

American law is designed specifically to be a dynamic, ever-shifting process. The Framers of the Constitution provided certain basic tenets that are absolute and dear to the American spirit but allowed for historical and cultural tendencies to shape policy over time. Part of the infrastructure of this framework is the idea of judicial review that determines the overall validity of laws through the courts according to the bounds of the Constitution. The Framers had the least tangible, historically-based evidence by far concerning how to best arrange the judiciary as compared to the other two branches of the new government, and this manifests in the vaguer language in the Constitution that outlines the judiciary function. For this reason, the power struggles that have arisen as part of the checks-and-balances system between the judiciary and the legislative branch whose laws it interprets have been historically more profound than those between the executive and legislative or the judicial and the executive. (Marbury v. Madison, the initial case that immensely broadened the judiciary's range of power, provides an excellent example.) This history, moreover, is necessarily driven by the individual personalities that serve in these offices, and thus court decisions are very much rooted in prevailing cultural opinion despite the American belief in the sovereignty of the written law (as the Framers in fact foresaw). The federal law cases concerning the constitutionality of the Pledge of Allegiance in the public school system and its own unique history demonstrate exactly this dynamic historical trend of the judiciary, and it is critical to keep this background in mind as the present survey examines (though not necessarily evaluates) the major court cases involved with the Pledge of Allegiance.

There are two major relevant court cases, both involving Jehovah's Witnesses, that lead up to the current debate about the Pledge of Allegiance in public schools raging

in the aftermath of the 2002 case *Newdow v. Elk Grove Unified School District* (Newdow). The first is *Minersville School District v. Gobitis* (Gobitis), which was argued in 1940 and ruled that it is in fact constitutional for school districts in America to require the recitation of the Pledge of Allegiance, even if it infringes on the First and Fourteenth Amendment rights to the free exercise of religion. The second is *West Virginia Board of Education v. Barnette* (Barnette), which was argued in 1943 and ruled that while it is constitutional for school districts in America to recite the pledge (and, practically speaking, all school districts did), it was not in fact constitutional to require every student to participate.

The most surprising feature of these cases is that they actually had nothing to do with the specific phrase *under God* from the Pledge of Allegiance. These words were not incorporated into the Pledge of Allegiance until 1954, more than a decade after the Barnette decision. The composition of the original Pledge of Allegiance was planned as part of the National Public School Celebration of Columbus Day in October of 1892, with the express purpose, according to its composer, Francis Bellamy, to ““...impress upon our youth the patriotic duty of citizenship.”” The original words were

“I pledge allegiance to my Flag,  
And to the Republic for which it stands:  
One Nation indivisible,  
With Liberty and Justice for all.”

Notice that in addition to the missing phrase *under God*, there is no mention of the United States of America specifically. The phrase *the Flag of the United States of America*, which replaced the phrase *my Flag*, was explicitly incorporated in 1923 in order to indoctrinate foreign-born immigrants who may have been thinking of the flags of their respective fatherlands. Sadly, this sentiment largely stemmed from anti-Eastern

European opinion and fear in the wake of the Red Scare of 1919 and the influx of immigrants who famously passed through Ellis Island until 1908. (The Story..., 2004)

Dr. John Baer adds in his own short history of the Pledge of Allegiance that Francis Bellamy was a Baptist minister and a “Christian Socialist,” insinuating that as often occurs to historical figures who create controversy, these two major additions to the Pledge of Allegiance demonstrate a misinterpretation of Bellamy’s intent. (Many official and unofficial histories of the Pledge of Allegiance regrettably choose to ignore this fact about his character. Embracing Communism is typically a stain on an American’s character, and socialistic tendencies are closely related.) He did vehemently oppose the 1924 addition of the words *United States of America* but was ignored by the committee that was established to authorize such a change in his now-public material recited in almost every school throughout the nation, and thankfully Bellamy never survived to see the phrase *under God* added in 1954 as part of the Eisenhower-McCarthy campaign to rid the nation of “Godless Communists.” Baer argues that Bellamy intended the original pledge to be a universal creed espousing the dream of liberty and justice for all mankind, if not necessarily the socialist ideals of equality and fraternity for all.

