup> Frankfurter asserts that the flag is “the emblem of freedom in its truest, best sense,” signifying “government resting on the consent of the governed,” representing “liberty regulated by law,” as well as “the protection of the weak against the strong,” and “security against the exercise of arbitrary power.”<sup>112</sup> No doubt, this expression was felt as bitterly ironic by the Gobitis and other dissenters. Frankfurter reassures them that forcing them to comply with the directive to salute the flag vindicates “liberty regulated by law” and the “protection of the weak against the strong,” but nothing could be further from the truth. Frankfurter’s assertions are so directly contrary to the basic implications of his holding that his rhetoric stands as a solemn reminder of how deeply contrary to our stated intentions our actions may be.

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105. *Id.* at 593.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 595.

110. *Id.*

111. *Id.* at 596 (quoting *Halter v. Nebraska*, 205 U.S. 34, 43 (1907)).

112. *Id.*

## 2. *Justice Stone's view*

The view of belonging implicit in Justice Stone's dissent is based upon pluralism and respect for conscientious difference. Justice Stone does not disagree that national unity is an important value, but he does disagree that compelled affirmations in conflict with conscience are an appropriate means of achieving unity.

[W]hile 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.<sup>113</sup>

While voluntary participation in patriotic exercises may promote national unity, compelling them is not permitted under the Constitution.

## B. *Belonging in Barnette*

### 1. *Justice Jackson's view*

The conception of belonging implicit in the Jackson/*Barnette* approach to the flag salute issue is based upon pluralism and respect for difference, and it builds upon and expands the view expressed by Justice Stone's dissent in *Gobitis*. Unity is the byproduct of a constitutional system that respects conscience and demands conformity only when genuinely necessary.

### 2. *Justice Frankfurter's dissent*

If anything, Justice Frankfurter's dissent in *Barnette* offers an even more strident and illiberal conception of belonging than his majority opinion in *Gobitis*. In *Barnette* he speaks as a minority of one in defense of an approach that has been rejected by a majority of the Court. Even the Justices Reed and Roberts, who did not reverse their position in *Gobitis*, were unwilling to join Frankfurter's approach in *Barnette*.

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113. *Id.* at 605.

According to Frankfurter, the only question in the case is whether “legislators could in reason have enacted such a law.”<sup>114</sup> In answering this question, Frankfurter declares

I cannot bring my mind to believe that the “liberty” secured by the Due Process Clause gives this Court authority to deny 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.<sup>115</sup>

Because the state of West Virginia has not acted completely without reason, Frankfurter says, the Court must not interfere with its judgments.<sup>116</sup> Frankfurter then goes on to lecture the Court for more than twenty pages on the virtues of judicial restraint.<sup>117</sup> Frankfurter again insists that the case involves “a general non-discriminatory civil regulation” that “touches conscientious scruples or religious beliefs of an individual or group.”<sup>118</sup>

Frankfurter then invokes Jefferson for the principle that religious freedom really means nothing more than equal treatment:

So far as the state was concerned, there was to be neither orthodoxy nor heterodoxy. And so Jefferson and those who followed him wrote guaranties of religious freedom into our constitutions. Religious minorities as well as religious majorities were to be equal in the eyes of the political state. But Jefferson and the others also knew that minorities may disrupt society. It never would have occurred to them to write into the Constitution the subordination of the general civil authority of the state to sectarian scruples.<sup>119</sup>

The conception of belonging implicit here is purportedly one based upon equal treatment. Frankfurter is quite blind to the fact that the

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114. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 647 (1943) (Frankfurter, J., dissenting).

115. *Id.*

116. *Id.*

117. *Id.* at 647–71. For example, Justice Frankfurter quotes Justice Holmes for the proposition that, “It must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.” *Id.* at 649 (quoting *Mo. Kan. Tex. Ry. Co. v. May*, 194 U.S. 267, 270 (1904)). According to Frankfurter, Holmes was stating “that responsibility for legislation lies with legislatures, answerable as they are directly to the people, and this Court’s only and very narrow function is to determine whether within the broad grant of authority vested in legislature they have exercised a judgment for which reasonable justification can be offered.” *Id.*

118. *Id.* at 651.

119. *Id.* at 653.

West Virginia state school board, like the Minersville, Pennsylvania school board before it, was dictating what is orthodox. To Frankfurter, because the school board was not imposing an explicitly religious orthodoxy, its actions are subject only to very minimal review, even though its actions were directly targeted at suppressing religious dissent.

Religious freedom is transformed by Frankfurter into an equality norm. Frankfurter insists he is vindicating “religious equality, not civil immunity.”<sup>120</sup> For Frankfurter, the essence of religious freedom is “freedom from conformity to religious dogma, not freedom from conformity to law because of religious dogma.”<sup>121</sup> Otherwise, Frankfurter warns, the specter is raised of every man becoming a law unto himself: “[E]ach individual could set up his own censor against obedience to laws conscientiously deemed for the public good by those whose business it is to make laws.”<sup>122</sup> The logic of this viewpoint is that general and neutral laws must be enforced equally against everyone, or else each person would simply decide for themselves which law to obey.

