

RECONSIDERING *GOBITIS*: AN EXERCISE IN PRESIDENTIAL LEADERSHIP

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ABSTRACT

In June of 1940, the Supreme Court ruled 8-1 in Minersville School District v. Gobitis that the First Amendment posed no barrier to the punishment of two school-age Jehovah's Witnesses who refused to pay homage to the American flag. Three years later, the Justices reversed themselves in West Virginia State Board of Education v. Barnette. This sudden change has prompted a host of explanations. Some observers have stressed changes in judicial personnel in the intervening years; others have pointed to the wax and wane of general anxieties over the war; still others have emphasized the sympathy-inspiring acts of terror visited upon Jehovah's Witnesses in the wake of Gobitis. Drawing upon previously unearthed archival material, this article for the first time attributes a major role to presidential initiative. A sophisticated strategy implemented by the Roosevelt administration systematically eroded the picture of political life constructed by Gobitis, presented an alternative reading of the First Amendment in urgent fashion, and rhetorically empowered advocates for the pro-rights position. Despite what many believed to be a deliberative moment, however, the Supreme Court incompletely memorialized the interaction between the branches of government. In copying the President's words without attribution and purging the record of executive branch participation, the Barnette Court impoverished our appreciation of the constitutional system in action. Understanding the remarkable debate over the right of conscience within this paradigm sheds light on a variety of enduring questions, from the strategies utilized by

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presidents to control political pathways, to the origins of the First Amendment's centrality to the modern order.

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INTRODUCTION

On June 14, 1943, the United States Supreme Court ruled that the First Amendment safeguarded the right of school-age Jehovah's Witnesses to refuse to salute the national flag. The sparkling decision penned by Robert H. Jackson extolled a "sphere of intellect and spirit"¹ protected by the Constitution and concluded that coercing a dissenter to participate in the civic ritual was incompatible with the idea of rule by "consent of the governed."² In the process of articulating the rationale of *West Virginia State Board of Education v. Barnette*,³ the Justices overturned a ruling written a mere three years prior by a more senior member of the Court, Felix Frankfurter.

Several factors made this turnabout surprising. First, the earlier decision reversed by the Justices, *Minersville School District v. Gobitis*,⁴ commanded all the votes of the High Court save one. Jurists are not only generally loath to upset previous rulings, they are also by disposition especially reluctant to reverse such lopsided majorities. Thus, something unsettled these constitutional understandings rapidly and decisively.

Second, despite the divergent outcomes, the tone of the freshly-inked opinion matched the prior ruling's confident exposition—*Barnette* did not read like a cautious effort to distinguish or supplement existing law, but rather as an evisceration of the earlier composition. The Court's declaration of religious and intellectual freedoms in a time of war was every bit as forceful as its earlier call for domestic unity. In three short years, not only had a judicial presentation of law become socially untenable, but also a new institutional consensus emerged to take its place.

Third, many of the background social factors that prevailed at the time of *Gobitis* were still in play. As litigants prepared to square off over the flag issue once again, Allied Powers may have been turning the tide in Europe but the final outcome in the Pacific remained unknown. By the

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

2. *Id.* at 641.

3. *Id.* at 641–42.

4. 310 U.S. 586 (1940). As proof that even thoroughly repudiated precedents can be resuscitated in a later generation, see *Barnes v. Glen Theater, Inc.*, 501 U.S. 560, 579 (1991) (Scalia, J., concurring in the judgment) (citing *Gobitis* for the proposition that "[c]onscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs") and *Employment Division of Oregon v. Smith*, 494 U.S. 872, 879 (1990) (Scalia, J., concurring in the judgment). For a biting critique of this attempted revivification, see Michael McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1124 (1990) ("Relying on *Gobitis* without mentioning *Barnette* is like relying on *Plessy v. Ferguson* without mentioning *Brown v. Board of Education*.").

same token, Japan's December 1941 attack on America had sowed widespread panic, yet somehow it did little to arrest the momentum of the transformation underway toward an enhanced right of conscience. Whatever happened to alter the conditions of constitutional law-making, its dynamics were not at the mercy of military skirmishing alone, but aligned with changing perceptions of the relationship between foundational ideas and armed conflict. The question remains: who was best placed to effect a wholesale change in such perceptions once the Supreme Court had spoken?

If the depth, breadth, and swiftness of this historic switch are to be appreciated, the episode must be examined against the entire politico-cultural landscape. Part I of this Article critiques the reigning accounts of the switch in time over religious conscience. Each has its merits, but each, upon closer inspection, proves to be a poor stand-alone or primary cause of the doctrinal reversal. Moreover, none offers a persuasive explanation for the rich content and confident tenor of *Barnette*. Some other powerful force characterized these events in ways that made a legalistic defense of *Gobitis* difficult to sustain, pressured the Justices to reconsider, and offered the tantalizing prospect of forging a new consensus over the First Amendment. Presidential action fulfilled all three conditions, and it fills the narrative gaps in the conventional explanations.

Relying on archival materials and secondary resources, Part II uncovers and analyzes a series of actions by the executive branch to undermine the social plausibility of *Gobitis*. These actions have long been underappreciated because the administration took no formal position in either lawsuit. I draw special attention to Franklin Delano Roosevelt's shift in presidential rhetoric, coupled with other instances of executive branch signaling, in eroding the cultural foundations of *Gobitis*. Presidential language not only pervaded the political consciousness, it also seeped into lawyers' filings and the statements of insiders, opinion-makers, and activists. In recognizing and responding to this multi-pronged strategy, the Justices borrowed heavily, if not exclusively, from presidential rhetoric to reconstruct the First Amendment in light of America's war experiences. The administration's efforts to create a new discursive convergence gave thematic coherence to a competing reading of the First Amendment. They also pushed the Supreme Court to reconsider its position and held out the possibility of the social cooperation necessary for the Court to take a pro-rights position. Once the government staked out its position on the right of conscience, the assurance of cooperation gave jurists the confidence to demolish *Gobitis*.

Part III evaluates some of the normative implications of this alternative model of constitutional development, in which the rhetorical consensus forged through presidential initiative spurred a recalibration of rights in the courts as well as new ways of talking about rights.⁵ Although they faced a unique alignment, the Justices did not fully capitalize on the deliberative moment by transparently acknowledging executive branch participation. Instead, they copied the President's words and ideas without attribution in *Barnette*, thereby scrubbing out of the official narrative executive branch participation. This missed opportunity has left generations of Americans with the mistaken impression of judges as the lone heroes in this dramatic sequence of events. Jackson's confident tenor underscored the triumphal image of the jurist as champion of the oppressed. A more interactive portrayal of rights development, however, would have better promoted rule of law values.

While the switch represented only one episode of constitutional transformation, a reevaluation of the episode sheds light on the ways in which courts as institutions respond to social developments in the construction of legal texts. It also suggests when the strategy of executive erosion might be pursued and the conditions under which it might prove successful.

I. REIGNING ACCOUNTS

In a span of three years, the United States Supreme Court placed the practice of saluting the national flag beyond the reach of the First Amendment, then abruptly changed course to rule that coercing a religious dissident to participate in the ritual transgressed one of the Constitution's "fixed" principles: an abhorrence of state-imposed orthodoxy in politics or religion.⁶ Several standard accounts of this switch have crystallized in the secondary literature, with each emphasizing either a causal mechanism internal to or external to the Court. Some of these explanations—such as the doctrinal account—are simply not plausible; others are incomplete as stand-alone explanations. I review briefly each of these accounts before

5. By contrast, many accounts that stress the development of rules explain the expansion of liberties in the late 1930s and early 1940s as a logical development of the Fourteenth Amendment. *See, e.g.*, WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 250–51 (1995) (despite endorsing earlier executive-led account of constitutional change, treating cases such as *Cantwell v. Connecticut*, 310 U.S. 296 (1940), as a continuation of the juridic elaboration of a "Second Bill of Rights").

6. *Barnette*, 319 U.S. at 642.

presenting the sequence of events so as to restore executive branch participation.

A. *The Trajectory of First Amendment Doctrine*

Perhaps the easiest account to put aside is that a discontinuity in precedent precipitated the overruling of *Gobitis*. In general, intervening occurrences present a cause for reconsideration of an earlier ruling if a legal rule proves unworkable in practice or if later decisions erode the logical foundations of that rule; otherwise, the practice of stare decisis strongly favors affirmation of settled principles of law.⁷

At midcentury, a genuine dispute existed over whether the rule of stare decisis should be used to bar the revisiting of constitutional cases. Justice Brandeis was among the most forceful proponents of the view that a more lenient approach to stare decisis was warranted in reading the Constitution because “correction through legislative action is practically impossible.”⁸ Whether or not the Justices themselves felt so bound over the question of religious conscience, the prevailing custom usefully delineates what should be relevant from the internal perspective of the High Court’s work.⁹

If we treat *Gobitis* as significant primarily for establishing a method for handling religion-based objections, nothing transpired between the years of 1940 and 1943 to call into question its doctrinal coherence or workability.¹⁰ The closest—and the one most often mentioned by observers because several Justices in dissent took the opportunity to denounce *Gobitis*—was the 1942 controversy of *Jones v. City of Opelika*.¹¹ There, the Justices affirmed a local licensing ordinance

7. For a modern encapsulation of these principles, see *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854–55 (1992) (plurality opinion of O’Connor, Kennedy, Souter, J.J.).

8. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting).

9. See *United States v. Title Ins. & Trust Co.*, 265 U.S. 472 (1924). Frankfurter’s *Barnette* dissent stressed the numerous jurists who had already passed on the constitutionality of a mandatory pledge, suggesting that this was an accepted method of urging respect for settled law. *Barnette*, 319 U.S. at 664–65 (Frankfurter, J., dissenting).

10. Occasionally, commentators have suggested that *Gobitis* was really about the Free Exercise Clause and *Barnette* was about the Speech Clause based mostly on the Justices’ comment in *Barnette* that “it is desirable to notice certain characteristics by which this controversy is distinguished.” *Barnette*, 319 U.S. at 630; see, e.g., CLYDE E. JACOBS, JUSTICE FRANKFURTER AND CIVIL LIBERTIES 47 (1974). Far from engaging in an effort to distinguish the earlier case, however, Justice Jackson went to great pains to say that the present case “calls upon us to reconsider a precedent.” *Barnette*, 319 U.S. at 630. The entire structure of the opinion—including the points made immediately after the throw away language about distinctive aspects of the matter at hand—is directed at carving out “the very heart of the *Gobitis* opinion.” *Id.* at 640. See generally *infra* Part II.

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

governing the sale of books, rejecting the argument that the First Amendment shielded from prosecution the Jehovah's Witnesses who ran afoul of the law.¹²

The Supreme Court granted reargument in the case and consolidated the matter with another appeal raising similar issues. Upon reconsideration, the Justices decided in favor of the individuals.¹³ William O. Douglas's opinion of May 3, 1943, pointed out that the fee to be exacted from peddlers and solicitors was not nominal in nature, not directed at breaches of the peace, and thus served to penalize the exercise of the rights to a free press and religious practice.¹⁴ The opinion focused on the "nature of the tax and its destructive influence" for these rights, including the prospect of abuse of authority so granted.¹⁵

As valuable as the holding might have been for clarifying the standards concerning permit regimes, *Opelika* did nothing to disturb the rule announced in *Gobitis*. Although the outcome vindicated First Amendment values and self-consciously "restored to their high, constitutional position the liberties of itinerant evangelists,"¹⁶ the case involved regulatory conditions upon commercial expressive activity rather than coerced speech or religious dissent. Moreover, the issue of whether nationalism could constitute a local responsibility was the farthest thing from the dispute. For these two reasons, there is nothing about the outcome that undermined the rule of *Gobitis* or rendered it especially difficult to implement.

That *Gobitis* appears in dissents to the initial ruling but makes no appearance in Douglas's final opinion favoring the Witnesses in *Opelika* confirms its doctrinal irrelevance for *Gobitis*. Harlan Fiske Stone, William O. Douglas, and Frank Murphy may have found it convenient to signal in an unconstrained dissent that the questions thought resolved in *Gobitis* should be reopened, but within the context of *Opelika* itself that precedent was not in issue. The importance of the *Opelika* litigation lay not in its impact on the law as a coherent set of rationales, but as proof of the shifting social plausibility of decision makers' interpretation of legal text, a point to which I shall return later.

12. *Jones*, 316 U.S. at 584.

13. *Jones v. City of Opelika*, 319 U.S. 104 (1943) (per curiam); see also *Murdock v. Pennsylvania*, 319 U.S. 105, 117 (1943) (invalidating an ordinance that contained a sliding scale permit fee for door-to-door canvassing).

14. *Murdock*, 319 U.S. at 113–15.

15. *Id.* at 113.

16. *Id.* at 117.

B. “We Knew We Were Wrong”

If no developments in case law between 1940 and 1943 demanded reconciliation, then what about the possibility that the initial decision never symbolized a true consensus among members of the Court? In fact, biographers refer to a feeling shared by Black, Douglas, and Murphy of having been misled by Frankfurter, suggesting that support for *Gobitis* may have been soft from the start.¹⁷ Years after the episode, Justice Black claimed that he did not know of Justice Stone’s decision to circulate a dissent, which did not make the rounds until the day before the conference at which the Justices voted to approve Frankfurter’s opinion. After reading Stone’s dissent, Black later claimed, “‘we knew we were wrong.’”¹⁸ Douglas, too, later stated: “In those days, Felix Frankfurter was our hero. . . . [W]e were inclined to take him at face value.”¹⁹

Because these admissions are embarrassing, it is possible that Douglas and Black harbored unvoiced doubts at the time. Even so, there are several reasons to be dubious of the general claim that *Gobitis* did not command social support at the outset. First, Stone’s dissent contained no new information that cast doubt on any of Frankfurter’s assertions. At most, reading Stone’s impassioned but more optimistic attempt to reconcile nationalism and individualism brought a tinge of nagging doubt—a pang that several of the Justices were perfectly willing to ignore when it came time to choose a side. Frankfurter’s diary records discussions about *Gobitis* and earlier cases raising the issue, and if Frankfurter’s characterization is accurate, Black describes himself as having “suppressed his doubts.”²⁰ Murphy, who apparently drafted a dissent,

17. See *infra* notes 19–20.

18. ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 284 (1994). Newman believes, as I do, that Black’s later explanation is more likely a post hoc rationalization rather than an accurate depiction of why he and others adhered to the Frankfurter-Hughes position. *Id.* at 284–85; see also H.N. HIRSCH, THE ENIGMA OF FELIX FRANKFURTER 147–53 (1981).

19. WILLIAM O. DOUGLAS, THE COURT YEARS, 1939–1975: THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS 44 (1980); see also BARBARA GRIZUTTI HARRISON, VISIONS OF GLORY: A HISTORY AND MEMORY OF JEHOVAH’S WITNESSES 190 (1978) (claiming that Black told Sydney Zion: “Felix [Frankfurter] mesmerized us.” (quoting Sydney Zion’s obituary for Hugo Black in *The New York Times*)). Douglas’s version of the events is more plausible. He describes his soul-searching as taking place “as the months passed and new cases were filed involving the same or a related problem.” DOUGLAS, *supra*, at 45.

20. Diary of Felix Frankfurter (June 14, 1943) (on file with *Washington University Law Review*). Frankfurter’s diary supports the idea that consensus existed at the time of the writing of *Gobitis*. According to the entry, Stone approached Frankfurter after lunch that day to try to convince him to remove the reference to “five prior decisions of the Court sustaining the compulsory Flag Salute.” *Id.* Frankfurter expresses genuine surprise at Stone’s and Black’s statements indicating they “had doubts at the time and did not speak up.” *Id.* Frankfurter’s diary also records Justice Roberts later that day

never circulated it. At the time, Douglas enthusiastically joined Frankfurter's draft opinion, and both Douglas and Murphy praised its eloquent treatment of difficult issues.²¹

Second, the ruling in *Gobitis* appeared at the time to be in harmony with the sentiment of the executive and legislative branches, given the public statements and apparent priorities of coequal actors. The Justices had every reason to expect an enduring alliance to emerge behind their reading of text. Against the mistake thesis, the first *Opelika* decision illustrates a certain internal resistance to the idea of overruling *Gobitis*. Although Black, Douglas, and Murphy announced their willingness to abandon precedent, a majority of the Court, led by Justice Reed, resisted the move—even going so far as to point out the dangers of an expansive conception of freedom of “the mind and spirit.”²² Stone's own separate dissent in the speech-licensing controversy made no mention of *Gobitis*, nor did Murphy's separate dissent, which Stone also joined. Their silence, too, suggests that they were not prepared to overrule existing precedent, they wished to preserve their options, or they believed the lawsuit did not present the right vehicle for revisiting the matter.

In short, there is little reason to treat *Gobitis* as anything other than a product of reason and compromise. Despite any initial misgivings, the fact remains that at the moment of truth no one was willing to depart from Justice Frankfurter or Chief Justice Hughes, each of whom made a passionate statement at conference on the need for national unity and the advisability of judicial forbearance in extraordinary times. Acquiescence, as much as enthusiastic support, provides a valid basis for institutional support of a reading of text, particularly from the perspective of ordinary Americans trying to make sense of the High Court's pronouncements. That Justice Murphy first drafted a dissent and then decided to put it aside and join the majority confirms rather than undermines the sense that the Frankfurter-Hughes position achieved substantial internal support at the time of its articulation.²³ When the social plausibility of text began to fluctuate over the next two years, sufficient members of the institution behaved in ways that indicated that *Gobitis* remained good law—until it was explicitly overruled.

recollecting that when those earlier flag cases were discussed, he had said that “the case should not be dignified by calling for argument in the writing of an opinion,” and that Brandeis' sole remark was “I would affirm without opinion.” *Id.*

21. See *infra* text accompanying note 44.

22. *Jones v. City of Opelika*, 316 U.S. 584, 594 (1942).

23. SIDNEY FINE, *FRANK MURPHY: THE WASHINGTON YEARS 185–87* (1984).

C. *The War Effort*

If no judicial decision cast doubt upon the rule of law, to what extent should the sudden change be attributed to the wartime environment? When the High Court encountered *Gobitis* in the spring of 1940, the nation had not yet entered the conflict that was rapidly engulfing Europe. Tensions, however, were palpable. Seizing on this anxious psychological state, some commentators, including Morton Horwitz, cite the “wartime atmosphere” as the chief reason for the institution’s shift on the issue.²⁴ Reflecting on the sudden reversal the day *Barnette* was decided, an editorialist mused that “the war news is pretty good these days” and “maybe the Supreme Court reads the war communiqués.”²⁵

The difficulty with zeitgeist accounts that rely on the general existence of hostilities is that they often fail to identify the mechanics of constitutional change—that is, how general feelings about the war or other background social facts are, or should be, filtered through deliberations about foundational principles. As a result, such explanations tend to be imprecise in their depiction of the meaning-making process. Official actions seem calibrated to little more than a vague sense of impending doom or triumph. The reasoning tracks a familiar narrative grounded in mass psychology: fear arising from an impending crisis leads to institutional conservatism; once the nation becomes fully engaged in war-making, an increased sense of confidence produces a liberating effect upon judicial discretion.

There can be little doubt that the war effort provided the largest landscape against which authorities construed the Constitution. It therefore formed a pervasive aspect of the public psychology. But despite the fact that elites began to see value in distinguishing America from its Nazi and fascist enemies, the ethics and vocabulary of anti-totalitarianism were selectively incorporated into juridic decisions. In 1940 the Justices resisted the Jehovah’s Witnesses’ attempt to frame the flag salute debate in these terms. What changed the most, then, was not America’s involvement in the war or the relative security that might flow from the state of hostilities, but rather how citizens brought perceptions of the war to bear upon the

24. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960*, at 252 (1992). Morton Horwitz attributes the switch to the “wartime atmosphere” without discussing any particular mechanics of constitutional change. *Id.*; see also LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (1986).

25. Editorial, *Court Reverses Self*, *BERKSHIRE EAGLE*, June 15, 1943 (on file with *Washington University Law Review*).

flag salute controversy. Urging a reconceptualization of the coerced flag salute as a tyrannical act, the administration invited others to make the right of conscience a wartime imperative.

D. The Suffering Witnesses and the Empathic Court

One of the most frequently mentioned causes of the doctrinal change is the alarming rise in the number and frequency of repressive acts against Jehovah's Witnesses in the wake of *Gobitis*. According to this narrative, the Justices changed their position on the coerced flag salute to be able to offer a judicial remedy to the acts of terror perpetrated in the name of the rule of law. Emphasizing the suffering of the religious group as a major force in constitutional development, Peter Irons argues that "few [rulings] have ever provoked as violent a reaction as the *Gobitis* decision."²⁶ Similarly characterizing the Witnesses' persecutions as "a turning point for religious liberty," Shawn Francis Peters points out that "vigilantes in nearly every state of the Union brutalized hundreds of [Witnesses]" and that the Justices were aware of such brutality.²⁷ The unmistakable implication of these accounts is that the acts of terror humanized for the Justices the costs of what was earlier only a romantic ideal of school-sponsored nationalism. So moved, the Court "rose to its full height as champion of the lowly" against an enflamed populace.²⁸

Even if we put aside the fact that the sympathy thesis has conveniently served the cause of judicial leadership on rights, the Justices, contemporaneously with *Gobitis*, ruled in other cases that benefited Jehovah's Witnesses.²⁹ This historical fact cuts against any claim that

26. PETER IRONS, *A PEOPLE'S HISTORY OF THE SUPREME COURT* 341 (1999).

27. SHAWN FRANCIS PETERS, *JUDGING JEHOVAH'S WITNESSES: RELIGIOUS PERSECUTION AND THE DAWN OF THE RIGHTS REVOLUTION* 8, 251 (2000); *see also* Vincent Blasi & Seana V. Shiffrin, *The Story of West Virginia State Board of Education v. Barnette: The Pledge of Allegiance and the Freedom of Thought*, in *CONSTITUTIONAL LAW STORIES* 433 (Michael C. Dorf ed., 2004); MICHAEL W. MCCONNELL ET AL., *RELIGION AND THE CONSTITUTION* 483 (2d ed. 2006) ("*Barnette* may have been a reaction to this violence."); MELVIN I. UROFSKY, *FELIX FRANKFURTER: JUDICIAL RESTRAINT AND INDIVIDUAL LIBERTIES* 56 (1991) (attributing reversal to "the spate of attacks on Jehovah's Witnesses, the apparent shift in Court sentiment, and news of Hitler's 'final solution' of the Jewish question in Europe"); SAMUEL WALKER, *IN DEFENSE OF AMERICAN CIVIL LIBERTIES: A HISTORY OF THE ACLU* 109 (1990) (stressing the "wave of violence against the Witnesses" unleashed by *Gobitis*). For a thoughtful warning as to the limits of the persecution thesis, see Neil M. Richards, *The "Good War," The Jehovah's Witnesses, and the First Amendment*, 87 VA. L. REV. 781 (2001).

28. Arthur Krock, *The Supreme Court at its Peak*, N.Y. TIMES, June 15, 1943, at 20.

29. The 1938 case of *Lovell v. Griffin*, 303 U.S. 444 (1938), overturned a Jehovah's Witness's conviction for running afoul of a law that made it a nuisance to distribute leaflets and handbooks and "literature of any kind" without first obtaining the permission of a city manager. *Id.* at 444-45. Chief Justice Hughes' opinion emphasized the "broad sweep" of the law and the danger of censorship that

decision makers needed to be sensitized to either the group's customs or the possibility of local acts of repression.

Frankfurter—and others who remained with him after the switch on the First Amendment—prized national identity over ethnic or religious identity in a time of war rather than the effacement of one's background.³⁰ This legitimate debate concerned the state's role in the management of group attachments, and not whether religion or particular religions ought to be part of one's portfolio of the self.

