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The Republic for Which It Stands

*Louis H. Pollak**

Judges, whether speaking from the bench or from the lectern, are, in general, admonished to ignore elections. And, in general, the admonition is sound. When the great Chief Justice first proclaimed the propriety, asserted the necessity, and exercised the authority, of judicial review, and defined its rationale and scope, he declared: "Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."¹ Nonetheless, I propose today to discuss an aspect of the recently concluded presidential election campaign. My submission is that what I shall say will not transgress the abstemious canon to which I have referred. My subject is not the outcome of the election, or what that outcome portends. My subject is one of the questions of public policy that chiefly divided the candidates. It is a question that I think is not inappropriate for me to discuss for the reason that, in a constitutional system predicated on judicial review, the way the question is answered can have implications of great consequence for the relationships between the two political branches of government on the one hand and the judicial branch on the other. That the question

* United States District Judge, Eastern District of Pennsylvania.

This article is an expanded version of a paper I gave on November 11, 1988, at Laramie in the course of a visit to the University of Wyoming College of Law. I want to express my gratitude for the warm hospitality shown me by Dean Richard J. Morgan and his faculty colleagues, and also by the students of the College of Law.

The paper was the Winston Howard Lecture, which bears the name of an illustrious alumnus who has been a leader of the Denver Bar for many years. It was a particular pleasure to make Mr. Howard's acquaintance. That pleasure was enhanced by the discovery that, decades ago, when Mr. Howard studied law at Laramie, the teacher who most shaped Mr. Howard's thinking was the late Clarence Morris. Professor Morris, for so many years one of the nation's leading scholars and teachers of torts and of jurisprudence, began his distinguished academic career at the University of Wyoming and completed it at the University of Pennsylvania, where I was privileged to be his colleague. This article is dedicated, with great affection and profound admiration, to the memory of Clarence Morris. In this article I refer to President Bush as "Vice President" because that was the office he occupied during the 1988 campaign. Similarly, I refer to Vice President Quayle as "Senator" because that was the office he occupied during the campaign.

1. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803).

may in some contexts test the first principles of the separation of powers does not, of course, mean that it would in every instance do so. And it is my surmise that when, in years to come, we revisit the campaign of 1988, we will think it quixotic that the question which concerns me, in the particular garb in which it presented itself, should have been treated as an issue of large consequence. But it was. And so I offer a preliminary assessment today, confident that it will be cut down to size by the more deliberate verdicts arrived at by others in quieter times.

I.

The question to be addressed is this: Was Vice President Bush, in his role as presidential candidate, right in censuring Governor Dukakis for his veto (a veto which was promptly overridden) of a bill enacted by the Massachusetts General Court in 1977? The bill sought to amend an existing school flag-salute statute by requiring public school teachers at the "first class of each day . . . [to] lead the class in a group recitation of the 'Pledge of Allegiance' to the Flag."² To answer this question, I will consider two sub-questions. First, in the spring of 1977, when Governor Dukakis had to decide whether to approve the bill, did it appear, in the light of then authoritative judicial precedents, that a statute directing teachers to lead students in the Pledge of Allegiance was constitutional? Second, given that a republican form of government — of which both the Commonwealth of Massachusetts and the United States of America are embodiments — is generally taken to presuppose a separation of the powers vested in the three branches of government,³ what deference, if any, do the two political branches, the legislature and the executive, when engaged in their joint exercise of the legislative power, owe to pronouncements of the non-political branch, the judiciary, on matters constitutional?

A. Was the 1977 Bill Constitutional?

To answer the first sub-question — namely, whether the 1977 bill requiring Massachusetts public school teachers to lead their students in the Pledge of Allegiance was constitutional — it might be thought that nothing more is called for than to cite two justly celebrated Supreme Court opinions: The first is Justice Frankfurter's opinion for the Court in *Minersville School District v. Gobitis*,⁴ which upheld the authority of a public school system to require a daily salute to the flag and recital of the Pledge of Allegiance by all students, including Jehovah's Witness students for whom rituals of obeisance to civil authority contravened fundamental religious scruples. The second is Justice Jackson's opinion for the Court in *West Virginia State Board of Education v. Barnette*,⁵ which overruled

2. MASS. ANN. LAWS ch. 71 § 69 (Law. Co-op. 1978).

3. *But see* Dreyer v. Illinois, 187 U.S. 71, 84 (1902), quoted with approval by Frankfurter, J., in his concurring opinion in *Sweezy v. New Hampshire*, 354 U.S. 234, 256-57 (1957), discussed in Pollak, *Mr. Justice Frankfurter: Judgment and the Fourteenth Amendment*, 67 YALE L.J. 304 (1957).

4. 310 U.S. 586 (1940).

5. 319 U.S. 624 (1943).

Gobitis. But a decent respect for the great issues dividing the Court in those cases instructs us that we need do more than reread *Gobitis* and *Barnette* and then shepardize the latter case to insure that it has not, in turn, been overruled. Our narrative begins, then, not with Felix Frankfurter in 1940 but with Francis Bellamy in 1892.

Francis Bellamy was a reformer-preacher and a writer — a self-described Christian Socialist. He was apprehensive about one strain of American life in the late nineteenth century — what he perceived as a mounting concentration of wealth “in the hands of a dangerous plutocracy.”⁶ At the same time, he had a passionate commitment to American nationhood. After being fired from his Baptist pulpit — evidently because he was perceived as uncomfortably radical — Bellamy was hired as a staff writer by *Youth's Companion*. *Youth's Companion*, a weekly, had started life, as its name suggests, as a children's magazine. But by the 'nineties *Youth's Companion* had broadened its scope: readership — which by then included adults — was up to half a million; and the roster of contributors — which already numbered, *inter alia*, Kipling, Thomas Hardy, Sarah Orne Jewett, James Whittier, Harriet Beecher Stowe, Tennyson, and Gladstone — before the end of the decade widened to include Jules Verne, Jack London, Theodore Roosevelt, Grover Cleveland, and Woodrow Wilson.⁷ The year Bellamy came to *Youth's Companion*, 1892, was precisely the right year for a man of Bellamy's devotion to his country's highest aspirations. Eighteen ninety-two was the year which would mark the four hundredth anniversary of Columbus' discovery of America. *Youth's Companion* decided to use the occasion as an instrument of patriotic rededication. To that end, Bellamy wrote the Pledge of Allegiance:

I pledge allegiance to my flag and the Republic for which it stands,
one nation indivisible, with liberty and justice for all.⁸

Bellamy explained both his concept of allegiance to the flag and his choice of words:

Why allegiance to the flag? . . . Because the flag stands for the Republic. And what does that vast thing, the Republic, mean? It is the concise political word for the Nation, — the *One Nation* which the Civil War was fought to prove. To make that *One Nation*

6. Roberts, *A Clear Pledge: Instilling Values in First Grade*, N.Y. Times, Oct. 10, 1988, at B1, col. 1.

7. J. HART, *THE OXFORD COMPANION TO AMERICAN LITERATURE* 859 (1941).

8. D. MANWARING, *RENDER UNTO CAESAR* 2 (1962). In June of 1942, seven months after Pearl Harbor, Congress made the text of the Pledge a matter of statute, modifying Bellamy's words slightly to substitute “the Flag of the United States of America” for “my flag.” Act of June 22, 1942, ch. 435, § 7, 56 Stat. 380 (codified as amended at 36 U.S.C. § 172 (1982)). In 1954, Congress inserted the phrase “under God” between “nation” and “indivisible.” Act of June 14, 1954, ch. 297, 68 Stat. 249. There have been no further changes in the Pledge, which reads:

I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.

36 U.S.C. § 172 (1982).

idea clearer, we must specify that it is *indivisible*, as Webster and Lincoln used to repeat in their great speeches. And its future?

Just here arose the temptation of that historic slogan of the French Revolution which meant so much to Jefferson and his friends, 'Liberty, equality, fraternity,' No; that would be too fanciful, too many thousands of years off in realization. But we as a nation do stand square on the doctrine of liberty and justice for all. That's all any one nation can handle. So those words seemed the only roundup of past, present, and future.⁹

1892 was not only a Columbus celebratory year; it was an election year. The incumbent President, Benjamin Harrison, who was seeking reelection, used the power of incumbency to proclaim October 12 Columbus Day. Moreover, President Harrison approved the Pledge, as did his opponent, the past-and-future President Grover Cleveland.¹⁰ But Presidential approval has never, at the federal level, been translated into legislative mandate. Congress has codified the Pledge,¹¹ and has directed the way in which one should be positioned while the Pledge is being recited,¹² but has at no time directed civilians either to salute the flag or to say the Pledge.¹³

At the state level, however — as we learn from David Manwaring's *Render Unto Caesar*, the first substantial chronicle of the flag salute — a different pattern emerged. New York led the way, in 1898, with a statute — enacted the day after the commencement of the Spanish American War — ordering the state Superintendent of Education to prepare programs of daily public school flag observance; a few other states followed suit. Then, in 1919, a year after World War I and at a time of West Coast anxiety about labor violence, Washington initiated a new statutory pattern — one directing local school authorities to "cause appropriate flag exercises to be held in every school at least once in each week,"¹⁴ with sanctions attendant on non-observance; a statutorily prescribed part of the observance was recital of the Pledge. Delaware followed in 1925, New Jersey in 1932, and Massachusetts in 1935. By 1940, local school authorities in some twenty other states had, without express statutory authorization, directed that school children participate in flag observance exercises.¹⁵

From the time that flag observance first became a widespread public school practice, certain minor sects entertained religious scruples about having their children participate. Mennonites, for example, believed that:

9. Roberts, *supra* note 6.

10. *Id.*

11. See Act of June 22, 1942, ch. 435, § 7, 56 Stat. 380 (codified as amended at 36 U.S.C. § 172 (1982)).

12. 36 U.S.C. § 172 (1982).

13. See West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 n.17 (1943).

14. D. MANWARING, *supra* note 8, at 3 (quoting 1919 Wash. Laws 210, § 4 (codified at WASH. REV. CODE ANN. § 4777 (1931 & Supp. 1941))).

15. *Id.* at 3-5.

[T]he entire New Testament . . . teaches nonresistance, also that we shall love our enemies, which makes it impossible for us to take any part in promoting war. Pledging allegiance to a flag as we see it, though we honor and respect it, at least implies a pledge to defend it against all its enemies, which would mean resort to arms and to take human life.¹⁶

But when, in 1928, the school authorities in Greenwood, Delaware, expelled thirty-eight Mennonite students for non-participation in the required ritual, and the American Civil Liberties Union (ACLU) announced its willingness to provide the legal backing of a court test, “[t]he idea,” according to Manwaring, “had to be abandoned . . . since the Mennonites’ doctrine of non-resistance would not allow them to act as plaintiffs in a court of law.”¹⁷ The ACLU had already encountered similar difficulties in attempting to represent (1) Jehovahite children expelled from the Denver schools and (2) the Tremains, members of the Elijah Voice Society, whose nine-year-old son, Russell, was taken from parental custody for a year when his parents removed him from a Seattle public school that insisted on his participation in flag observances.¹⁸

The log jam finally broke in the fall of 1935, when Carleton Nicholls, Jr., a student enrolled in third grade in a Lynn, Massachusetts public school, began the school year by refusing to participate in the required flag ceremony — a ceremony he had participated in without incident during first and second grade. The Nicholls family were Jehovah’s Witnesses. According to Carleton, the flag was “the Devil’s emblem,” a position endorsed by his father, who said: “The Scriptures prove the truth of my assertion that this world, this country, the entire worldly kingdom, is not possessed by any government or any country, but by the Devil. . . . Why, then, should I, or my son, pledge allegiance to the Devil’s kingdom?”¹⁹ This adversary view of the relationship between the Witnesses and civil authority seems to have had its genesis in the rhetoric of “Judge” Joseph Franklin Rutherford, the Witnesses’ second leader, who presided over the movement from 1916 to 1942, before the Witnesses, expanding world-wide, somewhat muted their message (which had been, *inter alia*, fiercely anti-Catholic²⁰) and achieved a substantial measure of acceptance. The Rutherford rhetoric that apparently was the catalyst of Carleton’s intransigence was a portion of a speech Rutherford gave to rally the American faithful during their 1935 convention. Taking note of the systematic refusal of thousands of Jehovah’s Witnesses in Germany to salute Hitler or acquiesce in Nazi programs — a stance that led a great many Witnesses to concentration camps — Rutherford said:

16. *Id.* at 11 (quoting letter from Nevin Bender to Roger Baldwin (June 29, 1929) (ACLU Archives vol. 357, “Delaware”)).

