

Life's Complexities: Rethinking Barnette, the Flag, Totalitarianism, and the First Amendment

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Life's Complexities: Rethinking *Barnette*, the Flag, Totalitarianism, and the First Amendment

Daniel Gordon*

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ABSTRACT

This article rethinks the meaning of the 1943 *Barnette* case and questions the canonical status of Justice Robert Jackson's famous opinion for the majority. On the assumption that we have lost sight of the logic that had been used to uphold compulsory flag salute laws, the article traces the many state court opinions on this topic prior to World War II. Also brought under scrutiny is Jackson's usage of the term "totalitarian" to describe flag salute laws, a quasi-theological term promoted first and foremost by the Jehovah's Witnesses. Jackson's opinion in *Barnette*, while rhetorically compelling, was out of sync with his own First Amendment jurisprudence as a whole. Finally, the article highlights overlooked strengths of Justice Felix Frankfurter's dissent in *Barnette*, notably his defense of state jurisdiction on the basis of epistemic pluralism. What makes *Barnette* a truly great case is not the often quoted passages in Jackson's opinion but the complex interchange between Jackson and Frankfurter about the nature of democracy and judicial review.

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“ . . . [N]o single principle can answer all of life’s complexities.”¹

I. DEMYTHOLOGIZING *BARNETTE* - AN OVERVIEW

What is now required is the “stiff-arm” salute, the saluter to keep the right hand raised with palm turned up.²

Therefore, be it RESOLVED, that the West Virginia Board of Education does hereby recognize and order that the commonly accepted salute to the Flag of the United States—the *right hand is placed upon the breast* and the following pledge repeated in unison: “I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands; one Nation, indivisible, with liberty and justice for all”—now becomes a regular part of the program of activities in the public schools.³

The two quotations immediately above are not profound in themselves, but being in contradiction with each other, they have profound implications. They purport to describe the same thing: the flag salute examined in *West Virginia State Board of Education v. Barnette*. The contradiction has not been observed by scholars before, and I wish to suggest that attending to such granular historical details can improve, and indeed transform, our understanding of Justice Robert H. Jackson’s celebrated majority opinion in this case.

Jackson described the gesture as a “a stiff-arm” salute, and in a footnote, he highlighted its similarity to the Nazi salute of Hitler.⁴ Jackson’s is also the first Supreme Court opinion in which the word “totalitarian” is mentioned,⁵ a fact central to one of the arguments in this article: Jackson did not regard the compulsory flag salute as unconstitutional merely because it violated the conscience of the Jehovah’s Witnesses; he found it unconstitutional because it violated his own political conscience, his own fear of the threat of totalitarianism. Jackson was clearly speaking in his own voice, and not merely relaying the religious views of the Witnesses, when he stated:

Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to

¹ *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 594 (1940).

² *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 628 (1943).

³ *Id.* at 627 (emphasis added).

⁴ *Id.* at 628 n.3.

⁵ This can be verified through a word search in all Supreme Court cases in Westlaw Campus Research.

Russian unity, down to the fast failing efforts of our present totalitarian enemies.⁶

Jackson's famous opinion reflected his deep concern that American soil was fertile ground for the growth of fascism. His description of the flag salute as resembling the hailing of Hitler served to strengthen his claim that the compulsory flag salute is *intrinsicly* dictatorial in nature. No previous court took this position. Notably, in the circuit court opinion which *Barnette* affirmed, holding that the compulsory flag salute violated the free exercise of religion and requiring an accommodation for the Witnesses, Judge Parker stated, "[t]here is, of course, nothing improper in requiring a flag salute in the schools."⁷ In contrast, Jackson believed that "[t]hose who begin coercive elimination of dissent soon find themselves exterminating dissenters."⁸

However, the straight-arm salute was not actually used in West Virginia schools when the *Barnette* case was decided. Jackson himself referred to the Board of Education's resolution in a footnote. As described in the resolution, the hand is held upon the chest and is not extended.⁹ The same description of the salute is featured in the Appellee's Brief.¹⁰ Jackson described the pledge as more Hitlerian than it really was.¹¹

With this fact on the table, I will pose a question to readers who have a basic familiarity with *Barnette*, a case which is usually required reading in Constitutional Law courses. How well do we understand this case? Consider the possibility that a case can become so iconic that we cease studying it and merely celebrate it. Is this not particularly true when a case contains moving passages—words so beautiful that we extricate them from the complexities of the debate in which the case was embedded? At that point, where a case is known primarily through dicta

⁶ *Barnette*, 319 U.S. at 641.

⁷ *Barnette v. W. Va. State Bd. of Educ.*, 47 F. Supp. 251, 253 (S.D. W. Va. 1942).

⁸ *Barnette*, 319 U.S. at 641.

⁹ *See id.* at 626, n.2.

¹⁰ Appellees' Brief at 5, *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (No. 591), 1943 WL 71856 [hereinafter *Barnette* Appellees' Brief].

¹¹ Both West Virginia and Congress had abolished the straight-arm salute before 1943. On December 22, 1942, a House Joint Resolution established that the pledge "is rendered by standing with the right hand over the heart." HR.J Res. 359, 77th Cong § 7, 56 Stat. 1074, 1077 (1942). Jackson himself quoted this new version of the pledge, with no arm extension, in *Barnette* to suggest that for Congress, the salute was not compulsory. *Barnette*, 319 U.S. at 624 n.17. On this point he was correct, for Sec. 7 states that civilians may show full respect for the flag "by merely standing at attention, men removing the headdress." HR.J Res. 359 § 7. Jackson scored a point in favor of granting exemptions to the salute, but he inadvertently contradicted his earlier description of the pledge as a stiff-arm salute. For a clear itemization of all modifications of the pledge in 1942, see 36 U.S.C § 172 (1959).

hovering above history, critical thinking tends to go on vacation. To make this point more clearly, as another scholar already did twenty years ago when writing, “[a]lthough we praise *Barnette*, we have not understood it,”¹² let us consider four basic questions to test our understanding.

A. Question 1 – What is our contextual understanding of *Barnette*?

Off the top of your head, what year was *Brown v. Board of Education* decided? This you certainly know: 1954. You probably also know that *Plessy v. Ferguson*, upholding racial segregation, was around 1890 (1896, to be exact). In other words, you are aware that there was a discrete historical era, from around 1890 to 1954, of judicially sanctioned racial segregation, which *Brown* overturned, thus beginning a new era of vitality for the Equal Protection Clause. Can you frame *Barnette* in any comparable context? What year was the case? I imagine you are not so sure, and you are not alone. In an essay called *The Supreme Court’s Five Greatest Moments*, an eminent law professor ranked Jackson’s opinion in *Barnette* as number one.¹³ Of course, he did not fail to quote the most famous passage:

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.¹⁴

But he also gave the wrong year, 1942, for the case. It was decided in 1943. Only a year off, it is true, but it is hard to imagine an article stating that *Brown* was in 1953. This is a sign of how decontextualized *Barnette* has become in the legal imagination. Other questions concerning chronology will tend to draw a blank, such as: when was the Pledge of Allegiance composed, and when did the flag salute become a requirement in American public schools? Has not *Barnette* been lionized in a vacuum?

¹² Jay S. Bybee, *Common Ground: Robert Jackson, Antonin Scalia, and a Power Theory of the First Amendment*, 75 TUL. L. REV. 251, 255 (2000).

¹³ Cass R. Sunstein, *Cass Sunstein: U.S. Supreme Court’s Top 5 Opinions of All Time*, TULSA WORLD (June 7, 2015), https://tulsa-world.com/archive/cass-sunstein-u-s-supreme-courts-top-5-opinions-of-all-time/article_3c9696c0-f3b7-573f-8db4-49e65460deb5.html [https://perma.cc/7ENS-NWRE].

¹⁴ *Id.* (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

B. Question 2 – Prior to *Barnette*, how did the Supreme Court and other courts adjudicate cases about the compulsory flag salute?

When I took a first-year course in Constitutional Law,¹⁵ here is what the editors of the required casebook wrote in their introduction to an extract from *Barnette*: “[t]he first constitutional challenge arose in Minersville, Pennsylvania, when William and Lilian Gobitis were expelled from school for refusing to comply with the school board’s requirement to salute the flag.”¹⁶

However, in the 1940 case referred to here, *Minersville School District v. Gobitis*, Justice Frankfurter noted that there had previously been “several per curiam dispositions of this Court” concerning flag salute laws.¹⁷ And in his dissent in *Barnette*, which overturned *Gobitis*, Frankfurter wrote:

I am fortified in my view of this case by the history of the flag salute controversy in this Court. Five times has the precise question now before us been adjudicated. Four times the Court unanimously found that the requirement of such a school exercise was not beyond the powers of the states. Indeed in the first three cases to come before the Court the constitutional claim now sustained was deemed so clearly unmeritorious that this Court dismissed the appeals for want of a substantial federal question. In the fourth case the judgment of the district court upholding the state law was summarily affirmed on the authority of the earlier cases. The fifth case, *Minersville District v. Gobitis*, was brought here because the decision of the Circuit Court of Appeals for the Third Circuit ran counter to our rulings. They were reaffirmed after full consideration, with one Justice dissenting.¹⁸

Frankfurter points to four constitutional challenges prior to *Minersville* which reached the Supreme Court.¹⁹ There were also several state court decisions on the constitutionality of the compulsory flag

¹⁵ I hasten to add, I am not a lawyer and did not receive a J.D. The M.S.L. at the Yale Law School is a one-year program.

¹⁶ PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING CASES AND MATERIALS 1481 (4th ed. 2000).

¹⁷ *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 592 (1940) (holding that states may require students in public schools to salute the flag and recite the Pledge of Allegiance).

¹⁸ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 664 (1943) (Frankfurter, J., dissenting) (citations omitted).

¹⁹ *But see* William A. Elias, Jr., *The Jehovah’s Witnesses Cases*, 16 U. KAN. CITY L. REV. 140, 145 n.28 (1948). Elias actually says there were more: “Prior to the *Gobitis* decision there had been five Supreme Court decisions which allowed flag salute regulations to stand. These cases were: *Leoles v. Landers*, 302 U.S. 656 (1937); *Hering v. State Board of Education*, 303 U.S. 624 (1938); *Gabrielli v. Knickerbocker*, 306 U.S. 621 (1939); and *Johnson v. Deerfield*, 306 U.S. 621 (1939), rehearing denied 307 U.S. 650 (1939).” *Id.*

salute, decisions that did not reach the Supreme Court. In short, there were numerous constitutional challenges before *Gobitis*.

The question of prior adjudication is significant. For it is one thing to believe that *Barnette* overruled only one previous case (*Gobitis*), and yet another thing to ponder Frankfurter's dissent, suggesting that *Barnette* overturned something close to a judicial consensus that compulsory flag salute laws are constitutional. The historical significance of *Barnette*—the extent to which it represents a kind of Kuhnian “paradigm” shift in American thinking about public schools, civic ceremonies, democracy, legislative power, and the First Amendment—has been underestimated.

We cannot assess the merits of Jackson's arguments in *Barnette* without an inventory of the arguments that had accumulated in support of the constitutionality of the flag salute. Admittedly, Frankfurter's dissent in *Barnette* is a grand summation, and extension, of those arguments. But we may wonder how attentive current-day scholars are to a dissent against a majority opinion that “has received universal adulation”²⁰; a dissent which defends “one of the most infamous decisions [*Gobitis*] in the Court's history . . . often mentioned in the company of *Dred Scott v. Sanford* and *Plessy v. Ferguson*”²¹; a dissent written by someone whom Judge Richard A. Posner described (in my opinion, mistakenly) as “brilliant but not thoughtful” and utterly unable to “understand why any American would refuse to salute the American flag.”²²

C. Question 3 – What were Frankfurter's principal arguments in *Gobitis*, where he wrote for the majority and in *Barnette*, where he dissented?