This, of course, is a straw man argument. Even the most ardent defender of religious freedom does not propose that every person’s conscience gives them an absolute veto over the law. The serious question is what the appropriate basis will be for granting or denying a requested exemption—what is the appropriate standard for imposing a limitation upon religious freedom? Perhaps it will be a compelling state interest, or, as Justice Jackson puts it in *Barnette*, perhaps limitations on religious freedom are permissible “only to prevent grave and immediate danger to interests which the State may lawfully protect.”<sup>123</sup>

But for Frankfurter, belonging rests upon equality, even if that equality requires coerced unanimity. The legislation in question, Frankfurter concedes, may be illiberal, but “the liberal spirit” cannot be “enforced by judicial invalidation of illiberal legislation. . . . 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.”<sup>124</sup> Frankfurter is surely correct that at the end of the day a “free society” rests upon a community’s commitment to freedom; but for

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120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 639 (majority opinion).

124. *Id.* at 670–71 (Frankfurter, J., dissenting).

Frankfurter, judicial restraint prevents the Court from invalidating legislation that is clearly contrary to that liberal spirit.

*C. Implications for this Symposium's Theme of Belonging*

It is interesting that in 1943, when feelings of national unity and resolve were high, respecting conscientious difference was not viewed as unduly threatening. Three years earlier, when the nation was deeply divided over whether or not to enter the war, compelling conformity was deemed necessary as a way of manufacturing unity.

Under the Frankfurter/*Gobitis* view, uniformity, regularity, consistency, and general and equal application of the laws to everyone is the recipe for national unity. The underlying picture of belonging is based upon empowering schools to counteract the disruptive teaching of parents who might have counterproductive influences on their children. Belonging in the United States is a result of having the right attitudes of patriotism and loyalty inculcated in schools, which are the primary incubators of these values. From the duty to teach civics and patriotism, the ability to require student participation in patriotic exercises such as the Pledge of Allegiance is viewed as being almost axiomatic.

It is easy to see the connection between unity, the central concern at the heart of the flag salute cases, and belonging, the central theme of this symposium. One of the springboards for our discussion of belonging is the Japanese concept of *amae*, introduced to the West through the psychological work of Dr. Takeo Doi,<sup>125</sup> and translated into the U.S. family law context by former Brigham Young University law professor Bruce Hafen, who was introduced to the concept by University of Tokyo professor Akira Morita, who has addressed this topic in this symposium.<sup>126</sup>

As Hafen notes, the usual English translation of *amae* as “dependence” misses something significant, namely the element of trust.<sup>127</sup> To the Western ear, dependence has negative connotations, and suggests a developmental stage that one should pass through or overcome on the road to autonomous adulthood. As Professor Akira

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125. Hafen relied on two of Doi's key works, which had been translated into English: TAKEO DOI, *THE ANATOMY OF DEPENDENCE* (John Bester, trans., 2002) and TAKEO DOI, *THE ANATOMY OF SELF* (Mark A. Harbison, trans., 2001).

126. Akira Morita, *Amae and Belonging—An encounter of the Japanese Psyche and the Waning of Belonging in America*, 25 *BYU J. PUB. L.* 341 (2011)

127. BRUCE C. HAFEN & MARIE K. HAFEN, *THE BELONGING HEART: THE ATONEMENT AND RELATIONSHIPS WITH GOD AND FAMILY* 23–24 (1994).

Morita explained to Professor Hafen more than twenty years ago, the term “belonging” better captures the meaning of *amae*.<sup>128</sup>

*Amae* is first manifest in a child’s “longing for his mother,” but this feeling is not properly described as *amae* until the baby is “old enough to realize his independence from his mother.”<sup>129</sup> Thus, *amae* is contrasted with fear of separation. For Doi, and for Hafen and Morita interpreting Doi, *amae* is not a stage of development to be passed through, but an important permanent component of human well-being. On this view, the need to belong, to have relationships of mutual reliance and even dependence, is not simply a sign of immaturity or a stage of development, but a condition of healthy mature emotional flourishing.<sup>130</sup>

*Amae* rests upon trust that others will be sensitive and responsive to meeting one’s needs.<sup>131</sup> To my mind, the approach to belonging implicit in the Frankfurter/*Gobitis* approach to coercion and conscience is deeply at odds with the concept of *amae*. In contrast, the Jackson/*Barnette* approach to coercion and conscience has deep resonance with the concept of *amae*. Perhaps this is best illustrated in

128. Better yet, says Professor Morita, “is the German translation of *amae*, which is Freiheit in Geborgenheit, which when translated literally means “freedom through emotional security.” HAFEN & HAFEN, *supra* note 127, at 33–34.

129. *Id.*

130. Professor Morita explains this as follows: “In Western societies, childhood dependency on parents is considered a temporary state of human development, to be subsequently rejected or repressed. In contrast, *amae* survives in Japanese society without being rejected, and constitutes a moral emotional source of the Japanese values of mutual dependency and sense of belonging to a group.” Morita, *supra* note 126, at 344. Or as Hafen explained it:

As freedom in the Western mind has come to mean personal liberation from political bondage, with its profound skepticism toward authority, the Western mind has been relatively closed to the values of *amae*. For example, Americans “have always looked down on the type of emotional dependence” inherent in *amae*. Moreover, their fear of oppression and their fierce commitment to self-reliance has made Americans innately cautious about trust or depending on others—attitudes that are prerequisite to *amae*. . . . As a result of these tendencies, Western skepticism has created serious barriers to relationships of belonging and loving interdependence—even to the point of defining freedom as the rejection of dependence on others, which may mean freedom as the rejection of *amae*. In other words, our Western sense of freedom seeks to avoid belonging.