The Justices might have been horrified at the ferocity of the reprisals, but they would have been unbelievably naïve to think that their original decision did not expose recalcitrant students and their parents to a series of collateral legal and extra-legal ramifications. If public school officials could constitutionally discipline students for failing to salute the flag, it stood to reason that motivated state actors might enlarge the menu of instruments by which to inculcate patriotism and control the moral development of minors. If the Court's position were to change, then influential actors would have to help its members see the matter differently. The question, then, is not why the Justices became more sympathetic to the Witnesses' plight, but why they became more receptive to the opinions of others.

flows from licensing regimes. *Id.* at 450. In *Schneider v. New Jersey*, 308 U.S. 147 (1939), the Supreme Court repudiated local efforts to prevent the “unsightly, untidy, and offensive condition of the sidewalks” by banning the circulation of handbills. *Id.* at 156. One of the individuals—an ordained minister with the Watch Tower Bible and Tract Society—did not apply for a permit because “she conscientiously believed that so to do would be an act of disobedience to the command of Almighty God.” *Id.* at 159. *Cantwell v. Connecticut*, 310 U.S. 296 (1940), released days before *Gobitis*, reversed the conviction of three Jehovah's Witnesses for violating laws against solicitation and breach of the peace. In a unanimous decision, the Justices declared the permit regime authorizing a local official to deny the ability to solicit a “censorship of religion . . . [and] a denial of liberty.” *Id.* at 305. As to the breach of the peace charge, while the religious dissidents played a record that attacked “all organized religious systems as instruments of Satan” and offended many listeners, they engaged “only an effort to persuade a willing listener to buy a book or to contribute money.” *Id.* at 309–10. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), which went against a Jehovah's Witness for shouting epithets at passersby, took great pains to narrow the traditional class of fighting words that may be proscribed to those “words, as ordinary men know, are likely to cause a fight.” *Id.* at 573.

30. In a memo found in Stone's legal files dated May 27, 1940, Frankfurter writes: “[A]ll my bias and predisposition are in favor of giving the fullest elbow room to every variety of religious, political, and economic view.” Memorandum from Justice Felix Frankfurter to Chief Justice Harlan F. Stone 1 (May 27, 1940) (on file with *Washington University Law Review*). Despite professing support for Stone's footnote 4 approach to judicial review, Frankfurter writes:

[I] cannot rid myself of the notion that it is not fantastic, although I think foolish and perhaps worse, for school authorities to believe—as the record in this case explicitly shows the school authorities to have believed—that to allow exemption to some of the children goes far towards disrupting the whole patriotic exercise.

Id. at 3. Frankfurter believed the “duty of compulsion” to be “minimal” and the school board's interest in “preaching the true democratic faith” significant. *Id.* at 4–5.

Gobitis generated scathing reviews, suggesting that the Justices' vision of First Amendment law might not be as widely shared as they had hoped.³¹ The sharp outcry created an opportunity for political actors to push aggressively for a more sustained reflection on the values at stake in these legal controversies. As to the specific question of the pledge, a disjunction in political opinion comforted rights advocates that action might be taken without alienating the entire electorate. It is within this richer socio-political framework that the public reaction is most profitably evaluated.

E. Personnel: The Role of Judicial Appointments

To what extent can the legal change be attributed to a shake-up in personnel on the High Court after it initially validated the coerced salute? No doubt Roosevelt's choices for the bench played a pivotal role. In the interim, Justice Stone, the lone dissenter in *Gobitis*, was elevated to Chief; Robert H. Jackson and Wiley Blount Rutledge, Jr., who both later voted to reverse the decision, also joined the Court.³² It is surely important that Jackson, assigned to write *Barnette*, had arrived from the administration. He had been involved as Attorney General with many legal issues related to the war. Despite his reputation for independence,³³ Jackson's close connections to the administration rendered him more receptive to the entreaties of executive branch officials and more willing to synchronize judicial readings of text with recent presidential priorities and themes.

To pose the question in a stronger form: Did President Roosevelt intend to make transformative appointments to the bench on this question

31. Francis H. Heller, *A Turning Point for Religious Liberty*, 29 VA. L. REV. 440 (1943) (collecting negative editorials). The *Washington Post*, however, defended Frankfurter's perspective:

A delicate line was skillfully drawn by the Supreme Court yesterday in its decision that local authorities may require children attending public schools to salute the American flag. . . . Freedom of religion extends only to the realm of spiritual belief and ritualistic practice. It does not permit any group to interfere with legitimate functions of the state under the guise of practicing their religion.

Editorial, *Rights and Privileges*, WASH. POST, June 4, 1940, at 6.

32. Richard Friedman stresses the importance of the appointments process as "the chief generator of constitutional change" during this period. Richard D. Friedman, *A Rendezvous With Kreplach*, 5 GREEN BAG 2D 453, 453 (2002); see also IRONS, *supra* note 26, at 341–42 (also stressing importance of appointments process). One can also understand those working in the attitudinalist tradition of political science to focus on judicial selection. See JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002).

33. Jackson had something of an independent streak, a part of the New Deal circle but hardly its most ardent loyalist. See EUGENE C. GERHART, *AMERICA'S ADVOCATE: ROBERT H. JACKSON* 230 (1958) (observing that Jackson made his "strong" opinions known, and was hardly a "yes-man for the President").

of rights? Advocating a reevaluation of executive action during this period, Mark Graber points out that Jackson and Rutledge expressed grave concerns about the plight of the Jehovah's Witnesses, and that this might have played a role in their selection.³⁴ There is certainly evidence that members of Roosevelt's inner circle knew about these leanings and found them positive. Stone's opposition to *Gobitis* was a matter of public record. Wiley Rutledge's public statements—before bar groups and in his judicial writings as a member of the U.S. Court of Appeals for the D.C. Circuit—gave ample evidence of his pointed disagreement with the Court's reasoning. Jackson's distaste for Frankfurter's ruling was well known within the administration;³⁵ not only did he oppose it on principle, as Attorney General he found himself forced to deal with fallout from the ruling.³⁶

Even so, one should take care not to treat the appointment power as an exclusive engine of legal change. Fetishizing the selection decision may lead one to overlook exogenous factors that alter jurists' ideological receptivity at transitional moments or influence their strategic behavior within existing intellectual and personal alliances once they find themselves on the High Court. The potential for shifting coalitions within an institution—including the sense of where the center is and which relationships comprise it—changes over time and can entail subtleties from subject matter to subject matter.³⁷ And the brute fact that by 1943 all but one of the Justices owed his position to Roosevelt did not mean they

34. Besides suggesting that Roosevelt “contributed to the overthrow of *Gobitis* by securing the appointment of two additional justices previously on record as thinking that case wrongly decided,” Graber alludes to the sympathetic positions staked out by the Attorney General and Congress on the Jehovah's Witnesses' behalf. Mark Graber, *Counter-Stories: Maintaining and Expanding Civil Liberties in Wartime*, in *THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND COMPLACENCY* 95, 104 (Mark Tushnet ed., 2005). Less persuasive is the suggestion that Congress had, in enacting the Flag Law of June 22, 1942, somehow publicly rejected *Gobitis*. PETERS, *supra* note 27, at 246; Victor W. Rotnem & F.G. Folsom, Jr., *Recent Restrictions Upon Religious Liberty*, 36 *AM. POL. SCI. REV.* 1053, 1063–64 (1942). That law still required individuals to show respect for the emblem, even if it contained no enforcement mechanisms. See *infra* note 194. Efforts to water down the law are better attributed to executive action. See *infra* text accompanying notes 195–200.

35. See *infra* text accompanying notes 128–31.

36. I discuss the significance of the appointment of these men to the High Court in Part II.B.2.

37. For treatments of Supreme Court behavior emphasizing interactions between the Justices, including negotiations over language, see LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998); FORREST MALTZMAN ET AL., *CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME* (2000). For studies that emphasize the stylistic and philosophical differences even among jurists who came to agree on certain outcomes, see MELVIN UROFSKY, *DIVISION AND DISCOURSE: THE SUPREME COURT UNDER STONE AND VINSON, 1941–1953* (1997); G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES* 230–50 (1976) (discussing Robert Jackson).

would see eye to eye on legal issues or, when a matter implicated the national interest, that they would interpret the administration's legacy the same way.

It should not be forgotten that judges, like other constitutional actors, are susceptible to prodding, cajoling, praise, and threats. Beyond treating appointees as fully formed jurists, appointment-centric models treat the Judiciary as a non-permeable institution after the personnel decision has been made. In raw terms, the additions of Jackson and Rutledge significantly increased the odds that *Gobitis* would be overruled or narrowed. But the model of presidential leadership engaged by the administration proved to be a complicated performance in which securing friendly jurists comprised only the first movement.

II. THE SWITCH AS LINGUISTIC TRANSFORMATION

It is obvious in retrospect that extra-judicial events eroded the social foundations of *Gobitis* in record time. The challenging question: what set of factors produced this result? In my retelling of the episode, the factor that I shall stress is the element of presidential leadership, both because it has been underanalyzed in the scholarly literature and because of its sheer potential in reshaping the range of plausible interpretive outcomes. I also underscore the importance of social convergence, defined as a state of affairs characterized by overlapping political beliefs and rhetorical tactics among governing institutions and affected communities. The model rests on a central insight: To the extent practicable, The Supreme Court strives for the appearance of cooperation and avoids readings of the Constitution that would marginalize the institution.

Instead of casting my lot with any of the conventional explanations,³⁸ I retell the episode by stressing a convergence of language practices that rendered a break in legal development appear not only reasonable in light of the circumstances, but also progressively more difficult to resist. Rather than emphasizing the ways in which juridic rhetoric departs in appearance

38. For internal accounts, see, e.g., PHILIP B. KURLAND, *MR. JUSTICE FRANKFURTER AND THE CONSTITUTION* 5 (1971). Peter Irons focuses on the personnel changes that transpired between the cases yet uncovers nothing to shed light on Jackson's personal motivations for breaking from a "close friend and judicial ally." IRONS, *supra* note 26, at 344. Irons depicts national political actors in relatively passive terms, as simply reminding citizens to "respect the Constitution." *Id.* at 341. In a more complicated portrayal, Edward White argues that the special status of the First Amendment can be attributed to the rise of a "'modernist' consciousness" that prized, among other ascendant twentieth century values, "the capacity of humans to master their experience and in effect to create their own destiny." G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 MICH. L. REV. 299, 306 (1996).

from political rhetoric, I stress the points of continuity, similarity, and congruence of political and legal discourse.³⁹

Committed actors in positions of influence pushed against reigning political beliefs and helped to create a new constitutional vocabulary. A fundamental incongruity between an electorally charged vision and an increasingly isolated juridic construction of legal text precipitated institutional receptivity to reexamining the legal question. The actions of the President and his aides between 1940 and 1943 stressing the importance of free expression and religious liberty generated significant momentum behind these new foundational meanings. This political vocabulary then presented jurists with the raw material to reshape First Amendment understandings.

Powerful societal values such as anti-totalitarianism impacted the development of the law, but ideas can not move themselves. Such values could not have gained currency as foundational beliefs until a critical mass of ordinary persons signaled their support of them as essential to democratic self-government, and political elites endorsed them in concrete matters. That happened due to a vigorous interaction between the various branches of government in the late 1930s and early 1940s. Despite never invoking the formal requirements of Article V or adhering to criteria of recognition beyond fidelity to rhetorical form and respect for institutional interactivity, political elites led the country through a remarkable and lasting shift in governing understandings of political and religious dissent.

A major constitutional reversal transpired when (a) politicians cast exigencies that arose in foundational terms, (b) judges borrowed from electorally mobilized vernacular to explain legal rulings, and (c) over time, ordinary Americans gained a degree of facility with a vocabulary of rights that emerged from this interaction. The entire debate over the right of conscience—during which some governing discourses were created and revitalized while others were destroyed or suppressed—can be understood as an instance of linguistic transformation.

39. Robert Ferguson has usefully explored the way in which legal opinions generally, and the pledge rulings in particular, deploy a monologic voice, interrogative mode, declarative tone, and, all together, comprise a rhetoric of inevitability. Robert A. Ferguson, *The Judicial Opinion as Literary Genre*, 2 YALE J.L. & HUMAN. 201 (1990).

A. *Gobitis: The Supreme Court's Opening Bid as to the Scope of the First Amendment*

Lillian and William Gobitas,⁴⁰ two Jehovah's Witnesses, declined to salute the American flag on the ground that paying homage to a false idol threatened their spiritual standing. Expelled for their "act of insubordination," they challenged the policy on First Amendment grounds.⁴¹ The students prevailed at each step in the litigation. Before the U.S. Supreme Court, lawyers for the Gobitas children pressed their argument that the salute was "very like that of the Nazi regime in Germany."⁴²

It did little good. On June 3, 1940, the High Court sided with the school district. The anti-totalitarianism argument made by the children's lawyers, which generated headlines across the country, found little traction in the courtroom. Only Justice Stone dissented on the ground that the First Amendment should protect "freedom of mind and spirit," and with a suggestion that the *Carolene Products* formula could have been utilized in the religious dissidents' favor.⁴³ Every other Justice privately praised Felix

40. The Gobitas family name is misspelled in the court records and this error is repeated in most secondary accounts of their odyssey; in an odd twist of fate, a typographical error also marred the Barnett family's moment in the national spotlight. See Blasi & Shiffrin, *supra* note 27, at 436 n.15.

41. Brief for Petitioners, *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940) (No. 690) [hereinafter Brief for Petitioners, *Gobitis*].

42. *Required Flag Salute Likened to Nazism: Brief in Supreme Court Assails Appeal by School Board*, N.Y. TIMES, Apr. 13, 1940, at 6 [hereinafter *Required Flag Salute*].

43. *Gobitis*, 310 U.S. at 606 (Stone, J., dissenting). Stone kept a file of the letters he received in response to his *Gobitis* dissent. Papers of Harlan Fiske Stone, Box 81, Supreme Court File, General Office, Minersville Sch. Dist. v. *Gobitis*, 1939 Term, Letters from Public 1940, Manuscript Division, Library of Congress (on file with *Washington University Law Review*). A number of jurists wrote to approve his dissent, as did then-Assistant Attorney General Thurman Arnold. See Letter from Thurman Arnold, Assistant Attorney General, to Justice Harlan Fiske Stone, U.S. Supreme Court (June 7, 1940) (on file with *Washington University Law Review*); Letter from Judge Henry W. Edgerton, U.S. Court of Appeals, D.C. Circuit, to Justice Harlan Fiske Stone, U.S. Supreme Court (June 4, 1940) (on file with *Washington University Law Review*); Letter from Judge Robert N. Wilkin, U.S. District Court, Northern District of Ohio, to Justice Harlan Fiske Stone, U.S. Supreme Court (June 17, 1940) (on file with *Washington University Law Review*). Stone's work not only brought praise from the American Civil Liberties Union, it also led the Descendants of the American Revolution to designate him as "an outstanding American." Letter from Reverend John Haynes Holmes, Chairman of Board of American Civil Liberties Union, to Justice Harlan Fiske Stone, U.S. Supreme Court (June 14, 1940) (on file with *Washington University Law Review*); see also Letter from Edward Everett Hale to Justice Harlan Fiske Stone, U.S. Supreme Court (July 25, 1940) (on file with *Washington University Law Review*). But see Letter from Italian-American World War Veterans of the United States, East Post No. 6, to Justice Elihu [sic] Stone, U.S. Supreme Court (June 7, 1940) (contending that the dissent "encouraged more pupils to refuse to salute the flag" and urging Stone to resign) (on file with *Washington University Law Review*).

Frankfurter's opinion and joined him in presenting a united front.⁴⁴

In his opinion for the Court, Justice Frankfurter framed the citizen's plea as presenting "conflicting claims" of "liberty of conscience" and the "authority to safeguard the nation's fellowship."⁴⁵ Yet despite the seemingly equivalent balance of interests at stake, it quickly became clear which interest would be determinative. He described the "promotion of national cohesion"⁴⁶ as a "great common end,"⁴⁷ "an interest inferior to none in the hierarchy of legal values";⁴⁸ he waxed eloquent that "national unity is the basis of national security."⁴⁹

In seeking to justify the subordination of individuality to national iconography, Frankfurter went so far as to appeal to latent memories of the Civil War:

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?" No mere textual reading or logical talisman can solve the dilemma.⁵⁰

Frankfurter copied this statement from President Lincoln's Address to a Special Session of Congress on July 4, 1861, convened for the purposes of making the case for military action against the seceding states. In that famous oration, Lincoln accused the states of attempting to "destroy the Federal Union,"⁵¹ and characterized the conflict as "a people's contest."⁵² After creating a collision between security and liberty, Lincoln proposed a

44. Of Frankfurter's first draft, Douglas wrote: "This is a powerful moving document of incalculable contemporary and (I believe) historic value. I congratulate you on a truly statesmanlike job." H.N. HIRSCH, *THE ENIGMA OF FELIX FRANKFURTER* 150 (1981). After the opinion was circulated again, he expressed: "You have done a magnificent job on a subject which defies, because of the host of intangibles, conventional legal treatment." *Id.* On his copy of the draft, Frank Murphy indicated: "This has been a Gethsemane for me. But after all the institution presupposes a government that will nourish and protect itself and therefore I join your beautifully expressed opinion." *Id.*; see also UROFSKY, *supra* note 27, at 50–52.

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

46. *Id.* at 595.

47. *Id.* at 593.

48. *Id.* at 595.

49. *Id.*

50. *Id.* at 596.

51. Abraham Lincoln, Message to Congress in Special Session, in *ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859–1865*, at 246, 247 (1989).

52. *Id.* at 259.

single solution: “no choice was left but to call out the war power of the Government.”⁵³

The Supreme Court’s invocation of this crisis from another epoch sought to recreate a sense of anxiety, engender a feeling of patriotism, and remind the populace that liberty might have to take a backseat to security in a time of crisis. This we know. Less appreciated in the literature is that the move offers a clue of the Supreme Court’s intention to align itself with perceived presidential objectives. Because the administration offered no formal opinion as to the legal question, Lincoln served as a proxy for Roosevelt’s imputed perspective. Few observers at the time would have missed the apparent logic of the Justices’ juxtaposition of the past chief executive under fire with Roosevelt’s leadership during the emerging international crisis.

In lauding the school board’s assertion of national unity as a justification to compel students to salute the flag, the Justices self-consciously mimicked Lincoln’s own plea to support the state’s decision “to resist force, employed for its destruction, by force for its preservation.”⁵⁴ On that “extraordinary occasion,”⁵⁵ Lincoln had observed: “the response of the country was most gratifying; surpassing, in unanimity and spirit, the most sanguine expectation.”⁵⁶ As strident as the opinion’s emphasis of unity and patriotism may appear to contemporary ears, the High Court was hardly alone in its sentiments. The Justices’ words, and the particular political ideals given precedence by their choice of words, were almost certainly influenced by the Justices’ rough determination of where public attitudes lay.

The Minersville School District, which claimed to speak for “countless other school districts throughout this country,”⁵⁷ had explicitly appealed to the extraordinary times as a reason for extending the idea of the state’s police power to protect the morale of students, employees, and average Americans:

In these days of social, economic and political unrest, the preservation of the state is dependent upon the maintenance of a proper morale as much as the maintenance of the health, peace, safety, and morals of the people. The state is much more susceptible to insidious attacks in these days of strain and stress than would

53. *Id.* at 250.

54. *Id.*

55. *Id.* at 246.

56. *Id.* at 250.

57. Brief for Petitioners, *Gobitis*, *supra* note 41, at 21.

appear from casual observation, and the maintaining of a proper morale among the people is, therefore, essential to the preservation of our nation. Any breakdown in the esprit de corps or morale of this country may conceivably have a more devastating effect upon the nation than a catastrophe resulting from disease, breach of peace, or even an invasion of the realm.⁵⁸

In order to arrest “the breakdown of government,”⁵⁹ the school district claimed in its legal briefs the authority to quell “disrespect to . . . the government, its institutions and ideals,”⁶⁰ and to stem what could be crippling feelings of “demoraliz[ation].”⁶¹ Thus, *Gobitis* both acknowledged, and in a deliberate show of institutional responsiveness, adopted popular ways of perceiving and dealing with the sense of crisis.

Arguably even more influential than the opinions of school officials, presidential rhetoric strongly endorsed the call for national cohesiveness in the late 1930s and early 1940s. Indeed, it is likely to be the reason why the students’ repeated cries that the compulsory pledge be treated as a hallmark of “totalitarian governments, such as the Hitler regime,” originally found no purchase.⁶² Litigants made arguments in this vein but the Justices showed little interest in them before the administration’s rhetorical intervention in the debate.

Little wonder: as early as the beginning of 1939, Roosevelt had repeatedly urged listeners to showcase a “united patriotism” and “united democracy,” to demonstrate the “united strength of a democratic nation.”⁶³ On the eve of oral argument in *Gobitis* in 1940, as the overseas fighting continued to dominate the news, Roosevelt stressed again the foundational importance of “national unity . . . in a very real and a very deep sense, the fundamental safeguard of all democracy.”⁶⁴ “American integrity and American security” can only be preserved, he proclaimed, if we do not “face the future as a disunited people.”⁶⁵ In light of such presidential statements, the Justices appeared to be striving for rhetorical convergence

58. *Id.* at 19.

59. *Id.* at 20.

60. *Id.* at 12 (quoting *Leoles v. Landers*, 198 S.E. 218, 221 (Ga. 1937)).

61. *Id.* at 20.

62. Respondents’ Brief at 11, *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940) (No. 690) [hereinafter Respondents’ Brief, *Gobitis*]. The anti-totalitarian tone of the *Gobitis* children’s brief was widely noted. See *Required Flag Salute*, *supra* note 42, at 6.

63. Franklin D. Roosevelt, Annual Message to Congress (Jan. 4, 1939), in *THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, 1939 VOLUME*, at 1, 5 (Samuel I. Rosenman ed., 1941).

64. Franklin D. Roosevelt, Annual Message to Congress (Jan. 3, 1940), in *THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, 1940 VOLUME*, at 1, 9 (Samuel I. Rosenman ed., 1941).

65. *Id.*

and social consensus by affirming the authority of the local school board, echoing the importance of national unity, and resisting expressions of individuality inconsistent with the priorities outlined by other political branches.

Their brief acknowledgment of the students' right to liberty of conscience aside, it soon became clear which interest would carry the day: "the ultimate foundation of free society," which is the "binding tie of cohesive sentiment."⁶⁶ Putting themselves in step with other political elites, the Justices reframed a claim to authorship of one's spiritual fate as a threat to the fate of a nation. In unmistakable references to a heightened sense of ideological tension, the Supreme Court located school officials' authority to coerce students to perform the flag salute ritual in a people's collective right to "self-protection."⁶⁷

In this sense, *Gobitis* is a perfectly logical ruling, a defensible amalgamation of sociological jurisprudence, classical republican notions of education, and the teachings of the legal process school.⁶⁸ Justice Frankfurter and his colleagues had every reason to expect that their reading of text would be enforced by state officials, lauded by federal authorities, and embraced by ordinary people. The citizenry surely could be counted upon to display love of country with the President extolling the virtues of sacrifice and cohesiveness.

In characterizing *Gobitis* as socially plausible, I do not intend to suggest that it should be celebrated as an optimal exposition in light of the criteria by which justifications are formally rendered (i.e., text, structure, history, ethics, precedent, pragmatics, and so on). Nor do I mean to imply that the Justices' reading of text was inevitable. In fact, interpretation entails both situated choice and a prediction of social reaction in a world of imperfect information. Some sort of reaction should have been anticipated, though the ferocity and organization of the political reaction made the reading of text exponentially more difficult to sustain. Indeed, the real surprise may not have been the Court's ultimate reversal, but rather the President's studied refusal to endorse an eminently plausible reading of the Constitution.

66. *Gobitis*, 310 U.S. at 596.

67. *Id.* at 600.

68. See HELEN SHIRLEY THOMAS, FELIX FRANKFURTER: SCHOLAR ON THE BENCH 58–59 (1960).

B. The Elements of Presidential Repudiation

Within three years of the Justices' ruling against the schoolchildren, the entire interpretive field had become irrevocably altered by swiftly moving political and cultural trends. A number of executive branch actions during this period deprived *Gobitis* of presidential approval and helped to isolate its presentation of the democratic values at stake.