The question is important because what makes *Barnette* a truly great Supreme Court case is not its memorable passages but the complex interchange between Jackson and Frankfurter about the nature of democracy and judicial review. The two justices also differed in their conceptions of public education. Frankfurter was by no means willing to rubber stamp any piece of democratically enacted legislation. But as we will see, he considered civic education, the formation of citizens with a sense of common identity, as essential for social cohesion. This meant

²⁰ Bybee, *supra* note 12, at 254-55, n.15 (discussing a series of scholars praising Jackson's opinion in *Barnette* as a “landmark”, “among the great paeans to human liberty”, “among the most eloquent pronouncements ever on First Amendment freedoms”, etc.)

²¹ *Id.* at 253 (footnotes omitted).

²² Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CALIF. L. REV. 519, 530 (2012).

that the preferences of parents had to sometimes be disregarded. In a striking formulation in *Gobitis*, a formulation reminiscent of the French idea of educational laicity,²³ he wrote, “[w]e are dealing here with the formative period in the development of citizenship 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.”²⁴ *Contra* Posner, Frankfurter actually stated that he was personally inclined to exempt conscientious objectors from the flag salute.²⁵ Still, he could not discern a *constitutional right* for Jehovah’s Witnesses to exempt themselves from a facet of the public educational system that had not been designed to discriminate against them. In his *Barnette* dissent, he referred to the *Scopes* case as an instance of some parents taking offense at the teaching of biology because it contradicts the biblical account of creation.²⁶ Considering that the Appellee’s brief in *Barnette* argued that students had a right to be exempt from classes in bookkeeping, grammar, domestic science, and geography,²⁷ Frankfurter had a rational basis for questioning the majority in *Barnette*.

The principle of interpretation that I propose we adopt toward *Barnette* is to see it as a very close decision, not a slam-dunk victory for the six who made up the majority. Frankfurter’s views were plausible and need to be examined with an open mind. Likewise, the orthodox veneration of Jackson as a free speech libertarian also needs to be re-examined, which leads to my last question.

²³ See generally Daniel Gordon, *Why Is There No Headscarf Affair in the United States?*, 34 HIST. REFLECTIONS, 37 (2008). There is vast scholarly literature on laicity and its implications for public education in France. My own work on this topic explores the banning of the headscarf and full veil in France by way of comparison with the United States, where *Barnette* has been adduced against such bans. See also Peter Baehr & Daniel Gordon, *From the Headscarf to the Burqa: The Role of Social Theorists in Shaping Laws Against the Veil*, 42 ECON. AND SOC’Y, 249 (2013).

²⁴ *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 598-99 (1940); see also *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 650, 654-55 (1943) (Frankfurter, J., dissenting) (discussing the school as a training ground for common citizenship and arguing that the promotion of citizenship is a legitimate legislative end, and that a state may reasonably believe the flag ceremony helps to achieve it).

²⁵ *Gobitis*, 310 U.S. at 598 (“we might be tempted to say that the deepest patriotism is best engendered by giving unfettered scope to the most crochety beliefs. Perhaps it is best . . . to give to the least popular sect leave from conformities like those here in issue.”).

²⁶ *Barnette*, 319 U.S. at 659 (Frankfurter, J., dissenting) (referencing *Scopes v. State*, 289 S.W. 363, 363 (1926)).

²⁷ *Barnette* Appellees’ Brief, *supra* note 10, at 46-47.

D. Question 4 – What was Jackson’s understanding of free speech?

It is well known that Jackson reframed the compulsory flag salute in terms of free speech, although courts had previously approached it in terms of freedom of religion. But what was his understanding of free speech in general? His opinion in *Barnette* is often held up as an emblem of our broad national commitment to free speech. A case in point is *Texas v. Johnson*, holding that the burning of the flag is a protected form of speech.²⁸ In *Johnson*, no one was compelled to show ceremonial respect for the flag; the question was whether one could desecrate it. Yet, the Court cited *Barnette* to support the proposition that the government was not just prohibited from *compelling* symbolic expression, it could not even *curtail* it.²⁹ In *Tinker v. Des Moines Independent Community School District*, the Court used *Barnette* to support its ruling that students have a right to wear armbands in school protesting the Vietnam War.³⁰ These are classic libertarian free speech cases, and *Barnette* is woven into them. But how does *Barnette* relate to Jackson’s own free speech jurisprudence? In *Barnette*, he appears to oppose all forms of governmentally compelled speech. After declaring that the government cannot prescribe what shall be orthodox, or force citizens to profess their belief therein, he added, “[i]f there are any circumstances which permit an exception, they do not now occur to us.”³¹

These are puzzling words from a justice who would later vote with the majority to uphold a New York statute (the Feinberg Law), making anyone who was a member of an organization advocating the overthrow of the government by force ineligible for employment in public schools.³² Another “exception” was Jackson’s concurring opinion in a case in which the Court upheld the constitutionality of a section of the Labor Management Relations Act of 1947 requiring officers in labor unions to swear that they were not members of the Communist Party. Jackson wrote, “[f]rom information before its several Committees and from facts of general knowledge, Congress could rationally conclude that, behind its political party facade, the Communist Party is a conspiratorial and revolutionary junta, organized to reach ends and to

²⁸ *Texas v. Johnson*, 491 U.S. 397, 420 (1989).

²⁹ *Id.* at 401.

³⁰ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 n.2 (1969).

³¹ *Barnette*, 319 U.S. at 642.

³² *See generally* *Adler v. Bd. of Educ.*, 342 U.S. 485 (1952).

use methods which are incompatible with our constitutional system.”³³ The idea that government cannot prescribe what shall be orthodox in politics, known today as the “no compelled speech” doctrine,³⁴ is belied by these cases. As for governmental proscription of speech, Jackson supported prohibitions on what is today called “hate speech,” which he called “group libel.” “Group libel statutes represent a commendable desire to reduce sinister abuses of our freedoms of expression—abuses which I have had occasion to learn can tear apart a society, brutalize its dominant elements, and persecute, even to extermination, its minorities.”³⁵

As his opinions indicate, Jackson was not a free speech libertarian.

E. A Roadmap to Deeper Understanding

What, then, is the meaning of *Barnette*? What did Jackson believe? How persuasive are his ideas when we examine them in the context of debate with Frankfurter? The rest of this article consists of three sections.

In Part II, I will examine the flag salute controversy in state court decisions prior to *Gobitis* and *Barnette*. These decisions were virtually unanimous in upholding the compulsory flag salute. Thus, we will gain a better understanding of the “paradigm” that existed before dissensus broke out in *Gobitis*, in which the two lower courts held in favor of the Jehovah’s Witnesses. A key factor in producing this dissensus was the new concept of “totalitarian” government. In Part III, I discuss the advent of “totalitarianism” in constitutional discourse as well as Jackson’s relationship to this concept, and how it influenced his First Amendment jurisprudence. In Part IV, I revisit Frankfurter’s majority opinion in *Gobitis* and his dissent in *Barnette* to restore a sense of the close nature of the *Barnette* decision. I would not say that *Barnette* was wrongly decided; I would say that it is wrong to think of the majority opinion as a clear triumph of reason and liberty. While Jackson spoke of certain principles as a “fixed star,” Frankfurter, with a more skeptical

³³ *Am. Commc’ns Ass’n. v. Douds*, 339 U.S. 382, 424 (1950) (Jackson, J., concurring and dissenting).

³⁴ Compare Richard F. Duncan, *Defense Against the Dark Arts: Justice Jackson, Justice Kennedy and the No-Compelled-Speech Doctrine*, 32 REGENT U. L. REV. 265 (2020) (celebrating the “no compelled speech” doctrine in Supreme Court decisions, from *Barnette* to *Masterpiece Cakeshop*), with Genevieve Lakier, *Not Such a Fixed Star After All: West Virginia State Board of Education v. Barnette, and the Changing Meaning of the First Amendment Right Not to Speak*, 13 FIU L. REV. 741 (2019) (taking a more critical approach in analyzing and distinguishing *Barnette* from subsequent Court decisions resting on the doctrine).

³⁵ *Beauharnais v. Illinois*, 343 U.S. 250, 304 (1952) (Jackson, J., dissenting).

disposition, spoke of “difficulties and complexities.”³⁶ Frankfurter’s opinions in *Gobitis* and *Barnette* may well be “bad law,” but the opinions must be preserved to appreciate the momentous debate that took place.

II. THE FLAG SALUTE CONTROVERSY BEFORE *GOBITIS* AND *BARNETTE*

To suggest that prior to *Gobitis* there was no constitutional dispute over the flag salute³⁷ is to imply that states and school districts acted with impunity when they imposed the salute. Yet, the constitutionality of the compulsory flag salute was adjudicated multiple times in state courts. In all cases, the plaintiffs were Jehovah’s Witnesses, and in all cases, the legal issue was whether compulsory flag salute regulations violated religious freedom under the state and federal constitutions. Nearly all cases, at both the trial and appellate level, were decided against the Witnesses. I will examine some of these cases, but before doing so, two other topics are worth addressing.

A. Law Journals Weigh in on Compulsory Flag Salutes in Schools

An analysis of the earliest articles in law journals indicates that the first academic comments generally supported the power of school boards and state legislatures to make the salute and pledge compulsory.³⁸ Robert B. Gosline, in a 1936 article in the *Law Journal of the Student Bar Association [at] Ohio State University*, observed that “the courts will not interfere with the board of education’s exercise of its discretionary powers to manage and control schools . . . unless such exercise is so arbitrary and unreasonable as to be an abuse of its

³⁶ *Barnette*, 319 U.S. at 660 (Frankfurter, J., dissenting).

³⁷ See BREST ET AL., *supra* note 16, at 1481.

³⁸ But see George K. Gardner & Charles D. Post, *The Constitutional Questions Raised by the Flag Salute and Teachers’ Oath Acts in Massachusetts*, 16 B.U. L. REV. 803 (1936). Although this is a notable exception, the argument here is complicated by the fact that the Massachusetts General Court (i.e., the legislature) implemented both a flag salute requirement and a requirement for all teachers at private and public educational institutions, including colleges and universities, to take an oath of allegiance to the state and federal constitutions. The article is directed primarily against the oath but does bring the flag salute requirement into its ambit. Prior to 1938, legal comments generally supported flag ordinances. Negative opinion on the compulsory flag broke out in 1938, stimulated most likely by federal district court decision in *Gobitis*. See, e.g., Note, *Compulsory Flag Salutes and Religious Freedom*, 51 HARV. L. REV. 1418, 1418-24 (1938).

discretion.”³⁹ As for the free exercise of religion, he wrote, “[p]ersonal and private rights guaranteed by constitutions are not absolute.”⁴⁰ Gosline cited judicial support for laws restricting religious freedom: laws against bigamy, laws against practicing medicine and fortune telling without a license, and laws against vaccination exemptions for school children attending public schools. The question concerning flag ordinances is “whether they have sufficient relation to the public welfare (education) to make them reasonable regulations and to keep them out of the category of an unreasonable and arbitrary interference with a personal liberty.”⁴¹ He did advise boards not to use coercion if they could avoid it, in order to avoid a backlash which could “defeat their own ends.”⁴² But Gosline concluded that “boards of education have the power” to enforce the compulsory flag salute.⁴³

An example of an exception to the rule that early comments in law journals regarded compulsory flag salute laws as constitutional can be found in Marjorie Hanson’s 1936 article in the *University of Pittsburgh Law Review*.⁴⁴ Hanson states that a distinction should be drawn “between a prohibition against conduct dangerous to public health and morals, and the requirement of a positive act in violation of religious scruples.”⁴⁵ She doubts that there is a “right to compel performance of an act which is contrary to religious beliefs, unless absolutely necessary for the general welfare.”⁴⁶ Thus, she cites a California case holding that a pupil, whose parents objected to dancing for religious reasons, should be exempt from participating, even though it was part of the course of physical education.⁴⁷ In spite of this, Hanson concludes that the ultimate weakness of flag regulations in Pennsylvania stems from the fact that they were enacted by local school boards in the absence of state-wide legislation. If the legislature “sanctioned the means used to promote that public policy [of maintaining public health and morals],” then the flag

³⁹ Robert B. Gosline, *Power of Board of Education to Compel Salute to Flag – Invasion of Religious Freedom*, 2 OHIO STATE L.J. 151, 152-53 (1936).

