

AMERICAN CONSTITUTIONALISM  
VOLUME II: RIGHTS AND LIBERTIES  
Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 8: The New Deal/Great Society Era—Democratic Rights/Free Speech

---

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

---

*Billy and Lillian Gobitas<sup>1</sup> were young Jehovah's Witnesses who attended public school in Minersville, West Virginia. In the summer of 1935, the leader of that sect, Joseph Rutherford, determined that flag salutes were a form of idolatry. Inspired by Rutherford, the Gobitas children refused to participate in the flag salute ceremony in their elementary and middle schools that fall. Billy, then a fifth grader, declared that "I do not salute the flag not because I do not love my country but I love my country and I love God more and I must obey his commandments." After the local board of education passed an ordinance mandating that "all teachers and pupils of the [Minersville] schools be required to salute the flag of our country as a part of the daily exercises," the Gobitas children were expelled from school. Walter Gobitas, their father, then brought a lawsuit against the Minersville School District, claiming that the mandatory flag salute violated his children's free speech and free exercise rights. The school district claimed that this was a legitimate patriotic exercise. A lower federal district court granted an injunction against mandatory flag salutes and that decision was sustained by the Court of Appeals for the Third Circuit. The Minersville School District then appealed to the Supreme Court of the United States. Both the American Civil Liberties Union and the Bill of Rights Committee of the American Bar Association submitted amicus briefs asking the Supreme Court to declare mandatory flag saluting unconstitutional.*

*The Supreme Court by an 8-1 vote declared mandatory flag salute laws were constitutional. Justice Frankfurter's majority opinion insisted that justices should defer to legislative judgments that such exercises promoted patriotism. The judicial decision in Gobitis appears to have been influenced by the increased likelihood that Americans would participate in World War II. Felix Frankfurter was particularly concerned that patriotic exercises be encouraged in war time. Many of his clerks described the outcome as "Felix's Fall of France Opinion." The American Bar Association took a very different view of the relationship between free speech and war. Their brief asserted,*

*The philosophy of free institutions is now being subjected to the most severe test it has ever undergone. Advocates of totalitarian government point to the speed and efficiency with which such systems are administered, and assert that democracy can offer nothing to outweigh these advantages. The answer is to be found in the value of certain basic individual rights and the assurance afforded by free institutions that these shall not be required to yield to majority pressure no matter how overwhelming.*

*The worth of our system must ultimately be judged in terms of the importance of those values and the care with which they are safeguarded. We consider them immeasurably important. We believe that the letter and spirit of our Constitution demand vindication of the individual liberties which are abridged by the challenged regulation.*

*As you read the opinions below, consider the different ways in which events in 1940 may have influenced the justices. How do you believe the justices should have been influenced, if at all, by these events?*

JUSTICE FRANKFURTER delivered the opinion of the Court.

---

<sup>1</sup> Their name was spelled incorrectly by the court reporter.

...

... We are dealing with an interest inferior to none in the hierarchy of legal values. National unity is the basis of national security. To deny the legislature the right to select appropriate means for its attainment presents a totally different order of problem from that of the propriety of subordinating the possible ugliness of littered streets to the free expression of opinion through distribution of handbills. . . . Situations like the present are phases of the profoundest problem confronting a democracy—the problem which Lincoln cast in memorable dilemma: ‘Must a government of necessity be too strong for the liberties of its people, or too weak to maintain its own existence?’ . . .

... [S]pecific activities of government presuppose the existence of an organized political society. The ultimate foundation of a free society is the binding tie of cohesive sentiment. Such a sentiment is fostered by all those agencies of the mind and spirit which may serve to gather up the traditions of a people, transmit them from generation to generation, and thereby create that continuity of a treasured common life which constitutes a civilization. ‘We live by symbols.’ The flag is the symbol of our national unity, transcending all internal differences, however large, within the framework of the Constitution. . . .

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

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

...

... Except where the transgression of constitutional liberty is too plain for argument, personal freedom is best maintained—so long as the remedial channels of the democratic process remain open and unobstructed—when it is ingrained in a people’s habits and not enforced against popular policy by the coercion of adjudicated law. That the flag salute is an allowable portion of a school program for those who do not invoke conscientious scruples is surely not debatable. But for us to insist that, though the ceremony may be required, exceptional immunity must be given to dissidents, is to maintain that there is no basis for a legislative judgment 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.

...

Judicial review, itself a limitation on popular government, is a fundamental part of our constitutional scheme. But to the legislature no less than to courts is committed the guardianship of

deeply-cherished liberties. . . . Where all the effective means of inducing political changes are left free from interference, education in the abandonment of foolish legislation is itself a training in liberty. To fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies rather than to transfer such a contest to the judicial arena, serves to vindicate the self-confidence of a free people.

JUSTICE McREYNOLDS concurs in the result.

JUSTICE STONE, dissenting.

...  
The guaranties of civil liberty are but guaranties of freedom of the human mind and spirit and of reasonable freedom and opportunity to express them. . . . The very essence of the liberty which they guaranty is the freedom of the individual from compulsion as to what he shall think and what he shall say, at least where the compulsion is to bear false witness to his religion. If these guaranties are to have any meaning they must, I think, be deemed to withhold from the state any authority to compel belief or the expression of it where that expression violates religious convictions, whatever may be the legislative view of the desirability of such compulsion.

...  
. . . I am not persuaded that we should refrain from passing upon the legislative judgment 'as long as the remedial channels of the democratic process remain open and unobstructed.' This seems to me no more than the surrender of the constitutional protection of the liberty of small minorities to the popular will. We have previously pointed to the importance of a searching judicial inquiry into the legislative judgment in situations where prejudice against discrete and insular minorities may tend to curtail the operation of those political processes ordinarily to be relied on to protect minorities. See *United States v. Carolene Products Co.* (1938) . . . And until now we have not hesitated similarly to scrutinize legislation restricting the civil liberty of racial and religious minorities although no political process was affected. *Meyer v. Nebraska* (1923). . . . Here we have such a small minority entertaining in good faith a religious belief, which is such a departure from the usual course of human conduct, that most persons are disposed to regard it with little toleration or concern. In such circumstances careful scrutiny of legislative efforts to secure conformity of belief and opinion by a compulsory affirmation of the desired belief, is especially needful if civil rights are to receive any protection. Tested by this standard, I am not prepared to say that the right of this small and helpless minority, including children having a strong religious conviction, whether they understand its nature or not, to refrain from an expression obnoxious to their religion, is to be overborne by the interest of the state in maintaining discipline in the schools.

...