The events occurred with Roosevelt at the height of his powers, having been returned to office in 1940 based on near-record margins. According to James MacGregor Burns, "Roosevelt's capacity to mobilize influence in national politics was probably greater in early 1941 than it had been at the height of the euphoria of 1933."⁶⁹ Altering the social plausibility of text involves seizing control of "political pathways"—the various methods by which constitutional knowledge and governing vocabulary are shared, stored, reproduced, and manipulated.⁷⁰ In controlling political pathways, committed actors seek to influence what decision makers come to believe are culturally feasible readings of a particular legal text, and present a set of alternatives to existing constitutional understandings. Presidents enjoy a number of advantages in shaping the public mind along these lines: the appearance that the office is invested with popular sovereignty; an unmatched capacity to personify moral, policy, or constitutional objectives; the power to make agency and judicial appointments that can influence policy and law; and a network of high and mid-level aides who are useful for coordinating efforts at constitutional transformation.⁷¹

69. JAMES MACGREGOR BURNS, *ROOSEVELT: THE SOLDIER OF FREEDOM* 36 (1970). As Richard Steele argues in his study of the Roosevelt administration's sophisticated media strategies, "[a]s perhaps no other political leader of his time, FDR was concerned with public opinion and confident of his ability to reach and mold it." RICHARD W. STEELE, *PROPAGANDA IN AN OPEN SOCIETY: THE ROOSEVELT ADMINISTRATION AND THE MEDIA, 1933-1941*, at 5-6 (1985). Not only did Roosevelt carefully manage traditional print media, whose writing agendas were notoriously difficult to control, but he and his network of official and quasi-official supporters also took advantage of emerging technologies such as the radio to maximize their legal and political advantages.

70. ROBERT L. TSAI, *ELOQUENCE AND REASON: CREATING A FIRST AMENDMENT CULTURE* 78-79 (2008).

71. Although presidents have long construed the Constitution and appealed to popular sovereignty, the incidences of oral presentations by the President and the technologies available for these performances multiplied during the early part of the twentieth century, particularly during the tenures of Theodore Roosevelt and Woodrow Wilson. See JEFFREY K. TULIS, *THE RHETORICAL PRESIDENCY* 64-66, 137-44 (1987). Less helpful is Tulis's claim there are "two constitutions" (the "original constitution" and "contemporary presidential and public understanding"). *Id.* at 17, 18. His definition of the "rhetorical presidency" to exclude written presentations by the President that do not deal with policy is also more cramped than necessary. *Id.* at 132-33. Written and oral constructions of the Constitution are most sensibly understood under the broad term rhetorics—subject to the maxims of "eloquence and reason." TSAI, *supra* note 70, at 12-15. Furthermore, rather than two constitutions,

Taking advantage of his popularity, Roosevelt and his advisors pursued a strategy of (a) coyly denying support to *Gobitis*; (b) ingeniously manipulating an array of political pathways to present an opposing construction of the First Amendment; and (c) installing jurists who would be receptive to the Chief Executive's perspective on the salience and scope of political freedoms. Concern about a cramped national understanding of the First Amendment constituted only one part of Roosevelt's agenda to mobilize the country toward war and hold together a ruling coalition. Nevertheless, it became an issue upon which a number of pragmatic and principled considerations converged.

1. *The Role of Presidential Rhetoric*

Presidential rhetoric played a pivotal role in the switch codified in *Barnette*, illustrating how orality can undo writing. If the Chief Executive made no public comment on the Supreme Court's flag salute decisions, he also denied the Justices' parsimonious reading of text the support of his office. Given the country's dependence upon Roosevelt's guidance, his studied refusal to mention the case was itself telling. Because the political temptation would have been greatest to endorse the ruling, even in qualified terms, the fact that he ignored the decision should be understood as a rejection of *Gobitis*.

Viewed against his public speeches,⁷² Roosevelt's strategic silence on the flag cases confirms the message of repudiation rather than indifference. Presidential language gave a unifying thematic structure to the periodic signals that the administration sympathized with religious dissidents at home and abroad. For the first time, Roosevelt cast the question of religious and political dissent in foundational terms. Although *Gobitis* had already been roundly criticized in the editorial pages, presidential rhetoric gave the decision's opponents crucial institutional support. It was no longer a gaggle of talking heads criticizing a particular legal opinion, but a popularly elected official conveying his disapproval. Soon it would become apparent that the ruling as a symbol stood as a major impediment to the President's constitutional vision.

On January 6, 1941, Roosevelt turned in a masterful address on the state of the union that later became known as "The Four Freedoms Speech." Interpreting the election as a mandate to battle authoritarianism

it is more helpful to think in terms of original text, political culture, and linguistic regimes which, for a period of time, shape constitutional behavior. See generally TSAI, *supra* note 70, at 140–62.

72. JAMES MACGREGOR BURNS, *ROOSEVELT: THE LION AND THE FOX* 454–55 (1956).

around the world in spite of America's official policy of neutrality, the Chief Executive took full advantage of the bully pulpit to present a fresh harmonization of the New Deal, an emerging rights-based national agenda, and the global conflict underway.⁷³ In the address, he committed the nation to building a "world founded upon four essential human freedoms"⁷⁴:

The first is freedom of speech and expression everywhere in the world.

The second is freedom of every person to worship God in his own way everywhere in the world.

The third is freedom of want—which, translated into world terms means economic understandings which will secure to every nation a healthy peacetime life for its inhabitants—everywhere in the world.

The fourth is freedom of fear—which translated into world terms means a world-wide reduction of armaments to such a point and in such a thorough fashion that no nation will be in a position to commit an act of physical aggression against any neighbor—anywhere in the world.⁷⁵

Roosevelt's subjugation of the economic rights for which he had so long toiled to a subset of political rights and the reduction of Americans' expansive economic ideas to only the third item among his "Four Freedoms" signified a break from the past, promised a redeployment of the nation's resources, and called for allegiance to a reconstructed constitutional order.

The major themes of Roosevelt's wartime vision, worked out in a series of addresses, achieved a high degree of coherence by the early 1940s. The first theme emphasized by Roosevelt entailed the rational integration of economic rights and certain non-economic rights in a way that elevated the latter as matters of contemporary salience and national priority. A second major theme involved the gradual sharpening of the First Amendment as the favored instrument for building consensus in favor of the war. A third technique retold the history of American constitutionalism as a struggle against evolving incarnations of autocracy,

73. *See id.* at 457.

74. Franklin D. Roosevelt, Annual Message to Congress (Jan. 6, 1941), in *THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT*, 1940 VOLUME, *supra* note 64, at 663, 672.

75. *Id.*

from the colonists' resistance of repressive English measures to the engagement with the forces presently arrayed against self-rule. Weaving these themes together skillfully, Roosevelt asked the people themselves to rebuild the "foundations of a healthy and strong democracy,"⁷⁶ urged the kinds of sacrifices on behalf of country offered during other foundational moments, and sought to rekindle "the faith of America" in its "democratic aspiration."⁷⁷

In doing so, Roosevelt unsettled citizens' constitutional expectations and primed their imagination for a transformation. As early as 1936, he began to direct the people's attention beyond their immediate borders. In his State of the Union address, Roosevelt spoke wistfully of taking the oath of office in March 1933 when "the world picture was an image of substantial peace."⁷⁸ Now, grave dangers threatened the "economic constitutional order"⁷⁹ fashioned by the New Deal which had broken the "domination of government by financial and industrial groups"⁸⁰ without returning to a form of government predicated upon the "ruthless and the strong."⁸¹ To defend these hard-won gains, America would seek "every legitimate means . . . against autocracy and in favor of freedom of expression, equality before the law, religious tolerance and popular rule."⁸²

Roosevelt began to shift his rationales from preserving the gains of the New Deal toward saving and reconfiguring the constitutional system, goals that would require fresh strategies:

The tools of government which we had in 1933 are outmoded. We have had to forge new tools for a new role of government operating in a democracy—a role of new responsibility for new needs and increased responsibility for old needs, long neglected.

76. *Id.* at 671. For example, in later iterations of the address, the word "basis" was changed to the "foundations of a healthy and strong democracy." Franklin D. Roosevelt, Annual Message to Congress, Seventh Draft, at 16 (Jan. 6, 1941) (on file with *Washington University Law Review*). To capture the moment in intergenerational terms, the writers added: "and their children." *Id.* at 2. References to concentration camps were also added. *Id.* at 19.

77. Franklin D. Roosevelt, Third Inaugural Address (Jan. 20, 1941), in *THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, 1941 VOLUME*, at 3, 5 (Samuel I. Rosenman ed., 1959).

78. Franklin D. Roosevelt, Annual Message to Congress (Jan. 3, 1936), in *THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, 1936 VOLUME*, at 8, 8 (Samuel I. Rosenman ed., 1938).

79. *Id.* at 13.

80. *Id.*

81. *Id.* at 16.

82. *Id.* at 11.

Some of these tools had to be roughly shaped and still need some machining down. . . . The American people, as a whole, have accepted them.⁸³

He proposed that fellow Americans think of the “nation’s program of social and economic reform [a]s therefore a part of defense, *as basic as armaments themselves*.”⁸⁴ Having militarized the New Deal, Roosevelt turned to characterizing the enemy’s aims and tactics as the antithesis of the American way of life:

Dictatorship, however, involves costs which the American people will never pay: The cost of our spiritual values. The cost of the blessed right of being able to say what we please. The cost of freedom of religion. The cost of seeing our capital confiscated. The cost of being cast into a concentration camp. The cost of being afraid to walk down the street with the wrong neighbor. The cost of having our children brought up, not as free and dignified human beings, but as pawns molded and enslaved by a machine.⁸⁵

At the dawn of 1940, Roosevelt again appealed to the people’s cherished First Amendment values:

We must look ahead and see the kind of lives our children would have to lead if a large part of the rest of the world were compelled to worship a god imposed by a military ruler, or were forbidden to worship God at all; if the rest of the world were forbidden to read and hear the facts—the daily news of their own and other nations—if they were deprived of the truth that makes men free.⁸⁶

Linking the freedom of America’s youth with the plight of oppressed children worldwide, he portrayed the war as more than an international effort, but also as a multi-generational endeavor.

Roosevelt’s “Four Freedoms” address on January 6, 1941, differed from these earlier orations in its clearly stated purpose, its organization, and its elegance.⁸⁷ With the campaign now behind him, the President laid

83. Franklin D. Roosevelt, Annual Message to Congress (Jan. 4, 1939), *supra* note 63, at 6.

84. *Id.* at 5 (emphasis added).

85. *Id.* at 11.

86. Franklin D. Roosevelt, Annual Message to Congress (Jan. 3, 1940), *supra* note 64, at 4.

87. Roosevelt had first mentioned these freedoms in response to a question about long-term peace objectives offhandedly at a press conference on July 5, 1940. SAMUEL I. ROSENMAN, *WORKING WITH ROOSEVELT* 263 (1952). The phrase “Four Freedoms” appeared in the fourth draft of his 1941 State of the Union after Roosevelt himself came up with the wording during an evening meeting with

out his constitutional vision with increased determination and urgency. He called “this Annual Message to the Congress . . . unique in our history”⁸⁸ because “at no previous time has American security been as seriously threatened from without as it is today.”⁸⁹ Making the case that the present conflict raised questions of the first order, he summarized our experiment in self-rule:

Since the permanent formation of our Government under the Constitution, in 1789, most of the periods of crisis in our history have related to our domestic affairs. . . .

It is true that prior to 1914 the United States often had been disturbed by events in other Continents. . . . But in no case had a serious threat been raised against our national safety or our continued independence.⁹⁰

Quoting Benjamin Franklin, one of the most beloved framers of the Constitution, he cautioned: “those who would give up essential liberty to purchase a little temporary safety, deserve neither liberty nor safety.”⁹¹

No longer content with reacting to hostile forces, Roosevelt proposed taking the offensive if America wished to become “the great arsenal of democracy”—a phrase he had earlier employed in a fireside chat to great fanfare.⁹² Going beyond mentioning the First Amendment as part of a

Hopkins, Robert Sherwood, and Samuel Rosenman, the triumvirate responsible for helping to craft many of Roosevelt’s speeches. *Id.* at 262–63; *accord* JEAN EDWARD SMITH, *FDR* 486–88 (2007).

88. Franklin D. Roosevelt, Annual Message to Congress (Jan. 6, 1941), *supra* note 74, at 666.

89. *Id.* at 663.

90. *Id.*

91. *Id.* at 665.

92. Franklin D. Roosevelt, Fireside Chat on National Security (Dec. 29, 1940), in *THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, 1940 VOLUME*, *supra* note 64, at 633, 643. Roosevelt first utilized this phrase in his audio address to the nation on December 29, 1940. In that fireside chat, he described the global conflict—which America had not yet officially entered—as “a last-ditch war for the preservation of American independence.” *Id.* As Rosenman reports, the phrase “arsenal of democracy” made its way into the speech after Frankfurter heard Jean Monnet, a representative of France, use it during a conversation. The two then agreed that Monnet should refrain from deploying the phrase and that it would be conveyed to Roosevelt for his use. ROSENMAN, *supra* note 87, at 260–61. Roosevelt went on: “Never before since Jamestown and Plymouth Rock has our American civilization been in such danger as now.” Franklin D. Roosevelt, Fireside Chat on National Security (Dec. 29, 1940), *supra*, at 634. Just three months before, Germany had joined an alliance with Italy and Japan. As Roosevelt saw it, “The Nazi masters of Germany have made it clear that they intend not only to dominate all life and thought in their own country, but also to enslave the whole of Europe, and then to use the resources of Europe to dominate the rest of the world.” *Id.* In describing the aims and methods of totalitarianism, he stated:

The history of recent years proves that the shootings and the chains and the concentration camps are not simply the transient tools but the very altars of modern dictatorships. . . .

hodgepodge list of rights, he now prioritized a national commitment to expressive freedom and religious worship above all other constitutional duties. He then took the further step of universalizing the significance of these rights. The explicit subordination of the “new economic constitutional order”⁹³ to First Amendment ideals was as striking as it was invigorating. As Roosevelt himself confessed, he had embarked upon a bold gambit to “make [the nation’s] people conscious of their individual stake in the preservation of democratic life in America,” to “toughen[] the fibre of our people,” “renew[] their faith and strengthen[] their devotion to the institutions we make ready to protect.”⁹⁴ Nothing less than “the happiness of future generations of Americans” depended upon its success.⁹⁵

The President’s oral performance heralded a special moment—one in which he sought the people’s assent for transformative change by appealing to revolutionary ideas. He would return to these themes in his inaugural address two weeks later, but at a higher level of abstraction. First, he situated the present conflict among other crucial moments of constitutional creation. Placing the global conflict on par with the American Revolution and the Civil War, two other breaks in constitutional time, and associating himself with two of the nation’s greatest leaders under fire, he declared:

In Washington’s day the task of the people was to create and weld together a nation.

In Lincoln’s day the task of the people was to preserve that nation from disruption from within.

In this day the task of the people is to save that Nation and its institutions from disruption from without.⁹⁶

Second, Roosevelt sought to “muster the spirit of America, and the faith of America” in order to extend national interests beyond U.S. shores.⁹⁷ This was not simply a convenient slogan to defeat the isolationist

The proposed “new order” is the very opposite of a United States of Europe or a United States of Asia. It is not a government based upon consent of the governed. . . . It is an unholy alliance of power and pelf to dominate and enslave the human race.

Id. at 639.

93. *See supra* note 79 and accompanying text.

94. Franklin D. Roosevelt, Annual Message to Congress (Jan. 6, 1941), *supra* note 74, at 670.

95. *Id.*

96. Franklin D. Roosevelt, Third Inaugural Address (Jan. 20, 1941), *supra* note 77, at 3.

97. *Id.* at 6.

orientation, but like similar moves during great deliberative moments, a general appeal to popular sovereignty for the reconfiguration of the political order. In 1942, confident that most of the nation was with him after the attack on Pearl Harbor, he proclaimed: “Our own objectives are clear; the objective of smashing the militarism imposed by war lords upon their enslaved peoples—the objective of liberating the subjugated Nations—the objective of establishing freedom of speech, freedom of religion, freedom from want, and freedom from fear everywhere in the world.”⁹⁸

In correspondence with members of the clergy and other civic leaders during this period, Roosevelt repeatedly underscored his commitment to “freedom of conscience, as written into the Federal Constitution.”⁹⁹ In June 1940, as popular reprisals against the Witnesses mounted, he advocated respect for “complete freedom of conscience.”¹⁰⁰ Roosevelt would continue this pattern through 1941, after which time he interspersed hearty endorsements of civil liberties with references to the “Four Freedoms.” Most appeared to be form letters, but the consistency of the message confirms how the administration wished its priorities to be perceived.

By the time that *Barnette* made its way onto the Supreme Court’s docket, the President had swamped the field with First Amendment oratory, creating the impression of popular inspiration and the seemingly unassailable logic of expressive liberty. After his bravura performance, who could remember the Justices’ words, much less side with their reading of text? Adhering to *Gobitis* put a person not only on the wrong side of the Constitution, but also on the wrong side of history.

98. Franklin D. Roosevelt, Address to Congress on the State of the Union (Jan. 6, 1942), in *THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, 1942 VOLUME*, at 32, 35 (Samuel I. Rosenman ed., 1950).

99. Letter from President Franklin D. Roosevelt to Edward McCullen (June 6, 1940) (on file with *Washington University Law Review*); Letter from President Franklin D. Roosevelt to John J. Baker, President, Golden Jubilee Convention, First Catholic Slovak Union of the United States (June 18, 1940) (on file with *Washington University Law Review*); Letter from President Franklin D. Roosevelt to Dr. Emmanuel Chapman, Committee of Catholics for Human Rights (July 27, 1940) (on file with *Washington University Law Review*).

100. Letter from President Franklin D. Roosevelt to Monsignor Joseph Ciarrocchi (Aug. 15, 1940) (on file with *Washington University Law Review*); Letter from President Franklin D. Roosevelt to Reverend J. Forest McGee (Sept. 11, 1940) (on file with *Washington University Law Review*).

2. *Judicial Appointments: Laying the Groundwork*

Roosevelt's decisive shift in governing rhetoric seemed to be accompanied by a strategy to make the High Court more susceptible to his urgings with regard to his war priorities, which included civil liberties. Compared with Roosevelt's early personnel decisions, which were geared toward validating the New Deal, his appointments during the war years reflected the administration's new-found emphasis upon political freedoms. At the same time that President Roosevelt promoted Stone to the post of Chief Justice in 1941, he also tapped Jackson to fill Stone's post as Associate Justice, and chose Senator James F. Byrnes, a trusted confidant who had shepherded many pieces of New Deal legislation through Congress, to replace the retired James C. McReynolds, one of the fiercest critics of presidential leadership and the New Deal agenda.¹⁰¹

While it would be going too far to say that these jurists could be expected to be at the President's beck and call, they were all individuals

101. Byrnes was later elected the Governor of South Carolina, in which capacity he led the state's "massive resistance" strategy against racial integration. Given his views on race, does his appointment to the Supreme Court in 1941 undermine the administration's apparent commitment to establishing expressive liberty as the basis for the post-war legal order? Not at all. Several liberal advisors and allies, including Harold Ickes, Harry Hopkins, and the NAACP, strongly opposed Byrnes' appointment because of his views on equality, but racial justice remained for Roosevelt a secondary concern at best. See HAROLD L. ICKES, THE SECRET DIARY OF HAROLD L. ICKES, THE LOWERING CLOUDS, 1939-1941, at 417 (1954) (opposing proposed appointment on the grounds that the President "could not afford to lose Byrnes from the Senate" and "Byrnes is not a New Dealer"); KEVIN J. MCMAHON, RECONSIDERING ROOSEVELT ON RACE 133-35 (2004). At the time, there was little reason to expect that Byrnes would be hostile to Roosevelt's increased interest in advancing First Amendment freedoms, though Byrnes later sided with the state in cases like *Jones v. Opelika* and *Bridges v. California*, no doubt adding to the sense of disquiet among progressives. See *Jones v. City of Opelika*, 316 U.S. 584 (1942); *Bridges v. California*, 314 U.S. 252, 279 (1941) (dissenting opinion). Packaging Byrnes with Jackson and Stone made confirmation by the Senate a breeze because of Byrnes' ties to the conservative wing of the party. Even as Roosevelt demonstrated his willingness to put a complicated New Dealer from the South on the High Court, within months plans were underway to bring Byrnes back off the Court to aid in the war effort. Within five months of being sworn in, on December 8, 1941, he met with Roosevelt over Japan's attack on Pearl Harbor and immediately began assisting the Justice Department with war legislation. A week later, it was leaked to the press that Roosevelt might "borrow Justice Byrnes temporarily to aid in revamping the production organization." JAMES F. BYRNES, ALL IN ONE LIFETIME 132, 147-56 (1958). Sensing an opportunity, and apparently at the urging of Chief Justice Stone and possibly others over the course of the next several months, Biddle counseled Roosevelt to fill the seat without delay. "Several times," Biddle writes, "I suggested to F.D.R. that the Court was shorthanded, that Byrnes ought to resign and the President should appoint a successor[.]" FRANCIS BIDDLE, IN BRIEF AUTHORITY 192 (1962). His mind made up, in early October 1942, Roosevelt met privately with Byrnes, asking him to take a leave from the Court to serve as "assistant president" and head of Economic Stabilization, outlining an impressive list of responsibilities that pressured Byrnes to offer his resignation from the Court. WALTER J. BROWN, JAMES F. BYRNES OF SOUTH CAROLINA: A REMEMBRANCE 117 (1992). Byrnes tendered his resignation from the Supreme Court, which the President happily accepted.

with executive branch experience or proven allies. Whatever position they might ultimately take on a legal matter, these men would display no reflexive reaction against executive leadership or vigorous government in the name of the people.

a. Harlan Fiske Stone

It has been widely assumed that the selection of Stone, originally a Coolidge appointee, to occupy the vacated seat of Hughes was an olive branch extended by Roosevelt to the Republicans after years of rancorous relations with the minority party.¹⁰² In fact, while Roosevelt did nothing to disturb such a perception of Stone's selection, the appointment of Stone after *Gobitis* could only mean that his position on the core set of values at stake in the matter did not contravene the President's plans. In fact, abundant reasons existed to expect Stone to be an important ally for the president's wartime initiatives once he had been rechristened as Roosevelt's man for the next phase of the constitutional revolution. As a former Attorney General, he would not be hostile to executive leadership. Stone's candidacy secured the backing of Zechariah Chafee, a prominent First Amendment scholar and critic of *Gobitis*, as well as George Norris, a liberal Democratic Senator from Nebraska.¹⁰³ Others apparently made it known to Roosevelt that New Dealers favored Stone for Chief.¹⁰⁴

102. See JOHN M. FERREN, *SALT OF THE EARTH, CONSCIENCE OF THE COURT: THE STORY OF JUSTICE WILEY RUTLEDGE* 226 (2004).

103. Harvard Law Professor Zechariah Chafee wrote to Roosevelt urging him "very strongly" to consider appointing Stone to the vacancy. Letter from Zechariah Chafee, Harvard Law School, to President Franklin D. Roosevelt (June 6, 1941) (on file with *Washington University Law Review*). Chafee himself had publicly criticized *Gobitis*, taking Hughes to task for not appreciating it as a right of conscience case: "if the phonograph and flag-salute cases had been decided in exactly the opposite way the combined results of the two decisions would give a scope to religious liberty closer to the ideals of the Chief Justice's Macintosh opinion, and to my conception of the life of the spirit." ZECARIAH CHAFEE, JR., *FREE SPEECH IN THE UNITED STATES* 405 (1941); see also *id.* at 405 n.64 (recommending opinion of New Hampshire Supreme Court reversing judgments of juvenile delinquency against young Witnesses be read "for its wise reflections on the cruelty of which patriotism is capable"). Senator George Norris also wrote to Roosevelt asking him to appoint Stone as Chief Justice. Letter from Senator George W. Norris to President Franklin D. Roosevelt (June 4, 1941) (on file with *Washington University Law Review*). Roosevelt wrote back: "I have made careful note of your suggestion regarding Justice Stone and you may rest assured that this matter is receiving most serious consideration." Letter from President Franklin D. Roosevelt to Senator George W. Norris (June 7, 1941) (on file with *Washington University Law Review*).