⁴⁰ *Id.* at 154.

⁴¹ *Id.* at 156.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Marjorie Hanson, *Constitutional Law—Religious Liberty—School Code—Right of School Board to Compel Salute to the Flag*, 2 UNIV. PITT. L. REV. 206, 207-09 (1936). When the article was written, the cases had not been reported. The author relied on summaries of them provided by the attorney for the plaintiff. Two cases the author identifies are *Commonwealth v. Kurak* and *Commonwealth v. Wilkovich*, both decided in December, 1935. *Id.* at 206.

⁴⁵ *Id.* at 207.

⁴⁶ *Id.*

⁴⁷ *Id.* at 207-08 (citing *Hardwick v. Bd. of Sch. Tr.*, 205 P. 49 (Cal. App. Ct. 1921)).

salute requirement would be legitimate.⁴⁸ Hanson's commentary is an indication of the deference to the legislature that was widespread in the 1930s. In her article, one can see a liberal tendency to sympathize with a religious minority juxtaposed against another characteristic of liberal thinking in the 1930s, which was deference to state legislation. It should also be noted that in the 1938 circuit court decision in *Gobitis*, which held in favor of the Witnesses, the exact same point was made. The circuit court stated that if there had been a state-wide law in Pennsylvania, and not merely a local school board regulation, the outcome would have been different.⁴⁹

B. The Origin of the Flag Salute in Schools

The second topic is the origin of the flag salute itself. On September 8, 1892, a popular children's magazine, *The Youth's Companion*, published the first copy of the Pledge of Allegiance. It was written by Francis Bellamy, a staff member of the magazine and a Christian socialist minister. In 1888, the magazine had already begun a campaign to sell U.S. flags inexpensively to public schools. Bellamy and the magazine owner's nephew, James B. Upham, used the 400th anniversary of Columbus reaching the Americas to advance the schoolhouse flag movement. The article of September 8 prescribed "[a] uniform Programme for every school in America" which Bellamy had already convinced numerous school superintendents to agree to at a conference in February, 1892.⁵⁰ On October 21, "the 400th Anniversary of the Discovery of America," students were to salute the flag and say, "I pledge allegiance to my Flag and the Republic for which it stands: one Nation, indivisible, with Liberty and Justice for all."⁵¹ "At the words, 'to my Flag,' the right hand is extended gracefully, palm upward, towards the Flag, and remains in this gesture till the end of the affirmation."⁵²

The National Education Association (renamed in the 1930s as the American Association of School Administrators) began to sponsor the

⁴⁸ *Id.* at 209.

⁴⁹ *Minersville Sch. Dist. v. Gobitis*, 108 F.2d 683, 693 (3d Cir. 1939) (providing background on three cases where the Court had affirmed flag saluting regulations that had been supported by both legislative and judicial means within the state).

⁵⁰ Francis Bellamy et al., *National School Celebration of Columbus Day. The Official Programme.*, THE YOUTH'S COMPANION, Sept. 8, 1892, at 446 (Bellamy's name appears at the end of the article with his title as Chairman of the Executive Committee).

⁵¹ *Id.*

⁵² *Id.*

flag salute in 1892.⁵³ Kansas implemented a statute in 1907 requiring a salute to the flag at the opening of each school day.⁵⁴ In the same year, the Supreme Court held that a state could prohibit the representation of the flag on a beer bottle.⁵⁵

Therefore a State will be wanting in care for the well-being of its people if it ignores the fact that they regard the flag as a symbol of their country's power and prestige, and will be impatient if any open disrespect is shown towards it. It is not extravagant to say that to all lovers of the country 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.⁵⁶

In the mid-1920s, the American Legion distributed millions of pamphlets promoting the flag salute and urged lawmakers to pass bills to make the pledge mandatory in public schools.⁵⁷ By 1942, twenty states had implemented such laws.⁵⁸

C. Flag Salute Cases Prior to *Gobitis*

In 1943, Madaline Kinter Remmlein wrote⁵⁹ that the constitutionality of the flag salute requirement was first challenged in New Jersey in the 1937 case of *Hering v. State Board of Education*.⁶⁰ The flag salute statute was upheld, and an appeal to the Supreme Court was dismissed for want of a substantial federal question.⁶¹ She noted that constitutional challenges were numerous after 1937 and occurred in thirteen states.⁶² There were actually a few cases even before 1937, as Hanson showed.⁶³ However, the chronology is less important than the consistency of the results until 1938. The early cases in which the Jehovah's Witnesses challenged the compulsory flag salute suggest that the repeated rulings against the Witnesses were overdetermined by the convergence of conservative (patriotic) and progressive (pro-

⁵³ Madaline Kinter Remmlein, Editorial Note, *Constitutional Implications of Compulsory Flag Salute Statutes*, 12 GEO. WASH. L. REV. 70, 71 (1943).

⁵⁴ *Id.*; see also E.T. FAIRCHILD, STATE OF KANSAS, LAWS RELATING TO THE COMMON SCHOOLS OF KANSAS 120 (State Printing Office, Topeka 1909).

⁵⁵ *Halter v. Nebraska*, 205 U.S. 34, 42 (1907).

⁵⁶ *Id.* at 43.

⁵⁷ Jennifer Jacobs Henderson, *Conditional Liberty: The Flag Salute Before Gobitis and Barnette*, 47 J. CHURCH & STATE 747, 748-49 (2005).

⁵⁸ *Id.* at 749.

⁵⁹ Remmlein, *supra* note 53, at 71-72.

⁶⁰ See *Hering v. State Bd. of Educ.*, 194 A. 177, 177 (N.J. 1937).

⁶¹ Remmlein, *supra* note 53, at 72 n.7.

⁶² *Id.* at 72.

⁶³ See generally Hanson, *supra* note 44.

legislative) dispositions. Alternatively, one could say that dissents were rare because there was not yet any coherent argument with which the Witnesses could succeed—until they forged one themselves based on the idea of “totalitarian” government.⁶⁴

In *Hering*, a New Jersey court issued a brief opinion upholding a state law requiring students to salute the flag and repeat the pledge every day. Justice Bodine invoked two principles that reoccur concerning the flag. “Those who resort to educational institutions maintained with the state’s money are subject to the commands of the state.”⁶⁵ And “[t]he pledge of allegiance is, by no stretch of the imagination, a religious rite.”⁶⁶ The Court of Errors and Appeals upheld the decision in one paragraph “for the reasons expressed in the opinion of Mr. Justice Bodine” merely adding that because, “[t]he wisdom of the statute under review was for the legislature; we express no view thereon.”⁶⁷

In another 1937 case, the Georgia Supreme Court provided a fuller rationale for the Atlanta Board of Education’s requirement to salute the flag.⁶⁸ In contrast to *Hering*, the reasons why the Jehovah’s Witnesses refused to participate in the pledge are laid out. Dorothy Leoles, age twelve, “refused to salute the flag for the sole reason that she believe[d] that to do so [was] an act of worship of an image or emblem.”⁶⁹ She was expelled from school and barred from attending any public schools in Atlanta. Although the flag regulation was local, the court noted, “it is the policy of this State, through instruction in schools by patriotic teachers, to instill the youth thereof with the principles of American government and patriotic duty.”⁷⁰ The court specified that the use of free public schools is a “privilege” predicated on “compliance with the reasonable regulations imposed by the proper school authorities.”⁷¹ Concerning the alleged violation of religious freedom per the U.S. and Georgia constitutions, the court stated that the flag is a symbol of the United States as “a land of freedom” and “disrespect to the flag is

⁶⁴ The term “totalitarian” occurs in the federal district court decision in *Gobitis v. Minersville Sch. Dist.*, 24 F.Supp. 271, 274 (E.D. Pa. 1938). “Our country’s safety surely does not depend upon the totalitarian idea of forcing all citizens into one common mold of thinking and acting or requiring them to render a lip service of loyalty in a manner which conflicts with their sincere religious convictions.” *Id.* at 274. I show later in this article how the Witnesses brought the term into legal debate.

⁶⁵ *Hering v. State Bd. of Educ.*, 189 A. 629, 629 (N.J. 1937).

⁶⁶ *Id.*

⁶⁷ *Hering v. State Bd. of Educ.*, 194 A. 177, 178 (N.J. 1937).

⁶⁸ *Leoles v. Landers*, 192 S.E. 218, 221-23 (Ga. 1937).

⁶⁹ *Id.* at 220.

⁷⁰ *Id.*

⁷¹ *Id.* at 221.

disrespect to the government.”⁷² “Each individual . . . has a right to determine for himself all of those questions which relate to his relation to the Creator of the Universe. No civil authority can coerce him to accept any religious doctrine or teaching”⁷³ But saluting the flag “is by no stretch of reasonable imagination a ‘religious rite.’ It is only an act showing one’s respect for the government”⁷⁴ The court ended by observing that a child is not required to attend a public school and may attend a private school.⁷⁵

In *Gabrielli v. Knickerbocker*, the Supreme Court of California acknowledged the sincere objections to the flag salute professed by Charlotte Gabrielli, age nine, and her father, as Jehovah’s Witnesses.⁷⁶ But the court, noting that the Supreme Court of the United States had dismissed similar cases, concluded that the question of whether a violation of religious freedom occurred “is no longer open.”⁷⁷ As for a possible violation of the state constitution’s provision of religious freedom, the Supreme Court of California simply asserted that all the arguments against a federal constitutional violation applied to the state.⁷⁸ It would require “cogent reasons” before “a state court in construing a provision of the state Constitution will depart from the construction placed by the Supreme Court of the United States on a similar provision in the federal Constitution.”⁷⁹ The court thus did not enter into extensive doctrinal discussion, but it did observe that religious freedom in general means that the legislature, while it has no power to regulate “mere opinion,” does have the authority to reach “actions.”⁸⁰

Similarly, in 1938, the Suffolk County Court in New York heard an appeal from the father of Grace Sandstrom, a girl who had refused to salute the flag in accordance with a statewide law. Judge Hill provided a very extensive explanation of the theological beliefs of the child. He included excerpts from a pamphlet called *Loyalty*, which was read over

⁷² *Id.* at 222.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 222-23.

⁷⁶ 82 P.2d 391, 392 (Cal. 1938) (overturning *Gabrielli v. Knickerbocker*, 74 P.2d 290 (Cal. Ct. App. 1937)). A salient point is that the federal district court’s 1938 decision in *Gobitis* was a momentous departure. When Frankfurter overruled it, as well as the circuit court ruling, he was not only supporting state legislation and school board regulations; he was also re-asserting the logic employed throughout the state court decisions, though he raised the philosophical plane of discussion, as we will see.

⁷⁷ *Id.*

⁷⁸ *Id.* at 393-94.

⁷⁹ *Id.* at 393.