HAFEN & HAFEN, *supra* note 127, at 33–34.

131. Doi explains *amae* as follows: “*Amae* is a noun form of *amaeru*, an intransitive verb meaning ‘to depend and presume upon another’s love or bask in another’s indulgence.’ It has the same root as the word *amai*, an adjective meaning ‘sweet.’ Thus *amae* can suggest something sweet and desirable.” Takeo Doi, *On the Concept of Amae*, in UNDERSTANDING AMAE 164 (2005), *quoted in* Morita, *supra* note 126, at 343–44. Or as Hafen puts it, “The deepest psychological and emotional needs of children require continuity and stability in their relationship with parents—a relationship that can be the key factor in their eventual development of mature, personal freedom.” Bruce C. Hafen, *Individualism and Autonomy in Family Law: The Waning of Belonging*, 1991 BYU L. REV. 1, 33, *quoted in* Morita, *supra* note 126, at 346.

the reactions of the two Gobitis children's teachers. William Gobitis's teacher responded to his refusal to salute the flag by physically trying to force him to raise his arm, and he responded by clinging to his pocket. His sister Lillian's teacher, in contrast, responded by giving her a hug and calling her a "dear girl." For a brief moment, this response reflected an attitude of *amae* (trusting belonging and reliance) in the teacher-student relationship.

As Professor Morita has explained in this symposium, Doi understood that, "to become an adult is to control the ambivalence that arises between autonomy and dependence so that they complement each other, not to become an individual who achieves freedom and independence by emotionally cutting himself off from others."<sup>132</sup> To a significant extent, we may be able to answer questions about claims of conscience by asking what effect respecting or refusing to honor those claims contributes to a stable sense of belonging, both for those who exercise their conscience in contravention of group norms and expectations and for the group. Focusing on the relationships involved, Hafen suggests, helps us avoid the mistake of "abandoning children to their rights."<sup>133</sup> We can imagine, and in *Gobitis* we have observed, different modes of responding to requests for accommodating conscientious objection to saluting the flag—one that creates distance and distrust, and one that creates a sense of safety and belonging, both for the dissenter and those who are respecting the dissenter.

This deep concern for relationships has been a consistent theme in the presentations in this symposium, including Professor Helen M. Alvaré's recommendations of ways to promote stable and dignified homes for disabled persons and their families. The homes Alvaré speaks of are places where we prepare people—and not just the disabled—for lives of interdependence, and not just independence.<sup>134</sup>

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132. Morita, *supra* note 126, at 344–45.

133. Bruce C. Hafen, *Children's Liberation and New Egalitarianism: Some Reservations about Abandoning Youth to Their "Rights"*, 1976 BYU L. REV. 605, 644 (1976) (internal quotation marks omitted); *see also* Hafen, *Individualism and Autonomy*, *supra* note 131, at 68–72, available at <http://lds.org/ensign/1989/10/the-waning-of-belonging> (last visited Feb. 21, 2011), *quoted in* Morita, *supra* note 126, at 345.

134. Helen M. Alvaré, Associate Professor of Law, George Mason University School of Law, Address at the Brigham Young University Symposium on Belonging: Belonging in America: Personhood Theory and the Value of Home for Disabled Persons and their Families (January 28, 2011). Alvaré noted that in today's world we should be focused not simply on preparing people for lives of independence, but for lives of interdependence. Alvaré also contrasted Robert Frost's line that "home is the place where, when you have to go there, they have to take you in"—with respect to the disabled, the law has turned this idea on its head, and families are the one place that can keep you out. *Id.* (quoting ROBERT FROST, *The Death of the Hired Man*, in POEMS BY ROBERT FROST: A BOY'S WILL AND NORTH OF BOSTON 69, 73

Alvaré is deeply sensitive not only to the need to avoid infantilizing the disabled, but also to the importance of not imagining that our goal will always be to prepare them for a life of maximum independence.

A deep concern for relationships is also evident in Professor Ann Laquer Estin's paper on different modes of determining where children "belong" when their families exist across national boundaries.<sup>135</sup> Her framework for thinking about various mechanisms for determining belonging is helpful—belonging can be thought of in formalistic terms, subjectively as a matter of identity and affiliation, or on the basis of being present in a place.<sup>136</sup> To my mind, Frankfurter's approach in *Gobitis* reflects a more formalistic understanding of belonging based upon uniformity, upon forced participation in the flag salute, whereas the majority's approach to belonging in *Barnette* takes into account subjective affiliations and the significance of particular children being physically present in particular classrooms.

These issues take on additional complicating dimensions in light of ever-changing reproductive technologies and the increase in the number and configurations of non-traditional families, including same-sex parent families. Professor Linda Elrod's paper helps identify the myriad issues that arise just with respect to identifying who a child's parents are. Her powerful argument for emphasizing the importance of looking at these issues from the perspectives of the affected children, not just their parents, is especially moving.<sup>137</sup> One thing that is striking about the Court's opinion in *Gobitis* is the absence of a concern for how the issue is viewed by the *Gobitis* children, and what the effect of the Court's compulsion will be for them.

Professor Margaret F. Brinig goes beyond theorizing about the significance of trust in her careful empirical examination of the likelihood of divorce for those who are raised in neighborhoods

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(2001)). Elsewhere, in a different context, I have contrasted models of church-state relations that emphasize independence, interdependence, and a unique model of interdependence that I describe and advocate. See Brett G. Scharffs, *The Autonomy of Church and State*, 2004 BYU L. Rev. 1217 (2004).