17. *Id.* at 12.

18. *Id.* at 12-14.

19. *Id.* at 31 (quoting Carleton Nicholls, Sr., Boston Post, Sept. 21, 1935).

20. See, for example, the hostility of the Witnesses to Catholicism that gave rise to the events reviewed by the Supreme Court in *Cantwell v. Connecticut*, 310 U.S. 296, 301, 309 (1940).

The Devil deceives the people and turns them away from God, and puts forth his agents who claim that the salvation of the people comes by reason of his agents. A striking example of this is the exaltation of one Hitler in Germany. He issues the command that all persons shall "Heil Hitler," which in the English language means "Salvation is by Hitler." But all people who have faith in God know that neither Hitler, Mussolini, the NRA scheme nor any other scheme nor any other creature can bring salvation to the people. . . . Thus all such "Heil Jehovah and Christ Jesus." They do not "Heil Hitler" nor any other creature. . . .²¹

As Rutherford's speech had emboldened the Nicholls, so their strong stand stirred Rutherford to proclaim, in a radio address, his full support for Carleton's defiance of the school authorities. "The . . . lad," said Rutherford, "has made a wise choice, declaring himself for Jehovah God and his kingdom. . . . All who act wisely will do the same thing."²² A Witness lawyer appeared with the Nicholls at a meeting with the Lynn school committee which, overruling the Nicholls' objections to Carleton Jr.'s participation in the flag ceremony, directed that Carleton be kept out of school until he changed his mind. Then, with the joint backing of the Witnesses and the ACLU, the Nicholls went to court. The vehicle was a petition for a writ of mandamus filed in the Massachusetts Supreme Judicial Court; the relief requested was a directive to the school committee to rescind its action. One justice heard the application; at the request of the parties he referred it to the full court. Over a year later, the court, speaking through Chief Justice Rugg, unanimously dismissed the petition.²³ Since the opinion in *Nicholls v. Mayor and School Committee of Lynn* was the first ruling by a state court of last resort on the flag salute problem,²⁴ and since it was the direct precursor of Governor Dukakis's problem in 1977, it warrants some scrutiny.

In support of its insistence that Carleton participate in the flag ceremony, the Lynn School Committee relied on two directives. One was its own Rule 18 which had been in force for some years and which called for recital of the Pledge at least once a week. The other was a statute enacted in 1935, the very year of Carleton's defiance. The statute read:

The school committee shall provide for each schoolhouse under its control, which is not otherwise supplied, flags of the United States of silk or bunting not less than two feet long, such flags or bunting to be manufactured in the United States, and suitable

21. D. MANWARING, *supra* note 8, at 30-31 (quoting *The Great Multitude* (pt. 1), WATCHTOWER 227, 235 (1935)).

22. *Id.* at 31 (quoting Rutherford, *Saluting A Flag*, LOYALTY 16 (1935)).

23. *Nicholls v. Mayor and School Comm.*, 297 Mass. 65, 7 N.E.2d 577 (1937).

24. The New Jersey Supreme Court, in a brief opinion by Justice Bodine, had rejected a Jehovah's Witness challenge to an obligatory school flag salute on February 5, 1937. But that was an intermediate appellate decision. The state's highest court, the Court of Errors and Appeals, affirmed without an opinion on the merits on September 22, 1937. *Hering v. State Bd. of Educ.*, 117 N.J.L. 525, 189 A. 629, *aff'd* 118 N.J.L. 566, 194 A. 177 (1937), *appeal dismissed*, 303 U.S. 624 (1938).

apparatus for their display as hereinafter provided. A flag shall be displayed, weather permitting, on the school building or grounds on every school day and on every legal holiday or day proclaimed by the governor or the president of the United States for especial observance; provided, that on stormy school days, it shall be displayed inside the building. A flag shall be displayed in each assembly hall or other room in each such schoolhouse where the opening exercises on each school day are held. Each teacher shall cause the pupils under his charge to salute the flag and recite in unison with him at said opening exercises at least once each week the "Pledge of Allegiance to the Flag." Failure for a period of five consecutive days by the principal or teacher in charge of a school equipped as aforesaid to display the flag as above required, or failure for a period of two consecutive weeks by a teacher to salute the flag and recite said pledge as aforesaid, or to cause the pupils under his charge so to do, shall be punished for every such period by a fine of not more than five dollars. Failure of the committee to equip a school as herein provided shall subject the members thereof to a like penalty.²⁵

In support of the petition for mandamus, Carleton's lawyers contended — as protesting Witnesses uniformly contended in the many flag observance cases that followed — that to salute the flag and recite the Pledge are actions that contravene the opening Commandments as laid down in Exodus:

Thou shalt have no other gods before me.

Thou shalt not make unto thee any graven image, or any likeness of any thing that is in heaven above, or that is in the earth beneath, or that is in the water under the earth.

Thou shalt not bow down thyself to them, nor serve them. . . .²⁶

To force Carleton to participate despite his religious convictions would, so it was argued, violate his rights under the Massachusetts Constitution, most notably Article 2 of the Declaration of Rights which provides that "no subject shall be hurt, molested, or restrained, in his person, liberty, or estate for worshipping God in the manner and season most agreeable to the dictates of his own conscience."²⁷ Some reliance was also put on the federal Constitution.

Chief Justice Rugg found that Rule 18 was an appropriate implementation of the 1935 statute and that, even before the statute, it was well within the general discretionary authority over school affairs delegated by the legislature. With respect to the mode of enforcement pursued by the school committee, Chief Justice Rugg acknowledged that the

25. Act approved May 13, 1935, ch. 258, 1935 Mass. Acts 306 (amending Mass. Gen. L. ch. 71, § 69 (Ter. ed.)).

26. *Exodus* 20:3-5.

27. MASS. CONST. pt. I, art. II.

statute established no penalty for a disobedient pupil, but is directed to the school committee and to the teacher. Power to enforce the rule is implied in the grant of power to establish it. It necessarily follows that, if [the statute] and the rule are valid, the school committee was acting within its jurisdiction in excluding the petitioner from attending school.²⁸

In turning to the merits of Carleton's constitutional claims, Chief Justice Rugg pointed out that "[n]either the Constitution of this Commonwealth nor that of the United States contains any definition of religion."²⁹ To define religion Chief Justice Rugg went back half a century to the Supreme Court's opinion in *Davis v. Beason*,³⁰ which sustained a territorial statute disenfranchising adherents of polygamy.³¹ The Court there stated that "[t]he term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will."³² Viewed from this perspective, said Chief Justice Rugg, it was apparent that

the flag salute and pledge of allegiance here in question do not in any just sense relate to religion. They are not observances which are religious in nature. . . . They impose no obligations as to religious worship. They are wholly patriotic in design and purpose. . . . The pledge of allegiance to the flag . . . is an acknowledgment of sovereignty, a promise of obedience, a recognition of authority above the will of the individual, to be respected and obeyed. It has nothing to do with religion.³³

Accordingly, since "[t]here is nothing in the salute or the pledge of allegiance which constitutes an act of idolatry, or which approaches to any religious observance," it follows that the required observance "does not in any reasonable sense hurt, molest, or restrain a human being in respect to 'worshipping God' within the meaning of the words in the [Massachusetts] Constitution."³⁴ Chief Justice Rugg then rejected Carleton's federal constitutional claims on the authority of *Hamilton v. Regents of the University of California*,³⁵ decided by the Supreme Court in 1934. There, speaking through Justice Butler and with a concurrence by Justice Cardozo, the Court rejected a challenge by two religiously-motivated pacifist students to a rule prescribed by the Regents of the University of California requiring male undergraduates to take a course in military

28. 297 Mass. at 68, 7 N.E.2d at 579 (citations omitted).

29. *Id.*

30. 133 U.S. 333 (1890).

31. In *Davis v. Beason* the Court affirmed a denial of *habeas corpus* on behalf of one who, with others, was convicted of conspiring to obstruct territorial law by falsely swearing, in order to be registered as Idaho voters, that they did not belong to an organization advocating polygamy when they were in fact members of the Mormon Church.

32. 133 U.S. at 342.

33. 297 Mass. at 70-71, 7 N.E.2d at 580.

34. *Id.*

35. 293 U.S. 245 (1934).

science.³⁶ Chief Justice Rugg did not address certain elements of *Hamilton v. Regents* which would seem to distinguish that case from the case at bar — namely, that the *Hamilton v. Regents* plaintiffs were not directed by the university to participate in some particularized form of ritual, and, furthermore, that, as Justice Butler noted, “California has not drafted or called them to attend the university.”³⁷

Chief Justice Rugg’s opinion, handed down on April 1, 1937, terminated the *Nicholls* litigation; not regarding the case as presenting a promising platform for further development of the federal claims, counsel forbore to seek Supreme Court review.³⁸ But appeals to the Supreme Court were taken in two other state cases — one from Georgia and one from New Jersey — that were virtually contemporaneous with *Nicholls* and tracked it closely in result and in rationale. In both instances the Court “dismissed [the appeal] for the want of a substantial federal question,”³⁹ citing *Hamilton v. Regents*.⁴⁰ The first dismissal was on December 13, 1937, the second on March 14, 1938. And a little more than a year later, the Court denied certiorari to review a decision of the California Supreme Court⁴¹ which followed, as controlling, the Court’s dismissals of the appeals from the

36. The plaintiffs were members of the Methodist Episcopal Church which had, in the early 'thirties, taken the doctrinal position that church members who were conscientious objectors should be exempt from military service and training. *Id.* at 251-53.

37. *Id.* at 262. In putting into focus the Fourteenth Amendment claim advanced by the *Hamilton v. Regents* plaintiffs, Justice Butler said that “[t]here need be no attempt to enumerate or comprehensively to define what is included in the ‘liberty’ protected by the due process clause. Undoubtedly it does include the right to entertain the beliefs, to adhere to the principles and to teach the doctrines on which these students base their objections to the order prescribing military training.” *Id.* (citations omitted). Justice Cardozo, whose concurrence was joined by Justices Brandeis and Stone, stated that “I assume for present purposes that the religious liberty protected by the First Amendment against invasion by the nation is protected by the Fourteenth Amendment against invasion by the states”; nonetheless, “I cannot find in the respondents’ ordinance an obstruction by the state to ‘the free exercise’ of religion as the phrase was understood by the founders of the nation, and by the generations that have followed. *Davis v. Beason*, 133 U.S. 333, 342.” *Id.* at 265. In assuming that the Fourteenth Amendment embraced the First Amendment’s religious liberties, Justice Cardozo paralleled the course pursued in *Gitlow v. New York*, 268 U.S. 652, 666 (1925), where the Court stated “we may and do assume that freedom of speech and of the press — which are protected by the First Amendment from abridgment by Congress — are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States.” The *Gitlow* assumption soon bore fruit in *Fiske v. Kansas*, 274 U.S. 380 (1927), *Stromberg v. California*, 283 U.S. 359 (1931), and *Near v. Minnesota*, 283 U.S. 697 (1931). Justice Cardozo’s cognate assumption was to bear fruit in *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

38. Evidently ACLU counsel were directing appellate strategy, and they may reasonably have felt that the federal claims had not been effectively presented to the Supreme Judicial Court, which was the court of first instance. D. MANWARING, *supra* note 8, at 59.

