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THE ICON AND THE ICONOCLASTS

How two people helped secure the American Flag's place as a cultural icon, and how two contradictory US Supreme Court decisions secured an individual's right of conscience with respect to the Pledge of Allegiance to the Flag and other Flag matters

...by Richard R. Gideon[i]

Since the time of the American Civil War the Flag of the United States of America, hereafter referred to as the "American Flag," has grown from a signaling device to a cultural icon. It is a ubiquitous symbol, displayed on top or in front of government buildings, schools, hospitals, commercial establishments, and millions of homes. It is used on uniforms, in sporting events, and in solemn rituals. Foreigners traveling across the USA are sometimes amazed at this; in many cases their national flags are owned by their governments, and private display is prohibited. Here in the USA it seems that the American Flag is the property of the people. It is. The government does establish "rules" concerning its usage; but what rules there are have no enforceable "penalties" associated with them, which makes those rules more like "suggestions" than statutes.

One could make a persuasive argument that it is this lack of penalties that endears the America Flag to the American people; one may use, or abuse, the flag as one sees fit. The American Flag thus plays host to both "iconists" and iconoclasts; a fact that troubles many politicians. While there have been attempts to "protect" the American Flag by Constitutional Amendment, so far nothing has come of it. In fact, the right of the American people to assume the flag as a secular icon, or to use it as matter to be destroyed in political protest, has been upheld by the Supreme Court of the United States. In other countries destroying or "insulting" a national flag could get you prison time[ii] – or worse! This paper will examine the circumstances that led to the American Flag's "icon" status, and the circumstances that legally protect the Flag's "iconoclasts."

Part 1: The Icon

The American Flag has not always been a relatively common adornment to the family home.

Before the Civil War it was in almost exclusive service to the military – particularly the Navy – and rarely seen on private property. But when Ft. Sumpter was fired upon by Confederate batteries in April, 1861, Unionists – many of whom had never given the American Flag much thought – were outraged; not only over the attack on the fort, but over "the insult to the flag." People who had formerly thought of the American Flag as something more appropriate for ships plying international waters now saw it as a symbol of loyalty to the Union, and they started displaying it at their businesses and homes. By war's end it had assumed a meaning that went beyond just identifying sovereignty; the tremendous loss of life for the cause of Union had imbued the Flag with a kind of secular religious quality, and thus it became emblematic of both the unity and permanence of what was now a national instead of federal government. It was the symbol of a "new" America.

But the path to becoming a true "icon" would involve more than just victory in the Civil War. Two men, William J. Canby and Francis Bellamy, would play major roles in elevating the Flag to icon status; and two Supreme Court decisions would test that status. [iii]

BETSY ROSS

In 1870 the last surviving grandson of famed flag-maker Betsy Ross, William J. Canby, presented a paper to the members of the Historical Society of Pennsylvania entitled "The History of the Flag of the United States." In that paper Canby claimed that his grandmother made the first American Flag at the request of George Washington, and two members of Congress: Col. George Ross and Robert Morris. Col. Ross was Betsy's late first husband's uncle. Morris was a rich Philadelphia merchant and an influential member of the wartime Continental Congress.[iv] While Canby never claimed that Betsy *designed* the American Flag, he did suggest that she made some *design changes* that the men approved – especially the change from six-pointed to five-pointed stars in the canton. Although the Betsy Ross story would eventually be challenged, there are some compelling bits of evidence that seem to backup parts of Canby's paper – especially the part concerning the five-pointed star.[v] It is also true that "Betsy Ross" as a famous flag-maker was not an "invention" of Canby's; well before her grandson delivered his paper the stories surrounding Betsy and her role in American history were well known.[vi] What is also well known is that Canby's story gained enough support for it to be included in elementary school history lessons.