⁸⁰ *Id.* at 394 (citing *Reynolds v. United States*, 98 U.S. 145 (1879) (upholding the banning of polygamy)).

the radio on October 6, 1935, by Joseph Franklin Rutherford, known as Judge Rutherford, the President of the Jehovah's Witnesses. This broadcast helps to explain the outbreak of conflicts over the flag in 1935 and 1936. Among the excerpts: "The flag of the United States is not a flag of Jehovah God and Christ Jesus. It is the emblem of power that rules the nation; and no one can truthfully say that God and Christ Jesus rule a government where crime is rampant."⁸¹ But the court did not consider such beliefs to be a sufficient basis for an exemption. Judge Hill stated, "[i]t should be a function of government to inculcate patriotism and to instill a recognition of the blessings conferred by orderly government under the Constitution of the nation and State The flag is the symbol of these aims and purposes."⁸² Hill cautioned against granting exemptions based on religion. "The religious zealot, if his liberties were to be thus extended, might refuse to contribute taxes in furtherance of a school system that compelled students to salute the flag."⁸³ The opinion closes with a gesture to legislative jurisdiction. "It is not for us to consider matters of policy. That is for the Legislature, and that policy which decrees that pupils in the public schools of the State shall salute the United States flag does not violate any rights guaranteed by the United States and the State Constitutions."⁸⁴

When the *Sandstrom* case came to the New York Court of Appeals in January 1939, Chief Judge Crane explored the theological context before pronouncing on the Free Exercise Clauses under the federal and state constitutions. Notably, he included a long extract from a dialogue with young Grace Sandstrom. The thirteen-year-old student stated that she would be "slain" if she saluted the flag.⁸⁵ Crane proceeded to state that "the flag has nothing to do with religion, and in all the history of this country it has stood for just the contrary, namely, the principle that people may worship as they please or need not worship at all."⁸⁶ "The States, like Congress, are free to reach actions which are in violation of

⁸¹ *People ex rel. Fish v. Sandstrom*, 3 N.Y.S.2d 1006, 1008 (N.Y. Cty. Ct., 1938).

⁸² *Id.*

⁸³ *Id.* at 1009.

⁸⁴ *Id.*

⁸⁵ *People ex rel. Fish v. Sandstrom*, 18 N.E.2d 840, 842 (N.Y. 1939) ("People who write the pamphlets and papers for your religion, do you know if they ever said anything [about] whether Jehovah's Witnesses should salute the flag or not? A. In the 'Loyalty' booklet it told about other school children who had refused and that they were expelled. Q. What do you think would happen to you if you salute the flag contrary to your conscience? A. When the battle of Armageddon comes, I would be slain. Because the flag is an image and it says in the Bible not to bow down to images.").

⁸⁶ *Id.*

social duties or subversive of good order.”⁸⁷ While recognizing the girl’s sincerity, Crane stated that she lacked the capacity to discern the requisites of law and order. “These are ponderous truths to flash upon this little girl who in all conscientiousness cannot, at her time of life, grasp them.”⁸⁸ However, he counseled the school districts to exercise moderation. “May there not be, however, a better way for accomplishing the purposes of this law than immediate resort to disciplinary measures?”⁸⁹

Judge Lehman’s concurring opinion is the closest thing to a dissenting opinion that one finds in any of the state court cases on the flag salute controversy. He agreed with Chief Judge Crane that the flag “has nothing to do with religion”⁹⁰ but questioned whether the legislature intended that each child be “*compelled* to join in the exercises.”⁹¹ Religious freedom “includes the right of the individual to carry out every obligation which *he believes* has a divine sanction.”⁹² Lehman nevertheless concurred because he did not think that providing an exemption to the Witnesses was tantamount to reversing the position of the lower court or invalidating the statute. He suggested that the statute could be interpreted as non-compulsory and that it was advisable to exercise restraint to avoid “clashes” between government and the dictates of conscience.⁹³

Though the state court opinions were consistent in upholding the compulsory flag salute, one senses that a consensus was breaking down in Judge Lehman’s concluding comments.

She does not refuse to show love and respect for the flag. She refuses only to show her love and respect in manner which she believes her God has forbidden. She asks only that she be not compelled to incur the wrath of her God by disobedience to His commands. The flag salute would lose no dignity or worth if she were permitted to refrain from joining in it.⁹⁴

Through the language Lehman used, he appeared to sympathize with the dilemma religious dissenters faced in following their religious principles and refusing to salute the flag.

⁸⁷ *Id.* at 843.

⁸⁸ *Id.*

⁸⁹ *Id.* at 844.

⁹⁰ *Id.*

⁹¹ *Id.* at 845.

⁹² *Id.*

⁹³ *Id.* at 846 (citing *United States v. Macintosh*, 283 U.S. 605, 634 (1931)).

⁹⁴ *Id.* at 846-47.

III. TOTALITARIANISM IN CONSTITUTIONAL DISCOURSE

A central argument of this article is that legal attitudes toward the compulsory flag salute shifted in the late 1930s when the term “totalitarian” entered the debate. The term was put into wide circulation by the Jehovah’s Witnesses. Historians of political thought have long recognized the importance of the idea of totalitarianism, but the important role of the Witnesses in inscribing this idea in appellate litigation has not received much attention.⁹⁵

A. Totalitarianism as a Political Construct

Totalitarianism, as a word and concept, has been a crucial component of political theory since the Cold War. The most influential text is Hannah Arendt’s *The Origins of Totalitarianism*, first published in 1951. Arendt used the term to capture the common features of Nazi Germany and Soviet Communism, particularly the belief that “anything is possible,” that is, that every facet of life, including human nature, can be molded by the state into a unified whole.⁹⁶ For Arendt, the quintessential institution of totalitarian regimes is the extermination camp, which she described as “the testing ground” for the achievement of “total domination.”⁹⁷ However, the word “totalitarian” took on a different meaning in the course of litigation about the flag salute. First, attorneys for the Witnesses applied the term not only to Nazi Germany and Soviet Communism but to Italy and other regimes, including the U.S. Secondly, while Arendt regarded totalitarianism as an “unprecedented”⁹⁸ feature of the twentieth century, the Witnesses regarded it as a recurrent phenomenon, dating to ancient times. Thirdly, since the extermination camps originated in 1941,⁹⁹ they could not function as a symbol of “totalitarian” government before then. The following discussion will show that the Witnesses construed not concentration camps, but the saluting of flags and of political leaders as the quintessentially totalitarian act.

⁹⁵ But see Robert L. Tsai, *Reconsidering Gobitis: An Exercise in Presidential Leadership*, 86 WASH. U. L. REV. 363 (2008) (offering insights into the place of “totalitarianism” in public discussion of the flag controversy).

⁹⁶ HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM*, 565, 568-69, 591 (Schocken Books, 2004) (on “everything is possible”).

⁹⁷ *Id.* at 565.

⁹⁸ *Id.* at 576; see also Peter Baehr, *Identifying the Unprecedented: Hannah Arendt, Totalitarianism, and the Critique of Sociology*, 67 AM. SOCIO. REV. 804, 811 (2002).

⁹⁹ *The Death Camps*, YAD VASHEM, <https://www.yadvashem.org/holocaust/about/final-solution/death-camps.html> [<https://perma.cc/EN2Y-Z6YX>].

The word “totalitarian” is not in the Constitution; hence, one could argue that it has no legal, only rhetorical, significance. Putting aside the fact that effective rhetoric is precisely what makes *Barnette* a canonical case, there is a purely legal response. The word “democracy” is not in the Constitution either, but the term figures centrally in constitutional doctrines, especially in the realm of the First Amendment. This is because “structural” arguments play a vital role in interpreting the Bill of Rights. Structural arguments arise from generalizations about the mode of government that the Constitution, as a whole, is allegedly designed to support.¹⁰⁰

Some of the most influential interpretations of the First Amendment are based on structural arguments; notably, the claim that the Constitution establishes popular sovereignty and democratic self-government. In *Free Speech and its Relation to Self-Government*, a work that had a major impact on Justice Brennan¹⁰¹ when he composed the Court’s opinion in *New York Times v. Sullivan*, Alexander Meiklejohn argued that the Constitution was set up principally to enable citizens to govern themselves. Meiklejohn argued that self-government entails the “absolute”¹⁰² protection by the First Amendment of all political ideas, including even anti-democratic ideas.

It makes no difference whether a man is advocating conscription or opposing it, speaking in favor of a war or against it, defending democracy or attacking it, planning a communist reconstruction of our economy or criticising it. So long as his active words are those of participation in public discussion and public decision of matters of public policy, the freedom of those words may not be abridged. That freedom is the basic postulate of a society which is governed by the votes of its citizens.¹⁰³

In *New York Times*, Brennan, too, interpreted the First Amendment in the context of an open democratic public sphere of debate.

The theory of our Constitution is that every citizen may speak his mind and every newspaper express its view on matters of public concern and may not be barred from speaking or publishing because those in control of government think that what is said or written is unwise, unfair, false, or malicious.¹⁰⁴

¹⁰⁰ PHILIP BOBBITT, *CONSTITUTIONAL FATE THEORY OF THE CONSTITUTION* 74 (1982).

¹⁰¹ William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 1 (1965).

¹⁰² ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 17 (1st ed. 1948) (arguing that the freedom of speech is absolute).

¹⁰³ *Id.* at 46.

¹⁰⁴ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 298-99 (1964).

For Jackson, too, the idea of democracy was vital in his conception of free speech; but his vision of democracy was entirely different. Meiklejohn did not write about freedom of speech until the late 1940s, and his ideas were explicitly rejected by the Supreme Court¹⁰⁵ before *New York Times* consecrated them. Prior to *New York Times*, the “clear and present danger” doctrine precluded the ultra-high level of protection for political speech that Meiklejohn supported.¹⁰⁶ Jackson subscribed to a version of democratic theory structured by concern about the potential of democracy to morph into dictatorship—with freedom of speech as a contributing factor. This version of democratic theory presupposed that the tendency of any free market of ideas is to be manipulated by anti-democratic extremists. Jackson believed that the government must stifle communist and fascist ideas and of course must not promote such ideas either. When the Witnesses began to portray the flag salute as “totalitarian,” Jackson took them seriously. In fact, the term “totalitarian” as used by the Witnesses confirmed and deepened Jackson’s anxiety about the potential of democracy to morph into dictatorship.

B. The Legal Significance of Totalitarianism

Since “democracy” is ingrained in First Amendment jurisprudence, it follows that the term “totalitarian” has legal significance to the degree that it constitutes one’s particular vision of democracy. It is, then, very important to track the emergence and influence of this term in legal argument. The upshot is that the word “totalitarian” became inscribed in the compulsory flag salute controversy, starting in 1938, and Jackson solidified it in his famous *Barnette* opinion.

Writing about the history of the word “totalitarian”, Bruno Bongiovanni discussed its origin in an Italian article written in 1923.¹⁰⁷ The word was originally used to criticize the government, but in 1925, Mussolini appropriated it as a positive description for his political program.¹⁰⁸ Bongiovanni is less clear when it comes to the origins of the word in English. He suggests that the term entered the domain of political theory in 1934 through George Sabine’s entry, entitled *State*, in the *Encyclopaedia of the Social Sciences*.¹⁰⁹ Bongiovanni provides

¹⁰⁵ *Dennis v. United States*, 341 U.S. 494, 524 n.5 (1951) (Frankfurter, J., concurring).

¹⁰⁶ Harry Kalven Jr., *The New York Times Case: A Note on the “Central Meaning of the First Amendment”*, SUP. CT. REV. 191, 204-05 (1964).

¹⁰⁷ Bruno Bongiovanni, *Totalitarianism: The Word and the Thing*, 3 J. MOD. EUROPEAN HIST. 5, 5 (2005).

¹⁰⁸ *Id.* at 6.