104. James Rowe, Jr., an Assistant Attorney General and previously Roosevelt's administrative assistant, wrote: "Probably no one will tell you, but 19 out of 20 of your own New Deal lawyers hoped you would make Mr. Justice Stone the Chief Justice. It was a really great appointment and the New Deal lawyers are happier than anyone else." Memorandum from James Rowe, Jr. to President Franklin D. Roosevelt (June 13, 1941) (on file with *Washington University Law Review*). Although this letter was written after Roosevelt had made his judicial selections (Roosevelt handwrote on the memo, "JHR

As an Associate Justice, Stone had sketched in *United States v. Carolene Products Company*¹⁰⁵ a map for reconciling judicial action on political rights with forbearance on economic matters, should others wish to follow it.¹⁰⁶ Stone, who favored the individualist position in *Gobitis* (and who bravely modeled such dissent against overwhelming numbers), could be expected to exert greater influence as Chief Justice over the exposition of rights. He would exercise that power by choosing Douglas to pen the revised majority opinion in *Opelika* and Jackson to author *Barnette*, and by persuading wavering colleagues to favor the rights position in other close First Amendment battles. Indeed, it is significant that Roosevelt initially may have preferred Jackson, but became convinced that Stone was the right man to promote consensus within the institution while remaining open to presidential prerogatives. Both Hughes and Frankfurter told Roosevelt they preferred Stone as Chief, and other aides may have also favored Stone for his demonstrated resolve on questions of political liberty.¹⁰⁷

b. Robert H. Jackson

Robert Jackson's appointment to the High Court continued the strong pattern of jurists that would be responsive to contemporaneous political developments. Equally important, Roosevelt's choice signaled his enhanced commitment to First Amendment rights. While the Senate considered his nomination, Jackson gave an Independence Day speech in which he tried to bring "clarity" to America's present challenges.¹⁰⁸ The address was carried live on the radio to a nationwide audience and replayed for a celebration on the National Mall the next day organized by the Office of Civilian Defense.¹⁰⁹

Not only do the major themes in the future Justice's address later reappear in *Barnette*, the speech demonstrates that the President's words profoundly influenced Jackson's language and thoughts. It is a transitional text, exemplifying the fluid relationship between political oration and

I am delighted to hear this"), it further suggests the existence of pro-Stone sentiment within the liberal legal community.

105. 304 U.S. 144 (1938).

106. *Id.* at 152 n.4.

107. See generally LIVA BAKER, FELIX FRANKFURTER 252–53 (1969).

108. Robert H. Jackson, Independence Day Address (July 4, 1941), reprinted in John Q. Barnett, Jackson on Independence Day (1941 and 1945), July 3, 2007 (on file with *Washington University Law Review*).

109. *Id.* at 1.

judicial opinion. First, as Roosevelt did before him, Jackson addressed his remarks to “all Americans” and appealed to notions of intergenerational sacrifice.¹¹⁰ Second, he waxed poetic about the goal of “broadened human rights” as both a moving force for the nation’s founding as well as the content of “the idiom of everyday living.”¹¹¹ Third, Jackson endorsed the idea that “America’s position in the society of nations is unavoidably that of a champion of the freedoms.”¹¹² Consider his most explicit cribbing of Roosevelt’s rhetoric:

When our national success demonstrated that freedom is an attainable goal, we made it the ultimate goal of all people everywhere. The four freedoms are not local or transient incidents; they are universal and timeless principles if they are valid at all. A blow against their existence in Europe is a blow at their validity everywhere. On the other hand, the example of a great and powerful people governed by their own consent through lawmakers of their free choice is a standing incitement to overturn tyranny anywhere.¹¹³

Jackson’s words not only reinforced FDR’s public statements on the role of the First Amendment in a post-war democracy, they also confirmed that a turn toward enhanced political rights ought to be an enduring change rather than a “transient” one.¹¹⁴ In its insistent pacing, emphasis on rights to portray a democratic “way of life,” and fusion of liberty with internationalism to encourage “liberty a new birth . . . in the midst of war,” this speech could be understood as a first draft of *Barnette*.¹¹⁵

There were other clues that Jackson would be open to claims of right even if he could not be expected to side with every claimant. He wrote a book titled, *The Struggle for Judicial Supremacy*.¹¹⁶ In the book, published in 1941, Jackson described Roosevelt’s efforts to reshape economic understandings as “not a fight to destroy the Court” but as simply the latest, public-spirited effort to “restore effective government.”¹¹⁷ Without

110. *Id.* at 4. “We are learning the overwhelming fact that now, as in 1776, our nation, together with our sister Republics on this hemisphere, faces a preponderantly hostile and undemocratic world. Now, as in 1776, we can turn to the Declaration of Independence for the principles which should guide our action.” *Id.*

111. *Id.* at 5.

112. *Id.*

113. *Id.* at 6.

114. *Id.*

115. *Id.* at 8.

116. ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* (1941).

117. *Id.* at xiii, xvii.

defending the particulars of the Judicial Reorganization Bill of 1937, he lauded the “revolt against judicial supremacy.”¹¹⁸

Jackson’s public views are salient for two reasons. First, despite his occasional appeal to the idea of judicial “self-restraint” and a “return to . . . the conviction that it is an awesome thing to strike down an act of the legislature approved by the Chief Executive,”¹¹⁹ in fact the book demonstrated that he believed in a responsive judiciary, one that should take account of “a rising tide of dissatisfaction with the Court.”¹²⁰ Although Jackson preferred to speak in terms of the “political nature of judicial review,” a close read reveals Jackson inching toward a depiction of the Supreme Court as a cultural institution, engaged in “nothing less than the arbitration between fundamental and ever-present rival forces or trends in our organized society.”¹²¹

Jackson lauded an emerging rights-protective trend in the Court’s jurisprudence, which he described as a “vigilant” stance toward “the free dissemination of ideas.”¹²² Jackson singled out for special praise the cases involving handbill ordinances, anti-picketing laws, and bans on public meetings that have “suffered the same end in the Court.”¹²³ These rulings, he argued, were compatible with the Court’s newfound restraint on economic matters because “[t]he presumption of validity which attaches in general to legislative acts is frankly reversed in the case of interferences with free speech and free assembly.”¹²⁴ In his mind a “perfectly cogent reason” existed for preferring the First Amendment:

Ordinarily, legislation whose basis in economic wisdom is uncertain can be redressed by the processes of the ballot box or the pressures of opinion. But when the channels of opinion and of peaceful persuasion are corrupted or clogged, these political correctives can no longer be relied on, and the democratic system is threatened at its most vital point. In that event the Court, by intervening, restores the processes of democratic government; it does not disrupt them.¹²⁵

Although this passage contained a footnote reference to *Gobitis* rather than a direct criticism of it, the future Justice’s logic seems to encompass

118. *Id.* at 234.

119. *Id.* at 321, 323

120. *Id.* at xix.

121. *Id.* at 311.

122. *Id.* at 284.

123. *Id.*

124. *Id.* at 285.

125. *Id.*

the Jehovah's Witnesses claim—namely, a “repressions of civil rights” or “civil liberties” by “local authorities” as to which neither the ballot box nor public opinion is likely to offer an efficacious remedy.¹²⁶ Jackson perceived the First Amendment as a beachhead of sorts for the judicial articulation of other rights. Painting himself as a dependable champion of civil rights, he pointed out the advantages of principled selectivity in the defense of constitutional norms over a general policy of forbearance: “[A] court which is governed by a sense of self-restraint does not thereby become paralyzed. It simply conserves its strength to strike more telling blows in the cause of a working democracy.”¹²⁷

Jackson's disgust for *Gobitis* was well documented before his appointment to the Supreme Court. Harold Ickes, a close confidante of President Roosevelt's, recorded an entry in his diary on June 5, 1940, expressing “utter astonishment and chagrin” at the Frankfurter opinion.¹²⁸ “As if the country can be saved, or our institutions preserved, by forced salutes of our flag by these fanatics or even by conscientious objectors!”¹²⁹ Ten days later, Ickes referred to a discussion with Jackson, who “told about the hysteria that is sweeping the country against aliens and fifth columnists. [Bob Jackson] is particularly bitter about the decision recently handed down by the Supreme Court in the Jehovah's Witnesses case, to which I have heretofore alluded.”¹³⁰ Jackson mentioned that “it might be necessary for the Government actually to indict some prominent local or state officials in order to make it known to the country that we were not being ruled by disorderly mobs.”¹³¹

Correspondence between the Attorney General's Office and the White House reveal that high-ranking officials kept Roosevelt apprised of the situation despite the Department of Justice's formal non-involvement. Thus, either Roosevelt had a personal interest in the legal and political issues involved or insiders wanted the President to make certain legal

126. *Id.* at 284–85.

127. *Id.* at 285.

128. ICKES, *supra* note 101, at 199.

129. *Id.* The entry has all the hallmarks of an honest, complicated reaction close to the event. He expressed derision for adult worshippers but sympathy for the “two little children, members of the crazy Jehovah's Witnesses sect, who had refused to salute the flag at the behest of their fanatical parents.” *Id.* He also noted his belief, no doubt tongue in cheek, that Frankfurter “is really not rational these days on the European situation.” *Id.*

130. *Id.* at 211.

131. *Id.* Rotnem and Folsom report that between June 12 and 20, 1940, “hundreds of attacks upon the Witnesses were reported to the Department of Justice.” Rotnem & Folsom, *supra* note 34, at 1061. See John Q. Barrett et al., *Recollections of West Virginia State Board of Educ. v. Barnette*, 81 ST. JOHN'S L. REV. 755, 795 (2007) (recounting other instances when Jackson expressed disapproval of *Gobitis*).

matters a national priority. Every few weeks Jackson authored a memorandum describing decisions in the Supreme Court of which the President should be aware. In a memorandum dated June 3, 1940, Jackson wrote:

Among the decisions of the Court in non-Government litigation the one of most interest was that in *Minersville School District v. Gobitis*. In this case the Court, in an opinion by Mr. Justice Frankfurter, held that the School Board could constitutionally exact a salute to the flag, even though the child was a member of a sect which believed the salute to be idolatrous worship of a man-made object or institution. The Court paid eloquent service to the principle that “the affirmative pursuit of one’s convictions about the ultimate mystery of the universe and man’s relation to it is placed beyond the reach of the law.” But, the Court said, “the mere possession of religious convictions . . . does not relieve the children from the discharge of political responsibilities.” . . . Mr. Justice Stone dissented. He recognized the power of government to control conduct notwithstanding religious scruples but thought the guarantee of religious freedom forbade the legislature to “compel public affirmations which violate . . . religious conscience.”¹³²

What appears to be a neutral synopsis can be read as a subtle criticism of the ruling. It must be kept in mind that Jackson would have wished to tread lightly given that Frankfurter remained a close advisor to the President and an unrestrained critique of *Gobitis* might be taken as a slap at Roosevelt himself, who placed Frankfurter in a position to write the opinion in the first place. Jackson could have mentioned the decisive nature of the majority, but refrained from doing so, leaving the impression of a close-fought case. Jackson sandwiched the holding of the opinion between two quotes emphasizing rights—an “eloquent” one from Frankfurter that endorsed the importance of the right of conscience and the other by Stone, which “recognized” constitutional limits.¹³³ Overall, the memorandum elevated Stone’s dissent and showcased the right of conscience.

Jackson’s disdain for *Gobitis* was most viscerally displayed in early drafts of *Barnette*.¹³⁴ Even when stronger language was removed, the

132. Letter from Attorney General Robert H. Jackson to President Franklin D. Roosevelt (June 3, 1940) (on file with *Washington University Law Review*).

133. *Id.*

134. For instance, an early draft of Jackson’s opinion described Germany’s internment of

ruling's total repudiation of the Court's prior art would remain unmistakable to the untrained eye.

c. Wiley B. Rutledge

In 1942, Roosevelt selected Wiley Rutledge, a judge on the U.S. Court of Appeals for the D.C. Circuit,¹³⁵ to fill the seat vacated by Byrnes when Byrnes agreed to organize and lead the fledgling Office of Economic Stabilization. Rutledge had been a vocal supporter of Roosevelt's court-packing plan—that is to say, a critic of institutional entrenchment and a proponent of socially responsive jurisprudence.¹³⁶ More specifically, the selection of Rutledge over Learned Hand—a brilliant but cautious jurist—signaled a greater interest on the part of the administration to promote individual rights as a central component of the war dividend. For if judicial restraint was all that the administration desired, there were far more dependable proponents of judicial acquiescence than Rutledge.¹³⁷ Conversely, Rutledge's public comments about the desirability of a strong position on rights and his reputation as a “humanist” lifted him from a relatively obscure figure west of the Mississippi to a darling of insiders appalled by the High Court's cramped position on the freedom of speech and worship.¹³⁸

As a member of the D.C. Circuit, Judge Rutledge singled out *Gobitis* for public condemnation and this could not have been lost on the President

Jehovah's Witnesses for refusal to salute the swastika and Japan's murder of sect members for declining to “bow to the East.” Circulated Draft Opinion by Justice Jackson, Mar. 30, 1943, at 5, W. Va. State Bd. of Educ., v. Barnette, 319 U.S. 624 (1942) (No. 591) (on file with *Washington University Law Review*) [hereinafter *Barnette* Draft, Mar. 30, 1943]. Another draft contained this rather extreme characterization of the law under review, and by extension, existing precedent: “But it is significant that the compulsory flag salute and pledge goes beyond any other form of attempted state control of expression ever considered by this Court.” Uncirculated Draft Opinion by Justice Jackson, Mar. 25, 1943, at 9, *Barnette*, 319 U.S. 624 (on file with *Washington University Law Review*).

135. Rutledge served as Dean of the Washington University Law School from 1930 until 1935. He was the Dean of the University of Iowa School of Law from 1935 until 1939, when Roosevelt appointed him to the D.C. Circuit.

136. In fact, the *Washington Post* lamented that, with his appointment to the Supreme Court, “[t]he conservative attitude toward the law has all but disappeared from the high bench.” *Supreme Court*, WASH. POST, Jan. 12, 1943, at 10.

137. It appears that Hand's perceived personal and philosophical associations with Frankfurter worked to Hand's disadvantage in the minds of Roosevelt and a number of his close advisors. GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 562–63 (1994) (arguing that the selection of Rutledge over Hand strengthened faction on Roosevelt Court that favored greater elaboration of rights); See MCMAHON, *supra* note 101, at 139 (quoting Justice Douglas).

138. Lewis Wood, *Rutledge Named to Supreme Court*, N.Y. TIMES, Jan. 12, 1943, at 1. At the time of the nomination, the *New York Times* noted his support for Roosevelt's court-packing plan and that he was a “man of marked simplicity” and “a humanist.” *Id.*

or his inner circle. Days after the opinion's release, Rutledge accepted an honorary degree from the University of Colorado. His commencement speech endorsed a symbolic linkage of the pledge and the war effort that *Gobitis* had declined to draw: "We forget [] . . . that it is [in] the regimentation of children in the Fascist and Communist salutes that the very freedom for which Jehovah's Witnesses strive has been destroyed."¹³⁹ Astute observers spread the news that a sitting judge had criticized his superiors—and Justice Stone took note.¹⁴⁰ In October of the same year, Rutledge addressed a gathering of the Federal Bar Association. He advocated respect for a diversity of viewpoints, calling "the carols of democracy . . . varied carols."¹⁴¹ Though he endorsed punishment of the saboteur, he cautioned that "we must distinguish carefully . . . between him and the honest objector to measures we must take."¹⁴² In July 1942 he urged the American Bar Association to "actively defend minority groups" and enforce laws that promise "fair treatment."¹⁴³ Culling these aspirations from the ongoing war effort, Judge Rutledge argued: "We shall not gain if, in helping to preserve democracy elsewhere, in the process we destroy it entirely here."¹⁴⁴

Francis Biddle played a behind-the-scenes role in securing Rutledge's elevation. First, he met privately with Justices Black, Murphy, Douglas, and later Chief Justice Stone before recommending Rutledge to the President. The meeting occurred after the Black-Murphy-Douglas joint dissent in *Opelika*, and the natural inference is that Biddle and others hoped to strengthen the bloc on the Court interested in advancing political freedoms. Second, he burnished Rutledge's reputation among insiders by enlisting Hebert Wechsler, who was on leave from Columbia University's law faculty, to review Rutledge's legal writings.

Commissioned by Biddle after Roosevelt professed "not know[ing] much about Rutledge's record since he had been on the Circuit Court,"¹⁴⁵

139. FERREN, *supra* note 102, at 188 (citing *Judge Rutledge Raps Flag-Salute Rule in Schools*, EVENING STAR (Washington), June 10, 1940, at 19).

140. See, e.g., *Judge of U.S. Court of Appeals Criticizes Law Requiring School Children to Salute Flag*, ROCKY-MOUNTAIN NEWS, June 9, 1940 (on file with *Washington University Law Review*).

141. FERREN, *supra* note 102, at 188 (quoting Rutledge's address before the Federal Bar Association).

142. *Id.*

143. *Id.*

144. *Id.*

145. Francis Biddle, *Diary of Francis Biddle* (Oct. 28, 1942) (on file with Papers of Francis Biddle, Franklin D. Roosevelt Presidential Library) [hereinafter *Francis Biddle, Diary of Francis Biddle* (Oct. 28, 1942)]. The entry indicates that Biddle was in close communication with Irving Brandt, a journalist from the Midwest and advocate for Rutledge's candidacy. *Id.* Brandt reportedly met with Chief Justice Stone, who apparently expressed his wish that the appointee "would 'stick'"

the Wechsler report offered a glowing assessment. Despite a perceived tendency to overwrite, Rutledge displayed a ““soundness of judgment, a searching mind, a properly progressive approach to legal issues,”” but his ““most striking trait—his warm sense for real people as the ultimate concern of law and his awareness of what real people are like throughout this broad land.””¹⁴⁶ This particular assessment seemed calculated to win Roosevelt over by suggesting that the two shared an affinity and aptitude for relating to the common man. Wechsler added a thought presumably aimed at Biddle and other advisors who desired a projection of the nominee’s likely views on political rights: ““Civil liberty problems and review of administrative agencies, particularly the labor field, have been the major issues. His work leaves no room for doubt that these values are safe in his hands.””¹⁴⁷ Finally, he reminded his readers of Rutledge’s ““stand in favor of the Court Plan.””¹⁴⁸

The Wechsler memo elevated Rutledge as a prospect. With his bona fides secure, Rutledge quickly became the favorite of Biddle and others who saw him as “a liberal who would stand up for human rights, particularly during a war when they were apt to be forgotten.””¹⁴⁹ Biddle’s diary entries and cabinet meeting notes show that by late October 1942 he took every opportunity to buttonhole the President after Cabinet meetings and advance Rutledge’s name.¹⁵⁰

and that it was “important not only to appoint a liberal but a scholar who could express liberal decisions in an appropriate way.” FERREN, *supra* note 102, at 213. Stone suggested two names from among the Circuit Judges who fit his criteria—John Parker and Wiley Rutledge—and, according to Brandt, “spoke[] of Wiley Rutledge’s work with praise.” *Id.* at 212. Brandt later called on Roosevelt personally to press Rutledge’s name—an event later cited by Roosevelt to Justice Douglas. In November, Biddle had his own meeting with the Chief Justice to discuss the vacancy. Despite the fact that Stone mentioned several names, by then Biddle had begun to settle upon Rutledge as “the most promising.” BIDDLE, *supra* note 101, at 193. Obviously treading carefully so as not to harm Rutledge’s chances, and well aware of the full court press to secure the appointment of Learned Hand, Biddle praised Hand as “head and shoulders above the others,” while presenting the positives in Rutledge’s favor. *Id.* at 194. Those who preferred Rutledge over Hand mentioned the age of Hand, playing to Roosevelt’s desire to avoid charges of hypocrisy over the court reform proposal. FERREN, *supra* note 102, at 216–17.

146. FERREN, *supra* note 102, at 215 (quoting Wechsler’s report). This comment appears aimed at Roosevelt, who on more than one occasion asked his aides to locate a suitable jurist from west of the Mississippi. In an interview with Wechsler, Ferren elicits confirmation that Biddle’s “most important consideration” was whether Rutledge was a “trustworthy liberal.” *Id.* at 216.

147. *Id.* at 215 (quoting Wechsler’s report).

148. *Id.*

149. BIDDLE, *supra* note 101, at 193.

150. On October 9, 1942, Biddle opposed holding Byrnes’s seat for him and proposed Judge Parker, Charles Fahy, Dean Acheson, and Ben Cohen. By mid-October, he was meeting with Brandt and promoting Rutledge to Roosevelt. Francis Biddle, *Diary of Francis Biddle* (Oct. 28, 1942), *supra* note 145 (“I had seen the President about a week ago and had suggested the name of Wiley Rutledge.”). In pressing for Rutledge, Biddle leveraged Stone’s name as well as Roosevelt’s interest in

3. *Other Instances of Executive Branch Signaling*

Although the Roosevelt administration did not formally participate in the flag salute litigation, key members of the executive branch nevertheless took steps to distance the administration from the logic and consequences of *Gobitis*. With his apparent consent, they translated the President's words into a concrete plan to mold public opinion over the flag salute issue.

a. *Eleanor Roosevelt*

The First Lady's writings and speeches frequently dovetailed with the President's pronouncements or initiatives. These moments provoked endless debate over the degree and nature of the coordination of their separate public personas: the assured patrician and the feminist crusader. Eleanor Roosevelt wrote a syndicated column, *My Day*, published six days a week between the years 1935 and 1960. Although great effort was expended to portray Eleanor's ideas as entirely her own, the administration permitted the impression of intermittent coordination to linger; in fact, she herself once let slip that her pieces occasionally served as "trial balloons" for the administration.¹⁵¹ A particularly transparent instance of joint

advancing Thurmond Arnold's career, while again (as with Learned Hand) resisting competing candidates with the age factor. Biddle seems to have settled on Rutledge even before consulting with Stone personally:

After Cabinet I spoke to the President about the Supreme Court vacancy, and suggested that the Chief Justice would, from what I had been told, be very favorable to Wiley Rutledge. I spoke to the President about the possibility of appointing Arnold to fill the vacancy created by Wiley Rutledge, if he was put in the Supreme Court. He seemed very favorably impressed. He spoke of the possibility of appointing Norris, which I thought was impossible as he is entirely too old. I told the President that Harold Ickes would like the appointment, but I did not think it would be as good as others. The President indicated that he wished to keep Ickes where he is and that he wanted an appointment of a man West of the Mississippi. Rutledge comes from Iowa. The President authorized me to discuss the matter further, discreetly, with the Chief Justice and other members of the Supreme Court.

Francis Biddle, Cabinet Meetings (July–Dec. 1942) (Nov. 6, 1942) (on file with *Washington University Law Review*). On November 20, 1942, Biddle

had a long talk with the President after Cabinet for [nearly] half an hour. He still spoke of the possibility of Hand's appointment, but agreed that he was too old and told me to prepare the papers for Rutledge and Arnold and send them over to him, under seal, for Grace Tully.

Francis Biddle, Cabinet Meetings (Nov. 20, 1942) (on file with *Washington University Law Review*). Biddle reports that he met with Rutledge that same day and came away impressed with his humble demeanor. On December 11, Biddle again raised the matter with Roosevelt, who indicated he "is not ready to act on the Supreme Court, but thinks he will in a few days. That situation has not changed." *Id.*

151. THE ELEANOR ROOSEVELT ENCYCLOPEDIA 357 (Maurine H. Beasley et al. eds., 2001). See generally ALLIDA M. BLACK, CASTING HER OWN SHADOW: ELEANOR ROOSEVELT AND THE SHAPING

performance came on February 13, 1937, when her column offered support to the President's court-packing plan by quoting from a letter allegedly penned by a reader.¹⁵² Her muted description of the internment camps erected to warehouse persons of Japanese ancestry could similarly be seen as a way of rebutting charges that the policy was inhumane and unconstitutional.¹⁵³

On June 23, 1940, mere weeks after the announcement of *Gobitis*, the First Lady devoted her entire column to the state of civil liberties in the Union. She declared: "it is time we stopped and took stock of ourselves," if the nation is to avoid being "swept away from our traditional attitude toward civil liberties by hysteria about Fifth Columnists."¹⁵⁴ The incident to which she gave prominent attention involved mistreatment of the Jehovah's Witnesses over the flag issue:

On page one of a newspaper this morning articles show the heat and lack of consideration with which many people are acting. One heading reads: "Crowds Force Sect Members to March with Flag in Wyoming." The story tells how six people of a certain religious sect were dragged from their homes and forced to pledge allegiance to the flag. . . .