135. Ann Laquer Estin, *Where (in the World) do Children Belong?*, 25 BYU J. PUB. L. 217 (2011). Professor Alvaré contrasts "formal" mechanisms that focus on citizenship and immigration status, "subjective" mechanisms that rest on indicators of identity and affiliation such as culture, language and heritage, and conceptions based upon a child's "presence in a place." Alvaré, *supra* note 134. Estin argues, "Children in the global village rarely belong to just one place, and in general, the broadest conception of where children belong helps to assure that governments will act to protect their welfare." Estin, *supra* note 135, at 217.

136. Estin, *supra* note 135, at 217.

137. Linda Elrod, *A Child's Perspective of Defining a Parent: The Case for Intended Parenthood*, 25 BYU J. PUB. L. 245 (2011).

“where trust decreases and there is less social cohesion and more disorder.”<sup>138</sup> Professor Brinig marshals convincing evidence that trust is connected with one’s sense of belonging on multiple levels—higher divorce rates later in life are correlated not just to the trust between one’s own parents, but also to more “generalized trust” that your neighborhood will “be there for you.”<sup>139</sup> For example, her findings indicate that a fourteen-year-old who lives in a neighborhood with a high divorce rate is more likely to cohabit rather than marry, and that individual’s own marriages are more likely to end in divorce.<sup>140</sup>

## VI. IMPLICATIONS FOR FAMILIES AND RECOGNITION

### A. *Families in Gobitis*

#### 1. *Justice Frankfurter’s opinion*

Justice Frankfurter argued in the *Gobitis* majority that it was good for families for children to be compelled to participate in patriotic observances such as the flag salute. As Frankfurter saw it, “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.”<sup>141</sup>

For Frankfurter, families are empowered when the state creates unity and order. Families are seen as benefitting from the strong arm of the state. For Frankfurter, parents are seen as being in competition with the state over the hearts and minds of their children, and the state is viewed as being at a comparative disadvantage to parents, which justifies compulsion at school:

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

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138. Margaret F. Brinig, *Belonging and Trust: Divorce and Social Capital*, 25 *BYU J. PUB. L.* 271, 276 (2011).

139. *Id.*

140. *Id.* at 275.

141. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 600 (1940), *quoted in* MANWARING, *supra* note 8, at 216.

which the state's educational system is seeking to promote.<sup>142</sup>

If you rushed through this long quotation, please go back and read it again. This is quite an extraordinary articulation of a vision of schools being in competition with parents, who “implant” unwanted ideas in the minds of their children and have an advantage over the state educational system because the state's commitment to religious toleration leaves those parents unmolested in their efforts to indoctrinate their children. Faced with parents so empowered, what school authorities seek, in Frankfurter's mind, is simply the right to awaken children's minds to values such as patriotism.

## 2. *Justice Stone's dissent*

Justice Stone's dissent in *Gobitis* offers an interesting counterpoint. He, too, notes that the state may be in competition with parents when it comes to the education of children, but Stone observes that the state “may through teaching in the public schools indoctrinate the minds of the young” and force them “to make affirmation[s] contrary to [their] belief[s] and in violation of [their] religious faith.”<sup>143</sup> In Stone's estimation, conceding this kind of power to the state was “a long step, and one which I am unable to take.”<sup>144</sup> Stone further explained:

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.<sup>145</sup>

Faced with a government empowered to require that children violate their basic religious tenets in the name of national unity, Stone concluded that the Constitutional protections for religious freedom outweighed any “inconveniences which may attend some sensible adjustment of school discipline in order that the religious convictions of these children may be spared.”<sup>146</sup>

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142. 310 U.S. at 599.

143. *Id.* at 602.

144. *Id.*

145. *Id.* at 602–03.

146. *Id.* at 607.

*B. Families in Barnette*

The Jackson/*Barnette* view sees families and their role quite differently. Parents, rather than the state, are viewed as having the primary role in inculcating values, and the state's views on what is good for children do not necessarily trump parents' view of what they believe to be good for their children.

*C. Implications for this Symposium's Theme of Families and Recognition*

The significance of families to one's sense of belonging can hardly be exaggerated, and has been an important theme in this symposium. The theme of being and becoming in Dr. Ya'ir Ronen's paper<sup>147</sup> resonates with the conflicts at the heart of the flag salute cases, which involved young children in the process of both being and becoming, subject to strong competing influences from family and the state. In the flag salute cases, the child's sense of belonging—at school, in their families, in their religious communities, as American citizens—exists mostly as a misty background consideration. In the background of the flag salute controversies lie very different attitudes towards the “being” of the children, and what the best way is to facilitate helping them “become” authentic human beings, true to themselves.<sup>148</sup>

The Court's focus on rights leaves little room for an in-depth consideration of the implications of the Court's choices, not to mention those of school boards, superintendents, principals, teachers, and peers, for the children's relationships. Professor Hafen's concern that our approach to these issues “abandons children to their rights” seems to be a legitimate worry.<sup>149</sup> Courts are programmed to think in terms of rights, but this can result in a sort of myopia that leaves unaddressed the implications of vindicating or failing to vindicate a right for important relationships.

Professor Laurence C. Nolan's paper on the implications of aging for belonging<sup>150</sup> might seem further removed from the issues in *Gobitis*. But consider her articulation of the need that all human

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147. Ya'ir Ronen, *On the Child's Need to Be One's Self*, 25 BYU J. PUB. L. 233 (2011).