¹⁰⁹ *Id.* at 7.

no earlier English examples. Although he mentions in passing Giovanni Gentile's article, *The Philosophic Basis of Fascism*, published in *Foreign Affairs*, he does not observe that the term appears prominently there.¹¹⁰ "In the definition of Fascism, the first point to grasp is the comprehensive, or as Fascists say, the 'totalitarian' scope of its doctrine, which concerns itself not only with political organization and political tendency, but with the whole will and thought and feeling of the nation."¹¹¹

The second alternative, given effect in the fascist governments of Italy and Germany, has produced what is called the totalitarian conception of the state, the doctrine that the state is not only sovereign in a legal sense but has also the function of regulating every department of social life—education, religion and art as well as capital and labor and the whole national economy.¹¹²

Clearly, the Jehovah's Witnesses were not the first to use "totalitarian" in English, but their adoption of this neologism began quite early,¹¹³ and they spread the term with an inflection that the above usages do not contain: they insisted upon the existence of strong totalitarian tendencies in the U.S.¹¹⁴

In *Warning*, Rutherford portrayed an eternal battle between the God Jehovah and the devil. The devil wagered that he could induce humans to blaspheme God; thus, every person is under a test to remain true to God and not serve the devil. Satan uses the tools of "politics"¹¹⁵ and

¹¹⁰ *Id.* at 7-8.

¹¹¹ Giovanni Gentile, *The Philosophic Basis of Fascism*, 6 FOREIGN AFFS. 290, 299 (1928).

¹¹² George Sabine, *State*, in ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 328, 330 (Edwin R.A. Seligman & Alvin Johnson eds., 14th ed. 1934).

¹¹³ See generally William Jones, *The Path from Weimar Communism to the Cold War. Franz Borkenau and "The Totalitarian Enemy"*, in TOTALITARISMUS 35 (Alfred Soellner et al. eds., 1997). Franz Borkenau, generally considered to be one of the first political theorists to use the term repeatedly in English, deployed it in 1938 and 1939. Judge Rutherford, who also began wielding the term in 1938, must also be counted as an early user of the term.

¹¹⁴ The turning point came in 1938; it was then that the Witnesses embarked on a campaign to denounce their adversaries as "totalitarian." Among the occurrences of "totalitarian" in 1938 was an advertisement in the Witnesses' magazine, *Consolation*, for a pamphlet entitled *Warning* by Rutherford. The ad states that Rutherford discusses the "totalitarian rule which is now sweeping the earth." *Warning*, CONSOLATION, Oct. 19, 1938, at 32. Lest one think that I am embarking on a historical digression by focusing on Rutherford, one should bear in mind that the "Judge," in addition to being the leader of the Witnesses, really was an attorney and judge, and that he served as counsel to the Witnesses in several Supreme Court cases prior to *Barnette* (but not *Barnette*; he died in 1942). He co-authored several briefs which integrated "totalitarian" into the analysis of the flag salute issue.

¹¹⁵ Audio file: *Warning* by Judge Rutherford (1938) (accessed at <https://archive.org/details/WarningByJudgeRutherford> [<https://perma.cc/86CJ-ZHDT>]). I was not able to obtain a hard copy of the pamphlet, but this is a recording that Rutherford made of it. Although the record may not be an exact replica of the pamphlet, both were issued in 1938.

“organized religion”¹¹⁶ to corrupt human beings. The Catholic Church, according to Rutherford, is the primary religious tool of the devil.¹¹⁷ Governmental organizations are also agencies which the devil uses to substitute idolatry for God’s kingdom. While “totalitarian” government, according to Rutherford, goes back to ancient times, it is particularly acute in the present, for a “great battle”¹¹⁸ is now taking place between Jehovah and the devil. Thus, a “great monstrosity” is growing.

That monstrosity is the government of the various nations under the arbitrary dictator, that is to say, a dictatorial government otherwise called a totalitarian rule. It arose first in Russia under the guise of Bolshevism or communism. Then it came forth in Italy under the name of fascism and then in Germany labelled as Nazism.¹¹⁹

Such monstrous dictatorial governments attempt to enforce rules or laws such as the heiling of men, compulsory saluting of flags, and other things, thus causing or attempting to cause the people to acknowledge that their protection and salvation comes from man and the power of men represented by some emblem or flag.¹²⁰

For Rutherford, to salute a political leader or the flag is to succumb to the devil or totalitarianism, which is the same thing. It makes no difference that the flag represents a democratic country.

Turning to some of the many briefs that Rutherford co-authored, we can observe a mixture of theology and law. *Cantwell v. Connecticut* was the first case in which the Supreme Court struck down a state law by incorporating the Free Exercise Clause of the First Amendment against the states.¹²¹ The case concerned a Connecticut statute requiring persons soliciting funds to obtain a certificate from the Secretary of the Public Welfare Council.¹²² The Secretary was also to determine if the fundraising party was “a bona fide object of charity.”¹²³ In their brief for the Witnesses, Rutherford and Hayden C. Covington, who represented the Witnesses in many cases, wrote:

Until recently a law such as this, as applied to sincere followers of Jesus Christ, was not dreamed of in America. But since the advance

Therefore, the recording, even if different, serves as evidence for his discourse at that time. The discussion of “politics” as a tool of the devil is at 10:35.

¹¹⁶ *Id.* at 11:14.

¹¹⁷ *Id.* at 18:12.

¹¹⁸ *Id.* at 2:40, 3:08, 8:42, 24:16 (explaining that the Day of Judgment is at hand and the choices that people must make to escape judgment).

¹¹⁹ *Id.* at 30:38.

¹²⁰ *Id.* at 31:14.

¹²¹ 310 U.S. 296, 303-04 (1940).

¹²² *Id.* at 300.

¹²³ *Id.* at 302.

of the totalitarian spirit and of the conspiracy to rule America by dictators many strange and unusual things have come to pass. The dictatorial and totalitarian spirit has struck down the institutions of life and liberty in all the countries of Europe, and is rapidly moving forward in this country.¹²⁴

They also stated, “this nation within a short time will be in a condition like that which now prevails in totalitarian states of Europe.”¹²⁵

In *Schneider v. New Jersey*, the Supreme Court struck down, again on First Amendment grounds, multiple city ordinances which required a permit for the distribution of handbills.¹²⁶ The ordinances sought to prevent littering on the streets. Irvington, New Jersey went a step further and limited house-to-house distribution.¹²⁷ In a petitioner’s brief on behalf of Jehovah’s Witnesses in Irvington, Rutherford cited only one source other than biblical ones.¹²⁸

If the Lord Jesus Christ, acting exactly as He did when He was on earth in the flesh, were here again and went from house to house in the Town of Irvington doing good and preaching the gospel (Luke 13:22), He would be liable to be incarcerated in the town calaboose for not having first applied to the police to grant Him permission to do what His heavenly Father commanded Him to do.¹²⁹

“Only the corporate or totalitarian states attempt to regulate the conscience of men or attempt to compel them to obey man’s law which is in derogation of the law of Almighty God.”¹³⁰ There are several other briefs filed by Rutherford and Covington which analogized the U.S. to Nazi Germany and warned of “totalitarian” domination.¹³¹

¹²⁴ Appellants’ and Petitioner’s Brief at 22, *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (No. 632), 1940 WL 46871.

¹²⁵ *Id.* at 32.

¹²⁶ 308 U.S. 147, 164 (1939).

¹²⁷ *Id.* at 157.

¹²⁸ See generally Petitioner’s Reply Brief, *Schneider v. New Jersey*, 308 U.S. 147 (1939) (No. 11), 1939 WL 48520 (citing eight Biblical references and one Supreme Court case).

¹²⁹ *Id.* at 3.

¹³⁰ *Id.* at 4.

¹³¹ See e.g., Petitioner’s Brief at 41, *Bowden v. City of Fort Smith*, 315 U.S. 793 (1942) (Mem.) (No. 314), WL 52779 (“The only factor which distinguishes this country as a republic with a democratic form of government, and therefore the only thing worthy of preservation from totalitarian aggression, is that American heritage epitomized as the ‘Bill of Rights.’”); Respondents’ Brief at 21, *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940) (No. 690), WL 46893 [hereinafter *Gobitis* Respondents’ Brief] (“Why this modern burning zeal compelling the saluting of flags and ‘heiling’ of men? It is a movement in support of Satan’s original challenge to Jehovah God that he, Satan, could turn all men against God. (Job 2:5) The Hitler totalitarian régime denounces Jehovah God, snatches children from their parents who worship Jehovah God; imprisons or kills the parents who

C. Totalitarianism in *Barnette*

In the Appellee's Brief in *Barnette*, Covington (no longer partnering with Rutherford, who was deceased) deployed the "totalitarian" theme with subtlety. There is considerably more secular legal argument in this brief than the others. And while many biblical references are still used, the word "totalitarian" is at times deployed in a secular manner. Here, for example, it is inscribed in a historical narrative:

In 1907 the first compulsory flag-salute regulation appeared in Kansas. Thereafter, until more recent years, compulsory participation in the ceremony did not increase or prosper; on the contrary, it disappeared until the rise of "fascism" and "nazism" in continental Europe. Concurrently with the spread of totalitarianism various states of the Union passed laws requiring the compulsory flag salute in schools. Between 1935 and 1939 eighteen states saw fit to expel children who refused to salute the national flag because of conscientious objection. Since the *Gobitis* decision in June 1940 and the present national emergency, children who refuse to salute the flag have been expelled in every state of the Union.¹³²

Here, Covington advocates a principle of strict scrutiny:

The present dominance of totalitarian ideas in other parts of the world suggests that an extension of legislative power in this direction should be viewed with suspicion and, *in the absence of a showing of clear necessity*, should be condemned as a deprivation of individual liberty without due process of law.¹³³

In the conclusion, Covington does inject a strong theological tone:

The compulsory flag-salute regulation is being used as a part of the totalitarian conspiracy for world domination to "get" Jehovah's witnesses in the same manner as Daniel was *framed*, while the great mass of the people are otherwise being regimented. It is manifestly foolish and silly legislation. The approximately seven years of endurance of persecution in the United States because of the regulation, and more than ten years' endurance of suffering for refusal to *heil Hitler* and his satellites and their respective "flags" in the *axis* dominated countries, should prove to all reasonable persons that the Law of Almighty God does not change¹³⁴

persist in obeying Almighty God. The flag saluting rule by school children, adopted and enforced in the States of Pennsylvania, New Jersey and Massachusetts, are leading in that same direction. Children have been expelled from schools, taken away from their parents, and committed to reform schools, and thus the sanctity of the home broken up. Such is cruelty heaped upon citizens without any just cause or excuse.").

¹³² *Barnette* Appellees' Brief, *supra* note 10, at 22 (internal citation omitted).

¹³³ *Id.* at 30 (emphasis in original).

¹³⁴ *Id.* at 89.

In sum, in the Appellee's Brief in *Barnette*, the word "totalitarian" glues together some sensible legal arguments and the Witnesses' Manichean, or theologically polarized, view of the world.

If one reads the brief with Jackson's opinion in mind, then a key point in Covington's discussion of freedom of speech is the right not to be compelled to speak. Jackson is famous for turning this idea of "no compelled speech" into an enduring First Amendment doctrine. Covington wrote:

When the right of *free speech* is exercised the person says something, or performs an act, a gesture symbolic of speech, to communicate to others an idea Or, as in the case at bar, the person's electing to *withhold* a gesture (or oral utterance) by means of which a certain state of mind is openly manifested or declared to others, may be claimed [sic] to be violative of a statute or school-board regulation. In the case here, appellees are compelled, under threat of severe penalty, to cause their children to communicate or "say" something which the children's and the parents' sincere and conscientious understanding of the CREATOR'S written Law convinces them to be morally wrong *for them* to "say"¹³⁵

To strengthen the point, Covington references *Stromberg v. California*, in which the Court upheld the right of nineteen-year-old Yetta Stromberg to lead a group of younger children in a salute to a reproduction of the flag of the Soviet Union.¹³⁶ Stromberg was an American-born girl of Russian parentage who owned books and pamphlets which contained "incitements to violence," and was a "member of the Young Communist League," which was "affiliated with the Communist Party."¹³⁷ As Stromberg led the pledge, the children recited, "I pledge allegiance to the workers' red flag and to the cause for which it stands, one aim throughout our lives, freedom for the working class."¹³⁸ Covington capitalized on the irony.