39. *Leoles v. Landers*, 302 U.S. 656, *dismissing appeal from* 184 Ga. 580, 192 S.E. 218 (1937), and *Hering v. State Bd. of Educ.*, 303 U.S. 624 (1938), *dismissing appeal from* 118 N.J.L. 566, 194 A. 177, *aff’g* 117 N.J.L. 525, 189 A. 629 (1937).

40. In both dismissals, the Court also cited *Coale v. Pearson*, 290 U.S. 597 (1933), *dismissing appeal from* 165 Md. 224, 167 A. 54 (1933), which Justice Butler had characterized as “similar” to the case at bar in *Hamilton v. Regents*, 293 U.S. at 264 (1936).

41. *Gabrieli v. Knickerbocker*, 12 Cal. 2d 85, 82 P.2d 991 (1938), *appeal dismissed and cert. denied*, 306 U.S. 621 (1939). The Court first dismissed the attempted appeal for want of jurisdiction (presumably because a local school rule, rather than a state statute, was involved), and then, treating the appeal papers as a petition for certiorari, denied the writ.

Georgia and New Jersey decisions. On the same day the Court affirmed a judgment of a three-judge Massachusetts federal court which, in reliance on *Nicholls* and on *Hamilton v. Regents*, denied an application for a declaratory judgment invalidating the Massachusetts flag-salute statute.⁴²

The foregoing decisions, and others in the late 'thirties in which Supreme Court review was not sought,⁴³ formed a strong doctrinal corpus for the proposition that public school children could be required to participate in flag observance ceremonies notwithstanding their religiously-based resistance to manifesting obeisance to a symbol of secular authority. But the judicial chorus was not unanimous. There were mutterings of disagreement from a Texas appellate court.⁴⁴ And Judge Irving Lehman of the New York Court of Appeals filed a notable concurring opinion in a case in which his colleagues, while sustaining the validity of an obligatory school flag salute, held that the parents of a non-saluting thirteen-year old who sent their daughter back to school each time she was sent home for refusing to salute could not be prosecuted criminally for failing to "cause such minor to attend upon instruction as hereinbefore required."⁴⁵ The majority of the court, while sustaining the salute, made plain its hope that school authorities could gain compliance through tactful instruction rather than coercion. But if all else failed and "it is thought necessary to carry the matter further, the action must be against the scholar, not the parents."⁴⁶ Judge Lehman, writing separately, put his doubts about coercion into doctrinal form:

The salute to the flag is a gesture of love and respect — fine when there is real love and respect back of the gesture. The flag is dishonored by a salute by a child in reluctant and terrified obedience to a command of secular authority which clashes with the dictates of conscience. The flag "cherished by all our hearts" should not be soiled by the tears of a little child. The Constitution does not permit, and the Legislature never intended, that the flag should be so soiled and dishonored.⁴⁷

Judge Lehman's discordant views, announced from the highest bench in New York, had been anticipated by a trial judge in Pennsylvania. That judge was Albert Branson Maris, appointed a federal district judge by Franklin Roosevelt on June 22, 1936, who was to be elevated to the Third Circuit two years later, and who was to become the longest-serving federal judge in the history of the republic.⁴⁸ The travail of Lillian and Wil-

42. *Johnson v. Deerfield*, 25 F. Supp. 918 (D. Mass.), *aff'd*, 306 U.S. 621 (1939).

43. *State ex rel. Bleich v. Board of Pub. Instruction*, 139 Fla. 43, 190 So. 815 (1939); *People ex rel. Fish v. Sandstrom*, 279 N.Y. 523, 18 N.E.2d 840 (1939).

44. *Reynolds v. Rayborn*, 116 S.W.2d 836 (Tex. Civ. App. 1938).

45. 279 N.Y. at 526, 18 N.E.2d at 841 (majority opinion quoting N.Y. EDUC. LAW § 627(B)(2)(Consol. Laws ch. 16)).

46. *Id.* at 533, 18 N.E.2d at 844.

47. *Id.* at 539, 18 N.E.2d at 847 (Lehman, J., concurring).

48. Judge Maris — a judge for fifty-two years and four-and-a-half months as of the date of this lecture — eclipsed Learned Hand in judicial longevity. Judge Hand was appointed a district judge in May of 1909, was elevated to the Second Circuit in 1924, and died in August

liam Gobitas (transformed, by errors of school officials and lawyers, into "Gobitis") began in the fall of 1935, several months before Maris became a judge. Lillian, twelve, and William, ten, were children enrolled in the Minersville public schools. Flag observance had been traditional in the Minersville schools for some twenty years,⁴⁹ but no school rule required such observance until November 6, 1935. On that day, in the face of unwillingness by Lillian and William and another Jehovah's Witness child to continue to participate — a stance evidently influenced by the widely publicized defiance of Carleton Nicholls two months before — the school board approved a resolution directing

[t]hat the Superintendent of the Minersville Public Schools be required to demand that all teachers and pupils of the said schools be required to salute the flag of our Country as a part of the daily exercises. That refusal to salute the flag shall be regarded as an act of insubordination and shall be dealt with accordingly.⁵⁰

Lillian and William remained unwilling to participate in the prescribed ceremony. Lillian tried to explain why:

The Constitution of the United States is based upon religious freedom. According to the dictates of my conscience, based on the Bible, I must give full allegiance to Jehovah God.⁵¹

And William wrote:

Our School Directors

Dear Sirs

I don't salute the flag because I have promised to do the will of God. That means that I must not worship anything out of harmony with God's commandments.⁵²

Rejecting these explanations, the school board on the same day authorized Superintendent Charles E. Roudabush to expel Lillian and William and another recalcitrant Jehovah's Witness student. Superintendent Roudabush did as he was bade — and, one surmises, performed the chore of expelling the children with some gusto, given the views he was to express some years later:

There is nothing in this pledge which should in any way conflict with any good citizen's religion. . . . It is evident that any religion which takes exception to this obligation or respect owed by every

of 1961. See as to Judge Maris, BICENTENNIAL COMMITTEE, JUDICIAL CONFERENCE OF THE UNITED STATES, *JUDGES OF THE UNITED STATES* 311-12 (2d ed. 1983), and, as to Judge Hand, *id.* at 206. Judge Maris died on February 7, 1989. He had turned ninety-five two months earlier. Judge Maris filed his last opinion for the Third Circuit — *Henry v. Perry*, Civ. No. 88-3226 — on February 6, 1989, the day before he died.

49. D. MANWARING, *supra* note 8, at 82.

50. *Id.* at 83 (quoting Minersville School Board Minutes (Nov. 6, 1935)).

51. Orenstein, *Flag Salute Flap recalls the old days in Minersville*, *The Morning Call* (Allentown, Pa.), Oct. 9, 1988, at A.1, A.2.

52. *Id.* at A.1.

American to his country's flag fosters a spirit of antagonism to his country, its laws, institutions and traditions.⁵³

Also, according to the Superintendent, "America is going wild on so-called liberty and freedom. Academic freedom cannot be applied to children of teen ages and, especially, to those who have been given dwarfed education at home."⁵⁴

Walter Gobitis, Lillian's and William's father, brought suit in their behalf in federal court. Contending that the expulsion of his children contravened the state and federal Constitutions, the plaintiff sought to enjoin the school board and Superintendent Roudabush from enforcing the Roudabush order. In an opinion filed on December 1, 1937, Judge Maris denied the defendants' motion to dismiss:

If an individual sincerely bases his acts or refusals to act on religious grounds they must be accepted as such and may only be interfered with if it becomes necessary to do so in connection with the exercise of the police power, that is, if it appears that the public safety, health or morals or property or personal rights will be prejudiced by them. To permit public officers to determine whether the views of individuals sincerely held and their acts sincerely undertaken on religious grounds are in fact based on convictions religious in character would be to sound the death knell of religious liberty. To such a pernicious and alien doctrine this court cannot subscribe.⁵⁵

Noting that it "seems obvious that [Lillian's and William's] refusal to salute the flag in school exercises could not in any way prejudice or imperil the public safety, health or morals or the property or personal rights of their fellow citizens," Judge Maris concluded that the School Board's "requirement of that ceremony as a condition of the exercising of their right or the performance of their duty to attend the public schools violated the Pennsylvania Constitution and infringed the liberty guaranteed them by the Fourteenth Amendment."⁵⁶ Judge Maris acknowledged that the highest courts of Massachusetts, Georgia, and New Jersey had come to a different conclusion. But he said that those courts had "overlooked the fundamental principle of religious liberty to which we have referred,"⁵⁷ and that the reliance of those courts on *Hamilton v. Regents* was misplaced, since that case (1) *was* one in which public safety was significantly implicated, and (2) *was not* one in which the excluded students were required by law to attend school. By contrast, in the case of Lillian and William, "[o]ur beloved flag, the emblem of religious liberty, has apparently been used as an instrument to impose a religious test as a condition

53. *Id.* at A.2.

54. *Id.*

55. *Gobitis v. Minersville School Dist.*, 21 F. Supp. 581, 584 (E.D. Pa. 1937), *aff'd*, 108 F.2d 683 (3d Cir. 1939), *rev'd* 310 U.S. 586 (1940).

56. *Id.*

57. *Id.*

of receiving the benefits of public education. And this has been done without any compelling necessity of public safety or welfare."⁵⁸

Six months later, following a trial, Judge Maris filed a further opinion containing findings of fact and conclusions of law. "The facts as I have found them sustain the allegations of the bill."⁵⁹ Accordingly, after reaffirming the principles announced in his earlier denial of the motion to dismiss, Judge Maris concluded that the challenged expulsion order "deprives the plaintiffs of their liberty without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States,"⁶⁰ wherefore the

plaintiffs are entitled to an injunction against the defendants restraining them from continuing in force the order expelling the minor plaintiffs from the Minersville Public School and prohibiting their attendance at said school and from requiring the minor plaintiffs to salute the national flag as a condition of their right to attend the said school.⁶¹

Two things Judge Maris did not do should be noted. He did not reiterate his previous recital that the action of the defendants contravened the Pennsylvania Constitution. And he did not reexamine his prior assessment of *Nicholls* and the Georgia and New Jersey cases as insufficiently sensitive to the "fundamental principle of religious liberty"⁶² involved, notwithstanding that the Supreme Court had in the interim dismissed appeals from the Georgia and New Jersey decisions and had cited *Hamilton v. Regents* in its orders of dismissal.⁶³

Over a year later, in November of 1939, the Third Circuit affirmed Judge Maris.⁶⁴ Of the extended opinion filed by Judge William Clark little need be said. The principal point to be made is the confident assertion that the entire corpus of Anglo-American jurisprudence, from the Year Books to our own time, will not disclose any other opinion that ranks as high on the Richter scale of judicial pomposity.⁶⁵ The second point — a matter of judicial technique — is that the only doctrinal discussion that cuts close to the heart of the case was reserved for a document entitled "Appendix;" there Judge Clark made the point (which was not a trivial one) that three of the four cases in which the Supreme Court had dismissed appeals or affirmed were situations in which "the state legislature declared,

58. *Id.* at 585.