Must we drag people out of their homes to force them to do something which is in opposition to their religion?¹⁵⁵

Eleanor Roosevelt tried to calm readers by appealing to the rule of law. She blunted the ruling's force by accentuating the Jehovah's Witnesses' sincerely held religious views, indicating that such beliefs were worthy of

OF POSTWAR LIBERALISM 23–48 (1996). For a study of Eleanor Roosevelt's impact on foreign policy, see JASON BERGER, *A NEW DEAL FOR THE WORLD: ELEANOR ROOSEVELT AND AMERICAN FOREIGN POLICY* (1981).

152. According to Eleanor Roosevelt, the fan of her column wrote:

People's fears are an odd thing anyhow. Here are these people all so scared for the Supreme Court, because it "protects our liberties." Whose liberties has it protected? Here they are terrified lest the Constitution be interpreted as it was meant to be interpreted in each age according to that period's own ideas instead of those of the past generation.

Eleanor Roosevelt, *My Day*, Feb. 13, 1937, reprinted in *ELEANOR ROOSEVELT'S MY DAY: HER ACCLAIMED COLUMNS 1936–1945*, at 49 (Rochelle Chadakoff ed., 1989) [hereinafter *MY DAY*].

153. Unlike her other articles, she engages in no obvious editorializing about the internment policy, though noting that "[e]verything is spotlessly clean" and loyal citizens within the camps are working in "several industries" to aid the war effort. Eleanor Roosevelt, *My Day*, Apr. 26, 1943, reprinted in *MY DAY*, *supra* note 152, at 290.

154. Eleanor Roosevelt, *My Day*, June 23, 1940, reprinted in *MY DAY*, *supra* note 152, at 169 (internal quotation omitted). This piece was written around the time that Eleanor Roosevelt gave Justice Frankfurter an earful about *Gobitis* during a dinner at the White House.

155. *Id.*

respect. Missing was any mention of the Supreme Court decision recently decided, much less a legalistic defense of its particulars. Indeed, she insisted that the Witnesses' steadfast refusal to salute the flag made them unlikely spies because "the most dangerous Fifth Columnists would be the first to conform."¹⁵⁶ She characterized the incident as a misguided attempt to ferret out subversives pursued in "unconstitutional and ill considered ways."¹⁵⁷ Such tactics, she insisted, trampled "the rights of innocent people" as well as "guilty people."¹⁵⁸

The First Lady closed by linking her views to those of the Department of Justice, which was dedicated to the defense of constitutional ideals: "If they [advocates of a suspension of civil liberties] happen to feel that our Constitution should be adhered to, unless it should be changed, they seem to be thinking along the same lines as the Attorney General of the United States."¹⁵⁹ This move conveyed the sense that she spoke with the full authority of the President as to the Constitution's demands.

It would be shrewd politics for the administration to signal to concerned members of the populace that the President cared about minority rights, while preserving a degree of deniability in order to hold on to his significant electoral majorities. Becoming unnecessarily embroiled in discrete disputes—particularly over a symbol that so many Americans felt impassioned about—threatened to dissipate the Chief Executive's ability to speak for a broad coalition. Roosevelt's coalition now included not only many liberal Republicans in the Northeast and West who might be expected to worry about political freedoms, but also greater numbers of the working class throughout the South, who could be counted among his most patriotic supporters.¹⁶⁰ Weaving inspiring abstractions while allowing proxies such as the First Lady to convey respect for dissent in everyday disputes would accomplish this tricky set of objectives. Eleanor Roosevelt was immensely popular, possessed obvious interpersonal skills, and the perceptions of her ceremonial office enhanced her ability to project and elicit sympathy without undermining the President's carefully crafted image of rectitude.

The First Lady's statements appeared well synchronized with the President's. During the years preceding *Gobitis* she, like Roosevelt,

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. See BURNS, *supra* note 72, at 454. Despite some erosion of support for Roosevelt in several quarters, Wendell Willkie's inability to make inroads among organized labor and working poor sealed his fate in the 1940 election.

stressed the benefits of security and unity. On September 21, 1938, Eleanor Roosevelt recounted sitting with “a group of young people who were discussing different types of security,” and observed that “youth is seeing more and more clearly that it is the stability of the whole which counts, that no individual can create security unless there is general security.”¹⁶¹

Increasingly, the First Lady invoked the Constitution as a justification for war. On December 13, 1939, she urged: “Let’s fight for our Democracy and our Bill of Rights, and wherever we find things in which we do not believe, let’s be free to express ourselves, but let us pray not to be dominated by fears or disturbed by nightmares.”¹⁶² Although she surprised some readers with her defense of a conscription law, she was a spirited defender of a right to conscientious objection:

I think that conscientious objectors should be protected, but they should be required to work for the country’s good in ways which do not conflict with their religious beliefs. But to put a man in jail, even when at war, if he has done nothing more than state that he does not believe in something seems to me one of the regrettable actions we ought to guard against.¹⁶³

Immediately after Roosevelt’s state of the union address in January of 1941, the First Lady urged readers to put aside partisan differences to execute his constitutional vision: “Surely all of us can be united in a foreign policy which seeks to aid those people who fight for freedom and, thereby, gives us the hope of present peace for ourselves and a future peace for the world founded on the four great principles enunciated today.”¹⁶⁴ On May 11, 1943, she commemorated the tenth anniversary of the “notorious” book burning ordered by Adolf Hitler.¹⁶⁵ The incident presented an instructive counterpoint to “the democracies of the world,” where “the passion for freedom of speech and of thought is always accentuated when there is an effort anywhere to keep ideas away from people and to prevent them from making their own decisions.”¹⁶⁶ Girding

161. Eleanor Roosevelt, *My Day*, Sept. 21, 1938, reprinted in *MY DAY*, *supra* note 152, at 98.

162. Eleanor Roosevelt, *My Day*, Dec. 13, 1939, reprinted in *MY DAY*, *supra* note 152, at 149.

163. Eleanor Roosevelt, *My Day*, Aug. 7, 1940, reprinted in *MY DAY*, *supra* note 152, at 177.

164. Eleanor Roosevelt, *My Day*, Jan. 7, 1941, reprinted in *MY DAY*, *supra* note 152, at 191–92. See also Eleanor Roosevelt, *My Day*, Dec. 3, 1941, reprinted in *MY DAY*, *supra* note 152, at 223 (repeating two individual pledges written by Carl Sandburg and sent to Office of Civilian Defense useful for inculcating in each citizen a “greater sense of responsibility about the preservation of our freedoms”).

165. Eleanor Roosevelt, *My Day*, May 11, 1943, reprinted in *MY DAY*, *supra* note 152, at 291.

166. *Id.*

herself with the First Amendment, she accused Nazi society of paternalism and autocracy. With a steadfast belief in the cleansing power of democratic liberty, she looked forward to the day when “the people whom Hitler has enslaved will have to come in contact again with the world of free expression and thought; then Hitler will have to face the judgment of his own people.”¹⁶⁷ On that day of redemption, Eleanor Roosevelt expressed “hope that we shall face an enslaved nation, where access to freedom of thought and expression may make great changes in the people.”¹⁶⁸

b. Francis Biddle

Then–Solicitor General Francis Biddle gave several speeches that denied executive branch support to the vision of the First Amendment articulated by the High Court. On June 16, 1940, days after the publication of *Gobitis* and before its logic could become etched in the minds of the citizenry, Biddle made an extraordinary radio address heard across the country. Because of the President’s magnificent use of the radio for his fireside chats during the dark days of economic uncertainty, the radio had evolved into the administration’s signature means of communicating directly with the people themselves, unadulterated by opinion-makers and intellectuals. The radio, in its capacity to overcome problems of time and space posed by a modern large-scale democracy, fostered a unique feeling of social intimacy. The Solicitor General’s resort to this technology conveyed a special seriousness about the message and an official desire to shape lasting attitudes.

In an attempt to quell the mob actions and other local efforts at repression, Biddle tried to deprive such actions of any legal justification:

Jehovah’s Witnesses have been repeatedly set upon and beaten. They had committed no crime; but the mob adjudged they had, and meted out mob punishment. The Attorney General has ordered an immediate investigation of these outrages. The people must be alert and watchful, and above all cool and sane. Since mob violence will make the government’s task infinitely more difficult, it will not be tolerated. We shall not defeat the Nazi evil by emulating its methods.¹⁶⁹

167. *Id.*

168. *Id.*

169. Francis Biddle, Radio Address (June 16, 1940). See PETERS, *supra* note 27, at 96 n.1

Like the First Lady, the Solicitor General eschewed a legalistic defense of *Gobitis*. Biddle could have seized the opportunity to underscore a difference between legitimate punishment of students for refusing the flag salute and illegal mob violence, but refused to draw such fine distinctions, lending support to the public view that text and consequence were entwined and together should be resisted. Instead, one of the highest law enforcement officials in the land issued no public defense of the Frankfurter ruling (nor did Jackson, the Attorney General). To the contrary, he warned that the federal government would take action against those who would try to take the ruling's logic to extreme ends. Importantly, the executive branch now apparently saw truth to the comparison between *Gobitis* and Nazi policies; they also made a causal relationship between that decision and the acts of brutality visited upon the Jehovah's Witnesses, past and present. Despite the entreaties of litigants, the Justices had initially refused to perceive these events in such ideological terms. By contrast, administration officials would underscore these connections at every opportunity.

Several weeks later, the Solicitor General gave remarks before a gathering of the Pennsylvania Bar Association. He again decried the "swiftly increasing cases of mob violence in connection with Jehovah's Witnesses" and argued that "we shall not tolerate such Nazi methods" of suppressing dissent, even with war looming.¹⁷⁰ Biddle indicated that the Attorney General shared his views and had ordered the FBI to conduct an "immediate investigation" of chargeable crimes related to these acts of religious and expressive persecution.¹⁷¹ In February 1942 he would give another radio address in an effort to "keep the nation unified and cool."¹⁷²

(quoting AM. CIV. LIBERTIES UNION, *THE PERSECUTION OF JEHOVAH'S WITNESSES* 22 (1941) (on file with *Washington University Law Review*)).

170. PETERS, *supra* note 27, at 97 (citing John Haynes Holmes, *The Case of Jehovah's Witnesses*, *CHRISTIAN CENTURY*, July 17, 1940, at 898 (on file with *Washington University Law Review*)). Biddle's own relationship with Roosevelt has been the subject of much interest, with most taking the view that Roosevelt was initially lukewarm to the possibility of appointing him to replace Jackson as Attorney General for fear that his inclination toward political liberties would be an impediment to the administration's war goals. RICHARD W. STEELE, *FREE SPEECH IN THE GOOD WAR* 122–28 (1999); GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME* 255 (2004). What is undeniable is that Roosevelt endorsed him as Jackson's successor with full knowledge of Biddle's credentials as an outspoken defender of rights, particularly as it related to religious dissent. It is also more than likely that the President's sustained interactions with Biddle, Ickes, Jackson, and others during this period may have caused him to reflect upon the deeper meaning of a constitutional vision in which security and liberty were closely aligned rather than diametrically opposed.

171. PETERS, *supra* note 27, at 97.

172. Letter from Francis Biddle to Beatrice H. David (Feb. 4, 1942) (on file with *Washington University Law Review*). Thanking a listener for her favorable remarks on his radio address, Biddle wrote: "We are trying hard here to keep the nation unified and cool. It is not an easy job as you

Biddle made some efforts to monitor and rein in the rhetoric of other agency heads during the crisis of June 1940. In a memo located in Robert Jackson's files as Attorney General, Biddle appended a recent public address by FBI Director J. Edgar Hoover. Biddle's June 27, 1940, memo singled out certain inflammatory statements by Hoover to the effect that "Freedom of the press, freedom of speech, freedom of activities and of thought . . . were conceived for honest persons seeking a land of liberty, and not for crooks or dictators, spies or traitors, or Communists or Budsmen."¹⁷³ Biddle urged Jackson to say something to Hoover:

Don't you think it is a bit too heady wine and in the future might be toned down? A word from you could suggest that this is the sort of thing that tends to create the volunteer workers movement J.E.H. doesn't much want.¹⁷⁴

It is not clear whether Jackson had a talk with Hoover, but the Director of the FBI soon changed his tune. By August, Hoover had begun to decry domestic persecution of the Witnesses. In an article carried in a weekend supplement to the *New York Herald Tribune*, he wrote about "our Fifth Column menace—and how to address it."¹⁷⁵ Hoover called upon the public to "outlaw the vigilante," reminding the populace that "vigilante methods have no place in America today."¹⁷⁶ Of "direct action outside the law" to enforce love of country, he added:

In the present surge of nationalism there lurks a serious danger. The actions of overzealous groups of individuals, no matter how patriotic in aim, may become un-American in method. . . . When world conditions brought on the present emergency I urged law enforcement to avoid hysteria and warned against unbridled trampling on the rights of innocent persons. It is as essential to

suggest. I like particularly what you said about the refugee and our flag." *Id.*; see also STONE, *supra* note 170, at 255 (quoting from other Biddle speeches).

173. Memorandum from Solicitor General Francis Biddle to Attorney General Robert Jackson, With Attachment: Address of J. Edgar Hoover, Director, FBI, before the Michigan Bankers Association, Grand Rapids, Mich., June 19, 1940 (June 27, 1940) (on file with *Washington University Law Review*).

174. *Id.*

175. J. Edgar Hoover, *Outlaw the Vigilante!*, THIS WEEK MAGAZINE, N.Y. HERALD TRIBUNE, Aug. 17, 1940, at 2 (on file with *Washington University Law Review*). Hoover authored several articles for the series, "For a Better America."

176. *Id.*

preserve civil liberties as it is to track down those who engage in espionage and sabotage.¹⁷⁷

In a society in which print and radio served as the primary tools for constructing the public mind, these instances of executive branch activity signaled to the citizenry at large that there ought to be limits on the authority of the people to enforce nationalistic sentiments. Along the way, key actors spread executive branch constructions of the First Amendment. Americans would have perceived these visible gestures, feints, and statements as the equivalent of presidential policy.¹⁷⁸

c. The Department of Justice

Under Jackson, the Department of Justice investigated civil rights complaints, but usually initiated lawsuits or filed briefs when a case could be brought under federal law. Although Biddle continued this litigation policy of limited court action, as Attorney General he broadened the informal means by which the executive branch sought to oversee local interactions with the Witnesses. He monitored cases affecting the Witnesses as matters of “religious freedom,”¹⁷⁹ and in distributing memoranda updating legal developments within the network of government lawyers, raised attorneys’ consciousness over such matters and streamlined the channels of information so developments on the ground floor could reach his office. On April 29, 1942, a memorandum for U.S. Attorneys declared “the Department’s policy with regard to the enforcement of the right of religious freedom.”¹⁸⁰ Victor Rotnem, Chief of the Civil Rights Section, began by impressing upon lawyers the seriousness of the problem:

In many instances the local authorities have not exercised such restraint. We have received complaints that in many cases State and

177. *Id.*

178. For example, the *New York Times* reported that the American Civil Liberties Union “commended [the Justice Department] for punishing investigations of peonage in the South and of mob violence against Jehovah’s Witnesses.” *Our “Tolerance” in Wartime Hailed: Civil Liberties Union Calls Forbearance “Remarkable” After Pearl Harbor*, N.Y. TIMES, June 18, 1942, at 36.

179. Memorandum from Victor W. Rotnem, Chief of Civil Rights Section, to Mr. Wendell Berge, Assistant Attorney General (Apr. 29, 1942), at 2 (on file with *Washington University Law Review*). See *id.* (discussing *Jones v. City of Opelika*, pointing out that editorial commentary on the decision trended in favor of the ruling, mentioning complaints about or from Jehovah’s Witnesses, and discussing Department of Justice efforts to create “uniform policy of treatment by United States Attorneys generally” and educate lawyers as to the “status of religious freedom”).

180. *Id.* at 1.

local officials have either participated in the mob action or have wilfully failed to afford the full protection of the law to people under the attack of mobs. In other instances invalid ordinances have been passed to furnish an excuse for official action or valid ordinances have been unconstitutionally invoked.¹⁸¹

He then outlined a Department of Justice rights strategy that adhered to longstanding departmental policy while cultivating free speech norms. The memorandum “pointed out that prosecutive action against such public officials who wilfully interfere with constitutional guarantees may be had under Section 52, Title 18, United States Code.”¹⁸² It remained the “duty of the Department to protect that freedom as well as other constitutionally secured rights,” and that “duty becomes more imperative, albeit more difficult, in time of war.”¹⁸³ At the same time, only the most serious actions ought to be brought, as “it is not the desire of the Department to institute numerous prosecutions against over zealous public officials.”¹⁸⁴ Before initiating a legal action, U.S. Attorneys “should take steps to secure the cooperation of such state and local officials involved through personal conferences or by letter, to the end that official vigilantism violative of freedom of worship may be avoided.”¹⁸⁵ An escalating approach, Rotnem argued, had already been proven to work:

On many occasions in the past where United States Attorneys have consulted with local authorities and pointed out to them the possibility that their actions or the various ordinances which they have sought to invoke were unconstitutional, the local authorities have willingly undertaken to avoid the practices questioned, and in several instances unconstitutional municipal ordinances have been repealed.¹⁸⁶

Even so, the Department’s desire not to “interfere with bona fide enforcement of state and local laws” and, presumably, a desire to conserve prosecutorial resources, should not be mistaken for a lack of commitment to the First Amendment.¹⁸⁷ For Biddle, a strong rhetorical presence on the

181. *Id.* at 2.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

part of the Department of Justice could be a perfect supplement to targeted court action:

It is not deemed out of place, however, to caution the local authorities that the application of such regulations as flag laws and peddling ordinances must be tempered in the interest of safeguarding religious freedom. The same moderation should be urged where it is consistent with local law enforcement, in cases where religious discussions lapse in to the use of “fighting words” in technical violation of a local statute or ordinance.¹⁸⁸

The last point is especially noteworthy, as it reveals a federal policy to encourage state and local officials to decline to prosecute close cases in the name of expressive liberty.

Biddle apparently authorized Department of Justice lawyers to author a published article criticizing *Gobitis* and urging its reversal. If Roosevelt’s newfound emphasis on rights proved too subtle for some ears, this article published in a political science journal confirmed once and for all the administration’s stance on the coerced flag salute. Readers found the words “U.S. Department of Justice” emblazoned beneath the authors’ names, giving the impression that the article represented departmental policy. In the article, Victor Rotnem and F.G. Folsom wrote that the activities of the Jehovah’s Witnesses have “occasioned intense animosity in every state of the Union,” summarized the post-*Gobitis* wave of terror, and reported that the Department of Justice received hundreds of complaints regarding legal and extra-legal measures taken against the sect.¹⁸⁹ In the closest thing to filing a formal entry of appearance in a live controversy, the authors publicly invited the Court to undo the damage at the earliest opportunity: “This ugly picture of the two years following the *Gobitis* decision is an eloquent argument in support of the minority contention of Mr. Justice Stone.”¹⁹⁰ Rotnem and Folsom added that “reversal of that ruling would profoundly enhance respect for the flag.”¹⁹¹

188. *Id.*

189. Rotnem & Folsom, *supra* note 34, at 1056.

190. *Id.* at 1063. By the time of publication, the High Court had granted rehearing in *Jones v. Opelika* and a three-judge panel had already ruled in *Barnette*, making appellate review likely. *See id.* at 1068 n.38. The tone and content of the article, which closely tracks the internal Department of Justice memorandum, suggests that the article was planned as part of a broader Department of Justice strategy on the question of religious freedom. Indeed, the article may be the product of the “treatise” that Department of Justice indicated it would prepare. *See* Memorandum from Victor W. Rotnem, Chief of Civil Rights Section, to Wendall Berge, Assistant Attorney General (last report May 13, 1942) (on file with Washington University Law Review).

191. Rotnem & Folsom, *supra* note 34, at 1063.

In support of their extra-judicial appeal to the Justices to square their reasoning with executive branch policy, they harkened to Roosevelt's inspiring words: "How much more effective an instrument of patriotic education it would be if the flag salute itself were made a practical daily exercise of a fundamental liberty, a liberty which is one of the four great freedoms for which this nation is now fighting!"¹⁹²

The two then advanced a novel argument as part of this unusual public relations gambit to influence judicial decision making: Congress, in enacting the Flag Law of June 22, 1942, may have "by-passed the constitutional issue here involved and supplied a statutory solution."¹⁹³ In essence, they argued that the law, which stated that "civilians will always show full respect to the flag when the pledge is given by merely standing at attention, men removing the headdress," preempted any state and local policies that demanded more onerous rituals.¹⁹⁴ That argument was later made by amicus curiae in the *Barnette* litigation and rejected by the three-judge panel;¹⁹⁵ the Justices subsequently flirted with the rationale though were not convinced by it.¹⁹⁶ Even so, it represented yet another effort by the administration to empower advocates for the pro-rights position.

The preemption argument was weakened by the joint resolution's advisory nature, as the lack of enforcement provisions suggested that whatever Congress meant to say, the national interest claimed could not be so powerful that it intended to stop others from regulating in the field.¹⁹⁷ The legislative record reveals that the chief concern was to ensure that the

192. *Id.*

193. *Id.*

194. Federal Flag Code, Pub. L. No. 77-623, § 7, 56 Stat. 377, 380 (1942) (current version at 4 U.S.C. § 4 (2000)).

195. Amicus curiae argued that Congress had entered the field of legislation, and that any conflicting state or local statutes and practices must fall in its presence. As for Congress's decision not to prescribe penalties for non-compliance, they cleverly argued that the law amounted to an affirmative decision to prohibit anyone else from enacting penalties related to handling of the flag. Brief for American Civil Liberties Union as Amicus Curiae at 20-23, *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (No. 591). The three-judge panel, which ruled for *Barnette* in a stunning decision that refused to apply *Gobitis*, nevertheless dismissed the preemption argument: "We are not impressed by the argument that the powers of the School Board are limited by reason of the passage of the joint resolution of June 22, 1942, pertaining to the use and display of the flag . . ." *Barnette v. W. Va. State Bd. of Educ.*, 47 Supp. 251, 255 (S.D. W.Va. 1942).

196. *See infra* Part III.C.

197. *See* S. REP. NO. 1477, at 2 (1942) ("The purpose of this joint resolution is to provide an authoritative guide to those civilians who desire to use the flag correctly. . . . Representatives of the American Legion appeared to be in support of the resolution and recommended its approval. The resolution carries out the recommendation of various patriotic societies and organizations who, in a national flag conference, arrived at a uniform guide for the proper use and display of the flag."); H.R. REP. NO. 2047, at 1 (1942) (same).

salute bear less of a resemblance to the Nazi salute and to standardize handling of the flag. It contained no criticism of the *Gobitis* decision, even obliquely, and no reference to the plight of the Witnesses or the idea of conscientious objection. If Congress intended to express its disapproval of that ruling, its criticism was mild indeed, and few citizens would have seen it as such. Despite the government lawyers' praise for the "statesmanship"¹⁹⁸ of patriotic organizations that sponsored the resolution,¹⁹⁹ it would have been surprising for such groups to endorse a law that would have been perceived as sympathetic to the Witnesses' perspective. The language of the non-binding guideline did try to soften expectations regarding how a civilian might show respect for the flag; any stronger signal was unlikely to have been intended. Therefore, the anti-*Gobitis* gloss to the law is attributable more to creative executive branch lawyering rather than firm congressional policy.