148. As Dr. Ronen puts it, “Alongside the child's need ‘to become,’ to develop and change, to fulfill dreams and plans . . . there is another need. This is the child's need to be his or her authentic self, and . . . to be recognized as ‘somebody’ when simply being that self.” *Id.* at 234–35.

149. Hafen, *Children's Liberation*, *supra* note 133.

150. Laurence C. Nolan, *Dimensions of Aging and Belonging for the Older Person and the Effects of Ageism*, 25 BYU J. PUB. L. 317 (2011).

beings—the old and young especially—have to belong:

[T]o belong, that is, in the sense that you are not alone, but part of the group. You are not isolated from others. You matter to others rather than only to yourself. Others do not perceive you as an outsider. You feel connected to others including as a citizen to your state and country.<sup>151</sup>

This quote, I think, could have been written as an indictment of the majority approach in *Gobitis*. It does not take a large dose of moral imagination to understand that the *Gobitis* children were made to feel they did not belong, that they were made to feel isolated, that they did not matter to others, and that they were not valued as citizens.<sup>152</sup> Professor Nolan helps highlight the truth that belonging is especially important when we are most vulnerable—including when we are very young and when we are very old.<sup>153</sup>

Professor Scott FitzGibbon invites us to think about belonging as it relates to legal recognition. Legal recognition, he argues, involves characterization and accreditation of a person as a legitimate member of a group.<sup>154</sup>

Professor Lynn Wardle tackles a particularly difficult dimension of the issue of belonging—the need to exclude. Belonging does not exist without boundaries; inclusion of some implies exclusion of others. As Wardle notes, “One of the paradoxes of belonging is that the need to belong also creates a need to exclude; in order for belonging to occur, there must be boundaries, standards defining the relationship, and criteria that separate . . . . All communities have membership requirements.”<sup>155</sup> In the flag salute cases, the voices for coercion and conscience both seek to vindicate the value of belonging. For Frankfurter belonging is based upon unity and mutuality, and for Jackson belonging is consistent with accommodating conscientious

151. *Id.* at 317.

152. This sentiment is easily discerned, for example, in the handwritten note that young William Gobitis gave to his school’s directors. In his note William struggled to assert his belonging as a citizen without betraying his religious beliefs. He wrote, “I do not salute the flag not because I do not love my country but I love my country and I love God more and I must obey His commandments.” Letter from William Gobitis to the Minersville, Pennsylvania School Directors (Nov. 5, 1935) available at [http://lcweb2.loc.gov/cgi-bin/ampage?collId=mcc&fileName=016/page.db&recNum=1&itemLink=r?ammem/mcc:@field\(DOCID\)+@lit\(mcc/016\)](http://lcweb2.loc.gov/cgi-bin/ampage?collId=mcc&fileName=016/page.db&recNum=1&itemLink=r?ammem/mcc:@field(DOCID)+@lit(mcc/016)).

153. Professor Nolan notes that the elderly often have a very weak sense of belonging, and that these feelings are often an indicator of depression. Nolan, *supra* note 150, at 321.

154. Scott FitzGibbon, *Parent, Child, Husband, Wife: When Recognition Fails, Tragedy Ensues*, 25 *BYU J. PUB. L.* 203, 207–08 (2011).

155. Lynn D. Wardle, *The Boundaries of Belonging: Allegiance and the Definition of Marriage*, 25 *BYU J. PUB. L.* 287, 289 (2011).

difference. Both approaches have implications of exclusion as well as inclusion. The *Gobitis* approach had the effect of excluding the Gobitis children from the public schools because they refused to bow to the state—they were willing to pay the price of expulsion to defend their conscience. Although less obvious, *Barnette*, too, has implications for exclusion. When freedom is vindicated, equality suffers. However, instead of the community excluding the individual, in *Barnette* the individual is standing aside from the community. The unity of shared patriotic exercises is weakened when individual conscience is respected as a legitimate basis for not participating in general and universal exercises like the Pledge of Allegiance. Dissenting individuals exclude themselves from the shared patriotic observance, which undermines the equality and unity that exists when everyone participates.

## VII. IMPLICATIONS FOR CONSCIENCE AND CONSCIENTIOUS OBJECTION

This brings us to the third and final primary theme of this symposium—conscience and conscientious objection. Conscience is afforded nearly sacred status under the Jackson/*Barnette* formulation, whereas conscience is afforded far less weight in the Frankfurter/*Gobitis* view of our constitutional order.

### A. *Conscience in Gobitis*

#### 1. *Justice Frankfurter's majority opinion*

As Frankfurter originally framed the issue in the first paragraph of his opinion in *Gobitis*, the Court is called upon to “reconcile the conflicting claims of liberty and authority.”<sup>156</sup> This might appear to be a balanced characterization of the conflict, but over the course of his opinion Frankfurter squarely sides against “liberty of conscience” and on the side of authority, as he puts it, “to safeguard the nation’s fellowship.”<sup>157</sup>

The way Frankfurter frames and reframes the issue throughout his opinion is a telling and useful illustration of how the ways in which we characterize values in conflict can lead us inexorably to one outcome rather than another. With each iteration of the issue—and

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

157. *Id.*

there are many of them—it is as if the “individual’s” liberty interest is further diminished and “society’s” collective interest in unity and cohesion is amplified. Or to use another metaphor, with each iteration of the issue, it is as if Frankfurter adds further rhetorical weight to one side of the scales of justice, while repeatedly removing weight from the other side, until at the end of the day, one side slams down decisively.