59. *Gobitis v. Minersville School Dist.*, 24 F. Supp. 271, 274 (E.D. Pa. 1938), *aff'd*, 108 F.2d 683 (3d Cir. 1939), *rev'd*, 310 U.S. 586 (1940).

60. *Id.* at 275.

61. *Id.*

62. 21 F. Supp. at 584.

63. See *supra* note 39 and accompanying text.

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

65. For example, the opinion opens with the following: "Eighteen big states have seen fit to exert their power over a small number of little children ('and forbid them not')." (indicating in footnotes that the "[t]otal population [of the 'big states'] according to the latest census [was] circa 38,000,000" and that "[a]ccording to the latest casualty lists [the number of children was] circa 120"). *Id.* at 683.

and the highest state court affirmed, a policy of flag saluting," by reason of which "[t]he connection between an omission to salute the flag and the commission of an injury to the public weal, becomes legally and factually closer."⁶⁶ In the fourth case, which involved a regulation that had been upheld by the state's highest court, the Supreme Court dismissed the appeal for want of jurisdiction and denied certiorari.⁶⁷

The Third Circuit's affirmance of Judge Maris was the first appellate determination that an obligatory flag salute was, as to participants whose religious principles precluded obeisance to secular symbols, unconstitutional. Predictably, the Minersville School authorities petitioned for certiorari. Had Judge Clark's opinion invalidated the salute on the dual grounds adumbrated by Judge Maris' first opinion — i.e., that the compulsion transgressed both the state and federal Constitutions — it is conceivable that the Supreme Court would not have thought the Third Circuit's decision required review. For under those circumstances the judgment of the Third Circuit could not have been reversed unless the Supreme Court were to overturn the lower courts' construction of the Pennsylvania Constitution; and it is, of course, most unusual for the Supreme Court to find error in the concurrent holdings of a district court and a court of appeals on a matter of local law. But the state constitutional claim was not mentioned in the conclusions of law contained in Judge Maris' second opinion — the conclusions of law undergirding his decree. And, similarly, Judge Clark treated the case as solely a federal matter: "These little children ('suffer them') are asking us to afford them the protection of the First Amendment . . . to the Constitution and to permit them the 'free exercise' of their 'religion'."⁶⁸ Under these circumstances, the Third Circuit's ruling was clearly in tension with the Georgia, New Jersey and Massachusetts rulings that Judge Clark had sought to distinguish. Supreme Court review was appropriate. Certiorari was granted on March 4, 1940.⁶⁹

The case was argued on April 25 and decided on June 3. On that June morning — as Britain was completing the evacuation of hundreds of thousands of allied troops from Dunkirk, and Hitler's armies were consolidating their sweep through the low countries and into France — Chief Justice Hughes called upon Justice Frankfurter to announce the Court's decision

66. *Id.* at 693 (citation omitted). In a closing flourish of pomposity, the final portion of the "Appendix" begins: "The record before us sheds but little light on the problems in educational psychology here discussed." *Id.* at 694.

67. *Id.* at 693.

68. *Id.* at 684. Plaintiffs' counsel did contend in the Supreme Court that defendants' actions contravened the Pennsylvania Constitution, but neither the Court's opinion nor the dissent mentioned the contention. 310 U.S. at 589-90 (1940).

69. 309 U.S. 645 (1940). In his opinion for the Court, Justice Frankfurter explained that certiorari was granted because the decision below "ran counter to several *per curiam* dispositions of this Court." 310 U.S. at 592. The footnote supporting this recital cites *Leoles v. Landers*, 302 U.S. 656 (1937) (dismissing the appeal from the Georgia court's decision); *Hering v. State Bd. of Educ.*, 303 U.S. 624 (1938) (dismissing the appeal from the New Jersey court's decision); *Gabrielli v. Knickerbocker*, 306 U.S. 621 (1939) (dismissing the appeal and denying certiorari to review the California court's decision); and *Johnson v. Deerfield*, 306 U.S. 621 (affirming the Massachusetts three-judge federal district court's decision), *reh'g denied*, 307 U.S. 650 (1939). See *supra* notes 39, 41 and 42.

in No. 690, *Minersville School District v. Gobitis*.⁷⁰ The opinion began by stating the case and explaining why certiorari was granted. Then the opinion paid handsome acknowledgement to two *amici* briefs which urged affirmance: "By their able submissions, the Committee on the Bill of Rights of the American Bar Association and the American Civil Liberties Union, as friends of the Court, have helped us to our conclusion."⁷¹ But affirmance was not the conclusion to which the *amici* helped the Court. The Court reversed the Third Circuit. Justice Frankfurter's opinion referred to some of the principal religion cases, including *Hamilton v. Regents*, and also certain of the polygamy cases, such as *Davis v. Beason*.⁷² Then, after observing that "[w]e are dealing with an interest inferior to none in the hierarchy of legal values" and that "[n]ational unity is the basis of national security,"⁷³ Justice Frankfurter said:

The precise issue . . . for us to decide is whether the legislatures of the various states and the authorities in a thousand counties and school districts of this country are barred from determining the appropriateness of various means to evoke that unifying sentiment without which there can ultimately be no liberties, civil or religious. . . .

The wisdom of training children in patriotic impulses by those compulsions which necessarily pervade so much of the educational process is not for our independent judgment. . . . For ourselves, we might be tempted to say that the deepest patriotism is being engendered by giving unfettered scope to the most crochety [sic] beliefs. . . . But the courtroom is not the arena for debating issues of educational policy. . . . So to hold would in effect make us the school board for the country. That authority has not been given to this Court, nor should we assume it.

. . .

That the flag-salute is an allowable portion of a school program for those who do not invoke conscientious scruples is surely not debatable. But for us to insist that, though the ceremony may be required, exceptional immunity must be given to dissidents, is to maintain that there is no basis for a legislative judgment that such an exemption might introduce elements of difficulty into the school discipline, might cast doubts in the minds of the other children which would themselves weaken the effect of the exercise. . . .

Judicial review, itself a limitation on popular government, is a fundamental part of our constitutional scheme. But to the legislature no less than to courts is committed the guardianship of deeply-cherished liberties.⁷⁴

70. 310 U.S. 586.

71. *Id.* at 592. It would appear from the report of the case that these were the only *amici*.

72. *Id.* at 594-95.

73. *Id.* at 595.

74. *Id.* at 597-600.

Joining Justice Frankfurter were the Chief Justice and Justices Roberts, Black, Reed, Douglas and Murphy. Justice McReynolds concurred in the result. Justice Stone dissented alone; the closing paragraphs of his opinion were these:

The Constitution expresses more than the conviction of the people that democratic processes must be preserved at all costs. It is also an expression of faith and a command that freedom of mind and spirit must be preserved, which government must obey, if it is to adhere to that justice and moderation without which no free government can exist. For this reason it would seem that legislation which operates to repress the religious freedom of small minorities, which is admittedly within the scope of the protection of the Bill of Rights, must at least be subject to the same judicial scrutiny as legislation which we have recently held to infringe the constitutional liberty of religious and racial minorities.

With such scrutiny I cannot say that the inconveniences which may attend some sensible adjustment of school discipline in order that the religious convictions of these children may be spared, presents a problem so momentous or pressing as to outweigh the freedom from compulsory violation of religious faith which has been thought worthy of constitutional protection.⁷⁵

Gobitis was to last only three years. Although it is hardly commonplace for the Court to overrule an earlier constitutional ruling, it has happened a number of times in the one hundred and eighty-five years since the Court first wielded the gavel of judicial review. And in one notorious instance — the *Legal Tender Cases*⁷⁶ — the turn-about was accomplished within a year. But in the *Legal Tender Cases* what changed a five-to-three ruling into a contrary five-to-four ruling was the retirement of one justice and the appointment of two. In the flag-salute cases, three members of the *Gobitis* majority — Justices Black, Douglas and Murphy — announced in June of 1942 their abandonment of the position they had subscribed to only two years before. That announcement came in dissent from the Court's validation, in *Jones v. Opelika*,⁷⁷ of municipal ordinances in Alabama, Arkansas and Arizona which required street vendors to pay a license fee; in amplifying their view that the exaction of a fee from Jehovah's Witnesses selling Witness publications was unconstitutional, the three Justices said:

The opinion of the Court sanctions a device which in our opinion suppresses or tends to suppress the free exercise of a religion practiced by a minority group. This is but another step in the direction which *Minersville School District v. Gobitis*, 310 U.S. 586,

75. *Id.* at 606-07.

76. *Knox v. Lee*, 79 U.S. 457 (1871) *overruling* *Hepburn v. Griswold*, 75 U.S. 603 (1870).

77. 316 U.S. 584 (1942). Chief Justice Stone also dissented. The majority consisted of Justices Reed (the author of the Court's opinion), Roberts, Frankfurter, Byrnes and Jackson.

took against the same religious minority, and is a logical extension of the principles upon which that decision rested. Since we joined in the opinion in the *Gobitis* case, we think this is an appropriate occasion to state that we now believe it also was wrongly decided. Certainly our democratic form of government, functioning under the historic Bill of Rights, has a high responsibility to accommodate itself to the religious views of minorities, however unpopular and unorthodox those views may be. The First Amendment does not put the right freely to exercise religion in a subordinate position. We fear, however, that the opinion in these and in the *Gobitis* case do exactly that.⁷⁸

The defection of Justices Black, Douglas and Murphy, while dramatic, was not of itself sufficient to overturn *Gobitis*. What broke the back of *Gobitis* was the retirement of two members of the *Gobitis* majority — Chief Justice Hughes and Justice McReynolds — and their replacement by justices of a different temper. The new justices were Jackson and Rutledge.⁷⁹ Justice Rutledge's views were a matter of public record. In April of 1942, two months before *Jones v. Opelika*, while still a member of the Court of Appeals for the District of Columbia, Justice Rutledge had dissented from a judgment sustaining the application of a District of Columbia street-vendor licensing ordinance to two Jehovah's Witnesses selling Witness periodicals, *Watchtower* and *Consolation*:

This is no time to wear away further the freedoms of conscience and mind by nicely technical or doubtful construction. Everywhere they are fighting for life. War has now added its censorships. They, with other liberties, give ground in the struggle. They can be lost in time also by steady legal erosion wearing down broad principle into thin right. Jehovah's Witnesses have had to choose between their consciences and public education for their children. In my judgment, they should not have to give up also the right to disseminate their religious views in an orderly manner on the public streets, exercise it at the whim of public officials, or be taxed for doing so without their license. I think the judgment should be reversed.⁸⁰

Justice Jackson, by contrast, was on the Supreme Court when *Jones v. Opelika* was decided, and he joined Justice Reed's majority opinion. So there was no public indication that Justice Jackson would embrace an opportunity to jettison *Gobitis*. But the Justice's former cabinet colleagues may have recalled that in June of 1940, Jackson, then Attorney General, had expressed at a cabinet meeting his vehement disagreement with Justice Frankfurter's *Gobitis* opinion.⁸¹

78. *Id.* at 623-24.

79. To be precise, Justice Jackson replaced Justice Stone, who was elevated to the center chair on Chief Justice Hughes' retirement, and Justice Rutledge replaced Justice Byrnes, who served briefly in succession to Justice McReynolds.

80. *Busey v. District of Columbia*, 129 F.2d 24, 38 (D.C. Cir. 1942). See Pollak, *Wiley Blount Rutledge: Profile of a Judge*, 1979 U. ILL. L. FORUM 301 (1979) (discussing Justice Rutledge's decision in *Busey* and his subsequent jurisprudence on the Supreme Court).