These actions taken by the Attorney General's office sought to chill local regulation by appearing to federalize the dispute over the flag, conveyed the lack of institutional cooperation to enforce *Gobitis*, suggested a broader lack of support of the Justices' reading of text,²⁰⁰ and called on the Supreme Court to broaden its interpretation of the First Amendment. On many levels at once, the administration appeared to be communicating its profound disagreement with the High Court's jurisprudence.

d. The War Department

Throughout the 1940s, the War Department engaged in propaganda to popularize "the four essential human freedoms" through posters, radio, and other media.²⁰¹ Conceived as a strategy for winning the war and the peace, the militarization of free speech served to entrench the First Amendment in the public mind during the war years and beyond. According to its architects, the "war of ideas" would be fought through

198. Rotnem & Folsom, *supra* note 34, at 1063.

199. Originally introduced by Senator Hobbs of Alabama, the joint proposal secured the endorsement of "patriotic organizations" such as the American Legion, the Veterans of Foreign Wars, and the Disabled American Veterans. 88 CONG. REC. 9166 (1942). Amendments and clarifications were made on December 22, 1942 (Pub. L. No. 829, 56 Stat. 1074), in order to "make it easier to display the American flag." *Id.*; see also S. REP. NO. 1848 (1942). Proponents described the resolution as "in substance, one that has been promulgated for 20 years." 88 CONG. REC. 3721 (1942).

200. Rotnem and Folsom detailed the editorials lauding the pro-liberty position in *Opelika* and highlighted the joint dissent in that case indicating a sudden internal erosion of support for *Gobitis* among the Justices themselves. Rotnem & Folsom, *supra* note 34, at 1066.

201. Franklin D. Roosevelt, Annual Message to Congress (Jan. 6, 1941), *supra* note 74, at 672.

books as “weapons,” “bullets,” and “thinking bayonets.”²⁰² Libraries became “arsenals of ideas.”²⁰³ The state, with the assistance of civilian supporters, labored to build a “munitions factory for the War of Ideas.”²⁰⁴

A series of paintings commissioned by the administration depicted the “Four Freedoms,” which appeared in the *Saturday Evening Post*. Norman Rockwell’s iconic representations of the First Amendment in action were distributed far and wide. These paintings portrayed constitutional ideals in terms that evoked popular sovereignty. The painting *Freedom of Speech* showed a working class man, standing to speak at a town meeting. The image was emblazoned with the rallying cries: “Save Freedom of Speech” and “Buy War Bonds.” *Freedom of Worship* appeared almost as a photographer’s partial capture of a gathering of worshippers whose hands are clasped in prayer, leaving the impression of multitudes. Above the sea of faces appeared the slogan, “Each According to the Dictates of His Own Conscience.”

In an ingenious union of statecraft, art, and private enterprise, original paintings were displayed to great pomp as part of the “Four Freedoms War Bond Show.” Sponsored by the U.S. Treasury Department, the *Saturday Evening Post*, and local department stores, the traveling exhibition distributed colorful prints to anyone who purchased war bonds.²⁰⁵ By most metrics, the government’s plan to spread a new civic gospel could be considered a success. The show toured sixteen cities and was viewed by 1.2 million individuals; the images and secondary accounts had a more lasting impact.²⁰⁶

This unprecedented public relations blitz extolling the virtues of expressive and religious liberty eased concerns that liberty had to be sacrificed in the name of war. Undoubtedly, the government’s efforts to control public opinion put additional pressure on jurists in the years between the flag salute cases to revisit their position. Popular culture buoyed the pro-rights perspective, rendering a more generous position increasingly desirable.

202. United States Holocaust Memorial Museum, Fighting the Fires of Hate, America at War, <http://www.ushmm.org/museum/exhibit/online/bookburning/war.php> (last visited Oct. 17, 2008).

203. *Id.*

204. Memorandum by McDougall, Progress in the War of Ideas (included in Cablegram Churchill to Curtin, Sept. 8, 1942, 6:43 p.m.) (on file with *Washington University Law Review*).

205. *Bond Rallies For Store Employees*, PITTSBURGH SUN-TELEGRAPH, Sept. 8, 1943, at 12 (on file with *Washington University Law Review*); *500 Attend Bond Show Preview*, PITTSBURGH SUN-TELEGRAPH, Sept. 8, 1943, at 12 (on file with *Washington University Law Review*).

206. Lester C. Olson, *Portraits in Praise of a People: A Rhetorical Analysis of Norman Rockwell’s Icons in Franklin D. Roosevelt’s “Four Freedoms” Campaign*, 69 Q.J. SPEECH 15, 15 (1983).

4. *Interlude: What Did Roosevelt Privately Think About the Pledge?*

Is there any direct evidence that Roosevelt disagreed with the substance of *Gobitis*? Roosevelt was a complicated political figure who delighted in playing matters close to his vest. He surrounded himself with advisors who vehemently disagreed with one another, and during deliberations he might lead others to believe that he sided or sympathized with their point of view. He joined the American Legion and served as “Honorary President General” of the U.S. Flag Association, even as he kept skeptics of nationalism as close advisors.²⁰⁷

The evidence on Roosevelt’s state of mind as to the precise issue is mixed. Some material suggests that he believed school districts had the legal authority to inculcate patriotism, even if the ruling was “stupid, unnecessary, and offensive.”²⁰⁸ And yet, one must leave room for the possibility that the First Lady and others who opposed *Gobitis* brought the President around to their position, especially in light of the fact there seemed to be no ardent defender of the ruling among his confidantes save Frankfurter.²⁰⁹ Complicating matters further, Roosevelt relentlessly pursued the press for publishing allegedly seditious material and hunted for Communists.²¹⁰ How are his complicated words and deeds related to the First Amendment to be reconciled?

207. Franklin D. Roosevelt’s American Legion Membership Card (1940) (on file with *Washington University Law Review*); Memorandum from the White House to Stephen Early (Mar. 16, 1939) (with attached letter) (on file with *Washington University Law Review*).

208. JOSEPH P. LASH, FROM THE DIARIES OF FELIX FRANKFURTER 70 (1975) (quoting JOSEPH P. LASH, A FRIEND’S MEMOIR 159 (1964)). At Hyde Park, the First Lady apparently worried aloud to Frankfurter that *Gobitis* would “generate intolerance, especially in a period of rising hysteria.” *Id.* According to Lash, during this otherwise jovial gathering Roosevelt, who was mixing a drink at the time, split the difference and sided with Eleanor on the political and moral weaknesses of the ruling, while siding with Frankfurter that schools had the legal power to do it and there had to be some limit to religious freedom. *Id.* ACCORD MAX FREEDMAN, ROOSEVELT AND FRANKFURTER: THEIR CORRESPONDENCE 701 (1967); JOSEPH P. LASH, ELEANOR ROOSEVELT: A FRIEND’S MEMOIR 159 (1964). These accounts consistently portray the First Lady’s opinion of *Gobitis* as “repugnant” in “logic and in justice,” as well as her fear that “self-appointed, flag-waving patriots would not feel that they had a mandate from the Supreme Court to drive out every conspicuous sign of dissent and non-conformity, even when undertaken for conscience’s sake.” FREEDMAN, *supra*, at 701.

209. As William Nelson demonstrates, the anti-totalitarian ethic grew strong in New York during this period, nourishing ideas of liberty and equality. WILLIAM E. NELSON, THE LEGALIST REFORMATION: LAW, POLITICS, AND IDEOLOGY IN NEW YORK, 1920–1980, at 121–33 (2001). Roosevelt hailed from the region, remained connected to his intellectual roots, and it is not hard to imagine the President feeling the pull to join his more liberal allies, many of whom also hailed from the Northeast.

210. For a more negative view of Roosevelt’s role in civil liberties, see STONE, *supra* note 170, at 282.

Consider the possibilities within a pluralistic conception of the presidency in which (a) multiple constituencies and priorities compete for a Chief Executive's attention and (b) after varying degrees of consultation, surrogates take action in his name:

1. Roosevelt came to believe *Gobitis* was wrongly decided and resolved to see the decision reversed at the earliest opportunity.
2. Privately indifferent as to the legal question, Roosevelt came to view the decision as a public relations disaster and a symbolic impediment to his administration's efforts to fight a just war.
3. Roosevelt personally believed *Gobitis* to be rightly decided, despite its harshness, but chose not to stand in the way of others in his administration who wished to undermine its reading of the First Amendment.

Based on the best available evidence, each of these explanations is consistent with the actions of Roosevelt and executive branch officials. Among these possibilities, the first is the least likely and the last is the most plausible because we lack direct evidence of Roosevelt's mind but have plentiful evidence of others' actions and words. For the historian, it is worthwhile to discover which of these accounts most accurately explains Roosevelt's true mind, i.e., whether he directed his advisors to chip away at the ruling or permitted them to act as entrepreneurs to broaden the right of conscience. From the standpoint of constitutional politics, however, the differences between these possibilities are minor. It is the public significance of the man's actions, not the private thoughts he might have entertained, that matter. Individual actors' intentions, while important, are secondary to the meanings that other participants might reasonably draw from their actions.

To an American citizen living through these years, and especially a jurist operating within the culture of national governance in Washington, D.C., the signals from the administration must have been consistent and pronounced. Compared with seditious speech, which Roosevelt pursued with a vengeance,²¹¹ religious dissent appeared to receive strong presidential endorsement. Statements by the President's advisors on the

211. See, e.g., Francis Biddle, Cabinet Meeting Notes (Apr. 24, 1942) ("The President, when it came my turn, commended me on the drive against the seditious papers and seemed pleased.") (on file with *Washington University Law Review*); Francis Biddle, Cabinet Meeting Notes (July 17, 1942) (reporting "on program regarding espionage, sedition, sabotage, etc.") (on file with *Washington University Law Review*).

controversy appeared to be seamless elaborations of the broader themes he announced. Far from interfering with the actions of his aides on behalf of the Witnesses, Roosevelt instead appeared to wrap their efforts in the highest constitutional principles, urging them onward.

Now that the gauntlet had been thrown down, the question became: how would the Supreme Court respond? Would the Justices stiffen their backs, defending an authority to inculcate nationalism that national officials themselves seemed to disavow, or would they sensibly rethink their position?

C. Judicial Revision: The First Amendment as a Legacy of War

Lost in the standard narrative about juridic heroism on rights are several near-misses and switches that reveal the interaction between the political community and the courts. These controversies demonstrate how the linguistic regime most visibly manifest in *Barnette* developed in 1942–43 as judges incorporated popular discourses from many sources, with executive branch rhetoric among the most likely candidates. Close analysis demonstrates that (a) several of the New Dealers, including Black and Jackson, worried about free speech excess; (b) one or more of these decision makers could be convinced to align with the enhanced social emphasis upon expressive liberty despite any initial misgivings; and, (c) external perceptions of the Supreme Court and its role in promoting civil liberties influenced the Justices' deliberations.

1. The Anti-Pamphletting and Licensing Ordinances: A New Regime Emerges

On June 8, 1942, a curious decision issued by the Supreme Court showed that the *Gobitis* alliance had started to fray. Penned by Justice Reed, *Jones v. City of Opelika*²¹² rejected a First Amendment challenge by a Witness to an ordinance that imposed a license tax on printed materials. Echoing the community-first ethos of *Gobitis*, Justice Reed stressed the “sovereign power explicitly reserved to the State . . . to ensure orderly living.”²¹³ In an attempt to sidestep charges of totalitarianism, he drew a dichotomy between the individual spirit (ruled by “ethical principles”) and action (ruled by law), “[s]o the mind and spirit of the man remain forever free, while his actions rest subject to necessary accommodation to the

212. 316 U.S. 584 (1942).

213. *Id.* at 593.

competing needs of his fellows.”²¹⁴ Turning to the specific enactment, he greatly minimized the impact of the tax on the free flow of information: “[I]t is difficult to see in such enactments a shadow of prohibition of the exercise of religion or of abridgment of the freedom of speech or the press. It is prohibition and unjustifiable abridgment that is interdicted, not taxation.”²¹⁵

Stone, newly installed as Chief Justice, dissented on the ground that the Constitution had put the rights of speech and worship in a “preferred position,”²¹⁶ and that the ordinance constituted a “prohibited invasion of the freedoms thus guaranteed.”²¹⁷ He insisted that these “commands are not restricted to cases where the protected privilege is sought out for attack. They extend at least to every form of taxation which, because it is a condition of the exercise of the privilege, is capable of being used to control or suppress it.”²¹⁸ Justice Murphy also dissented, writing separately. Opposing the majority’s move to separate constitutional text from individual spirit, he echoed the Chief’s anti-totalitarian rhetoric:

Freedom to think is absolute of its own nature; the most tyrannical government is powerless to control the inward workings of the mind. But even an aggressive mind is of no missionary value unless there is freedom of action, freedom to communicate its message to others by speech and writing.²¹⁹

Justices Black, Douglas, and Murphy then dropped a bombshell: they had decided to renounce their support for *Gobitis* because they saw *Opelika* as a “logical extension of the principles upon which that decision rested,” and one they could no longer abide.²²⁰ “Since we joined in the opinion in the *Gobitis* case,” they announced in their politically significant but doctrinally unnecessary joint statement, “we think this is an appropriate occasion to state that we now believe that it also was wrongly decided.”²²¹

When the High Court ultimately reheard *Opelika* and reversed the outcome, some editorialists praised the Justices’ action, viewing it as the execution of the President’s will. The *St. Louis Post-Dispatch* proclaimed:

214. *Id.* at 593–94.

215. *Id.* at 597.

216. *Id.* at 608 (Stone, C.J., dissenting).

217. *Id.* at 600.

218. *Id.* at 608.

219. *Id.* at 618 (Murphy, J., dissenting).

220. *Id.* at 623 (Black, Douglas, Murphy, J.J., dissenting).

221. *Id.* at 623–24.

“[t]he first two of President Roosevelt’s ‘Four Freedoms’—freedom of speech and freedom of religion—have been staunchly bulwarked in the United States by the Supreme Court.”²²² Justice Douglas’s opinion in the companion case, *Murdock v. Pennsylvania*,²²³ reinforced the emerging convergence. For the first time, the Supreme Court placed First Amendment rights in a “preferred position,” thereby tracking the contemporaneous moves of the executive branch.²²⁴

Martin v. City of Struthers initially divided the Justices 5-4, leading them to sustain an ordinance that banned door-to-door canvassing.²²⁵ At conference, Justice Black argued vociferously in favor of protecting the sanctity of the home and warning religious dissenters that “you cannot set up your conscience as superior to law for the whole community.”²²⁶ Finding himself on the short end of the conference vote, Stone penned a dissent.²²⁷ After reading Stone’s draft dissent, Justice Black reportedly remarked that he “would not want to be placed in a position of deciding against ‘free speech and freedom of religion’ with the Chief, Douglas, Murphy, and Rutledge appearing to be greater champions of liberty than he is.”²²⁸ Frankfurter’s notes mention that “he was informed that Black’s law clerk was laboring with him and bearing down hard on him with arguments that he would be much criticized by ‘liberals’ if he let his opinion stand.”²²⁹ Black switched his vote and wrote the opinion striking down the ordinance, incorporating much of Stone’s draft dissent.

This exchange yields several insights about this generative period while deliberations over the right of conscience continued. First, by the spring of 1943, a dependable bloc of Justices had begun to coalesce around expanded First Amendment liberties. Second, this group, with Justice Black as a swing vote on this occasion, proved to be sensitive to a rising external belief in enhanced liberties. That is to say, the ascendant linguistic regime depended upon a coalition within the Court that was receptive to changing perceptions of the right of conscience. Internally, the precise alliance might change from case to case, and the individual

222. *The Court Clears its Conscience*, ST. LOUIS POST-DISPATCH, May 4, 1943, at 2B (on file with *Washington University Law Review*).

223. 319 U.S. 105 (1943).

224. *Id.* at 115.

225. *Martin v. City of Struthers*, 319 U.S. 141 (1943).

226. Notes of Felix Frankfurter dated April 27, 1943 (on file with Reel 138, Manuscript Division, Library of Congress, Washington, D.C.); see also “The Story of Struthers,” May 6, 1943 (on file with *Washington University Law Review*).

227. “The Story of Struthers,” *supra* note 226, at 2.

228. *Id.*

229. *Id.*

Justices might stress some rights over others. But a deeper trend could be detected: the language of rights generally, and the First Amendment specifically, had become a crucial way to get to five votes.

2. *Barnette: Entrenching the “Four Freedoms”*

Against this rich ideological backdrop, the Justices revisited the question of the pledge in *West Virginia State Board of Education v. Barnette*.²³⁰ In a brief submitted to the U.S. Supreme Court, Walter Barnett and others invited the Justices to follow the President’s lead and repel the “intolerable invasion” of their rights, repeatedly invoking Roosevelt’s “Four Freedoms” Address.²³¹ First, in a crude attempt to capitalize upon a resurgent nativism, they argued that as American-born citizens the sect posed less “danger to the nation” than “the hundreds of thousands of enemy aliens, lo millions, who are in possession of liberty and freedom while the nation battles their fatherland for the preservation of the four freedoms.”²³² Second, in recounting the “storm of violence and persecution”²³³ of Witnesses sparked by *Gobitis*, Barnett’s attorneys reported: “In three of the cities *mobocracy* ‘took over’ and the ‘four freedoms’ were *blitzkrieged*.”²³⁴ The juxtaposition of *Gobitis*-inspired violence with the President’s more inspirational message was intended to discourage institutional support for the decision. Third, the schoolchildren proposed that the flag be converted from a tool of terror into a “practical daily lesson” on the First Amendment, “a liberty which is one of the four great freedoms for which inhabitants of this land now fight!”²³⁵

On June 14, 1943, the Justices overruled *Gobitis* and composed a very different picture of group life—one that conveyed tolerance, hope, and cosmopolitanism. Four major themes figured prominently in both Roosevelt’s State of the Union address and the public opinion codifying the Supreme Court’s switch on the constitutionality of the coerced pledge: (a) a re-imagination of the First Amendment as the main armament in the struggle to rid the world of totalitarianism; (b) the establishment of the First Amendment in a “preferred” position vis-à-vis other constitutional rights and powers; (c) the introduction of an anti-discrimination principle;

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

231. Appellees’ Brief at 70, *Barnette*, 319 U.S. 624; *see id.* at 38, 75 (invoking four freedoms).

232. *Id.* at 38. “Concurrently with the spread of totalitarianism,” the students wrote, “various states of the Union passed laws requiring the compulsory flag salute in schools.” *Id.* at 22.

233. *Id.* at 78.

234. *Id.* at 75.

235. *Id.* at 77.

and (d) the production of a popular constitutional language by which to disseminate these war-inspired ideas.

Robert Jackson penned the ruling in *Barnette*. The opinion began with a recitation of the facts containing a thinly-veiled reference to a spate of hostile actions—both official and unofficial—against Witnesses since the Court last heard a challenge to the pledge: “Children of this faith have been expelled from school and are threatened with exclusion for no other cause. . . . Parents of such children have been prosecuted and are threatened with prosecutions for causing delinquency.”²³⁶

The Justices then deftly moved to reconcile the tension between Roosevelt’s mobilized vision of the First Amendment and their own parsimonious reading. Mirroring the administration’s tactics, Jackson’s opinion stressed the special place of the First Amendment. “The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is more definite than the test when only the Fourteenth is involved.”²³⁷ Justice Jackson argued that the rights to speech and worship “are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect.”²³⁸ In a statement that might refer to the Court’s odyssey in achieving a new synthesis, he insisted: “Authority here is to be controlled by public opinion, not public opinion by authority.”²³⁹

“If there is any fixed star in our constitutional constellation,” Jackson continued, “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.”²⁴⁰ *Barnette* projected an American identity as guarantor of the “freedom to be intellectually and spiritually diverse,” a society in which “exceptional minds” flourished alongside “occasional eccentricity and abnormal attitudes.”²⁴¹ The ruling interlaced the principle of anti-discrimination, a legacy of the Civil War, with the principle of expressive liberty, a principle at stake in the global battle for the future of democracy itself. President Roosevelt had repeatedly spoken of a unified America whose

236. *Barnette*, 319 U.S. at 630.

237. *Id.* at 639.

238. *Id.* This paragraph is added to Jackson’s draft circulated on June 12, 1943, apparently in response to Stone’s comments. Memorandum from Robert H. Jackson, accompanying Draft opinion by Justice Jackson, June 12, 1943, *Barnette*, 319 U.S. 624 (on file with *Washington University Law Review*).

239. *Barnette*, 319 U.S. at 641.

240. *Id.* at 642.

241. *Id.*

“national policy” included the steadfast defense of democracy and embattled peoples around the world “without regard to partisanship.”²⁴² Capturing this ideal of equality, Justice Jackson similarly wrote: “Free public education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party or faction.”²⁴³ Just as the survival of democracy demanded a generous, undifferentiated display of force in its self-defense abroad, so too the continuation of a civilized, democratic people rested upon unstinting enforcement of the First Amendment at home.

Evisceration of *Gobitis* did not lead to the validation of a transient public policy, but rather marked the latest and arguably most significant step in an ambitious reordering of the public imagination. Wiley Rutledge helped to cement a consensus favoring the centrality of the First Amendment to post-war America. Upon being sworn in as a member of the High Court, he wrote a letter thanking President Roosevelt, signaling a desire to complete Roosevelt’s legacy: “If, in some way, [my efforts] may help to establish more firmly the democratic institutions which you fight to keep, and to create throughout the world, it will make me glad.”²⁴⁴ On the Court, he joined Jackson as a member of an institution that was, for a time, committed to fulfilling the wartime promises of enhanced democratic freedoms. Even when Jackson eventually parted ways from his colleagues on certain First Amendment questions, this new consensus would not only hold, but be extended by others.

A language of rights emerged from this sustained interplay between the branches of government, sweeping away the remnants of *Gobitis*. This popular constitutional language possessed an overtly opposition and anti-majoritarian structure: one’s fundamental rights “may not be submitted to a vote”; they “depend on the outcome of no elections.”²⁴⁵ The right to “conscience,”²⁴⁶ previously ignored by the Supreme Court, penetrated

242. Franklin D. Roosevelt, Annual Message to Congress (Jan. 6, 1941), *supra* note 74, at 667.

243. *Barnette*, 319 U.S. at 637. This uneasy union of equality, expression, and American security would become a fixture of presidential language. Eisenhower, for instance, synthesized these ideas into a guiding tenet for achieving world peace: “Conceiving the defense of freedom, like freedom itself, to be one and indivisible, we hold all continents and peoples in equal regard and honor. We reject any insinuation that one race or another, one people or another, is in any sense inferior or expendable.” Dwight D. Eisenhower, First Inaugural Address (Jan. 20, 1953), in GOV’T PRINTING OFFICE, INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES 293, 298 (1989).

244. Letter from Justice Wiley Rutledge to President Franklin D. Roosevelt (Feb. 15, 1943), in FERREN, *supra* note 102, at 221.

245. *Barnette*, 319 U.S. at 638.

246. *Id.*

everyday debate along with the imprimatur of national leaders in the global project to “free minds.”²⁴⁷

As much as the repressive policies of foreign countries offered an instructive counterpoint,²⁴⁸ the ruling also gave the Justices a chance to distinguish a war-constituted people from the ones who authored and approved the Constitution’s original text. This opinion thus unified the reigning rationales and discourses of two major deliberative moments all too often treated as a single stretch of constitutional development: the New Deal and World War II. Roosevelt had made the case that the “inner and abiding strength of our economic and political systems”²⁴⁹ is dependent upon the protection of civil liberties; indeed, that the “happiness of future generations” demanded it.²⁵⁰ Apparently taking their cue from the administration, the Justices endorsed and elaborated the point. Rejecting the argument that vindication of the schoolchild’s right somehow disabled government and betrayed New Deal principles, *Barnette* stated: “To enforce those rights today is not to choose weak government over strong government. It is only to adhere as a means of strength to individual freedom of the mind. . . .”²⁵¹ A “strong” government had at the Framing and New Deal period been set in opposition to vigorous enforcement of rights (a “weak” government had idolized state sovereignty and freedom of contract). Now, the relationships between these ideas were recalibrated so that “strong government” was now closely associated with “civil liberty.”²⁵²

A judge in post-war America found herself authorized to defend the most crucial human faculties such as “individual freedom of mind.”²⁵³ In defending First Amendment values, the jurist became concerned with “the development and well-being of our free society . . . and its continued growth”; ensuring the means of “political and social changes desired by the people.”²⁵⁴ The First Amendment “reserved” a “sphere of intellect and

247. *Id.* at 641.