This history has a direct impact on Newdow, but the present point is that the phrase *under God* has no bearing to Gobitis, which is in fact deeply rooted in the issue of Church and State. The issue of the oppression of religion arose, then, when a family of Jehova’s Witnesses took especial offense to their children being required by the Minersville School District to pledge allegiance to the Flag rather than God, viewing the United States Flag symbolically as a false idol. The children, ages 15 and 16, were expelled from the Minersville School District in Pennsylvania for delinquency when they

refused to do so, and because Pennsylvania mandated compulsory attendance in school for all children, they were forced to attend a private school. The father sued the school district to recoup the money and expenses for this private education, believing that it was unlawful to require attendance at a private school when the public school system discriminated against his children's individual beliefs and trampled on their rights to the free exercise of religion. (Minersville..., 1940)

Unlike many cases that never see the judgment of the Supreme Court due to procedural errors, *Gobitis* worked its way up through two key stipulations. The first was that the children were old enough to maturely and intelligently hold their own religious beliefs and initiated the complaint of their own volition. Despite their status as minors, they were deemed to have reached an age when they were no longer under the intellectual influence or compulsion of their parents. This brings about the second stipulation, that the children were not mere pawns being manipulated in a broader political agenda. The entire *Gobitis* family was found to be firmly and convincingly in adherence with a certain legitimate and established religion which in turn dictated their personal values. In other words, it was a genuine case. (Minersville..., 1940)

The majority opinion, which won overwhelmingly by a deceptive 8-1 vote, ruled in favor of the Minersville School District, mandating that a child must participate in the Pledge of Allegiance in a public school if that school district requires its recitation. In the majority opinion, Justice Frankfurter ruled that the courts have a duty to help maintain the safety of the American people and ideals, stating that "national unity is the basis for national security." Reciting the Pledge of Allegiance was found to be a useful and proper tool in instilling patriotism and the common beliefs of American core values among

American youth, and even if this were not the case he matter-of-factly claims that “the courtroom is not the arena for debating issues of educational policy.” In the ongoing struggle to define the judiciary’s powers, Justice Frankfurter argued that it is not the Supreme Court’s place to determine how best to educate and indoctrinate children even if it had the time and power, but rather that the legislative branches of governments and Boards of Education both local and federal reserved that privilege. (Minersville..., 1940)

The 8-1 vote is deceptive, then, insofar as the majority opinion explicitly admits to dancing delicately around certain issues that require a great deal of care, and the fact that most Americans realized that the United States would have to enter the Second World War in order to stop Hitler’s seemingly invincible armies from storming across Europe and the rest of the world undoubtedly played some role in the overwhelming ruling in favor of State authority over individual freedom. Justice Frankfurter writes that “our present task, then, as so often the case with courts, is to reconcile two rights in order to prevent either from destroying the other.” The problem is paradoxical in nature: how can a government which holds the freedoms of speech and religion to be absolute stifle that freedom to compel its youth to believe in it? (Minersville..., 1940)

Just as the majority opinion nearly argued as much for the Gobitis family’s side of the case as its own, Justice Stone likewise argued nearly as much for the majority opinion as for his lone dissent, a testament to the case’s complex philosophical subtleties. He writes that “concededly the constitutional guarantees of personal liberty are not always absolute,” that “the State concededly has power to require and control the education of its citizens,” but that this power “is not an absolute to which free speech must yield.” There is no distinct difference between the underlying principles and premises in each opinion,

only a difference in conclusion. In addition, he agreed with Justice Frankfurter on the issue of “reasonable accommodation” between the two “right” sides of the conflict, so that the only real dissent was his belief that this one small and legitimately heart-felt case would not lead to a deluge of rebellion across the nation. The specific case involved, in other words, clearly and obviously did not constitute an extremely rare instance of “clear and present danger” that would allow the State’s authority to supercede individual liberty. *Barnette* would reverse *Gobitis* on exactly those grounds. (Minersville..., 1940)

*Barnette* was argued only three years after *Gobitis* and is as much famous for the inception of “activism” among court justices and its eloquent opinion pieces as it is for the details of the case. It is unusual that a landmark decision such as *Gobitis* would merit revisiting in such a short amount of time before its policies’ effects could be studied, but two major national events catalyzed an immediate national response: drawing on the authority of *Gobitis*, the federal Board of Education had passed a mandate requiring the recitation of the Pledge of Allegiance in all American schools, and throughout the nation Jehovah’s Witnesses were being physically tortured and harassed for their “unpatriotic” beliefs. The enactment made a mockery of the carefully reasoned opinions of *Gobitis* in the eyes of the Supreme Court, provided no refuge to any child who would flee for religious reasons to private schools, and there was tremendous backlash to the treatment of decent white Americans like Southern African-Americans or Japanese immigrants. Also of minor significance was the succession of Chief Justice Hughes by now-Chief Justice Stone, the lone dissenter in *Gobitis*.