Early in the opinion, “conscience of individuals” is seen as “collid[ing] with the felt necessities of society.”<sup>158</sup> A little later, a man’s “conception of religious duty” is seen as being in “conflict with the secular interests of his fellow men.”<sup>159</sup> Later still, “religious liberty” is juxtaposed with “legislation of general scope not directed against doctrinal loyalties of particular sects.”<sup>160</sup> Frankfurter then characterizes the issue as pitting “conscientious scruples” against “obedience to a general law not aimed at the promotion or restriction of religious beliefs.”<sup>161</sup> Later “those who refuse[] obedience from religious conviction” are weighed against “manifestations of specific powers of government deemed by the legislature essential to secure and maintain that orderly, tranquil, and free society without which religious toleration itself is unattainable.”<sup>162</sup> Eventually, the societal interest is characterized as the “promotion of national cohesion.”<sup>163</sup> Frankfurter deems this to be “an interest inferior to none in the hierarchy of legal values. National unity is the basis of national security.”<sup>164</sup> The flag, Frankfurter maintains, “is the symbol of our national unity, transcending all internal differences, however large.”<sup>165</sup>

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158. *Id.* at 593.

159. *Id.*

160. *Id.* at 594. This is a highly contestable characterization of the regulations at issue, which were explicitly targeted at dissenting Jehovah’s Witnesses. The claim that the school board resolution in *Gobitis* was “legislation of general scope” and that it was “not directed against doctrinal loyalties of particular sects” is not just dubious, but flatly contradicted by the record. See MANWARING, *supra* note 8, at 82–83.

161. *Gobitis*, 310 U.S. at 594.

162. Never mind that the regulations requiring participation in the flag salute were not laws enacted by the Pennsylvania state legislature, but resolutions passed by a local school board, which Frankfurter imbues with the same status and authority as the legislature. *Id.* at 595.

163. *Id.*

164. *Id.*

165. *Id.* at 596. Frankfurter goes on to cite the Court’s opinion in *Halter v. Nebraska*, 205 U.S. 34 (1907):

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.

*Id.* at 43. Frankfurter does not address the irony of maintaining that compelling pledging

By the end of the opinion, not only are these interests second to none, but Frankfurter claims that to hold otherwise would be to turn the Supreme Court into the “school board for the country” that might express a policy preference for “giving unfettered scope to the most crotchety beliefs” and respecting “individual idiosyncrasies.”<sup>166</sup>

With this, Frankfurter’s rhetorical *tour de force* of aggrandizing the state’s interest in compelling conformity—national security, an interest inferior to none in the legal hierarchy—reaches a crescendo, while the competing liberty interests are ultimately dismissed (and dismissible) as “crotchety beliefs” and “individual idiosyncrasies.” It is little wonder that the drum beat of national unity, cohesion, and security drowns out the soft flutes of individual freedom of “dissidents” who seek “exceptional immunity.”<sup>167</sup>

Under the Frankfurter/*Gobitis* view, conscience must yield to general secular regulations that are not specifically targeted at religion. As the flurry of enactments requiring participation in patriotic exercises after *Gobitis* illustrates, sometimes such “secular regulations” are thinly veiled (or even explicit) attempts to coerce religious conformity. It is very similar to the view articulated by Justice Scalia in *Employment Division v. Smith*, where the Court held that laws that burden religious exercise do not violate the Free Exercise if they are general and neutral.<sup>168</sup> So closely related are these viewpoints that Justice Scalia actually quotes *Gobitis* in his *Smith* opinion, without acknowledging in the text that *Gobitis* was explicitly overturned by *Barnette*.<sup>169</sup>

## 2. Justice Stone’s dissent

Justice Stone concedes that “constitutional guaranties of personal liberty are not always absolutes.”<sup>170</sup> But in his view, religious

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allegiance to the flag is a way of “protecting the weak against the strong.” *Id.*

166. *Gobitis*, 310 U.S. at 598.

167. *Id.* at 599–600.

168. 494 U.S. 872 (1990).

169. Justice Scalia quoted Justice Frankfurter: “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.” *Id.* at 879 (quoting *Gobitis*, 310 U.S. at 594–95). Scalia also cited *Gobitis* for the principle that, “The right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’” *Id.* (quoting *United States v. Lee*, 455 U.S. 252, 263, n. 3 (1982)).

170. *Gobitis*, 310 U.S. at 602 (Stone, J., dissenting).

practices may be suppressed only when they are “dangerous to morals, . . . [or] are inimical to public safety, health, and good order.”<sup>171</sup> But from these permissible limitations, Stone says, “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.”<sup>172</sup> Stone begins to articulate a conception of secularity that is pluralistic. Religious practices may be suppressed, but only when they are “dangerous to morals,” or are “inimical to public safety, health, and good order.” In other words, limitations are permissible when they are necessary to vindicate a specific list of legitimating grounds for limitation.<sup>173</sup>

### *B. Conscience in Barnette*

As noted earlier, conscience is afforded very high status in Justice Jackson’s majority opinion in *Barnette*. Near the end of his opinion, Justice Jackson describes the price for accommodating differences of opinion on even important issues as one worth bearing.