248. The anti-totalitarian ethic shaped not only foreign policy, but also post-war jurisprudence across a number of areas. *See generally* MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2002); RICHARD A. PRIMUS, *THE AMERICAN LANGUAGE OF RIGHTS* (1999); ROGERS M. SMITH & PHILIP A. KLINKNER, *THE UNSTEADY MARCH: THE RISE AND DECLINE OF RACIAL EQUALITY IN AMERICA* (1999).

249. Franklin D. Roosevelt, Annual Message to Congress (Jan. 6, 1941), *supra* note 74, at 671.

250. *Id.* at 670.

251. *Barnette*, 319 U.S. at 637.

252. *Id.* at 631, 637.

253. *Id.* at 637.

254. *Roth v. United States*, 354 U.S. 476, 488 (1957).

spirit” in each citizen.²⁵⁵ With respect to the flag salute, the school board’s policy “invades” that sacred realm.²⁵⁶ Such a move of aggression, in turn, justified an equally forceful response from the Judiciary to repel the power encroaching upon the “free mind.”²⁵⁷ The confident tone of *Barnette* introduced a triumphant image of the judge on the front lines to enforce the Constitution as a means of saving liberal democracy.

As I have argued elsewhere, the development of constitutional law can be understood in terms of “linguistic regimes”²⁵⁸: more or less stable unions of popular rhetoric, institutional protocols, and political beliefs over time. These regimes are not necessarily compelled by text but inform participants’ readings of text. They transcend the partisan politics of the moment, emerge and disintegrate in stages of development, and are maintained in a matrix of mutually nourishing norms. A regime “provides the social structure within which rules are rationally formulated and implemented, and identifies the subset of ‘active’ terms in a people’s vocabulary.”²⁵⁹

What of the regime that Justice Jackson’s opinion inaugurated? As the *Barnette* opinion underlined, committed actors intended the transformation of the 1940s as a change in the dominant ethos that had guided foundational understandings in recent decades rather than a revival of an older “philosophy that the individual was the center of society.”²⁶⁰ The war-inspired re-commitment to the individual could be cognizable only against the background of “changed conditions”: “the laissez-faire concept or principle of non-interference has withered at least as to economic affairs, and social advancements are increasingly sought through closer integration of society and through expanded and strengthened governmental controls.”²⁶¹ Such a turn amounted to a rejection of the early New Deal position that “[j]udicial self-restraint is equally necessary whenever an exercise of political or legislative power is challenged. . . . [And] power does not vary according to the particular provision of the Bill of Rights which is invoked.”²⁶²

255. *Barnette*, 319 U.S. at 641.

256. *Id.*

257. *Id.* at 637.

258. TSAI, *supra* note 70, at 352; see generally Robert L. Tsai, *Fire, Metaphor, and Constitutional Myth-Making*, 93 GEO. L.J. 181 (2004). For an alternative approach to regime theory that hews closely to inputs and outcomes rather than discourses and beliefs, see Mark J. Richards & Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 AM. POL. SCI. REV. 305 (2002).

259. TSAI, *supra* note 70, at 52.

260. *Barnette*, 319 U.S. at 639.

261. *Id.* at 640.

262. *Id.* at 648.

If Frankfurter and Jackson aligned themselves with different strands of political thought during this fertile period, they agreed that deliberations over the contours of constitutional self-government ought to be conducted within the parameters of presidential rhetoric. Jackson's ruling seized the mantle of the just war by borrowing themes articulated by the President. For his part, Frankfurter sent a copy of the *Barnette* ruling and his dissent to Roosevelt along with a note that read: "They ought to furnish to the future historian food for thought on the scope and meaning of some of the Four Freedoms—their use and their misuse."²⁶³

Barnette represented a convergence of public values and rhetorical forms rather than the complete triumph of a single set of ideas. It was no more the correct reading of the First Amendment than it was the final word on the topic. Nor is it any easier to classify the outcome as either majoritarian or counter-majoritarian. Unlike the struggle over labor rights or black equality, nothing resembling a social movement could be said to motivate actors to take up the cause of the Jehovah's Witnesses. The sect lacked a powerful or dependable lobby. Yet despite the group's political vulnerabilities, the administration resisted the crudest majoritarian route available, however tempting that option must have been. Roosevelt's aides found pragmatic reasons to take up the sect's cause despite finding its practices distasteful, extreme, and unpopular. They hoped that many intellectuals, as well as many ordinary citizens, would support such a course of action, but the breadth and intensity of such support depended greatly on how the matter was characterized. The administration proceeded as if attitudes could be shaped, and disparate constituencies perhaps knitted together by resort to constitutional language, rather than by adopting the policy believed to be preferred by the median voter.

If public approval is one measure of success, then pro-rights forces within the administration had reason to cheer. Members of the media sensed that the High Court's decision in *Barnette* realized Roosevelt's constitutional vision. On June 20, 1943, as news of the ruling spread across the country, *The New York Times* called the decision "impressive evidence of the high regard in which the Bill of Rights is held by this country which is fighting, along with the rest of the United Nations, to establish the 'Four Freedoms.'"²⁶⁴ Astute observers celebrated the removal

263. Letter from Justice Felix Frankfurter to President Franklin D. Roosevelt (May 3, 1943), in ROOSEVELT AND FRANKFURTER: THEIR CORRESPONDENCE, 1928–1945, at 699 (Max Freedman ed., 1967).

264. W.H. Lawrence, *Civil Liberties Gain by the Flag Decision*, N.Y. TIMES, June 20, 1943, at E10; see also Editorial, *A Freedom is Reinstated*, CLEVELAND PRESS, June 15, 1943 (on file with

of a judicially erected obstacle to the realization of the nation's loftiest war goal to secure freedom "for all mankind."²⁶⁵ *The Christian Century* recommended that the most accessible passage containing the "fixed star" metaphor "become part of the 'American scriptures,' to be memorized and taken to heart by every patriot."²⁶⁶ Public acceptance of *Barnette* as a codification of presidential priorities and a roadmap for governance reverberated across the land.²⁶⁷ The administration's performance during this crucial period can be understood to precipitate the transfiguration of Americans' war experience into an overarching rationale for constitutional change. Even though disagreements would erupt over how to implement the legacy of the last war in discrete controversies,²⁶⁸ there was nevertheless broad agreement on how to talk about political freedom.

Washington University Law Review) ("It is a healthy thing, especially at a time when we are fighting for the four freedoms, that the judiciary should revoke its unwise and ill-seasoned acquiescence in local infringements of the freedom of religion.").

265. See, e.g., *A Fundamental Freedom*, CHRISTIAN SCIENCE MONITOR, June 15, 1943, at 16 ("The importance of the flag salute case lies . . . in the administration of scrupulous justice and in the punctilious observance and safeguarding of one of the great freedoms which the United Nations now seek to guarantee for all mankind.").

266. Editorial, *Court Upholds Freedom of Conscience*, CHRISTIAN CENTURY, June 23, 1943, at 731; see also Thomas Reed Powell, *The Flag Salute Case*, NEW REPUBLIC, July 5, 1943, at 16 (on file with *Washington University Law Review*) (ending analysis with Jackson's constellation metaphor); Lewis Wood, *Supreme Court Ends Compulsion of Flag Salute*, N.Y. TIMES, June 15, 1943, at 1; *Fixed Star*, NEW HAVEN REGISTER, June 16, 1943; *Individual Freedom*, NEWARK EVENING NEWS, June 15, 1943 (on file with *Washington University Law Review*); *A Notable Opinion*, HARTFORD TIMES, June 15, 1943 (on file with *Washington University Law Review*).

267. Most editorials saw the ruling as a crucial component in America's messianic constitutionalism. Robert Jackson clipped a number of the most interesting and laudatory comments on his handiwork, demonstrating that he was carefully monitoring public reaction. See, e.g., Editorial, *Supreme Court's Flag Salute Decision*, NEW HAVEN COURIER, June 16, 1943 (on file with *Washington University Law Review*) ("The meaning [of the ruling] will not be lost on suffering millions elsewhere on the earth."); Editorial, *Supreme Court on Flag Salute*, SYRACUSE HERALD-JOURNAL, June 16, 1943 (on file with *Washington University Law Review*) ("[S]uch a triumph for the Bill of Rights is powerful propaganda for the democracy which America is defending."); Editorial, *The Flag Salute Decision: An Example to the World*, CAMDEN COURIER, June 16, 1943 (on file with *Washington University Law Review*) ("In this decision the free world sees illumined brightly the sharp distinction between the totalitarian way, which regiments soul and mind as well as body—And the democratic, American way By permitting our people the freedom to be ag'in [sic] the government, even the freedom to refuse to salute its flag—our Constitution by that very token inspires the might [sic] majority of us to love our nation more, to cherish it and fight for it because our loyalty comes from the heart—and is not dictated by a club.") (clippings found in Container 127, Robert Houghwout Jackson, Manuscript Division, Library of Congress, Washington, D.C.). Others saw the High Court's action as nipping a reactionary domestic movement in the bud. See Editorial, *The Supreme Court and the Flag Salute*, WATERTOWN TIMES, June 15, 1943 (on file with *Washington University Law Review*) (discussing collateral repressions flowing from *Gobitis* and concluding: "We should be willing to go a long ways in tolerance before we permit the growth of a movement which, carried to extremes, might jeopardize rights which are precious to all of us.").

268. See, e.g., *Beauharnais v. Illinois*, 343 U.S. 250 (1952); *Dennis v. United States*, 341 U.S. 494 (1951); *Kunz v. New York*, 340 U.S. 290 (1951); *Terminiello v. Chicago*, 337 U.S. 1 (1949).

III. THE LESSONS OF HISTORY

A. *The Undiscovered Republican Moment*

It would be easy to understate the significance of the political and social alliance forged over the First Amendment during the 1940s. There is a tendency to see events that transpire during war years as *sui generis*, either because of the excitable nature of the times, the awful demands of war, or the temptation to take procedural shortcuts. For these reasons, one can detect an inclination to drain wartime actions of normative significance and to treat them as temporary or extraordinary—perhaps even irrational—courses of action.²⁶⁹ This instinct to marginalize wartime developments is exacerbated by the fact that during war horrifying policies have been pursued alongside humane ones—the aggressive pursuit of suspected Communists and the indefinite internment of Japanese Americans and nationals to name just two. But the moment is important to recover from these other unfortunate instances, if for no other reason than that doing so reminds us that presidential prerogative, foreign policy, and the extension of certain rights can, under certain circumstances, go hand in hand.

Of course, I mean to go a bit further in my claims: the wartime moves of the President and the Supreme Court over the right of conscience should be treated as legitimate in a foundational sense. Without claiming that war measures are always valid, there are several reasons to understand the First Amendment upheaval of the 1940s as a republican moment. Advocates followed no particular formula beyond appealing to the Constitution and striving for institutional consensus. Both supporters and

269. Robert McCloskey understands the Supreme Court's First Amendment jurisprudence after the war to veer "erratically" between "negation" and "acquiescence." ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 131 (2005). Like McCloskey, Vincent Blasi sees the 1940s—especially the second half of the decade—as an "abnormal" period of development. Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 450 (1985). Norman Rosenberg sees the 1940s as a time when free speech texts "turned away" from realism and returned to "the classicism of the 1920s," when "questions about the relationship between inequality and free speech were pushed aside and more legal formulations came to the fore." Norman L. Rosenberg, *Another History of Free Speech: The 1920s and the 1940s*, 7 LAW & INEQ. 333, 335 (1989). Rosenberg is critical of the marketplace and town meeting metaphors, which are "soothing" and "nostalgic" but fail to capture the maldistribution of resources and power in American society. *Id.* at 359. Even those living through the tumultuous war years feared the rebound effect: that "[w]artime patriotism tends to become peacetime intolerance." Robert E. Cushman, *Civil Liberty After the War*, 38 AM. POL. SCI. REV. 1, 1 (1944). Before the annual meeting of the Political Science Association on January 22, 1944, Professor Robert Cushman stated: "We know from grim experience that in the peace which follows a tough war, civil liberty faces new and increased dangers. High-keyed energies and emotions, suddenly released, seek a new outlet." *Id.*

opponents of enhanced First Amendment liberties adhered to the customs of mobilized deliberation as they took their case to the people. They appealed to the collective wisdom of the citizenry, invoked historical precedent as guides, and cast contemporary disputes in terms of permanent values and long-term consequences. The structure and general arc of public action surrounding the *Gobitis* to *Barnette* switch gave members of the polity a sense of heightened expectations and encouraged citizen participation.

And so they did. Individuals who preferred a robust vision of state power agitated for state and local restrictions on what they believed to be deviant behavior and applauded official efforts to rein in rights-based discourse. Social progressives, religious groups, and those with an otherwise disparate set of interests rallied to the defense of the right of conscience. Dissenters brought their complaints in the courts when the political channels did not favor their readings of text, ensuring exposure for their positions and giving jurists a chance to cast these social disputes in legal terminology. Elites brought their perspectives to bear not only during litigation, but also in the media and through a series of interactions between the branches of government.

The mobilization of American society in anticipation of the war transpired over the course of several national campaigns yet transcended electoral mechanisms. Despite Roosevelt's coyness about his war aims through the election season, the administration's rationales for American involvement had long been articulated, and from 1941 onward the President's liberty-based justifications for war were debated openly. All of this had the cumulative effect of galvanizing the public around the importance of political liberty, encouraging deliberation over foundational values, and decreasing the likelihood of what Bruce Ackerman calls "false positives"—institutional mistakes in formal recognition of new values when no social convergence actually exists.²⁷⁰ First, increased attention to the importance of expression and religion in the abstract improved the quality of deliberation.²⁷¹ The overlapping, back-and-forth nature of the debate clarified the democratic stakes.

270. BRUCE ACKERMAN, *I WE THE PEOPLE: FOUNDATIONS* 278–79 (1991). Bruce Ackerman warns against "false negatives" and "false positives"—the always present risk that governing institutions fail to recognize a new consensus over foundational commitments or endorse values that have not, in fact, achieved broad and deep support. *Id.* For purposes of identifying criteria useful for measuring the degree of institutional interaction, I adopt his terminology without endorsing the entire apparatus of dualism.

271. As Chong and Druckman point out, "individuals will become more motivated to engage in conscious evaluation when they are exposed to opposing considerations." Dennis Chong & James N.

Second, even if voter participation does not spike during a time of war, a heightened state of awareness nevertheless causes constitutional actors on the whole to become more cognizant of the signals of other participants to a debate. Robert Dahl warns that the deliberative quality of public action is not dependably measured by polls or elections; instead, he suggests focusing on the degree of governmental interaction as a measure of the depth and breadth of discussion.²⁷² If one heeds this advice, every branch of government said something on the issue of religious and expressive liberty.

Third, as governmental participation rises, we should expect institutions to make fewer mistakes in reading the social terrain because of the greater dedication of actors in making their views known. A risk remains that the intensity of a small group's views can be mistaken for the breadth of popular assent. But it is a possibility that comes with the territory.

Fourth, one can expect institutions to be more willing to correct errors in predicting the extent and source of social cooperation when mistakes do occur. The Justices in this case originally believed an alignment grounded in *Gobitis* was forthcoming; to their surprise, the President opposed their construction of the Constitution, while Congress struck a more neutral stance. That the Justices apparently altered their position upon invitation rather than in response to an open threat enhances rather than detracts from the reasoned nature of the deliberation.

Uncovering a complicated process at work, the episode demonstrates that the elaboration of law as a language of power unfolds as a series of managed contingencies, one in which debilitating errors and heady victories could have occurred at nearly every turn. The administration made crucial choices in a period during which a nascent rights-talk was in flux between the economic and political, and even persons of authority were uncertain as to the relative importance of political rights and their justifications.²⁷³ The calculated risk of executive branch officials to intervene in a series of ongoing First Amendment debates and

Druckman, *Framing Theory*, 10 ANN. REV. POL. SCI. 103, 110 (2007) [hereinafter Chong & Druckman, *Framing Theory*]; see also James N. Druckman, *Political Preference Formation: Competition, Deliberation, and the (Ir)relevance of Framing Effects*, 98 AM. POL. SCI. REV. 671 (2004).

272. Robert A. Dahl, *Decision-making in a Democracy: The Supreme Court as National Policy-maker*, 6 J. PUB. L. 279 (1957).

273. For an account of this period as a disjunction in which the diminished economic language of rights represents a missed opportunity, see RISA GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* (2007).

affirmatively side with the speech-protective strand of the discourse significantly improved its prospects for success in the public mind. Prior to this point, executive branch statements on the First Amendment had inclined in a decidedly speech-restrictive direction, especially when the nation was at war.

Among the contingencies illustrated by the exchange is the dialectical relationship between two rights-based discourses: liberty and equality. Despite the strong suggestions of inequality, public officials consistently portrayed the Jehovah's Witnesses' troubles in terms of political liberty. Moreover, contrary to accounts of the war years as a steady march toward a commitment to racial equality, the early 1940s rights cases evinced a determined focus on arguments about political liberty, turning to equality more openly once a foothold on liberty had been gained.²⁷⁴

Having worked to achieve a new alignment, the High Court would, for a time, repeat the mantra of preferred rights in elaborating the intricacies of First Amendment law. Even though the sudden flush of institutional alignment would fade and the precise phrasing fall out of the juridic lexicon, the notion that free speech and religious rights are special would become an article of faith. Deliberations would continue over how best to give effect to the Constitution. But few would dare to deny the centrality of the First Amendment to American democracy.

B. Critiquing Barnette: A Road Not Taken

Although *Barnette* appropriated presidential rhetoric and a number of observers understood this to have occurred, the Justices' search for alignment turned out to be neither as transparent nor complete as it might have been. As a result, the deliberative moment was imperfectly memorialized. The ruling struck a blow for liberty, to be sure, yet it also promoted a decidedly judge-centered vision of freedom. Where

274. McMahon's analysis of *Gobitis* and the Roosevelt Court supports my account, though he stops short of claiming, as I do, that the rights of free speech and religion served a bridging function during the relevant period. As a result, his brief discussion of the First Amendment is jarring, appearing to be one step in a concerted effort to "extend and federally protect the rights of black Americans" and "rewrit[e] civil rights laws." MCMAHON, *supra* note 101, at 97–143. Goluboff's account of this fluid period acknowledges early First Amendment decisions, casting them as pro-labor outcomes, but otherwise focuses on the relationship between the themes of labor and equality in presidential programs. GOLUBOFF, *supra* note 273, at 30–32, 141–73. As McMahon acknowledges, however, "there is no clear evidence that FDR nominated jurists with a specific desire to advance African American rights." MCMAHON, *supra* note 101, at 142. Conversely, there is, on the whole, comparatively more evidence that his nominees would espouse views favoring the elaboration of the First Amendment.

Frankfurter's ruling painted a romantic vision of republican deliberation sans judicial participation, Jackson's aesthetic choices threatened to erase non-judicial actors from the social landscape. Judicial rhetoric cannot control how others behave, especially a president under strong pressures to go his own course. But one's word selection can create incentives and fashion tools that may be used to promote the rule of law in other contexts.

The statement of facts in a draft marked "3-25-43 not circ" in Jackson's legal files reveals a preliminary interest in making a show of solidarity with the executive branch:

An attitude so dispassionate toward our flag is to many suggestive of disloyalty. But neither in this case *nor in the statements of responsible officials of the Department of Justice* has there been the slightest suggestion that Jehovah's Witnesses harbor a purpose to give aid or comfort to our enemies or are in sympathy with them.²⁷⁵

Because the federal government made no appearance in the litigation, any statements to which Jackson referred must have had an extrajudicial origin. This passage was excised from the draft circulated on April 17, 1943, in which any hint of social support for *Gobitis* was also erased.²⁷⁶

In a detailed but undated set of comments on an original draft of *Barnette*, Jackson's law clerk "JFC" had suggested a reference to the "June 16, 1940 radio speech, [in which] Solicitor General Biddle said that the Attorney General had ordered that an investigation be commenced."²⁷⁷ The March 25 draft contains a reference to Biddle's speech, as well as the article by Rotnem and Folsom, which Jackson's clerk thought "would be desirable to indicate the position of these gentlemen in the Department of

275. *Barnette* Draft, Mar. 30, 1943, *supra* note 134, at 5 (emphasis added).

276. Draft Opinion by Justice Jackson, Apr. 17, 1943, at 10 n.15, *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1942) (No. 591) (on file in Jackson, Container 127, Case No. 591, Papers of Robert Houghwout Jackson, manuscript division, Library of Congress, Washington, D.C.) (crossing out footnote text and accompanying citations: "The *Gobitis* opinion has, however, found some favor among the commentators") [hereinafter *Barnette* Draft, Apr. 17, 1943]. These references appear to have been lifted from the contribution of the Committee on the Bill of Rights, whose membership included Zechariah Chafee and Abe Fortas, and the American Bar Association. Those amici appealed to the idea of "freedom of conscience" and sought to supply "evidence as to the actual operation of the compulsory flag salute." Brief of the Committee on the Bill of Rights of the American Bar Association, as Friends of the Court at 23, 23–24, *Barnette*, 319 U.S. 624. These amici explicitly declined to discuss the legal consequences of the Flag Law of 1942. *Id.* at 3.

277. Undated Four Page Memorandum, *Barnette*, 319 U.S. 624 (on file in Jackson, Container 127, Case No. 591, Papers of Robert Houghwout Jackson, manuscript division, Library of Congress, Washington, D.C.) [hereinafter Undated Memorandum]. "JFC" are the initials for John F. Costelloe, Jackson's first law clerk.

Justice.”²⁷⁸ The text originally devoted several paragraphs to the mob action to enforce *Gobitis* as well as the presidential response:

Apparently of the impression that this decision held that there was a duty on all persons to salute the flag, mobs fired with psychopathic patriotism have taken into their hands its enforcement. Officials have in some instances been downright lawless. The Federal Department of Justice, soon after the *Gobitis* decision, instituted investigation of the outrages, and prosecutions have followed. . . . Responsible officials of the Federal Department of Justice have publicly summarized the violent aspects of the flag salute movement which has now spread to include expulsions from schools in every state of the Union.²⁷⁹

References to Nazi persecution of Witnesses,²⁸⁰ American-style mob action, the suggestion that the Court’s earlier language may have inspired such lawlessness, the participation of the Department of Justice, and disapproval of the excesses of the pro-flag movement were all removed in subsequent drafts. Jackson deleted the citation to the Justice attorneys’ anti-*Gobitis* article; in its place appeared this statement that gestured toward the legislature rather than the executive branch: “The action of Congress in making flag observance voluntary and respecting the conscience of the objector in a matter so vital as raising the Army contrasts sharply with these local regulations in matters relatively trivial to the welfare of the nation.”²⁸¹ The reference to Biddle’s radio address was likewise removed.

278. *Id.* The memo misspells Rotnem’s name as “Rotner, et al.” but describes them as “gentlemen in the Department of Justice.” *Id.* It may have been dropped because of the clerk’s own concern that “their article is . . . intended more for advocacy than exposition, since it contains many statements of opinion quite inapposite to a formal report by a governmental agency or statement by a governmental opinion speaking in that capacity.” *Id.*

279. Draft Opinion by Justice Jackson, Mar. 25, 1943, at 17–18, *Barnette*, 319 U.S. 624 (on file in Jackson, Container 127, Case No. 591, Papers of Robert Houghwout Jackson, manuscript division, Library of Congress, Washington, D.C.) [hereinafter *Barnette* Draft, Mar. 25, 1943].