FRANCIS BELLAMY

If William J. Canby put his version of the story of the American Flag (and his grandmother) in American schoolrooms, then Francis Bellamy taught American kids how to "worship" it. A Baptist minister and so-called "Christian socialist," Bellamy was the creator of "The Pledge of Allegiance." The Pledge came along at a time in America's history when the first wave of what would eventually become massive immigration was occurring, spurred on by the Industrial Revolution in America and political turmoil in many European countries – especially in Eastern Europe. America was "the land of opportunity," and was a magnet for marginalized people looking to get in on the action. But in America's large cities – and especially New York City – the education establishment was worried; how does one turn these people, and especially their children, into Americans as quickly as possible? Teaching them the English language was a first step, but in the late 1800's good citizenship was thought to be best demonstrated by a proper attitude toward the American Flag. In 1888 patriotic ceremonies were introduced into the New York City public schools. George T. Balch, who was an auditor for the city's Board of Education, a teacher, and a Civil War veteran, introduced the first known "flag salute" used in American public schools. The salute consisted of a chant accompanied by hand gestures. The chant went as follows: "We give our Heads! - and our Hearts! - to God! And our Country! One Country! One Language! One Flag"[vii] The salute began with students touching their foreheads, then their hearts, and then extending their right arms toward the flag, palms down.[viii] If the last part of that gesture seems familiar - it should!

William Lyon Mackenzie King, Prime Minister of Canada, on 1937 visit to Germany - photo courtesy Wikipedia Commons

The Bellamy Salute – 1915 photo courtesy Wikipedia Commons

In 1891 a magazine geared toward young people, *The Youth's Companion*, hired 36 year old Francis Bellamy to be assistant editor. Bellamy was also selected to be chairman of a committee formed by the National Education Association to promote "National School Celebration Day," an event to take place of 21 October 1892 – which happened to coincide with the 400th anniversary of Christopher Columbus's "discovery" of America. The celebration had great support across the country, gaining the endorsement of Congress and President Harrison. *The Youth's Companion*, which had been promoting the placement of American Flags in all schools, contributed not only publicity for the event but also a new Bellamy penned salute to the American Flag: "I pledge allegiance to my Flag and the Republic for which it stands, one nation, indivisible, with liberty and justice for all."[ix] Bellamy also incorporated a modified version of Balch's hand gestures, which started with a military style salute at the beginning of the Pledge, and at the words "..my Flag" changed into the extended right arm toward the flag – only this time with the palm up. The new Pledge, and its hand gestures, was a smash hit. As schools across the country began acquiring American Flags they also incorporated the Pledge at the beginning of an academic day. Over time the Pledge would be modified slightly, and in 1954 the words "under God," were added[x]. The hand gestures stuck around too; until World War II, when they were dropped as being too much like that other hand salute – the one used by Nazi Germany.

Part 2: The Iconoclasts

The word “icon” is loaded with theological implications. From the Greek word “εἰκών,” the American Heritage Dictionary defines it as “1. An image; representation. 2. A representation or picture of a sacred Christian personage, itself regarded as sacred, especially in the tradition of the Eastern Churches.”[xi] For some religious organizations saluting an icon, even one that is secular in nature, is blasphemous. One of those organizations is the Jehovah's Witnesses.[xii]

The Jehovah's Witnesses trace their genesis to the work of Charles Taze Russell, who in 1870 was the head of a Bible study group in Pittsburgh, Pennsylvania. Influenced by the writings of George Storrs and George Stetson, ministers in the Millerite Adventist movement,[xiii] Russell, a former Presbyterian and Congregationalist who had been struggling in matters of faith, had come to the conclusion that much of mainstream Christianity was wrong, and he and a group of bible-study acquaintances set out to rectify the situation. Although Russell did not create the Jehovah's Witnesses organization himself, he, along with Pittsburgh industrialist and philanthropist William Henry Conley, set the stage for it by creating the “Zion's Watchtower and Tract Society” for the purpose of producing and distributing religious tracts promoting Russell's views on the Bible. Russell died in 1916 having achieved some success with his new organization. His successor was Joseph Franklin Rutherford[xiv], an attorney, who ran the Watchtower organization with an “iron hand,” and introduced the name “Jehovah's Witnesses” in 1931. He also “refined” many of Russell's teachings. Amongst Rutherford's many conclusions were two that would eventually get a lot of Jehovah's Witnesses in trouble: 1)that service in the military was morally wrong[xv], and 2)that saluting a flag was idolatry.[xvi]