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.<sup>174</sup>

Patriotism is fully compatible with and enhanced by a commitment to pluralism. To think that patriotism will flourish under a regime of compulsion rather than one of voluntarism is to underestimate the appeal of freedom.

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171. *Id.*

172. *Id.*

173. It is interesting to see how close this is to the way religious freedom claims are treated under the international human rights instruments that were drafted in the aftermath of World War II, with cases like *Barnette* very much on the minds of the drafters. See Brett G. Scharffs, *Symposium Introduction: The Freedom of Religion and Belief Jurisprudence of the European Court of Human Rights: Legal, Moral, Political and Religious Perspectives*, 26 J.L. & RELIGION 249 (2010–11).

174. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641–42 (1943).

*C. Implications for This Symposium's Theme of Conscience and Conscientious Objection*

The call for respecting conscience is addressed directly by Professor Robin Fretwell Wilson's presentation at this conference about religious liberty exemptions with respect to same-sex marriage laws, and several articles she has written previously on the topic of conscience-based exemptions generally.<sup>175</sup> Of course, dissenters with religious or moral objections to same-sex marriage could be forced to participate in facilitating same-sex marriages, as the children in *Gobitis* were forced to salute the flag. This does not seem to be a particularly attractive model for changing hearts and minds. If that were to happen, public officials who refuse to comply might be forced to resign or to face criminal penalties,<sup>176</sup> photographers who dissent could be fined,<sup>177</sup> and ministers or churches that dissent could be punished.<sup>178</sup> Or, more attractively, exemptions for conscience could be given either judicially or through legislation.<sup>179</sup> The lessons of the flag

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175. See Robin Wilson, *Insubstantial Burdens: The Case for Government Employee Exemptions to Same-Sex Marriage Laws*, 5 NW. J.L. & SOC. POL'Y 318 (2010); Robin Wilson, *Same-Sex Marriage and Religious Liberty: Life after Prop 8*, 14 CHAP. J. L. & POL'Y 101 (2009).

176. After the California Supreme Court invalidated California's "one man and one woman" marriage laws in *In re Marriage Cases*, 43 Cal. 4th 757 (2008), several religiously-motivated County Clerks attempted a variety of pretexts to avoid sanctioning same-sex marriages. For example, three days before same-sex marriages were to start the Merced County Clerk, Stephen Jones, announced that he would no longer issue marriage licenses for any couples. By way of explanation, Jones claimed, "This wasn't about my beliefs on the issue [of same-sex marriage]," and cited staffing and space shortages instead. Eventually Jones began performing marriages again when his explanation was discredited in the local newspaper. Corinne Reilly, *Merced Clerk Backtracks On No Weddings*, THE MODESTO BEE (Jun. 8, 2008), available at <http://www.modbee.com/2008/06/08/322199/merced-clerk-backtracks-on-no.html>; see also Timothy Kincaid, *Two More California Counties Stop Officiating at Weddings*, BOX TURTLE BULLETIN (Jun. 11, 2008), <http://www.boxturtlebulletin.com/2008/06/11/2187>.

177. A wedding photographer in New Mexico was found to have violated New Mexico law by refusing to photograph a same-sex wedding. Willock, LLC, HRD No. 06-12-20-0685 (N.M. Hum. Rts. Comm. Apr. 9, 2008) (decision and final order), available at <http://volokh.com/files/willockopinion.pdf>.

178. For extensive discussion of attempts to strip religiously-affiliated organizations of tax-exempt status over same-sex discrimination issues, see Douglas M. Kmiec, *Same-Sex Marriage and the Coming Antidiscrimination Campaigns Against Religion*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS (Douglas Laycock & Robin Fretwell Wilson eds., 2008).

179. "One state, Connecticut, has exempted religious organizations that provide 'adoption, foster care or social services,' like Catholic Charities, from the duty to place children with same-sex couples if the organization receives no public funds, while two states, Vermont and New Hampshire, have exempted fraternal benefit societies, like the Knights of Columbus, from extending benefits to same-sex spouses. A single state, New Hampshire, exempts individual objectors who work for a religious organization from the duty to solemnize, celebrate, or promote same-sex marriages if doing so would violate 'religious beliefs and faith.'" Robin

salute cases resonate deeply with the call of Professor Wilson and others for recognizing claims of conscience with respect to same-sex marriage and adoption.<sup>180</sup>

The contrasting approaches to issues of coercion and conscience evident in the flag salute cases are addressed in a deeply thoughtful way by Professor Robert Burt's paper, *Belonging in America*.<sup>181</sup> It is impossible to do justice to Professor Burt's complex and subtle argument here, so I will focus on just one aspect. Burt contrasts two very different judicial voices with which the Supreme Court speaks to American citizens—one voice that is characterized by coercion, by “declaring a winner” and “order[ing] compliance by the loser,” while the other voice is “much more subtle in its effectuation” because it aims at changing hearts and minds and appeals to us to change our conceptions of ourselves.<sup>182</sup>

The first voice is familiar enough, but the second voice is also evident in a number of contexts. It is exemplified in the move from *Brown I*,<sup>183</sup> where the Supreme Court, utilizing the first voice, declared that separate is not equal,<sup>184</sup> to *Brown II*,<sup>185</sup> where the Court called for “all deliberate speed” in the process of integration.<sup>186</sup> Here the Court shifted to the second voice. As Burt explains it:

So far as the Court was concerned, the future began to arrive only a decade later, when the nationally elected officials in Congress and the Presidency overwhelming approved the Civil Rights Act of 1964 and the Voting Rights Act of 1965. These laws were enacted over the continued opposition of the white segregationists in Congress and in most Southern statehouses. But these Southerners were by now morally isolated—not simply or even primarily because the black-robed Nine Old Men in Washington had ruled against them, but because the national community now opposed them and embraced

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Fretwell Wilson, *Insubstantial Burdens: The Case for Government Employee Exemptions to Same-Sex Marriage Laws*, 5 NW. J.L. & Soc. POL'Y 318, 319–20 (2010) (quoting N.H. Rev. Stat. § 457:37).