Compelling one to communicate by means of oral utterance or by gesture, under penalty, is quite as clear an invasion of the right of free speech as the attempt by law to *prevent* expression or communication by word or sign, such as use of the "red flag" in the *Stromberg* case, *supra* If the right is given or safeguarded by the Constitution to salute the flag of a foreign power whose principles are at enmity to the principles of the United States Constitution, then with greater force of reason the Constitution of

¹³⁵ *Id.* at 66.

¹³⁶ *See Stromberg v. California*, 283 U.S. 359, 362 (1931).

¹³⁷ *Id.*

¹³⁸ *Id.*; *Barnette* Appellees' Brief, *supra* note 10, at 65 (referencing *Stromberg v. California*, 283 U.S. 359, 362 (1931)).

the United States shields the poor and helpless child who, bearing no allegiance to a foreign power, refuses for conscience'[s] sake to salute the national flag.¹³⁹

The word “totalitarian” is not used in this context, but the message is clear. A real concern to avert totalitarianism would allow a young person to refrain from saluting the American flag and might not allow a person to salute the Soviet flag: American law has it backwards.

Admittedly, *Barnette* and *Stromberg* are distinguishable. Most notably, *Stromberg* does not concern public schools. However, when powerfully evocative terms like “totalitarian” are brought into discussion, they tend to blur distinctions. One of the things that makes Jackson’s opinion in *Barnette* so hypnotic is that he saturated it with the language of force. The word “totalitarian”, which he uses once, is the hub from which emanate the spokes of “coerce” (used four other times)¹⁴⁰ as in “to coerce uniformity of sentiment,”¹⁴¹ “force,”¹⁴² “graveyard,”¹⁴³ “exterminating,”¹⁴⁴ and other gratuitously violent terms. Put differently, his hyperbolic language would have been nonsensical to the judicial community if the specter of “totalitarian” government did not serve to make a slippery slope leading from the flag salute to dictatorship and genocide comprehensible.

Rutherford and Covington must be credited with getting Jackson and others to regard the U.S. as a locus of “totalitarian” tendencies which the judiciary must try to contain. In this context, Jackson famously declared:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One’s right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.¹⁴⁵

Although the passage articulates the concept of strict scrutiny which is now a settled doctrine, for Jackson in 1943 it was a dictum, an effusion of the moment; it was not intended to have a legally binding

¹³⁹ *Barnette* Appellees’ Brief, *supra* note 10 at 66-67.

¹⁴⁰ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 630, 633, 634, 640 (1943).

¹⁴¹ *Id.* at 640.

¹⁴² *Id.* 634.

¹⁴³ *Id.* at 641.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 638.

effect on Jackson himself, let alone the Court. This is evident from Jackson's own opinions.

D. Totalitarianism in *Terminiello*

In *Terminiello v. Chicago*, a suspended Catholic priest who delivered an anti-Black and anti-Jewish oration to the Christian Veterans of America was charged with breaching the peace and convicted of violating a Chicago city ordinance.¹⁴⁶ The priest argued that the ordinance violated his right to free speech, and the United States Supreme Court agreed. The majority declared:

The vitality of civil and political institutions in our society depends on free discussion. . . . it is only through free debate and free exchange of ideas that government remains responsive to the will of the people The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes.¹⁴⁷

This is a Cold War version of “totalitarian” theory: America has a libertarian tradition that distinguishes it from fascist and communist regimes. But Jackson believed that freedom of speech in a democracy facilitates the welling up of political extremism. He saw *Terminiello* as a kind of Hitler. “His speech . . . followed, with fidelity that is more than coincidental, the pattern of European fascist leaders.”¹⁴⁸ Jackson plainly contradicted his paean to the Bill of Rights in *Barnette*:

The present obstacle to mastery of the streets by either radical or reactionary mob movements is not the opposing minority. It is the authority of local governments which represent the free choice of democratic and law-abiding elements, of all shades of opinion, but who, whatever their differences, submit them to free elections which register the results of their free discussion.¹⁴⁹

Here, Jackson reveals a vision of the “totalitarian” threat very different from the Court's majority when he adds, “This drive by totalitarian groups to undermine the prestige and effectiveness of local democratic governments is advanced whenever either of them can win from this Court a ruling which paralyzes the power of these officials.”¹⁵⁰ In other words, not only can government be a source of totalitarian culture as Jackson argued in *Barnette*; there is also the danger of unfettered civil society becoming totalitarian. The judiciary should not

¹⁴⁶ *Terminiello v. Chicago*, 337 U.S. 1, 3 (1949).

¹⁴⁷ *Id.* at 4 (citations omitted).

¹⁴⁸ *Id.* at 22 (Jackson, J., dissenting).

¹⁴⁹ *Id.* at 24 (Jackson, J., dissenting).

¹⁵⁰ *Id.*

restrict the action of states seeking to contain political extremism. With words no less eloquent than the “fixed star” but much less quoted thereafter, Jackson concluded, “The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.”¹⁵¹

The idea of constitutional “suicide” was not unique to Jackson. Karl Loewenstein, in his theory of “militant democracy,” argued that fascist parties in Europe took advantage of democratic liberties to subvert democracy from within the system.¹⁵² Militant democracy meant that free societies must protect themselves against the abuse of freedom. Loewenstein faulted the European democracies for their “legalistic self-complacency and suicidal lethargy.”¹⁵³ He was explicit that limiting freedom of speech and association is essential for the self-maintenance of democracies.¹⁵⁴ Loewenstein’s ideas were influential in the making of West Germany’s post-war constitution, the “Basic Law,” which was ratified in 1949, the year *Terminiello* was decided.¹⁵⁵ The Basic Law, which is now the Constitution of a united Germany, does not afford freedom of speech to those who oppose the democratic order.¹⁵⁶ The Basic Law also permits the Constitutional Court to ban extremist political parties. The Communist Party of Germany has been banned in Germany since 1956.¹⁵⁷

It seems likely that Jackson, who was the Chief Prosecutor in the Nuremberg Trials, would have been familiar with the Basic Law and its underlying philosophy. But that is not the only reason to presume that

¹⁵¹ *Id.* at 37 (Jackson, J., dissenting).

¹⁵² Karl Loewenstein, *Militant Democracy and Fundamental Rights*, I, 31 AM. POL. SCI. REV., 417, 423 (1937) (“The fact that fascism is not an ideology, but only a political technique, is . . . victorious only under the extraordinary conditions offered by democratic institutions. Its success is based on its perfect adjustment to democracy. Democracy and democratic tolerance have been used for their own destruction.”).

¹⁵³ *Id.* at 431.

¹⁵⁴ Karl Loewenstein, *Militant Democracy and Fundamental Rights*, II, 31 AM. POL. SCI. REV., 638, 653 (1937).

¹⁵⁵ Grundgesetz [GG] [Basic Law], art. 18 (Ger.), translation at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0103 [<https://perma.cc/YR3D-BCER>]. See generally R. W. Kostal, *The Alchemy of Occupation: Karl Loewenstein and the Legal Reconstruction of Nazi Germany, 1945-1946*, 29 L. HIST. REV. 1, 1 (2011).

¹⁵⁶ Grundgesetz [GG] [Basic Law], art. 18 (Ger.) (“Whoever abuses the freedom of expression . . . in order to combat the free democratic basic order shall forfeit these basic rights.”).

¹⁵⁷ *Id.* at art. 21; see also Paul Franz, *Unconstitutional and Outlawed Political Parties: A German-American Comparison*, 5 B.C. INT’L COMPAR. L. REV., 51, 59 (1982) (discussing the banning of the German Communist Party).

he knew Loewenstein's work. The Court cited it in *Beauharnais v. Illinois*,¹⁵⁸ which concerned a hate speech law; that is, a statute forbidding the portrayal of a class of citizens of any race or religion as depraved, criminal, unchaste, or lacking virtue.¹⁵⁹ Frankfurter, writing for the majority, upheld the statute. His opinion cited Loewenstein.¹⁶⁰ Jackson dissented on technical grounds, but he devoted a substantial portion of his dissent to defending the value of what were then called "group libel" statutes. Jackson did not cite Loewenstein, but he cited another source which relied upon and developed Loewenstein's ideas. This was *Democracy and Defamation: Control of Group Libel*, David Riesman's pioneering article on hate speech.¹⁶¹ Generally remembered today as a sociologist and author of *The Lonely Crowd* (1950), Reisman was trained in law. His *Democracy and Defamation* article argued that the law regarding the libeling of individuals could also be applied to find that an entire group of people were victims of defamation. The article was briefly in vogue; not only Jackson but the majority in *Beauharnais* cited it.¹⁶²

There is even more in *Beauharnais* that undercuts Jackson's affirmation in *Barnette* that the Bill of Rights trumps democratically enacted state legislation. In fact, Jackson admits that he has changed his mind.

The spectrum of views expressed by my seniors shows that disagreement as to the scope and effect of this Amendment underlies this, as it has many another, division of the Court. All agree that the Fourteenth Amendment does confine the power of the State to make printed words criminal. Whence we are to derive metes and bounds of the state power is a subject to the confusion of which, I regret to say, I have contributed—comforted in the acknowledgment, however, by recalling that this Amendment is so enigmatic and abstruse that judges more experienced than I have had to reverse themselves as to its effect on state power.¹⁶³

He goes on to write,

The assumption of other dissents is that the "liberty" which the Due Process Clause of the Fourteenth Amendment protects against

¹⁵⁸ See generally *Beauharnais v. Illinois*, 343 U.S. 250 (1952). See also HARRY KALVEN, JR., *THE NEGRO AND THE FIRST AMENDMENT* 21-22 (1965) (discussing *Beauharnais*, which has settled into oblivion, and the short life of the idea of group libel).

¹⁵⁹ *Beauharnais*, 343 U.S. at 251.

¹⁶⁰ *Id.* at 259 n.9.

¹⁶¹ David Riesman, *Democracy and Defamation: Control of Group Libel*, 42 COLUM. L. REV., 727, 732 (1942) (discussing Loewenstein's idea of militant democracy).

¹⁶² *Beauharnais*, 343 U.S. at 261 n.16.

¹⁶³ *Id.* at 287-88 (Jackson, J., dissenting).

denial by the States is the literal and identical “freedom of speech or of the press” which the First Amendment forbids only Congress to abridge. The history of criminal libel in America convinces me that the Fourteenth Amendment did not “incorporate” the First, that the powers of Congress and of the States over this subject are not of the same dimensions, and that because Congress probably could not enact this law it does not follow that the States may not.¹⁶⁴

In sum, Jackson no longer believed that the First Amendment applied to the states in full force.

E. Some Inconsistencies in Jackson’s Decisions

As described by Harry Kalven, Jr., Jackson, in *Beauharnais*, upheld a “two-tier view of free speech.”¹⁶⁵ Federal law is to be scrutinized more closely than state law. There is, however, no hint of a two-tier view in *Barnette*, in which Jackson wrote,

The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the *Bill of Rights*.¹⁶⁶

Barnette, in fact, represents an anomaly in Jackson’s legal career.