81. Blue, *One Nation, Divisible. With Liberty For None*, N.Y. Times, Sept. 2, 1988, at A27, col. 2. See III THE SECRET DIARY OF HAROLD L. ICKES 199, 211 (1954).

The vehicle for reexamining *Gobitis* was not long in coming. In early 1942, the West Virginia State Board of Education adopted a resolution which, after extended paraphrase of portions of the *Gobitis* opinion, described "the commonly accepted salute to the Flag," including the Pledge of Allegiance, and directed "all teachers . . . and pupils in such [public] schools . . . to participate in the salute . . . provided, however, that refusal to salute the Flag be regarded as an act of insubordination, and shall be dealt with accordingly."⁸²

Following the decision in *Jones v. Opelika*, three Jehovah's Witness parents — Walter Barnett⁸³ and a sister and a brother-in-law — sued in a federal district court to enjoin enforcement of the directive as against their own and all other children enrolled in public schools whose religious scruples precluded participation in the flag-salute ceremony. Because the directive was rooted in a state statute and was of statewide application, a three-judge panel was convened; the panel was chaired by Judge John Parker, the senior member of the Fourth Circuit. A motion to dismiss, predicated on *Gobitis*, was denied.⁸⁴ Judge Parker's opinion noted that three members of the *Gobitis* majority had abandoned it in *Jones v. Opelika*, and, moreover, that the Court's opinion in *Jones v. Opelika* had disclaimed reliance on *Gobitis* in reaching the *Jones v. Opelika* result.⁸⁵ Judge Parker wrote:

Under such circumstances, and believing, as we do, that the flag salute here required is violative of religious liberty when required of persons holding the religious views of plaintiffs, we feel that we would be recreant to our duty as judges, if through a blind following of a decision which the Supreme Court has thus impaired as an authority, we would deny protection to rights which we regard as among the most sacred of those protected by constitutional guaranties.⁸⁶

Accordingly, Judge Parker and his colleagues determined "that the regulation of the Board requiring that school children salute the flag is void in so far as it applies to children having conscientious scruples against giving such salute and that, as to them, its enforcement should be enjoined."⁸⁷

82. Resolution of West Virginia Board of Education, January 9, 1942, *reprinted in* 319 U.S. at 626-28, n.2 (1943).

83. His name somehow became "Barnette" in court. See D. MANWARING, *supra* note 8, at 303 n.14.

84. *Barnette v. West Virginia State Bd. of Educ.*, 47 F. Supp. 251 (D. W. Va. 1942), *aff'd* 319 U.S. 624 (1943).

85. "No religious symbolism is involved, such as was urged against the flag salute in [*Gobitis*]. For us there is no occasion to apply here the principles taught by that opinion." *Jones v. Opelika*, 316 U.S. 584, 598 (1942).

86. 47 F. Supp. at 253. At the time of Judge Parker's opinion, Justice Rutledge had not yet been named to the Court, so consideration of his view of *Gobitis* was not called for. For a discussion of Judge Parker's non-obedient posture toward an as-of-then unoverruled Supreme Court precedent, see Pollak, *supra* note 80, at 313-15.

87. 47 F. Supp. at 255.

On direct appeal from the three-judge court, the Supreme Court, speaking through Justice Jackson, affirmed. The celebrated rhetoric of Justice Jackson's opinion in *West Virginia State Board of Education v. Barnette*⁸⁸ — "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein"⁸⁹ — was matched by the passion of Justice Frankfurter's dissent:

One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution. Were my purely personal attitude relevant I should wholeheartedly associate myself with the general libertarian views in the Court's opinion, representing as they do the thought and action of a lifetime. But as judges we are neither Jew nor Gentile, neither Catholic nor agnostic. We owe equal attachment to the Constitution and are equally bound by our judicial obligations whether we derive our citizenship from the earliest or latest immigrants to these shores. As a member of this Court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard.⁹⁰

Justices Roberts and Reed dissented in *Barnette* because they continued to "adhere to the views expressed by the Court in [*Gobitis*]."⁹¹ Justices Black and Douglas, while "substantially in agreement" with Justice Jackson, filed a brief concurrence elaborating on their "change of view" from *Gobitis*.⁹² Justice Murphy, stating "I agree with the opinion of the Court and join in it," also filed a brief concurrence.⁹³ Chief Justice Stone and Justice Rutledge were evidently content with Justice Jackson's opinion, for they said nothing.

Barnette, decided on Flag Day in 1943, is the Supreme Court's last word on the flag salute. The difficulties that confronted Governor Dukakis thirty-four years after *Barnette* in deciding whether to veto the 1977 bill, and the difficulties that we may confront today, forty-five years after *Barnette*, in second-guessing the Governor's veto, are compounded by the fact that the constitutional logic deployed by Justice Jackson in *Barnette* did

88. 319 U.S. 624 (1943).

89. *Id.* at 642.

90. *Id.* at 646-47. According to Max Freedman:

When Frankfurter circulated this dissent, two members of the Supreme Court, who need not be identified here, called formally on Frankfurter in his Chambers to plead with him to omit or soften this opening paragraph. They said it was too emotional and too personal for inclusion in a Supreme Court opinion. Frankfurter said they had given him very good reasons for taking these words out, but he had even better reasons for keeping them in; and in they stayed.

FREEDMAN, ROOSEVELT AND FRANKFURTER, THEIR CORRESPONDENCE, 1928-1945 701 (1967).

91. 319 U.S. at 642-43 (Roberts & Reed, J.J., dissenting).

92. *Id.* at 643 (Black & Douglas, J.J., concurring).

93. *Id.* at 644 (Murphy, J., concurring).

not keep pace with his rhetoric. What Justice Jackson tried to do was to defeat *Gobitis* by outflanking it rather than by meeting it frontally. But the flanking maneuver failed.

What happened was this: Justice Frankfurter had, it will be recalled, said in *Gobitis*: "That the flag-salute is an allowable portion of a school program for those who do not invoke conscientious scruples is surely not debatable."⁹⁴ And then Justice Frankfurter went on to argue that judicial insistence that "exceptional immunity must be given to dissidents"⁹⁵ would involve an insupportable judicial finding that those state officials charged with making school policy could not reasonably have concluded that an exemption for dissenting children "might cast doubts in the minds of the other children which would themselves weaken the effect of the exercise."⁹⁶ But, rather than undertaking to reassess the balance Justice Frankfurter struck in favor of state officialdom and against those asserting religious scruples, Justice Jackson recast the issue so as to put out of account

one's possession of particular religious views or the sincerity with which they are held. While religion supplies appellees' motive for enduring the discomforts of making the issue in this case, many citizens who do not share these religious views hold such a compulsory rite to infringe constitutional liberty of the individual.⁹⁷

Then, having eviscerated the very elements that had given the plaintiffs standing in *Barnette* and in *Gobitis*, Justice Jackson said:

The *Gobitis* decision . . . assumed, as did the argument in that case and in this, that power exists in the State to impose the flag salute discipline upon school children in general. The Court only examined and rejected a claim based on religious beliefs of immunity from an unquestioned general rule. The question which underlies the flag salute controversy is whether such a ceremony so touching matters of opinion and political attitude may be imposed upon the individual by official authority under powers committed to any political organization under our Constitution. We examine rather than assume existence of this power . . .⁹⁸

And the balance of the opinion is an attempt to demonstrate the non-existence of "this power." The argument is arresting:

National unity as an end which officials may foster by persuasion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement.

Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged

94. *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 599 (1940).

95. *Id.* at 599-600.

96. *Id.* at 600.

97. 319 U.S. at 634-35.

98. *Id.* at 635-36 (citation omitted).

by many good as well as by evil men. . . . As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity. . . . Compulsory unification of opinion achieves only the unanimity of the graveyard.

It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings.⁹⁹

Sobering and noble words. But do they, as Justice Jackson supposed, undermine Justice Frankfurter's proposition that, questions of the religious scruples of particular children aside: power exists in the State to impose the flag salute discipline upon school children in general?¹⁰⁰ The question is one I tried to address twenty-five years ago, when I first endeavored to go behind the words of *Barnette* to what those words signified. The answer I then formulated is one I cannot improve on, so I will take the liberty of sharing it with you. To conclude that there is in the panoply of state sovereignty no general power to require school children to salute the flag is, I said:

certainly, an unconventional view of the constitutional limitations imposed upon the states. The states, after all, are the repositories of general governmental power. And — questions of federal supremacy aside — this means that for the most part the Constitution limits state authority only insofar as particular exertions of the state's general governmental power impinge on the several federal rights specified in the fourteenth amendment and other limiting provisions of the Constitution. Surely what Justice Frankfurter meant, when he said in *Gobitis* that West Virginia's power to include a flag salute in the school program was "not debatable," was that — apart from the question of the state's power to require the salute of those who asserted particularized federal liberties — West Virginia had as much authority to require a flag salute as to make each schoolchild learn the national anthem or take courses in the history of West Virginia and the United States.

There appear to be only two qualifications of the broad proposition that the states may, apart from the particularized federal liberties, exert their general governmental powers as they will. One qualification, which has thus far substantially defied judicial enforcement, is that the states must maintain a republican form of government. Another is that the states must refrain from undertaking programs "respecting an establishment of religion." The flag salute was not regarded as an establishment of religion by Justice Jackson or those Justices who joined his opinion. Nor should it have been so regarded, for it was not a religious exer-

99. *Id.* at 640-41.

100. 310 U.S. at 599.

cise. It was simply an exercise which impinged on the religious, and perhaps other, first amendment scruples of some schoolchildren.¹⁰¹

Why do I belabor this issue? Because, in determining the impact of *Barnette* on subsequently emergent problems — e.g., the constitutionality of the bill Governor Dukakis decided to veto — it may matter a great deal whether Justice Jackson's eschewal of interest in a would-be non-saluter's "possession of particular religious views or the sincerity with which they are held" is to be understood as the considered view of a majority of the *Barnette* Court — i.e., at least five of the six justices who voted to affirm — and hence *precedential*, or only as the considered view of a plurality. Cutting in favor of giving full weight to what Justice Jackson wrote is that Justice Murphy's concurrence not only expressed agreement with the opinion of the Court but also contained the following statement: "I am unable to agree that the benefits that may accrue to society from the compulsory flag salute are sufficiently definite and tangible to justify the invasion of freedom and privacy that is entailed or to compensate for a restraint on the freedom of the individual to be vocal or silent according to his conscience or personal inclination."¹⁰² Cutting the other way is that Justices Black and Douglas, in the concurrence in which they characterized themselves as "substantially in agreement with the [Court's] opinion,"¹⁰³ concluded as follows:

Neither our domestic tranquility in peace nor our martial effort in war depend on compelling little children to participate in a ceremony which ends in nothing for them but a fear of spiritual condemnation. If, as we think, their fears are groundless, time and reason are the proper antidotes for their errors. The ceremonial, when enforced against conscientious objectors, more likely to defeat than to serve its high purpose, is a handy implement for disguised religious persecution. As such, it is inconsistent with our Constitution's plan and purpose.¹⁰⁴

Eighteen years after *Barnette*, Justice Harlan, in a concurring opinion, endorsed the *Barnette* language that I regard as problematic. The case, *Lathrop v. Donahue*,¹⁰⁵ involved a challenge to an integrated bar's use of the dues of the plaintiff member to advance political causes to which the plaintiff did not subscribe. The plurality did not reach the merits of the case, regarding the challenge as insufficiently concrete. Justice Harlan rejected the challenge on the merits, and, in so doing, intimated that the case would have required a different result had the state bar, like the school board in *Barnette*, compelled the plaintiff to speak on behalf of the state organization: "The holding of *Barnette* was that, no matter how strong or weak such beliefs might be, the Legislature of West Virginia was not

101. Pollak, *Foreword: Public Prayers in Public Schools*, 77 HARV. L. REV. 62, 72 (1963).

102. 319 U.S. at 646 (Murphy, J., concurring).