Part 3: The 1940 Supreme Court decision

At a convention of the Jehovah's Witnesses in June,1935, Rutherford was asked about saluting the American flag; i.e., the Pledge of Allegiance. Rutherford said that to salute an earthly emblem, ascribing salvation to it, was unfaithfulness to God. In September of that same year a third grade student named Carleton Nichols from Lynn, Massachusetts, made history by becoming the first Jehovah's Witness to be expelled from a public school for failing to perform the Pledge of Allegiance. Nichols was praised by Rutherford, the result of which

was more Witness children refusing to salute the flag and more school districts expelling them (and firing Witness teachers). The Witnesses responded by hiring teachers and establishing "Kingdom Schools" to educate Witness children.[xvii]

MINERSVILLE SCHOOL DISTRICT,
BOARD OF EDUCATION OF
MINERSVILLE SCHOOL DISTRICT, ET AL. v. GOBITIS ET AL.
Argued April 25, 1940 - Decided June 3, 1940

The1935 incident concerning Carleton Nichols was just an opening shot in a legal "culture war" between the Jehovah's Witnesses and local governments; a war that would end up being adjudicated before the Supreme Court of the United States. In Minersville, Pennsylvania, the children of Walter Gobitas[xviii], Lillian and William, also took their cue from Rutheford and refused to participate in the Pledge of Allegiance. While Lillian apparently had a sympathetic teacher, William did not. In a 2007 interview about the case, Lillian Gobitas Klouse said, "Billy's fifth grade teacher attempted to physically force his arm out of his pocket to make the requisite salute."[xix] Ten-year-old William wrote a letter to the Minersville school board, explaining why he refused to salute the flag. "I do not salute the flag because I have promised to do the will of God," he wrote in the opening paragraph of his letter. He went on to explain that he must not "worship anything out of harmony with God's law."[xx] On 6 November 1935, with the Gobitas family in attendance, the Minersville Board of Education voted to expel Lillian and William. The decision put great economic hardship on the Gobitas family, as the children were placed in a private school, and the family's grocery store business suffered backlash from Minersville residents. So Walter Gobitas, with the help of the Witnesses, sued.

In the winter of 1938 a trial was held in the United States District Court for the Eastern District of Pennsylvania, before Judge Albert Branson Maris. The result was a win for the Gobitas family. The Minersville School District decided to appeal to the Third Circuit of the U.S. Court of Appeals. Once again the Gobitas family won. But the District wasn't giving up; they appealed to the Supreme Court. The Supreme Court decided to take the case and issued a Writ of Certiorari for the lower courts' records. Amongst the lawyers representing the Gobitas

family was Watch Tower Society president Joseph Franklin Rutherford. This time the Gobitas family lost by a vote of 8 to 1, with Justice Harlan F. Stone dissenting. Writing for the majority, Justice Felix Frankfurter wrote,

> *The case before us must be viewed as though the legislature of Pennsylvania had itself formally directed the flag-salute for the children of Minersville*[xxi]*; had made no exemption for children whose parents were possessed of conscientious scruples like those of the Gobitis family; and had indicated its belief in the desirable ends to be secured by having its public school children share a common experience at those periods of development when their minds are supposedly receptive to its assimilation, by an exercise appropriate in time and place and setting, and one designed to evoke in them appreciation of the nation's hopes and dreams, its sufferings and sacrifices. The precise issue, then, for us to decide is whether the legislatures of the various states and the authorities in a thousand counties and school districts of this country are barred from determining the appropriateness of various means to evoke that unifying sentiment without which there can ultimately be no liberties, civil or religious.*[xxii]