180. See generally *id.* For a less formal discussion of exemptions, see this archived series of exchanges between Dale Carpenter, Doug Laycock, Robin Wilson, Carl Esbeck, Rick Garnett, and Tom Berg on Volokh.com. Dale Carpenter, *Protecting Religious Liberty from Gay Marriage and Protecting Gay Marriage from Religious Liberty*, VOLOKH.COM (Apr. 23, 2009, 1:16AM), available at [http://volokh.com/posts/chain\\_1240449003.shtml](http://volokh.com/posts/chain_1240449003.shtml).

181. Robert A. Burt, *Belonging in America: How to Understand Same-Sex Marriage*, 25 BYU J. PUB. L. 351 (2011).

182. *Id.* at 356–57.

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

184. *Id.* at 495.

185. *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

186. *Id.* at 301.

the cause of African-Americans, who were increasingly vocal on their own behalf in both the North and South. The Court set the stage for this public activity by endorsing and giving high visibility to the grievances of African-Americans; but the Court did not and could not order the voluntary recognition extended to African-Americans by nationally elected officials.<sup>187</sup>

Burt suggests that this second model might be the right approach for dealing with the issue of gay marriage,<sup>188</sup> and identifies a concrete tactic that the Court might employ to exercise what Alexander Bickel,<sup>189</sup> speaking about the same series of school desegregation cases a generation earlier, described as the “passive virtues”<sup>190</sup>—defer the question to states and state law.<sup>191</sup>

One advantage of the first approach, which Burt recognizes, is that it provides definite resolutions to specific disputes, but the second approach is more appropriate when what is sought is not just the “right to be left alone or even a right to be passively tolerated or actively forgiven in their sinful practices,” but when claimants are asserting instead “a right to be approved by, affirmatively embraced by, the community in which they claim fully honored membership.”<sup>192</sup> As Burt correctly observes, “This result cannot be imposed on the community from outside.”<sup>193</sup> By its nature, this sort of claim must be “framed as a request rather than a coercive demand.”<sup>194</sup> While judicial force can be utilized to “command attention,” it cannot be effectively

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187. Burt, *supra* note 181, at 358.

188. *Id.* at 357.

189. Professor Burt is the Alexander M. Bickel Professor of Law at Yale Law School. Alexander Bickel, who clerked for Justice Frankfurter during the 1952 term and was a professor at Yale Law School, is most well known for his long-running defense of judicial restraint. See generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (2d ed., Vail-Ballou Press 1986) (1962); ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* (1975); see also John Moeller, *Alexander Bickel: Toward A Theory of Politics*, 47 J. POL. 113 (1985).

190. BICKEL, *supra* note 189, at 200–01. Pay particular attention to the discussion of the phrase “all deliberate speed” on pages 246–254.

191. Burt identifies three virtues of deferring to state courts: first, because no single state court decision would apply to the whole United States, each state court could be a participant in the debate (and presumably add new ideas to the discussion); second, because state constitutions are much easier to amend than the federal Constitution, no state supreme court will have a final word on the matter; and finally, because repeated litigation in state courts would keep both sides of the same-sex marriage debate in regular contact with each other, there would be ample opportunity for them to learn to see each other “as recognizable human beings rather than moral abstractions or demonic forces.” Burt, *supra* note 181, at 360.

192. Burt, *supra* note 103.

193. *Id.*

194. *Id.*

employed to “command obedience.”<sup>195</sup>

The flag salute cases can be understood as another context where the Court saw the virtue of backing down from a “command and control” posture into an “intermediary-evocative” posture, framing ideals of respect and toleration in a way that was calculated to elicit a deeper patriotism than what could be coerced from people. Justice Jackson’s arguments about coercion could easily be transported to the issue of gay marriage:

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.<sup>196</sup>

Professor Burt’s approach to these issues could well be summed up by Justice Jackson’s final declaration: “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.”<sup>197</sup>

### VIII. CONCLUSION

As Professor Thomas Berg has recently observed, religious and sexual minorities have more in common than either side seems to want to admit.<sup>198</sup> Both make claims that go to the very heart of personal identity and self-understanding; both make claims with public as well as private dimensions; both are likely to remain minorities and may not fare well if left only to the vicissitudes of public opinion. And both want more than to be left alone or barely tolerated; each wants a measure of approval and affirmation; they want to feel safe; they want to belong.

Conversations such as those we have had in this symposium will hopefully be instrumental in finding ways forward, not just to finding ways of seeing these goals as not being mutually irreconcilable, but in finding ways to vindicate—if imperfectly—both.

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195. *Id.*

196. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943).

197. *Id.* at 642.

198. Thomas C. Berg, *What Same-Sex Marriage and Religious Liberty Claims Have in Common*, 5 *NW. J.L. & Soc. POL’Y* 206 (2010).