103. *Id.* at 643 (Black & Douglas, J.J., concurring).

104. *Id.* at 644.

105. 367 U.S. 820 (1961).

free to require as concrete and intimate an expression of belief in any cause as that involved in a compulsory pledge of allegiance."¹⁰⁶

Notwithstanding this weighty sponsorship, and the added fact that Justice Frankfurter joined Justice Harlan's concurrence, I would not regard it as prudent to treat *Barnette* so broadly — i.e., as holding that the *Barnette* plaintiffs' children's "possession of particular religious views" was irrelevant to the result. It seems to me instructive that the Court's judgment in *Barnette* comports with a narrower reading of what the Court decided. The Court's judgment affirmed the decree entered by Judge Parker's three-judge-court — an injunction barring required participation in the flag ceremony by "children having religious scruples against" such participation.¹⁰⁷ And that narrower reading also comports with the construction of *Barnette* followed by the Court in *Wooley v. Maynard*¹⁰⁸ — a case decided on April 20, 1977, while the Massachusetts bill was awaiting Governor Dukakis' signature or disapproval.

In *Wooley*, plaintiffs Maxine and George Maynard sued in the federal district court in New Hampshire to enjoin various state officials from enforcing, as to them, statutes requiring that New Hampshire automobile license plates carry the legend "Live Free or Die" and imposing criminal penalties for covering up any of the writing on license plates. A three-judge court found in the Maynards' favor and enjoined defendants "from arresting and prosecuting plaintiffs at any time in the future for covering over that portion of their license plates that contains the motto 'Live Free or Die'."¹⁰⁹

The Supreme Court, speaking through Chief Justice Burger, affirmed. The opinion stated that "[t]he Maynards consider the New Hampshire State motto to be repugnant to their moral, religious, and political beliefs, and therefore assert it to be objectionable to disseminate this message by displaying it on their automobiles."¹¹⁰ According to Mr. Maynard,

by religious training and belief, I believe my 'government' — Jehovah's Kingdom — offers everlasting life. It would be contrary to that belief to give up my life for the state, even if it meant living in bondage.

...

I also disagree with the motto on political grounds. I believe that life is more precious than freedom.¹¹¹

In sustaining the Maynards' objection to advertising a motto they profoundly disagreed with, Chief Justice Burger found *Barnette* to be controlling authority:

106. *Id.* at 858 (Harlan, J., concurring).

107. Pollak, *supra* note 101, at 73 n.42.

108. 430 U.S. 705 (1977).

109. *Maynard v. Wooley*, 406 F. Supp. 1381, 1389 (D. N.H. 1976) *aff'd* 430 U.S. 705 (1977). The court declined to direct the defendants to issue to plaintiffs a license plate not embossed with "Live Free or Die," notwithstanding that the record suggested that such a plate could be made for five dollars or thereabouts.

110. 430 U.S. at 707 (citation omitted).

111. *Id.* at 707 n.2 (quoting Affidavit of George Maynard, App. 3).

Here, as in *Barnette*, we are faced with a state measure which forces an individual, as part of his daily life . . . to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable.

. . .

The fact that most individuals agree with the thrust of New Hampshire's motto is not the test; most Americans also find the flag salute acceptable. The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable.¹¹²

In sum, *Wooley* confirms my view that *Barnette* should be read as protecting against compelled utterances with which, on grounds of religious, political or moral principle, the speaker disagrees, as distinct from compelled utterances with which the speaker is not in substantive disagreement but which, to borrow Justice Murphy's phrase in his *Barnette* concurrence, it is the speaker's "personal inclination" not to make. Thus, if the Maynards were today to move to Buffalo and learn that the New York Legislature and Governor Cuomo had ordained that New York license plates should include the legend "I Love New York" — a sentiment the Maynards concurred in but felt shy about broadcasting on the nation's highways — I submit that the Supreme Court would give their new grievance short shrift. If I am right in this, it signifies that *Barnette* is to be read as proscribing obligatory participation in flag ceremonies when such participation connotes endorsement of a belief to which the unwilling participant in fact takes serious principled exception — and not otherwise.

Let us now consider the problem that confronted Governor Dukakis in 1977. What was the bill put before him by the General Court? What conclusion should he have come to as to its validity?

From the discussion of *Nicholls*,¹¹³ it will be recalled that the 1935 Massachusetts statute required "[e]ach teacher [to] cause the pupils under his charge to salute the flag and recite in unison with him at said opening exercises at least once each week the 'Pledge of Allegiance to the Flag;'"¹¹⁴ moreover, the statute provided that a teacher's "failure for a period of two consecutive weeks . . . to salute the flag and recite said pledge as aforesaid, or to cause the pupils under his charge so to do,"¹¹⁵ could result in

112. *Id.* at 715. Justice Rehnquist, joined by Justice Blackmun, dissented. The principal thrust of the dissent was that *Barnette* was concerned with compelled avowal of a set of beliefs, and that being required to put New Hampshire's license plates on one's car offered no basis for others to impute to the licensee any philosophic commitment to the motto embossed on the plate — especially when one was free, by bumper sticker or otherwise, to festoon one's automobile with credos dissenting from "Live Free or Die." Another dissenting opinion — by Justice White, joined by Justices Blackmun and Rehnquist — addressed a procedural issue not pertinent to the present discussion.

113. See *supra* notes 23-38 and accompanying text.

114. 297 Mass. at 67-68, 7 N.E.2d at 578.

115. Act of May 13, 1935, ch. 258, 1935 Mass. Acts 306.

a fine of up to five dollars. The 1977 bill undertook to amend the 1935 statute by substituting for the first of these requirements the following: "Each teacher at the commencement of the first class of each day in all grades in all public schools shall lead the class in a group recitation of the 'Pledge of Allegiance to the Flag.'" ¹¹⁶ It is to be noted that the new prescriptive language called for a daily rather than a weekly flag observance. But it is also to be noted that the new prescriptive language omitted the "salute" and required the teacher to "lead the class in a group recitation" of the Pledge rather than to "cause the pupils . . . to . . . recite in unison with him . . . ;" however, the unchanged penalty provision retained the words "salute" and "cause."¹¹⁷ That the legislature was principally concerned with the Pledge, as distinct from the salute, and wanted to increase the frequency of flag observance ceremonies, is confirmed by the bill's title — "An Act requiring recitation of the pledge of allegiance to the flag in all public schools at the commencement of class each day."¹¹⁸

The Governor, a lawyer, was doubtful of the bill's constitutionality. So he took advantage of the remarkable advisory opinion procedure that has been part of Massachusetts' fundamental law since 1780 — "Each branch of the legislature, as well as the governor or the council, shall have authority to require the opinions of the justices of the supreme judicial court, upon important questions of law, and upon solemn occasions"¹¹⁹ — to ask the Supreme Judicial Court what it thought of the bill. Specifically, the Governor inquired whether the amendatory language (1) when "coupled with a fine for non-compliance" would infringe the rights of teachers under the federal or the Massachusetts Constitution, and (2) would infringe the rights of students under either Constitution. The request for an advisory opinion was submitted on April 27, 1977, and was responded to on May 16, 1977. "The Justices did not solicit briefs in this matter because of the shortness of time within which our opinion had to be submitted. We allowed the Attorney General's request to submit a memorandum. That memorandum considered G. L. c. 71, § 69, as now in effect, and concluded that '[i]nsofar as c. 71, § 69 may be read categorically to require teacher participation, it is inconsistent with the First Amendment of the Constitution of the United States and may not be enforced.'" ¹²⁰

Two opinions were filed by the Justices of the Supreme Judicial Court:

Five members of the court answered "Yes" to the first question propounded — namely whether the 1977 bill to amend the 1935 statute

116. MASS. ANN. LAWS ch. 71 § 69 (Law. Co-op. 1978).

117. *Id.*

118. *Id.*

119. MASS. CONST., pt. 2, ch. 3, art. 2. More or less similar procedures obtain in three other New England states — Maine, New Hampshire and Rhode Island — and in Alabama, Colorado, Delaware, Florida, North Carolina, and South Dakota; some other states have tried and abandoned the idea. P. BATOR, P. MISHKIN, D. MELTZER & D. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 70 (3d ed. 1988).

120. Opinions of the Justices to the Governor, 372 Mass. 874, 363 N.E.2d 251, 253 n.3 (1977).

would be an infringement of the constitutional rights of teachers — and therefore “beg[ged] leave to be excused from answering”¹²¹ the further question whether the bill would infringe upon the constitutional rights of students. En route to their non-answer to the second question, the five justices noted that the 1935 statute “contains no criminal penalty for a student who fails to participate in the recitation of the pledge of allegiance to the flag,” and added that “[w]e think it is clear from the opinion . . . in the *Barnette* case . . . that no punishment of any kind may be imposed on a student who elects, as a matter of principle, to abstain from participation.”¹²² As to the first question, the five justices stated that “[i]n our view, the rationale of the *Barnette* opinion applies as well to teachers as it does to students,”¹²³ and cited three cases so holding.¹²⁴ The five justices did express considerable doubt that the 1935 statute, if amended in the fashion contemplated by the 1977 bill, should as a textual matter be read as imposing a fine on a teacher who did not lead students in the Pledge;¹²⁵ but the justices concluded that the existence of a statutory requirement to lead students in the Pledge would be unconstitutionally coercive even if no criminal penalties could be imposed.¹²⁶

Two justices responded to the Governor in a somewhat different way. They acknowledged that *Nicholls*, the 1937 case in which the Supreme

121. *Id.*, 363 N.E.2d at 255.

122. *Id.*

123. *Id.* at 254.

124. The cited cases were *Russo v. Central School Dist.*, 469 F.2d 623 (2d Cir. 1972) (overturning dismissal of teacher who stood with hands at side during flag ceremony) *cert. denied*, 411 U.S. 932 (1973); *Hanover v. Northrup*, 325 F. Supp. 170, 171 (D. Conn. 1970) (overturning dismissal of teacher who refused to lead or recite Pledge because “with liberty and justice to all,” was an untrue statement of present fact and “was not a pledge to work for something”); and *State v. Lundquist*, 262 Md. 534, 278 A.2d 263 (1971) (Maryland statute exempting from obligatory flag salute students and teachers who have “religious reasons” for non-participation held unconstitutionally too circumscribed, because *Barnette* protects a teacher’s principled right to select his own mode of and time for expressing loyalty to the United States).

Another case, decided after the *Opinion of the Justices*, in which a teacher’s discharge was upheld, is distinguishable. *Palmer v. Board of Educ. of City of Chicago*, 603 F.2d 1271 (7th Cir. 1979) (upholding discharge of teacher who refused on religious grounds to participate in a wide range of curricular activities, of which the flag-salute was only a part), *cert. denied*, 444 U.S. 1026 (1980).

125. The pertinent provisions of the 1935 statute, as they would be amended by the 1977 bill, provided:

Each teacher at the commencement of the first class of each day in all grades in all public schools shall lead the class in a group recitation of the “Pledge of Allegiance” to the Flag. A flag shall be displayed in each classroom in each such schoolhouse. Failure for a period of five consecutive days by the principal or teacher in charge of a school equipped as aforesaid to display the flag as above required, or failure for a period of two consecutive weeks by a teacher to salute the flag and recite said pledge as aforesaid, or to cause the pupils under his charge so to do, shall be punished for every such period by a fine or [sic] not more than five dollars.