Before joining the Court, Jackson served as Solicitor General and Attorney General under Franklin D. Roosevelt, advocating that legislation limiting the free market should be immune from judicial review. In 1941, he published *The Struggle for Judicial Supremacy*,¹⁶⁷ in which he criticized the Court during the *Lochner* era for expanding the Fourteenth Amendment to strike down socially progressive legislation. In 1955, he published *The Supreme Court in the American System of Government*, in which he wrote,

I know of no modern instance in which any judiciary has saved a whole people from the great currents of intolerance, passion, usurpation, and tyranny which have threatened liberty and free institutions . . . it is my belief that the attitude of a society and of its organized political forces, rather than its legal machinery, is the controlling force in the character of free institutions.¹⁶⁸

¹⁶⁴ *Id.* at 288.

¹⁶⁵ KALVEN, *supra* note 158, at 34.

¹⁶⁶ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

¹⁶⁷ *See generally* ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* (1941).

¹⁶⁸ ROBERT H. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* 80-81 (1955). Compare Jackson’s logic with Frankfurter’s:

Let us now return, with a fresh perspective, to the “fixed star.” For the sake of close analysis, it is worth quoting again:

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.¹⁶⁹

Steven Smith has observed that Jackson affirms two separate propositions. The first is that governmental officials must always refrain from prescribing political and other values. The second is that officials cannot compel citizens to assent to the values they prescribe. Smith acutely notes that the conjunction “or” separating the two principles means that the propositions are distinct, and both are binding. He suggests that Jackson would have done better to say “and,” resulting in a single prohibition: when the government prescribes orthodoxies, it cannot also compel every person to assent. Smith’s argument is sound for two reasons. First, it defies common sense to say that government cannot prescribe political values, because it does so all the time.

The bottom line is that governments, under our Constitution or otherwise, are constantly and necessarily in the business of declaring some things to be true and others to be false—of “prescribing what shall be orthodox” in the diverse and sundry matters that government deals with. And indeed, American governments have from the beginning emphatically and sometimes eloquently enlisted support on the basis of declarations of what were held out as pertinent or important or even noble truths. Liberty. Equality. Opportunity. “We hold these truths” This is a nation “*dedicated to the proposition that*”¹⁷⁰

According to Smith, the real problem Jackson meant to address was not governments making ideological affirmations but governments requiring subjects to replicate them.¹⁷¹ As Smith says, the first part of

[T]he real battles of liberalism are not won in the Supreme Court. To a large extent the Supreme Court, under the guise of constitutional interpretation of words whose contents are derived from the disposition of the Justices, is the reflector of that impalpable but controlling thing, the general drift of public opinion. Only a persistent, positive translation of the liberal faith into the thoughts and acts of the community is the real reliance against the unabated temptation to straitjacket the human mind.

FELIX FRANKFURTER, *Can the Supreme Court Guarantee Toleration?*, in *LAW AND POLITICS: OCCASIONAL PAPERS OF FELIX FRANKFURTER 1913-1938*, 195, 197 (Archibald MacLeish & E.F. Prichard, Jr. eds., 1962).

¹⁶⁹ *Barnette*, 319 U.S. at 642.

¹⁷⁰ Steven D. Smith, “*Fixed Star*” or *Twin Star*?: *The Ambiguity of Barnette*, 13 *FIU L. REV.* 801, 811 (2019).

¹⁷¹ *Id.* at 806-07.

the fixed star “is not a plausible account of what American governments have ever done or ever could do.”¹⁷²

I would go further. The second proposition, against compelled speech, is indeed plausible, but Jackson himself did not adhere to it. This is evident in *Adler*¹⁷³ and *Douds*,¹⁷⁴ where he sided with the majority upholding oaths requiring the disavowal of communism and violent revolution. The flag salute was unacceptable for Jackson, not because it was compelled speech per se, but because he perceived it as a ceremony resembling the rites of “totalitarian” governments.

For Jackson, the Bill of Rights was not a fixed star. His rhetoric sounds profoundly censorious of all state laws that infringe upon free speech, but the remedy he suggests has limited legal impact. The Witnesses received an exemption; the flag salute law was not struck down. If it is heinous for government to prescribe orthodox ideas, what gives it the power to require the flag salute in the first place? Jackson addresses the issue in a manner which, at first, suggests that the law should be struck down.

The *Gobitis* decision, however, *assumed*, as did the argument in that case and in this, that power exists in the State to impose the flag salute discipline upon school children in general. The Court only examined and rejected a claim based on religious beliefs of immunity from an unquestioned general rule. The question which underlies the flag salute controversy is whether such a ceremony so touching matters of opinion and political attitude may be imposed upon the individual by official authority under powers committed to any political organization under our Constitution. We examine rather than assume existence of this power and, against this broader definition of issues in this case, re-examine specific grounds assigned for the *Gobitis* decision.¹⁷⁵

According to Jay S. Bybee, Jackson did not in fact recognize the power of West Virginia to prescribe the flag salute: “his approach called for striking the law in its entirety.”¹⁷⁶ An argument pulling in favor of this view is that Jackson portrayed the compulsory flag salute as broad in its impact: a violation of the free speech of both religious and secular persons, and not merely an infringement of the free exercise of religion. This was a novel move, presaged in Covington’s brief.¹⁷⁷ The circuit

¹⁷² *Id.* at 813.

¹⁷³ See generally *Adler v. Bd. of Educ.*, 342 U.S. 485 (1952).

¹⁷⁴ See generally *Am. Commc’ns Ass’n. v. Douds*, 339 U.S. 382, 422 (1950) (Jackson, J., concurring and dissenting).

¹⁷⁵ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 635-36 (1943).

¹⁷⁶ Bybee *supra* note 12, at 284.

¹⁷⁷ See generally *Barnette Appellees’ Brief*, *supra* note 10.

which held in favor of the Witnesses and overruled *Gobitis* had treated the salute only as a religious freedom issue.¹⁷⁸ The amicus briefs from the American Bar Association¹⁷⁹ and the American Civil Liberties Union¹⁸⁰ contained no free speech arguments. The concurring opinion of Justices Black and Douglas focused on religion.¹⁸¹ But Jackson wrote,

While religion supplies appellees' motive for enduring the discomforts of making the issue in this case, many citizens who do not share these religious views hold such a compulsory rite to infringe constitutional liberty of the individual. It is not necessary to inquire whether non-conformist beliefs will exempt from the duty to salute unless we first find power to make the salute a legal duty.¹⁸²

This does sound as if Jackson was preparing to nullify the law in its entirety. If it is inconsistent with freedom of speech and offends “many citizens,” why should there be a flag salute requirement at all? However, Bybee does not adduce any specific passage to prove that the decision was so far reaching. There are, however, two passages which clearly speak of granting an accommodation to those opposed to the salute.¹⁸³ Even more conclusive is the simple fact that the decision affirms the circuit court’s injunction to restrain enforcement against Jehovah’s Witnesses.¹⁸⁴ While Jackson’s rhetoric equating compelled speech with totalitarianism is intense, the holding reverts to the piecemeal spirit of religious accommodationism. So riveted have readers of the case been by its dicta that they have overlooked its narrow holding.

¹⁷⁸ *Barnette v. W. Va. State Bd. of Educ.*, 47 F. Supp. 251, 252 (S.D. W. Va. 1942) (“the regulation amounts to a denial of religious liberty . . .”).

¹⁷⁹ See generally Brief of the Committee on the Bill of Rights, of the American Bar Association, as Friends of the Court, *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (No. 591), 1942 WL 75727.

¹⁸⁰ Brief for Am. Civ. Liberties Union, Amicus Curiae, *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (No. 591), 1943 WL 71854.

¹⁸¹ *W. Va. State Bd. Of Educ. v. Barnette*, 319 U.S. 624, 643 (1943) (“We believe that the statute before us fails to accord full scope to the freedom of religion secured to the appellees by the *First* and *Fourteenth Amendments*.”).

¹⁸² *Id.* at 634-35.

¹⁸³ “But here the power of compulsion is invoked without any allegation that remaining passive during a flag salute ritual creates a clear and present danger that would justify an effort even to muffle expression.” *Barnette*, 319 U.S. at 633-34.

¹⁸⁴ *Id.* at 642.

IV. FRANKFURTER'S VOICE IN THE GREAT CONVERSATION

A. From Particularism to Pluralism

Given the inconsistency in Jackson's opinion in *Barnette*, and the inconsistency in his position on the Fourteenth Amendment over time, Frankfurter's mammoth dissent (it is 10,000 words long, almost four times longer than his majority opinion in *Gobitis*) acquires a correspondingly large significance. When one no longer adulates Jackson's opinion, then one ought not denigrate Frankfurter's. A respectful re-reading of his opinions in both cases becomes potentially exciting in the interstice of Jackson's contradictions.¹⁸⁵

The attitude I recommend is to regard oneself as a *witness*, not to a truth incarnated by Jackson but to a serious debate over enduring questions between Jackson and Frankfurter. Their debate over the flag was part of a larger conversation about the meaning of the Constitution. Writing about the educational ideal of "The Great Conversation," Robert M. Hutchins observed that "To put an end to the spirit of inquiry . . . it is not necessary to burn the books. All we have to do is to leave them unread for a few generations."¹⁸⁶ Leaving Frankfurter unread tends to close down inquiry.

Similar to the idea of the Great Conversation is Elie Wiesel's discussion of the Talmud. He describes the contention between the School of Hillel and the School of Shammai in the first century B.C.E: Rabbi Hillel was patient and tolerant with new students while Rabbi Shammai was strict and unforgiving.¹⁸⁷ A stranger came to Shammai and asked to be taught the entire Torah quickly, while he stood on one foot.¹⁸⁸ Shammai cast him out, but Hillel received him politely. "If that is what you wish, so be it. This is the substance of the law: 'Do not do unto others what you do not want them to do unto you.' All the rest is commentary—now go and study."¹⁸⁹ After discussing how in his youth he preferred Hillel, Wiesel states, "Both may be right, provided the two options remain open; *even though Hillel's decision prevails, both opinions must be transmitted.*"¹⁹⁰ Wiesel goes on to say that in Jewish theology, two opposing attitudes can be right at different times. "God

¹⁸⁵ Such a reading deserves a separate article. Here, I will only counsel an attitude of mind to bring to the reading, and I will suggest why Frankfurter's opinions are not outdated.

¹⁸⁶ ROBERT M. HUTCHINS, *THE GREAT CONVERSATION: THE SUBSTANCE OF A LIBERAL EDUCATION* 2 (1952).

¹⁸⁷ ELIE WIESEL, *SAGES AND DREAMERS* 169 (1991).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 171 (emphasis added).

alone is always right. God alone knows history in its totality; only fragments are shown to man.”¹⁹¹

This attitude is all the more proper because it was Frankfurter’s own attitude toward life and the law. He was impervious to the all-knowing rhetoric of the Witnesses, including the grandiloquent rhetoric of totalitarianism. In the first words in his *Barnette* dissent, he identifies himself as a Jew, “[o]ne who belongs to the most vilified and persecuted minority in history”¹⁹² It is a brilliant identity-based opening because it allows him to make several points at once. First, being in a minority group himself, he is not “insensible”¹⁹³ to the condition of the Witnesses as a minority. Second, his Judaism gives him a personal reason to readily accept “the general libertarian views in the Court’s opinion”¹⁹⁴ Last, of course he makes the case for “judicial self-restraint,” a term he will repeat four times in the opinion.¹⁹⁵ To dramatize to the reader that he has turned a corner from the particularism of his Jewish identity to the non-denominational view of a judge, Frankfurter refers to a sacred text that is not his own, “[b]ut as judges we are neither Jew nor Gentile, neither Catholic nor agnostic.”¹⁹⁶ The allusion is to a letter written by Saint Paul to the Galatians, 3:28.¹⁹⁷ It is striking to note that his only usage of the word “Jew” comes from a Christian passage which he deploys to suggest that one should surmount one’s given identity.