The only major difference from *Gobitis* in *Barnette* was that this time it was a group of students and involved parents in the State of West Virginia who were clamoring

for the enforcement of this new mandate and seeking punishment for another family of Jehovah's Witnesses. While the roles were reversed, the religious issues remained similar, and ironically enough it was the bloodlust mentality on the part of the appellants in West Virginia that led to a complete reversal in the Supreme Court's thought. What had been a decision to promote national unity had turned America against itself, and what had been a decision steeped in concern for its direct effects on personal liberties had given way to out-and-out religious persecution. The case was whisked through the lower courts and arrived uncommonly quickly in the Supreme Court.

In order to affect social change, Justice Jackson outlined in the majority opinion of *Barnette* a radical new paradigm shift concerning the powers of judicial review: "We examine rather assume existence of this power [to indoctrinate youths against their will]..." Whereas *Gobitis* had ruled largely on the premise that dictating education policy is not within the confines of the judiciary but remains within the jurisdiction of the legislative branch, *Barnette* challenged that lack of authority by offering this obviously discriminatory statute for the nation to judge. Justice Jackson ridiculed the idea that there could be a "clear and present danger" in an act so harmless as refusing to recite the Pledge of Allegiance, with the implication that there was now for no good reason a "clear and present danger" to an innocent religious group on account of the Board of Education's lack of foresight enabled by *Gobitis*. Because the situation clearly required "State intervention," it was painfully clear who would impose it, no matter the established precedents.

In its 6-3 decision, *Barnette* thus allowed for a significant broadening of the judiciary's powers and role in education by claiming a near-emergency situation and

interpreting the practical effects rather than the letter of the law established by the Board of Education. Since *Gobitis* had proved in the Supreme Court's view that the Board of Education under the legislative branch could not act responsibly when given a gift decision by the Supreme Court, Justice Jackson outlined four major points that drastically reduced the Board of Education's power in court. They are, in brief, that a "government with limited powers need not be an anemic one," that because the State educates American youth it is all the more necessary to ensure their constitutional rights, that the minority should not be at risk for the tyranny the majority, and that national unity could be fostered more effectively by "persuasion" rather than "compulsion." This led to the inspiring reiteration of this basic American truth: "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 a word or act their faith therein."

Justices Black and Douglas had in *Barnette* reversed their previous votes in *Gobitis*, making the decision all the more stunning and helping solidify the status of the new breed of "activist judge." While the term hardly applies to them in retrospect, this became the central legacy of *Barnette* as they concurred with Justice Jackson that "although the principle [of *Gobitis*] is sound, its application in the particular case was wrong" and that "the idea of a test oath has always been abhorrent in the United States," whereas previously they had personally declined such interpretive powers that extended beyond the written law concerning education. As a direct result of this broadening of scope and power, there has been an exponentially increasing number of Supreme Court cases heard on education since 1943, but there are many who would argue that this more

“shotgun” mentality of the judiciary has undermined the true purpose and integrity of the judiciary. (Quarterman v. Byrd, Engle v. Vitale, and Tinker v. Des Moines are just a few examples.)

Justice Frankfurter, who wrote the majority opinion of *Gobitis*, maintained his previous decision when he dissented in *Barnette*. He argued that the Supreme Court Justices must not allow their personal opinions and convictions overwrite their duty to strictly interpret the laws of the legislative branch, and he criticized the majority for blowing this particular case way out of proportion in a grab for power. It became for him and the other dissenters a matter of good faith between the three branches of government, and even he admitted that he desperately wished to side with the majority. He could not, however, let his personal preference overcome his official duties, and writes that "the only opinion of our own even looking in that direction that is material is our opinion whether legislators could in reason have enacted such a law." If the opinion of Justice Jackson is profoundly inspiring to entrust the federal Supreme Court to fairly review an increasing number of education laws and cases, Justice Frankfurter's opinion is an equally sobering caveat against the often-imagined infallibility of the Supreme Court and its own tendency to grab for power and diverge from its own intent and purpose.

While it is difficult if not impossible to refrain from interpreting the “data” and “facts” as the author of any supposed objective piece and imposing a bias on the reader, an examination of court opinion is a particularly hopeless cause, namely because it is itself exactly that: opinion. The significance rests in the why, especially when the philosophies and ideals of a human being are influenced by so many historical

generalities and concrete details. The present survey finishes now at the beginning with a brief look at Newdow, roughly sixty years since the Barnette ruling.

### References

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