MASS. ANN. LAWS ch. 71 § 69 (Law. Co-op. 1978).

126. 363 N.E.2d at 255. In considering whether a teacher could have securely ignored the statutory command simply because no criminal penalties would be entailed, it is well to remember that in *Nicholls* the Supreme Judicial Court sustained expulsion of the plaintiff notwithstanding that the 1935 statute did not in terms impose penalties on a recalcitrant student.

Judicial Court had sustained the expulsion of a third-grader for non-participation in the flag ceremony, had been undermined by *Barnette*. And the two justices also acknowledged "that teachers who find the salute or pledge 'morally objectionable' cannot be required to participate in the salute or pledge."¹²⁷ Here the two justices cited *Wooley v. Maynard*.¹²⁸ The reference to *Wooley v. Maynard*, decided just a week before Governor Dukakis submitted his questions to the Supreme Judicial Court, evidently was directed to Chief Justice Burger's observation, rooted in *Barnette*, that the "First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable."¹²⁹ Furthermore, the two justices, like their five colleagues, were disposed to read the 1977 bill as not imposing any fine on a teacher who declined to lead students in a recital of the Pledge. But these determinations led the two justices to the following conclusions: "There is no constitutional obstacle to a provision for voluntary participation by students and teachers in a pledge of allegiance to the flag. We would construe the bill to provide an opportunity for such voluntary participation. So construed, it is not unconstitutional."¹³⁰

The view of the two disagreeing justices that constitutional questions could be obviated by construing the bill to provide for voluntary participation may have a certain surface appeal; but, on reflection, it seems to me quixotic. The bill provided that "each teacher at the commencement of the first class in each day . . . shall lead the class in a group recitation of the 'Pledge of Allegiance to the Flag.'"¹³¹ This is not the prose of voluntarism; it is the familiar directive prose in which statutes are ordinarily cast. A decent respect for his colleagues in the legislature should have impelled the Governor to take them at their words. He did, and vetoed the bill. Had the legislature voted a bill authorizing voluntary flag observance ceremonies, the Governor would presumably have signed it. Had the legislature voted a bill requiring flag observance ceremonies, but exempting those unwilling to participate on grounds of principle, the Governor very likely would have signed it, leaving to the courts the resolution, case by case, of the ancillary constitutional problems such legislation might, in certain applications, entail.¹³² The bill presented to Governor

127. *Id.* at 256.

128. 430 U.S. 705 (1977).

129. *Id.* at 715. The two disagreeing justices also cited *Russo v. Central School Dist.*, 469 F.2d 623 (2d Cir. 1972), *cert. denied*, 411 U.S. 932 (1973), and *Hanover v. Northrup*, 325 F. Supp. 170 (D. Conn. 1970), two of the cases relied on by the other justices. See *supra* note 124.

130. 363 N.E.2d at 256 (citations omitted).

131. MASS. ANN. LAWS ch. 71 § 69 (Law. Co-op. 1978).

132. The five justices, in the concluding paragraph of their response to the Governor, observed that

[i]f the Legislature enacted a statute which permitted a student or teacher to sit quietly without participating in the pledge of allegiance by others in a classroom, different and yet still difficult constitutional questions would be presented, on which our opinion has not and could not be sought by the Governor in the circumstances.

Id. at 255. Compare *State v. Lundquist*, 262 Md. 534, 278 A.2d 263 (1971) (protecting teacher's right to refuse on nonreligious grounds to participate in the pledge of allegiance).

Dukakis was obligatory and contained no exemptions. It may well be the case that the 1977 bill was no more flawed, from a constitutional perspective, than the 1935 statute it sought to amend, but it was also no less so. Under *Barnette*, *Wooley*, and the teacher cases in lower courts,¹³³ the 1935 statute was, as the Massachusetts Attorney General had advised the Supreme Judicial Court, a mandate that, if "read categorically to require teacher participation . . . is inconsistent with the First Amendment of the Constitution of the United States and may not be enforced."¹³⁴ Accordingly, Governor Dukakis was right in vetoing a bill that, at a minimum, compounded the 1935 statute's difficulties by calling for daily, rather than weekly, obligatory flag ceremonies. He was right, that is, if his duty in deciding whether to approve the bill was to withhold approval if, under prevailing constitutional doctrine, there was no realistic likelihood that the courts would sustain enforcement of the bill.

B. What Deference Did Governor Dukakis Owe to Barnette?

I have proceeded up to this point on the assumption that Governor Dukakis' problem was to predict the judicial response to enforcement of the 1977 bill, signing the bill if he expected acquiescence and vetoing it if he were quite sure that the courts would overturn it. But the assumption may impose too great a constraint on the governor of a sovereign state. Suppose that Governor Dukakis, a graduate of the Harvard Law School, had been convinced that *Barnette* was profoundly misguided and that former Professor Frankfurter had been right all along. In asking this question, I am not intimating any sympathy on my part with such a conviction. Although, as noted, I have difficulties with Justice Jackson's analysis, I have always thought *Barnette* was rightly decided, and nothing said in the presidential campaign has altered my view.¹³⁵ However, I am

133. See cases cited *supra* note 124.

134. 363 N.E.2d at 253 n.3.

135. In his speech on August 18, 1988, accepting the Republican nomination for the Presidency, Vice President Bush said: "Should public school teachers be required to lead our children in the Pledge of Allegiance? My opponent says no — but I say yes." In a speech on August 23, 1988, the Vice President said: "I would have signed it because I think that symbolism of our country, one nation under God, is good and I don't think it hurts the children at all to say that Pledge in school." N.Y. Times, Aug. 24, 1988, at B6, col. 5. He returned to the theme in a speech the following day. "What is it about the Pledge of Allegiance that upsets [Governor Dukakis] so much? It's very hard for me to imagine that the Founding Fathers, Samuel Adams and John Hancock and John Adams would have objected to teachers leading students in the Pledge of Allegiance to the Flag of the United States." N.Y. Times, Aug. 25, 1988, at 1, col. 4. (Hancock and the two Adamses — all of whom came from Governor Dukakis' home state of Massachusetts — were signers of the Declaration of Independence; none of them, however, participated in the Constitutional Convention or was a member of the Congress that framed the Bill of Rights). A November 1, 1988 letter to *The New York Times* from Professor Burton Caine of Temple Law School, expresses puzzlement as to what Vice President Bush believes to be the proper exercise of the veto. Professor Caine writes, in pertinent part:

Last week President Reagan vetoed an act of Congress which would have provided protection for Government employees who discover fraud or mismanagement. The President had promised both parties his support for the bill but vetoed it anyway on the advice from the Attorney General that the law somehow violated the Constitution. No decision of the Supreme Court was cited.

prepared to entertain the possibility that a governor, or a legislator, or even a President, could conscientiously disagree. What then?

Two propositions are in tension. The law — and especially the supreme law of the Constitution — must be complied with. At the same time, the law — and especially the supreme law of the Constitution — must always be open to reexamination. Our nation's interest in the constant revivification of the law means, at a minimum, that litigants, private and public, should always be free to urge on the courts, and particularly the Supreme Court, a sober second look at a significant constitutional holding. Thus,

Vice President Bush did not criticize the President's veto and presumably agreed with it.

The Constitution of the United States binds both Federal and state officials equally. Because both the President and the Governor believed that legislation presented to them violated the Constitution, they felt themselves compelled to exercise their veto power.

Since Vice President Bush criticized Governor Dukakis but not President Reagan, what is the constitutional principle for which Vice President Bush stands?

N.Y. Times, Nov. 18, 1988, at A34, cols. 4-5.

Senator Quayle, a lawyer, had the following to say in a colloquy with Nina Totenberg of National Public Radio on October 18, 1988:

Quayle: Well, the first freedom that you want to protect is the freedom of our country. The freedom of our country means our country — the constitution, our government — we have a free government. We want to maintain that freedom. But freedom means a lot of different things — freedom of speech, freedom of religion, individual liberties.

Totenberg: You mention freedom of religion. Do you think that Jehovah's Witnesses should be free to refuse to say the pledge of allegiance in school if it violates their religious principles to do so.

Quayle: Well, I think that the pledge of allegiance legislation that has been passed at the state levels on having a teacher lead a class in a pledge of allegiance is perfectly proper and they have the freedom to lead in that pledge of allegiance and I don't think it is going to infringe on anybody else's freedom.

Totenberg: But you realize that a teacher who is a Jehovah's Witness who felt that that was a violation of his or her faith would be violating a criminal statute if he or she refused to lead the pledge.

Quayle: We have freedom of religion and we have a free legislature, an independent government that passes laws and the courts of this land uphold and take freedom of religion very importantly and to my knowledge — and we'll see if the courts get into this — the pledge of allegiance statutes passed meet the constitutional test of freedom of religion.

Totenberg: No, Senator, they've been struck down every time.

Quayle: Well, I don't know, there's a lot of various laws on the books. The one in Massachusetts hasn't been struck down. The one that the governor has here in Illinois, I don't think has been struck down.

Totenberg: They've never been enforced.

Quayle: Well, they're on the books.

Another sort of jurisprudence is exemplified by the following excerpts from a comment by Professor Charles R. Kesler, a political scientist at Claremont College:

Now the relevance of [*Barnette*] to the Massachusetts law is doubtful, as the Massachusetts court admitted, because *Barnette* concerned primarily the right of students to be exempt from saying the pledge, whereas the bill vetoed by Dukakis required simply that teachers lead the pledge. But the *Barnette* decision does provide insight into Dukakis's view of the Constitution, which is consistent with progressive or liberal jurisprudence as it has developed over the past century.

Consider this famous sentence from the 1943 case. "If there is any fixed star in our constitutional constellation," Justice Jackson writes, "it is that

to take a very contemporary example, it has been pursuant to this process that counsel — including counsel for the United States, as *amicus* — have on occasion urged the Court to overturn *Roe v. Wade*,¹³⁶ advice it has thus far not followed.¹³⁷ But this advice has come in cases in which the Court has considered the validity of state statutes contended by their proponents to be consistent with, not contradictory of, *Roe v. Wade*.

By contrast, for a state to adopt, and seek to enforce, legislation designedly in conflict with established Supreme Court precedent at a time when — as was certainly true with the flag-salute issue in 1977, and remains true today — the relevant case law suggests no slight glimmer of likelihood that the Court will change its mind, would be a course fraught with real danger to our federal system. As Justice Frankfurter observed in his *Barnette* dissent:

The flag salute requirement in this case comes before us with the full authority of the State of West Virginia. We are in fact passing judgment on “the power of the State as a whole.” Practically we are passing upon the political power of each of the forty-eight states. Moreover, since the First Amendment has been read into the Fourteenth, our problem is precisely the same as it would be

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.”

But by what authority did these officials — six Supreme Court justices — decree that there shall be no political orthodoxy in America and then force citizens to abide by their opinion? That there shall be no orthodoxy is itself an orthodoxy. This contradiction is, to borrow Willmoore Kendall’s phrase, the Achilles’ heel of all relativism. It happens also to violate the innermost logic of the American political tradition, which began by declaring the “self-evident” truth that “all men are created equal. . . .”

That it should now be controversial to lead schoolchildren in the pledge only shows how strained the American consensus has become after decades of liberal reformism.

Legal Intelligencer, Nov. 3, 1988, at 9, col. 1. Professor Kesler is, of course, entitled to disagree with *Barnette*. The operative question is, however, whether a governor (or a President, see text *infra*, at notes 146-53) is entitled to predicate exercise or non-exercise of the veto on disagreement with *Barnette*.