Frankfurter was espousing "judicial restraint,"[xxiii] a theory that holds that courts must grant deference to legislatures because those bodies represent the will of the majority. The "flip-side" of this coin is called "judicial review," which holds that majorities cannot take away a basic Constitutional right from individuals simply because they are majorities. While Frankfurter was sympathetic to the Gobitas children, he said the proper remedy was to appeal to the legislature:

> *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. See Missouri, K. & T. Ry. Co. v. May, 194 U.S. 267, 270. Where all the effective means of inducing political changes are left free from interference, education in the abandonment of foolish legislation is itself a training in liberty. To fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies rather than to transfer such a contest to the judicial arena, serves to vindicate the self-confidence of a free people.*

In other words, if the legislature has done something wrong the place to correct it is at the ballot box, not the courts. This was the philosophy of Oliver Wendell Holmes, Jr., former Chief Justice of the United States, who once wrote, "*A law should be called good if it reflects*

the will of the dominant forces of the community, even if it will take us to hell."[xxiv]

Justice Stone, who cast the only dissenting vote, was not about to let the majority decision stand without comment. In his rebuttal Stone wrote,

> *The law which is thus sustained is unique in the history of Anglo-American legislation. It does more than suppress freedom of speech and more than prohibit the free exercise of religion, which concededly are forbidden by the First Amendment and are violations of the liberty guaranteed by the Fourteenth. For by this law the state seeks to coerce these children to express a sentiment which, as they interpret it, they do not entertain, and which violates their deepest religious convictions....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.*

Stone's opinion would come back to the Supreme Court in just three years.

Part 4: The 1943 Supreme Court decision

The "*Gobitis*" decision sparked a wave of widespread violence against the Jehovah's Witnesses; so much so that First Lady Eleanor Roosevelt appealed for calm. Never popular with mainstream Americans, the Witnesses were seen as subversives, and as the United States entered World War II some were even accused of being sympathetic to the Nazi government in Germany; an irony, since about half of the known number of German Witnesses were imprisoned by the Nazis for holding to the same beliefs as those espoused in America. The decision also caused some states and school districts to legislate patriotism. In 1942 the legislature of the state of West Virginia amended its statutes to require all public schools therein to conduct courses of instruction in history, civics, and in the Constitutions of the United States and of the State "for the purpose of teaching, fostering and perpetuating the

ideals, principles and spirit of Americanism, and increasing the knowledge of the organization and machinery of the government."[xxv] Local public school were required to perform the Pledge of Allegiance, complete with the Bellamy Salute, as part of their morning exercises.[xxvi] None of this stopped the Jehovah's Witnesses from refusing to salute the flag.

But the "*Gobitis*" decision made many legal scholars nervous. It seemed anti-American to compel a citizen to pay homage to an object, even if that object was the nation's flag. Does one actually succeed in inculcating patriotism through force of law? For many people the answer was "no." Certainly the Jehovah's Witnesses had their supporters; the American Civil Liberties Union and many newspaper editorial boards declared the "*Gobitis*" decision a blow to liberty. Even some of those members of the Supreme Court that had voted to overturn the lower courts' decisions in the "*Gobitis*" case were now having second thoughts.[xxvii] They would soon have their chance to act upon them.

WEST VIRGINIA STATE BOARD OF EDUCATION v. BARNETTE
Argued March 11, 1943 - Decided June 14, 1943

In 1943, in the middle of World War II, Jehovah's Witnesses Walter Barnette, Lucy McClure, and Paul Stull sued when their children were expelled from the Kanawha County, West Virginia, schools for their refusal to salute the American Flag. In what looked like a replay of the "*Gobitis*" case the Witnesses won in the lower federal courts, and the state appealed to the Supreme Court. Briefs of *amici curiae*[xxviii] were filed on behalf of the Committee on the Bill of Rights of the American Bar Association, and by the American Civil Liberties Union. But while the "*Gobitis*" case put the emphasis on religious liberty as guaranteed by the U.S. Constitution's First Amendment,[xxix] the *Barnette* case emphasized the freedom of speech provision contained in that Amendment. This time the Jehovah's Witnesses won, six votes to three.