280. The “3-25-43” draft contained these sentences after the first Department of Justice reference, which were later dropped:

On the contrary, it appears that this group’s followers have been suppressed in all countries under Axis control, and in Germany they have been sent by the hundreds to concentration camps. There they have refused to “Heil” and salute the swastika as an emblem of the Reich, and in Japan they have been killed and persecuted for refusing to bow to the Japanese flag, repeat the oath of allegiance to Japan, and give the “bow to the East.” There would be ready unanimity in denouncing such treatment of these by our enemies as stupid and cruel and in thanking God that we Americans are not like our enemies.

Id. at 5.

281. Compare *Barnette* Draft, Mar. 30, 1943, *supra* note 134 (footnote reference to Rotnem &

Although these acknowledgements of executive action never made it into the published opinion, the notations prove that the contemporaneous extra-judicial words and actions of the Roosevelt administration weighed upon the minds of the Justices and their clerks during the drafting of the opinion. After Jackson's drafts were sanitized, any indication that the Supreme Court might have wished to harmonize the President's reconstructive efforts and the Court's reading of text was ambiguous beyond the language of liberty common to both endeavors.

At the repeated instigation of Stone, who worried that some aspects of the opinion seemed "too journalistic for a judicial opinion," Jackson streamlined discussion of the brutalities inflicted upon the Witnesses so only collateral proceedings were briefly noted.²⁸² The Chief pushed Jackson hard to "go over the footnotes with care and see whether they really measure up to the dignity which should characterize an opinion of the Supreme Court of the United States."²⁸³ Stone became obsessed with the idea that mere mention of these travesties "might well give the impression that our judgment of the legal question was affected by the disorders which had followed the *Gobitis* decision."²⁸⁴ To convince Jackson to prune his prose, he resorted to a shoe-on-the-other-foot strategy: "If the decision had gone the other way, it is quite possible that the Legion and other similar minded organizations would have produced similar disorders. But that, I think, should not affect our judgment, and if it doesn't affect our judgment is it worth repeating."²⁸⁵ Better to deny exogenous influences on judicial reasoning to avoid criticism that the Supreme Court might be bending like a reed in the wind. Management of public perceptions is an essential aspect of adjudication, but Stone's fears were overblown since there was no serious risk that school officials would

Folsom article crossed out with notation "is this the right footnote?") with *Barnette* Draft, Apr. 17, 1943, *supra* note 276.

282. Memorandum from Chief Justice Harlan F. Stone to Justice Jackson (May 24, 1943) (on file in Container 127, Case No. 591, Robert Houghwout Jackson, Manuscript Division, Library of Congress, Washington, D.C.).

283. *Id.* Stone wrote again to Jackson a week later, indicating that he "had considerable doubt about the wisdom of the footnotes." Memorandum from Chief Justice Harlan F. Stone to Justice Jackson (Mar. 31, 1943) (on file in Container 127, Case No. 591, Robert Houghwout Jackson, Manuscript Division, Library of Congress, Washington, D.C.).

284. Memorandum from Chief Justice Harlan F. Stone to Justice Jackson, Mar. 31, 1943, *supra* note 283. Jackson's law clerk joined Stone's criticism on this point, writing: "I think that this portion on the effect of the *Gobitis* decision should be redrafted. Because lawless mobs may have misunderstood its meaning is not in itself a reason to change it." Undated Memorandum, *supra* note 277, at 3.

285. Memorandum from Chief Justice Harlan F. Stone to Justice Jackson, Mar. 31, 1943, *supra* note 283.

refuse to implement *Barnette*. And it is possible to take judicial notice of outside events and perspectives without giving the impression of capitulation.

In minimizing the impact of social and political developments, the Justices stuck to an age-old script according to which jurists hope to curry respect for the rule of law by striking a resolute pose. Yet bowing at the altar of detached independence entailed enormous tradeoffs. For one, the effort to purge judicial discourse of social reaction was not entirely successful. External criticisms of the Court's previous decision remain sprinkled throughout the final opinion. Footnote 15 contains "exhaustive references to the secondary material on the *Gobitis* case."²⁸⁶ As Jackson's clerk described, it is a "list of *Gobitis* haters" that "begins with Powell, . . . and continues until we reach the anonymous student notes."²⁸⁷ The passage stayed in the text presumably because as Jackson's clerk advised, "[t]heir practical unanimity is . . . of some significance and possibly of some help"—that is, to show that *Barnette* responded to the criticisms of prominent intellectuals.²⁸⁸ If the Justices were already willing to go this far in pointing out critical reviews of their prior work, why not mention the contrary views of the Justice Department or the White House? In fact, given the tradition and ideal of interbranch interaction, it is more defensible for the High Court to acknowledge the position of the executive branch than it is to accede to the criticism of unaccountable opinion-makers. So long as presidential perspectives are made openly, as they were here, judicial reliance on executive perspectives would remain subject to public accountability.

By the same token, the published opinion drastically minimizes, but could not erase, the abuses against the Jehovah's Witnesses; it just ensured that official accounts of their repression remained vague. It would have been a far more powerful vindication of the rule of law if the Justices had been willing to portray their role as a mediating institution accurately, especially since the cooperation of the executive branch was assured in carrying out that pro-rights vision. They could have easily delineated and repudiated destructive misreadings of *Gobitis*, as well as the collateral legal ramifications that were obviously a byproduct of the Court's construction of text. Doing so would have acknowledged that legal utterances have consequences and that these pragmatic considerations are salient to the inquiry, even if they should not be decisive. Instead, the

286. Undated Memorandum, *supra* note 277, at 4.

287. *Id.*

288. *Id.*

Justices hid behind the fiction that they are neither influenced by, nor care to learn about, non-judicial facts. The absence of transparency does little to ensure that judges are actually insulated from the rest of the world. It merely keeps others guessing about which combination of exogenous developments might prove determinative in any particular controversy.

Embracing the High Court's role as a cultural actor and demanding a more faithful rendering of the "facilitative" tradition of the judiciary²⁸⁹ would have brought additional dividends to the rule of law. By indicating more openly that it received the signals coming from the executive branch and other actors on the constitutional question, the Supreme Court might have endorsed a cooperative rather than a juricentric model of law. The point is not to make the system of constitutional lawmaking hierarchical, but more widely understood as it actually operates. Empowerment, not obedience, is the ultimate goal of the interactive model. Before ordinary citizens can fully participate in the constitutional system, they need to know how it actually operates.

It is possible that portraying an interactive judiciary might have convinced Black, Douglas, and Murphy to sign on to a single opinion rather than dilute the consensus with additional opinions. Black and Douglas jointly penned a concurring statement to stress the component of religious liberty implicated by the situation. They argued that the Witnesses should be treated as "conscientious objectors" and that coerced ceremonies offer "a handy implement for disguised religious persecution."²⁹⁰ Murphy chose to underscore that the flag represents a set of ideas for which "we have fought and are now fighting again."²⁹¹ He also defended, in language every bit as dramatic as Roosevelt's, "spiritual freedom to its farthest reaches."²⁹² Jackson's concessions to Stone's concerns about judicial independence apparently pushed the others to feel they needed to say more in the name of the First Amendment—to capitalize on the moment. Given the desire on the part of Black, Douglas, and Murphy to go farther and the Chief's already strong dissent in *Gobitis*, Jackson was highly unlikely to lose Stone's vote to Frankfurter or to the

289. See generally TSAI, *supra* note 70, at 140–62. I argue that the "facilitative" model of portraying the interrelationships of the branches of government is superior to the "enforcement" model. The former asks what steps best promotes engagement by others on matters of constitutional salience, while the latter is interested mainly in projecting judicial vindication of seemingly ageless values. See *id.* at 138–39.

290. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 644 (1943) (Black, Douglas, J.J., concurring).

291. *Id.* at 645 (Murphy, J., concurring).

292. *Id.*

duo of Roberts and Reed, both of whom declined to sign Frankfurter's dissent and chose only to say that they "adhere to the views expressed by the Court in . . . *Gobitis*."²⁹³

Paying due respect to the administration's new priorities might have created incentives for other office holders to take rights seriously, especially when, as here, judges prove reluctant to do so. Although it may be hard to imagine a president making decisions to gain the possible approval of a few judges, rhetorical alignment is a prize of sorts to the wily politician: judicial endorsement of presidential programs, language, or values can generate desired momentum for one's agenda, restock necessary social resources, and be redeployed to gain new supporters among elites and activists. Outside of the courts, juridic cooptation of presidential language and perspective can be sold as validation of constituencies' labors. Interest groups and politicians gain prestige by encouraging the impression that judges are accountable to public sentiment from time to time.

Judicial notice of the Roosevelt administration's various moves might have fortified executive branch officials such as the Attorney General or subordinate lawyers in deciding to pursue rights vigorously even when the President had shown less than full commitment to the project. These quasi-autonomous actors included many career lawyers whose loyalties tend to run to ideals over personalities or party affiliation. Conspicuous mention of their labors could have, under appropriate circumstances, empowered such mid-level officials to keep constitutional considerations in mind and battle for them as a matter of bureaucratic politics. Where the President laid down no comprehensive policy to the contrary, juridic language could have promoted the internalization of enduring values and given cover to interstitial lawmaking on behalf of rights.

All of this might have been achieved without sacrificing the Supreme Court's independence. Its rhetorical autonomy and prestige, painstakingly cultivated over generations, would not have been threatened. The Court could have accomplished these goals in its own words, on its own terms, without opting for judicial erasure.²⁹⁴ The rule of law would have been stronger for it.

293. *Id.* at 642–43.

294. For another intriguing instance of judicial erasure, see Bruce Ackerman and Jennifer Nou, *Canonizing the Civil Rights Revolution: The People and the Poll Tax*, 103 NW. U. L. REV. (forthcoming 2009) (contending that *Harper v. Virginia Board of Elections* helped erase the impact of popular sovereignty of 1960s in ending wealth discrimination).

There is much to celebrate in *Barnette*. The Justices' willingness to revisit a recently issued ruling is admirable, and their desire for a better consensus exactly what one should expect. On substance, it is eminently sensible to demand more than naked assertions of national security when rights are at stake. Even so, copying Roosevelt's words without attribution deprived the people of their chance to achieve an unambiguous codification of a rare deliberative moment. Instead, the judicial retreat to impersonal language led some observers to view the case as the resolution of an isolated problem rather than a part of a broader reevaluation of political ideals—one has to put many clues together to discern the deeper socio-legal processes underway. Unfortunately, the Court's refusal to link arms with other actors openly conveyed the erroneous impression that such deep conflicts over values were something that lawsuits alone could resolve.

C. Assessing the Strategy of Presidential Erosion

The Roosevelt administration's layered efforts to undermine the social foundations of First Amendment text took place against the backdrop of earlier instances of presidential leadership. Back in 1933, at his first inaugural, Roosevelt had announced that the "people of the United States" have "registered a mandate that they want direct, vigorous action."²⁹⁵ Accordingly, he had boldly wrapped himself in plebiscitarian themes: "They have made me the present instrument of their wishes."²⁹⁶

The most poignant incident on the minds of political elites in the early 1940s surely would have been Roosevelt's epic attempt a few years earlier to pack the Supreme Court. Although the proposal ended in defeat, the event apparently prompted key Justices to reconsider their jurisprudence on economic liberty and legislative authority, if for no other reason than to quell the sense of crisis.²⁹⁷ It is possible that participants and observers

295. Franklin Delano Roosevelt, Inaugural Address (Mar. 4, 1933), in *THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, 1933 VOLUME*, at 11, 15 (Samuel I. Rosenman ed., 1938).

296. *Id.* at 16.

297. For accounts claiming that the court-packing plan altered the Justices' sense of plausible readings of the Constitution, see BRUCE ACKERMAN, *2 WE THE PEOPLE: TRANSFORMATIONS* (2000); WILLIAM E. LEUCHTENBERG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* (1995). Others, however, have argued that the judicial decisions touted as reactions to the plan owed more to developing lines of doctrine than external pressures. See BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* (1998); accord G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* 13, 23 (2000) (characterizing the court-packing thesis as "anachronistic" and cautioning against attributing too much causal force to events that occurred "within a relatively short time span"). Cushman persuasively shows that certain intellectual trends were already underway, and that most legislators

drew two types of lessons from what became known as “the struggle of 1937.”²⁹⁸ The first, apparently learned the hard way by members of the High Court, is that responsiveness to significant political and cultural changes could forestall an erosion of faith in the rule of law or affirmatively enhance the legitimacy of their pronouncements.

It would have been surprising if, having gone through this wrenching episode in the mid-1930s, the Justices had chosen to precipitate an open conflict with the executive branch in the 1940s over rights once the executive branch began to throw its support behind enhanced political liberties in the name of the people. The changed composition of the Supreme Court made open conflict less necessary. For anyone seeking to influence the law’s development, subtlety could be effective as well as expedient.

The President, too, almost certainly drew a lesson from that sequence of events. Although he eventually gained his true objective once the Court backed away from summarily opposing the legislative creativity of the New Deal, his assault on the Justices’ reasoning and advanced age spurred an enormous intellectual, political, and institutional reaction. His attacks on the High Court lent credence to charges that he had crossed the line from popular leader to dictator-in-waiting. Reflecting on the episode, Roosevelt and his aides should have appreciated and, to some extent, internalized the high price of brinksmanship.

Another episode may have well been on the minds of insiders working to extend political rights. After the 1936 election, several legislators mounted their most sustained effort to enact an anti-lynching law. Roosevelt maintained a strict silence on the measure but gave his blessing surreptitiously—much like the bifurcated approach later taken with regard to the situation involving students who refused to salute the flag. In an early test of Roosevelt’s governing coalition over the question of race, supporters tried to turn the debate into a referendum on the Democratic Party and the New Deal. Southerners, including Senator Byrnes, staunchly opposed the bill. As Kevin McMahon explains, the shrill oratory engaged by advocates and opponents, the regional divisiveness opened by the debate, and the ultimate defeat of the anti-lynching bill may have

and observers believed the court-packing plan would not succeed. However, Cushman does not disprove the possibility that the president’s rhetorical resistance to the High Court’s body of work—of which the reorganization plan comprised merely one part—encouraged a more receptive orientation in the Court. For jurists who tired of being at the center of public debate, greater deference would have been attractive even if formal organization proved not to be a credible threat.

298. Robert Jackson described the monumental dispute in these terms. JACKSON, *supra* note 117, at xix.

convinced partisans to tread carefully on questions of rights in the future or to seek the cooperation of other institutions, such as the federal courts.²⁹⁹ This experience, too, might have encouraged rights advocates within the administration to tread carefully.

In the modern age in which contentious clashes between the branches are expected and sometimes celebrated, the virtues of indirect social resistance remain underappreciated. First, whereas provocation is most likely to generate institutional entrenchment and political backlash, more sophisticated tactics can build incremental or overlapping support—even from unexpected sources. The scale and sources of public reactions are difficult to predict *ex ante* because of imperfect information about true political preferences, shifts in preferences when one or more variables change, the multiplicity of plausible scenarios, and the possibility of changing alliances. Erosion is a conservatizing strategy.

Second, as Roosevelt may have learned from these encounters with the coordinate branches, the politics of brinkmanship distracts the nation from other pressing goals precisely because it galvanizes individuals around a narrow set of priorities. If the constitutional issues at stake degenerated into a fight between flag wavers and uncompromising libertarians, the resulting battle could very well impede ongoing efforts to aid America's European allies against totalitarianism, the general push toward international engagement, and other items on the President's agenda. Linguistic transformation demands a high degree of social assent. A leader must go to great lengths to avoid dissipating the impetus for change and to zealously guard the integrity of reformist discourse.

Empirical studies on the power of framing issues in constitutional terms confirm the advantages of the administration's tactics. Such studies establish that constitutional terminology has a "disproportionate influence over individual attitudes."³⁰⁰ The subjects in such studies strongly endorse "democratic values such as free speech and free association" when such principles are stated at a high level of abstraction, but support seemingly fractures when specific circumstances are introduced.³⁰¹

299. MCMAHON, *supra* note 101, at 115–18. Roosevelt told Walter White, Secretary of the NAACP: "The Southerners by reason of the seniority rule in Congress are chairmen or occupy strategic places in most of the Senate and House committees. If I come out for the anti-lynching bill now, they will block every bill I ask Congress to pass. . . . I just can't take that risk." SMITH, *supra* note 87, at 400.

300. Chong & Druckman, *Framing Theory*, *supra* note 271, at 111.

301. *Id.* at 103. For studies on language and political psychology, see *id.* For studies on frames in communication, see G. TUCHMAN, *MAKING NEWS: A STUDY IN THE CONSTRUCTION OF REALITY* (1978); W.A. Gamson & A. Modigliani, *The Changing Culture of Affirmative Action*, in 3 *RESEARCH*

Once power is understood in relational terms, as a number of political scientists urge,³⁰² the greatest threat to a leader's extended reputation (or legacy) is the dissipation of perceived moral authority. This is what gave the bifurcated rhetorical strategy on behalf of First Amendment freedoms a fighting chance: high-minded abstractions are more likely to rouse and unify rather than disturb and divide. If the President encountered substantial resistance from the coordinate branches, the people at large, or the intellectual elite, he could always clarify his position. In Neustadtian terms, the bifurcated strategy preserved Roosevelt's bargaining flexibility, his capacity to persuade others on a host of issues, and his public prestige, which flowed in no small part from popular perception of his ability to manage the great challenges of the time—economic devastation and recovery, then the war and reconstruction.³⁰³

Third, more nuanced presidential strategies conserve requisite social resources or bases of political authority.³⁰⁴ An enormous amount of political capital must be expended to mount and sustain open projects of reform, with uncertain results. Unconventional strategies of constitutional transformation strain existing institutions and established relationships. Besides draining the electorate's capacity for reform and testing its patience, pressing aggressively for constitutional change may polarize advisers who make enormous personal sacrifices to serve the President and nation. Roosevelt kept a number of aides in the dark about the court reform bill until he had decided upon pursuing it, leading to a great deal of

IN POLITICAL SOCIOLOGY 137 (R.D. Braungart ed., 1987); D.V. Shah et al., *News Framing and Cueing of Issue Regimes: Explaining Clinton's Public Approval in Spite of Scandal*, 66 PUB. OPINION Q. 339 (2002).

302. James MacGregor Burns defines power "not as a property or entity or possession but as a relationship in which two or more persons tap motivational bases in one another and bring various resources to bear in the process." JAMES MACGREGOR BURNS, *LEADERSHIP* 15 (1978). This orientation understands that "[p]ower is ubiquitous. It permeates human relationships." *Id.* Others have emphasized the distribution or scope of authority. See Robert A. Dahl, *Power*, in 12 *INTERNATIONAL ENCYCLOPEDIA OF SOCIAL SCIENCE* 406 (D.L. Sills ed., 1968); HAROLD D. LASSWELL & ABRAHAM KAPLAN, *POWER AND SOCIETY* 74–102 (1950).

303. RICHARD E. NEUSTADT, *PRESIDENTIAL POWER AND THE MODERN PRESIDENTS: THE POLITICS OF LEADERSHIP FROM ROOSEVELT TO REAGAN* (1990). Neustadt analyzes presidential authority not in terms of textually based powers or specific tactics, but in terms of professional and popular perceptions of the office and the general capacity of the individual occupying the office to persuade others to action.

304. As Fred Greenstein explains, varying rhetorical tactics can hold together strong-minded parties motivated by a variety of interests, while preserving a unifying personae. FRED I. GREENSTEIN, *THE HIDDEN-HAND PRESIDENCY: EISENHOWER AS LEADER* 19, 31 (1982). Greenstein suggests that a politician who portrays himself as a non-partisan manager may be more likely to engage in indirect tactics of persuasion. Yet the temptations of subterfuge and public subtlety are at least as great for a wartime leader and reformer such as Roosevelt who might nevertheless wish "to conceal the political side of his leadership" in shaping the nation's constitutional understandings. *Id.* at 5.

anxiety among supporters over his judgment, motives, and the depth of his loyalties. Another frontal assault on the Supreme Court's reading of the cherished First Amendment may well have cleaved his network of advisors beyond repair. Roosevelt could ill afford to lose trusted and experienced aides at so critical a time. Conversely, granting his tacit approval to advance a rights-based agenda surely forestalled demoralization of trusted liberal allies and gave his presidency a fresh burst of energy.

As our reappraisal of the flag salute rulings illustrates, a myriad of techniques exists for promoting or dislodging constitutional understandings short of formal amendment. Governing institutions and informal relationships can be ingeniously repositioned and their energies harnessed for transformative goals. If such processes are understood in social terms, we should remain on the lookout for more subtle patterns: (a) an oppositional construction of text publicized in the name of the people; (b) an appropriate level of intensive and engaged public debate; (c) a convergence of institutional practices; and (d) a sufficient degree of support among different sectors of the political community, or at least the lack of sustained and significant opposition, to such a consensus.

In a contest over constitutional ideas, a president is uniquely positioned to dictate the terms of debate. A chief executive dedicated to a course of action is able to control political pathways so as to enlarge or downplay the significance of a juridic act, arrest its absorption in normative communities through strategic silence or carefully delineated responses, or harness the symbolism of the office and its many resources to swamp the constitutionally salient actions of others. Compared with the judiciary and the legislature, which speak intermittently (and sometimes in a fractured voice), a chief executive who wishes to articulate the scope of the Constitution is faced with a wealth of opportunities to ratify, ignore, or undermine the work of the lower courts and officers.³⁰⁵ In the modern administrative state, a president committed to a particular conception of rights can, in a series of texts, oratories, and other signals, entrench a constitutional vision and build respect for such a vision.

The Framers had something like this in mind when, in promoting a "vigorous Executive," they argued that "[e]nergy in the Executive . . . is

305. See generally KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* (1999); Dawn E. Johnsen, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 *IND. L.J.* 363 (2003); Keith E. Whittington, *Presidential Challenges to Judicial Supremacy and the Politics of Constitutional Meaning*, 33 *POLITY* 365 (2001).

essential . . . to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy.”³⁰⁶ Rather than simply catering to the lowest common denominator, the rhetorical power of the office can be directed toward resisting majoritarian excesses and seeking convergence over enlightened norms. The office was designed not to ensure a “servile pliancy of the Executive, to a prevailing current,” but rather so “[w]hen occasions present themselves, in which the interests of the people are at variance with their inclinations,” that officer holder could in the name of the “public good,” promote “more cool and sedate reflection.”³⁰⁷

The Jehovah’s Witnesses’ strange practices, open denunciations of other faiths, and litigious ways engendered significant antagonism in local communities, where distrust and patriotism predominated.³⁰⁸ In a highly charged environment, presidential power was successfully deployed to ameliorate excesses in governing discourse and tamp down exclusionary instincts in the community. Far from cowing other constitutional actors, executive initiative can, as it did here, promote institutional respect for rights, knit new constituencies on behalf of transformative objectives, and inspire others to take action in the name of rights.

CONCLUSION

The U.S. Supreme Court’s turnabout on the constitutionality of the coerced flag salute in the early 1940s offers a reminder that a vigorous executive is not necessarily inhospitable to a robust conception of liberty. More could certainly be said about the promises and pitfalls of executive initiative and the conditions under which foundational change is attainable through presidential action. A comparative analysis would also be profitable, if it is conducted with an eye toward explicating when successful presidential strategies can be efficaciously replicated in new contexts.

What is certain is that the plebiscitarian presidency has formed part of our social reality for some time. It is a feature of the legal order that is unlikely to change anytime soon. In reconsidering *Gobitis*, this Article began with the premise that the most promising inquiry involves not whether executive dominance of a democratic republic is advisable in the

306. THE FEDERALIST No. 70 (Alexander Hamilton).

307. THE FEDERALIST No. 71 (Alexander Hamilton).

308. See Rotnem & Folsom, *supra* note 34, at 1056 (arguing that the Jehovah Witnesses’ beliefs “have occasioned intense animosity in every state of the Union, and the virulent attacks on institutionalized religion, particularly the Catholic church, are highly offensive to many people”).

abstract, but how the weight of presidential authority can be effectively brought to bear upon the elaboration of rights. In one remarkable moment when the nation hurtled toward global conflict, the resources of the presidency were harnessed to expand, rather than contract, the meaning of liberty.