The issue of the *New Yorker* published during election week provides a clue as to the provenance of the Pledge as an issue in the campaign:

A story in the *Washington Post* describes how, one evening last May, five of George Bush’s campaign advisers went to Paramus, New Jersey, to observe a group of thirty voters assembled by Bush researchers as a test group to measure the emotional impact of campaign themes. The advisers were Roger Ailes, Lee Atwater, Robert Teeter, Craig Fuller and Nicholas Brady. They went behind a two-way mirror and watched as the group was told about furloughed prisoners, the Pledge of Allegiance, and Boston Harbor, and at the end of the session Governor Dukakis’s support among the group had dropped from 30 to 15. “I realized right there that we had the wherewithal to win . . . and that the sky was the limit on Dukakis’s negative,” Atwater said.

New Yorker, Nov. 14, 1988, at 32.

136. 410 U.S. 113 (1973).

137. See *Thornburgh v. American College of Obstetricians*, 476 U.S. 747, 759 (1986). The United States has reiterated this advice in *Webster v. Reproductive Health Service*, No. 88-605, probable jurisdiction noted on January 9, 1989, 109 S. Ct. 780, argued April 26, 1989.

if we had before us an Act of Congress for the District of Columbia.¹³⁸

For one state to defy the law as theretofore announced by the Court would invite the constitutional disequilibrium that roused the Court's concern in *Cooper v. Aaron*,¹³⁹ the case in which Governor Faubus sought to frustrate the desegregation of Little Rock's Central High School. When, in 1986, Attorney General Meese, in an address at Tulane,¹⁴⁰ took the Court to task for what he read as overly extravagant claims of judicial supremacy in *Cooper v. Aaron* — putting the Court's opinions on a parity with the Constitution itself — the Attorney General was himself promptly taken to task in an editorial in the *Washington Post*.¹⁴¹ Shortly thereafter, the Attorney General qualified what he had said at Tulane. In particular he stated certain cautions that seem particularly relevant to the present question:

Supreme Court decisions do, of course, have general applicability. In addition to binding the parties in the case at hand, a decision is binding precedent on lower federal courts as well as state courts. Further, such decisions, as Lincoln once said, are "entitled to very high respect and consideration in all parallel cases" by the other departments of government, both federal and state. Arguments from prudence, the need for stability in the law, and respect for the judiciary will and should persuade officials of these other institutions to abide by a decision of the Court. It would be highly irresponsible for them not to conform their behavior to precedent.¹⁴²

The proper course for a governor, faced with a bill he believes in but that contradicts the Constitution as the Supreme Court has expounded it, is to veto the bill, explain the constitutional difficulties, and propose appropriate revisions. This is the course followed a year ago, in relation to a constitutionally flawed anti-abortion bill, by Pennsylvania's Governor Casey.¹⁴³ Governor Casey's predecessor, Governor Thornburgh, had followed the same course six years before.¹⁴⁴ Governor Casey explained his 1987 veto eloquently and succinctly:

I was elected Governor of Pennsylvania to carry out the pledges I made to the people of this Commonwealth, and I will not break faith with those people, or break my promises to them. I have stated repeatedly that I am opposed to abortion on every moral ground. . . . This legislation, if corrected in the manner dis-

138. 319 U.S. at 650 (citations omitted).

139. 358 U.S. 1 (1958).

140. Meese, *The Law of the Constitution*, 61 TUL. L. REV. 979-90 (1987).

141. Wash. Post, Oct. 29, 1986, at A18, col. 1.

142. Meese, *The Tulane Speech: What I Meant*, 61 TUL. L. REV. 1003, 1003-04 (1987).

143. Letter from Governor Robert P. Casey to the House of Representatives of the Commonwealth of Pennsylvania (Dec. 17, 1987).

144. Letter from Governor Dick Thornburgh to the Senate of the Commonwealth of Pennsylvania (Dec. 23, 1981).

cussed below, will provide us with an opportunity to take a step forward in limiting this destruction.

In its present form, however, I have concluded that it is not constitutional and that I must veto it.

...

I promised the people of Pennsylvania, and I took an oath, that I would uphold the Constitution. The legitimacy of our system of government, the finest on earth, depends not just upon our pursuit of the moral good, but also upon our adherence to the rule of law.¹⁴⁵

At the national level, there may be greater scope for the political branches to inject into the law-making process their disagreements with authoritative judicial pronouncements. President Jackson, we recall, in part justified his veto of a bill that would have chartered a third Bank of the United States on the ground that the Court, speaking through Chief Justice Marshall, had been wrong, in *McCulloch v. Maryland*,¹⁴⁶ in upholding congressional power to establish the Second Bank. And Lincoln, in his debates with Douglas — those real debates that we have not seen the like of since — made it plain that if he vanquished Douglas in their Senate race, he would challenge Chief Justice Taney's opinion in *Dred Scott*.¹⁴⁷ "If I were in Congress, and a vote should come up on a question whether slavery should be prohibited in a new territory, in spite of that *Dred Scott* decision, I would vote that it should."¹⁴⁸

Would the Lincoln and Jackson precedents offer support to a Congress and a President that wanted to require public school children and their teachers, in the District of Columbia or some other federal enclave, to recite the Pledge of Allegiance notwithstanding their religious or otherwise principled objections? I think not. Jackson's veto of the Bank bill did not impose constraints on anyone; to the contrary, it declined (subject to override by Congress) to perpetuate a substantial quasi-governmental structure and set of processes. Similarly, Lincoln's proposed reinstatement of prohibitions on slavery in federal territories would have worked to dissolve governmentally maintained servitude.¹⁴⁹

145. Letter, *supra* note 143, at 1-3.

146. 17 U.S. (4 Wheat.) 316 (1819).

147. *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

148. A. Lincoln, Speech at Chicago (July 10, 1858), reprinted in P. ANGLE, *CREATED EQUAL? THE COMPLETE LINCOLN-DOUGLAS DEBATES OF 1858* 36 (1958).

149. In one sense, of course, this is an incomplete statement. One of the propositions announced by Chief Justice Taney, in his extended opinion in *Dred Scott*, was that an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.

60 U.S. at 450. If one were to give authoritative weight to this first whisper from a justice of substantive due process, then Lincoln's proposed law would be perceived as intending to work a deprivation of the slaveholder's Fifth Amendment rights. I would argue that the Chief Justice's pronouncement was dictum and did not command the endorsement of a majority of his Court.

Moreover, with respect to *Dred Scott*, it is of particular importance that the doctrine Lincoln would have sought to challenge through new legislation and further litigation had been newly minted just a year before. The Court had not — as it had with *Barnette* — had the opportunity for sober second thought leading on the one hand to modification or rejection, or on the other hand to reaffirmation. The distinction is a crucial one. Professor Herbert Wechsler made the point in 1965, in calling on state officials in the South finally to acquiesce in the Supreme Court's rulings in *Brown v. Board of Education*¹⁵⁰ and subsequent cases. "When that chance [of a new court challenge to a controversial decision] has been exploited and has run its course, with reaffirmation rather than reversal of decision, has not the time arrived when its acceptance is demanded, without insisting on repeated litigation? The answer, it seems to me, must be affirmative. . . . It is not surprising . . . that the bar has raised its voice so loudly on this problem, calling for a generous acceptance of decisions when their doctrine has been settled, as an act of self-subordination necessary to maintain the rule of law. There comes a point where there can be only one answer to the call."¹⁵¹

Congress and the President have this year collaborated on legislation which fits my prescription of an appropriate form of rejection by the political branches of a Supreme Court opinion. The opinion was that in *Korematsu v. United States*,¹⁵² decided in late 1944, a year-and-a-half after *Barnette*. In *Korematsu*, the Court sustained the wartime internment of American citizens and resident aliens of Japanese ancestry. The Court has had subsequent occasion to cite *Korematsu*, but it has never reaffirmed that ominous and unprecedented ruling. If the decision in *Barnette* was one of the high points of our constitutional jurisprudence, the decision in *Korematsu* was surely close to the nadir, vying with *Dred Scott* and *Plessy v. Ferguson*.¹⁵³ In the Civil Liberties Act of 1988,¹⁵⁴ Congress enacted and the President approved a statute providing modest reparations for those interned. Section 2(a) of the Act is as follows:

The Congress recognizes that, as described by the Commission on Wartime Relocation and Internment of Civilians, a grave injustice was done to both citizens and permanent resident aliens of Japanese ancestry by the evacuation, relocation, and internment of civilians during World War II. As the Commission documents, these actions were carried out without adequate security reasons and without any acts of espionage or sabotage documented by the Commission, and were motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership. The excluded individuals of Japanese ancestry suffered enormous damages, both material and intangible, and there were incalcul-

150. 347 U.S. 483 (1954).

151. Wechsler, *The Courts and The Constitution*, 65 COLUM. L. REV. 1001, 1008-09 (1965). Cf. Carter, *The Courts Are Not The Constitution*, Wall St. J., Feb. 7, 1989, at A18, col. 4.

152. 323 U.S. 214 (1944) (result vacated on writ of coriam nobis, 584 F. Supp. 1406 (N.D. Cal. 1984)).

153. 163 U.S. 537 (1896).

154. Pub. L. No. 100-383, 102 Stat. 903 (1988).

able losses in education and job training, all of which resulted in significant human suffering for which appropriate compensation has not been made. For these fundamental violations of the basic civil liberties and constitutional rights of these individuals of Japanese ancestry, the Congress apologies on behalf of the Nation.¹⁵⁵

CONCLUSION

In *Barnette*, Justice Jackson wrote that “[t]he case is made difficult not because the principles of its decision are obscure but because the flag involved is our own.”¹⁵⁶

With this in mind, I will, in closing, read some words of Oliver Wendell Holmes spoken a month before he turned sixty. In the measured cadences you will hear the young man who, forty years before, was Class Poet of the Harvard College Class of 1861 — and who, a few months after leaving Harvard, was serving as a lieutenant in the Twentieth Massachusetts and was wounded at Balls Bluff, as he was later to be wounded at Antietam and at Fredericksburg. Holmes, as Chief Justice of Massachusetts, was speaking from the bench of the Supreme Judicial Court. The date was February 4, 1901. The occasion was the centenary of the day that John Marshall was sworn in as Chief Justice of the United States:

A few words more and I have done. We live by symbols, and what shall be symbolized by any image of the sight depends upon the mind of him who sees it. The setting aside of this day in honor of a great judge may stand to a Virginian for the glory of his glorious State; to a patriot for the fact that time has been on Marshall's side, and that the theory for which Hamilton argued, and he decided, and Webster spoke, and Grant fought, and Lincoln died, is now our corner-stone. To the more abstract but farther-reaching contemplation of the lawyer, it stands for the rise of a new body of jurisprudence, by which guiding principles are raised above the reach of statute and State, and judges are entrusted with a solemn and hitherto unheard-of authority and duty.

...

It is all a symbol, if you like, but so is the flag. The flag is but a bit of bunting to one who insists on prose. Yet, thanks to Marshall and to the men of his generation — and for this above all we celebrate him and them — its red is our lifeblood, its stars our world, its blue our heaven. It owns our land. At will it throws away our lives.¹⁵⁷

I suggest to you that what gives our flag this power over our lives is that, under the Constitution, it does not govern our minds and spirits.

155. Pub. L. No. 100-383, § 2(a), 102 Stat. 903 (1988).

156. 319 U.S. at 641.

157. THE MIND AND FAITH OF JUSTICE HOLMES 385 (M. Lerner, ed., 1943).