One can only imagine what Frankfurter must have thought of the briefs submitted by the Witnesses in *Gobitis* and *Barnette*. In the *Gobitis* brief, the Jews are portrayed as a people who forsook their covenant with God and took up the worship of idols.¹⁹⁸ Immediately after describing the corruption of the Jews, the text says that the Witnesses are the ones—meaning the only ones—now “in a covenant to do the will of God.”¹⁹⁹ The *Barnette* brief for the Witnesses stated that they have the same relationship to the flag that Jesus’s apostles had when they were arrested for their refusal to “‘heil’ or salute Caesar and the Jewish

¹⁹¹ *Id.* at 173.

¹⁹² *W. Va. State Bd. Of Educ. v. Barnette*, 319 U.S. 624, 646 (1943) (Frankfurter, J., dissenting).

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 648, 666, 667.

¹⁹⁶ *Id.* at 647.

¹⁹⁷ Galatians, 3:28 (King James) (“There is neither Jew nor Greek, there is neither bond nor free, there is neither male nor female: for ye are all one in Christ Jesus.”).

¹⁹⁸ *Gobitis* Respondents’ Brief, *supra* note 131 at 18.

¹⁹⁹ *Id.*

clergy.”²⁰⁰ This suggests a resemblance of both Caesar and the Jews to the Nazis.

The Witnesses purported to know exactly who God is and exactly how to set up God’s kingdom. Their alternative to “totalitarian” rule was not democracy; it was “THEOCRATIC GOVERNMENT.”²⁰¹ Particularly in the *Gobitis* brief, Rutherford and Covington addressed the Court with the presumption that the Court viewed the world through a Christian lens. “This honorable court takes judicial notice that the Holy Bible is the authoritative Word or law of Almighty God.”²⁰² It is said that Frankfurter was “intensely patriotic,”²⁰³ which would explain why he was not swept away by the analogies the Witnesses posited between the U.S. and Nazi Germany. However, to reduce his perspective to patriotism shrinks him by ascribing to him a fixed identity, when it is evident that he was a believer in pluralism.

B. Frankfurter Ensures a Comprehensive Understanding of the Issues in *Barnette* and *Gobitis*

Frankfurter was skeptical of the far-reaching claims of the Witnesses, who lacked epistemic self-restraint. The beginning of his opinion in *Gobitis* is far more abstract than the personalized opening of his dissent in *Barnette*, but equally brilliant. It establishes the same intellectual high ground, pluralism, as the basis for his argument about the need for judicial deference to state legislation. The argument he makes is that there can be no religious freedom without skepticism.

When does the constitutional guarantee compel exemption from doing what society thinks necessary for the promotion of some great common end, or from a penalty for conduct which appears dangerous to the general good? To state the problem is to recall the truth that no single principle can answer all of life’s complexities. The right to freedom of religious belief, however dissident and however obnoxious to the cherished beliefs of others—even of a majority—is *itself the denial of an absolute*. But to affirm that the freedom to follow conscience has itself no limits in the life of a society *would deny that very plurality of principles* which, as a matter of history, underlies protection of religious toleration.²⁰⁴

Frankfurter is saying that if we could determine the nature of religious truth with absolute certainty, we would dispense with religious

²⁰⁰ *Barnette* Appellees’ Brief, *supra* note 10 at 28.

²⁰¹ *Gobitis* Respondents’ Brief, *supra* note 131 at 9.

²⁰² *Id.*

²⁰³ Posner, *supra* note 22, at 530.

²⁰⁴ *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 593-94 (1940) (emphasis added).

freedom; we would simply enforce the one true religion. Once we accept religious freedom, we accept that human judgment is relative. When it comes to the question of whether the flag salute is educationally valuable, it is not up to the Court to decide. The Court must apply skepticism to itself and not consider itself an all-knowing philosopher-ruler. In educational matters the Court has no expertise.

Frankfurter is not suggesting that the legislature has superior expertise. Rather, he is asserting that with respect to any topic about which there is no method for establishing a single truth, the decision should default to the democratic process. The Court's role is only to determine if the legislature has a reasonable—meaning plausible—view of the matter; for there is no level of truth beyond that.

We are dealing here with the formative period in the development of citizenship. Great diversity of psychological and ethical opinion exists among us concerning the best way to train children for their place in society. Because of these differences and because of reluctance to permit a single, iron-cast system of education to be imposed upon a nation compounded of so many strains, we have held that, even though public education is one of our most cherished democratic institutions, the *Bill of Rights* bars a state from compelling all children to attend the public schools.²⁰⁵

It follows that the Court cannot dictate educational theory to the public schools. If the mind can seize the truth about what constitutes the proper form of education, we would have no right to choose whether to attend private schools. We would establish, as in Plato's *Republic*, one educational system.²⁰⁶ The question as to whether the civic nature of the ceremony would be disrupted by permitting exemptions must be posed in the same open-ended epistemic space. Who is to decide, given that there can be no definitive answer? The states are within their cognitive rights to consider "that such an exemption might introduce elements of difficulty into the school discipline, might cast doubts in the minds of the other children which would themselves weaken the effect of the exercise."²⁰⁷

The Witnesses can be required to conform. Frankfurter recognizes that this entails a loss of autonomy within the context of the ceremony, but there is no deprivation of liberty. Since the Witnesses are not compelled to attend the public schools, they are not compelled to salute

²⁰⁵ *Id.* at 598-99.

²⁰⁶ *See generally* THE REPUBLIC OF PLATO 193-220 (Allan Bloom trans., 2d ed. 1991) (514a-541b).

²⁰⁷ *Gobitis*, 310 U.S. at 600.

the flag. Moreover, the salute does not cut to the heart of the exercise of religion. In *Barnette*, he wrote:

It is not even remotely suggested that the requirement for saluting the flag involves the slightest restriction against the fullest opportunity on the part both of the children and of their parents to disavow as publicly as they choose to do so the meaning that others attach to the gesture of salute. All channels of affirmative free expression are open to both children and parents. Had we before us any act of the state putting the slightest curbs upon such free expression, I should not lag behind any member of this Court in striking down such an invasion of the right to freedom of thought and freedom of speech protected by the Constitution.²⁰⁸

While the iconic words of Jackson in *Barnette* continue to be celebrated, one must remember not to minimize the importance of Frankfurter's. In exploring the views of Frankfurter, one can comprehend the contours of the debate over the flag at a much higher level.

V. CONCLUSION

I have only scratched the surface of Frankfurter's opinions, but I have suggested that they rested on a more coherent philosophical platform than Jackson's canonized opinion. Jackson simply had superior rhetorical skills. A separate article would be needed to trace Frankfurter's pluralism systematically through his arguments about the flag salute. But one thing must be noted. Frankfurter did not defend judicial restraint because he was politically "conservative." Today, judicial restraint is often associated with opposition to *Roe v. Wade*, which for some conservatives is the preeminent symbol of judicial activism.²⁰⁹ Yet, for Frankfurter, the symbol of judicial activism was the activity of the Lochner Court: striking down social legislation protecting workers from the ravages of unregulated capitalism. In *Bunting v. Oregon*, the Court upheld a state law limiting the work day to ten hours.²¹⁰ Frankfurter co-authored the brief and argued it in the Supreme Court.²¹¹ The case opened a crack in the Lochner era's protection of business interests. Frankfurter was unable to comprehend how Jackson

²⁰⁸ *W. Va. State Bd. Of Educ. v. Barnette*, 319 U.S. 624, 664 (1943) (Frankfurter, J., dissenting).

²⁰⁹ Jack M. Balkin, *Why Liberals and Conservatives Flipped on Judicial Restraint: Judicial Review in the Cycles of Constitutional Time*, 98 TEX. L. REV. 215, 233, 239, 242 (2019).

²¹⁰ *Bunting v. Oregon*, 243 U.S. 426, 438 (1917).

²¹¹ Archibald MacLeish, *Foreword* to LAW AND POLITICS, OCCASIONAL PAPERS OF FELIX FRANKFURTER 1913-1918, at ix, xix (1939).

could both affirm the primacy of the First Amendment over state legislation and assert that the property rights of business owners vis-à-vis state legislation would not be revived.²¹² According to Frankfurter, the more one elevates free speech to a level of an absolute, the more one must do the same with the rights of property and contract. Frankfurter wrote:

Our power does not vary according to the particular provision of the Bill of Rights which is invoked. The right not to have property taken without just compensation has, so far as the scope of judicial power is concerned, the same constitutional dignity as the right to be protected against unreasonable searches and seizures, and the latter has no less claim than freedom of the press or freedom of speech or religious freedom.²¹³

It is worth recalling that Joseph Lochner was a baker who claimed that he had a right to employ workers for more than ten hours per day, or sixty hours per week.²¹⁴ In a recent case, also involving a baker, *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, the Court had to find the balance between the baker's First Amendment rights and the principle of anti-discrimination as interpreted and applied by a state civil rights commission.²¹⁵ The Court decided in favor of the First Amendment, citing the "fixed star" passage in *Barnette*.²¹⁶ The state's commitment to equal treatment, which obviously has a constitutional source in the Fourteenth Amendment, was perfunctorily reduced to an "orthodoxy" which the baker had a right to find "offensive."²¹⁷ Hence,

²¹² See *Barnette*, 319 U.S. at 639, 648. Here, Jackson distinguishes between the incorporation of speech rights and of property rights. His argument is that property rights are not as fully incorporated. The argument rests on two questionable points, neither of which Frankfurter accepted. The first is that the right of property is not consecrated anywhere in the Bill of Rights but is delineated only in the Fourteenth Amendment. The second is that a right of this kind deserves less judicial protection than one that is in the Bill of Rights. I cannot see why the absence of explicit reference, in the Fourteenth, to freedom of speech and religion should be taken as proof that these rights become *stronger*, through incorporation, than those rights which one deems to be explicit in the Fourteenth. One implication of Jackson's reasoning is that freedom of speech is more important than the equal protection clause, because the latter is mentioned only in the Fourteenth. Again, why should a right such as speech, originally designed not to apply against the states, be protected after incorporation more than those rights, such as equal protection, which the Fourteenth prescribes on its own terms, i.e., without incorporation? The answer for Jackson might be that he did not think that equal protection had any meaning other than to incorporate something contained in the Bill of Rights. Today, at least, that is an impossible viewpoint.

²¹³ *Id.* at 648-49 (Frankfurter, J., dissenting).

²¹⁴ *Lochner v. New York*, 198 U.S. 45, 46 (1905).

²¹⁵ *Masterpiece Cakeshop v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1723 (2018).

²¹⁶ *Id.* at 1731.

²¹⁷ *Id.*

the conflict between two fundamental rights—free speech and equality—was trivialized.

Frankfurter, I believe, would have recognized the “complexities” of the *Masterpiece Cake* case. He also might have suggested that, when it comes to the excruciatingly difficult matter of weighing First Amendment rights against the fundamental right not to be discriminated against, there can be no final answer: the matter should perhaps be left to the states to resolve. Of course, one can disagree, but my point is that *Masterpiece Cake* does not rise to the high level of analysis achieved in *Barnette*. In *Masterpiece Cakeshop*, the tension between free speech and non-discrimination is not adequately dramatized, and the question of state jurisdiction is hardly addressed.

Frankfurter approached the flag salute issue as requiring inquiry into “ultimate questions of judicial power in its relation to our scheme of government.”²¹⁸ This is missing in some of the cases which subsequently relied upon Jackson’s “fixed star,” which is a reason to preserve Frankfurter’s voice in the Great Conversation.

²¹⁸ W. Va. State Bd. Of Educ. v. Barnette, 319 U.S. 624, 667 (1943) (Frankfurter, J., dissenting).