While the Supreme Court often revisits earlier decisions, reversals are less common, and to have a reversal come so soon after "*Gobitis*" was remarkable. Justice Robert H. Jackson[xxx], writing for the majority, seemed eager to explain why the *Barnette* case required examining:

This case calls upon us to reconsider a precedent decision, as the Court, throughout

its history, often has been required to do. Before turning to the Gobitis case, however, it is desirable to notice certain characteristics by which this controversy is distinguished. The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin. But the refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so. Nor is there any question in this case that their behavior is peaceable and orderly. The sole conflict is between authority and rights of the individual. The State asserts power to condition access to public education on making a prescribed sign and profession and at the same time to coerce attendance by punishing both parent and child. The latter stand on a right of self-determination in matters that touch individual opinion and personal attitude."[xxxi]

Jackson's phrase, "individual opinion and personal attitude," was an allusion to the First Amendment's guarantee of free speech. Coercing students to recite the Pledge and perform the Bellamy Salute violated their First and Fourteenth[xxxii] Amendment rights. Jackson was quick to point out that the sincerely held religious beliefs of the Witnesses did not control the decision of the court:

Nor does the issue, as we see it, turn on 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. It is not necessary to inquire whether nonconformist beliefs will exempt from the duty to salute unless we first find power to make the salute a legal duty.[xxxiii]

Part of Jackson's opinion is best described by the phrase, "you can't legislate morality." Jackson wrote,

The case is made difficult not because the principles of its decision are obscure, but because the flag involved is our own. Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous, instead of a compulsory

routine, is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

Given that Jackson was a staunch Democrat and an FDR appointee, inclined to judicial deference, his libertarian decision stunned some of this colleagues on the court.

Justice Felix Frankfurter, who had written the majority opinion in the "*Gobitis*" case, wrote a dissenting opinion in which he took the majority to task. Reminding the court that he was a Jew and understood a thing or two about persecution, Frankfurter got directly to the point:

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 the 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. The duty of a judge who must decide which of two claims before the Court shall prevail, that of a State to enact and enforce laws within its general competence or that of an individual to refuse obedience because of the demands of his conscience, is not that of the ordinary person. It can never be emphasized too much that one's own opinion about the wisdom or evil of a law should be excluded altogether when one is doing one's duty on the bench. 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. In the light of all the circumstances, including the history of this question in this Court, it would require more daring than I possess to deny that reasonable legislators could have taken the action

which is before us for review. Most unwillingly, therefore, I must differ from my brethren with regard to legislation like this. I cannot bring my mind to believe that the "liberty" secured by the Due Process Clause[xxxiv] *gives this Court authority to deny to the State of West Virginia the attainment of that which we all recognize as a legitimate legislative end, namely, the promotion of good citizenship, by employment of the means here chosen.*

For Justice Frankfurter, in any contest between the state and the individual, deference must be given to the state.

The *Barnette* decision stunned many individuals and organizations, especially patriotic organizations (the American Legion had filed its own *amicus* brief, urging reversal), coming as it did in the middle of a major war. But the iconoclasts had won.

Part 5: Efforts to protect the American flag by legislation

On 22 June 1942 a set of guidelines concerning the American Flag and the Pledge of Allegiance, created by the National Americanism Commission of the American Legion, were adopted by Congress and passed into law, establishing America's first official "Flag Code."[xxxv] The law included the Bellamy Salute, but on 22 December of that same year the Code was revised to eliminate it. The Flag Code would be modified two more times; in 1954 to add the phrase "under God" to the Pledge of Allegiance, and in 1976 to make the specifications pertaining to the American Flag as delineated in Executive Order 10834[xxxvi], that had heretofore been requirements only for Federal agencies, applicable to anyone.[xxxvii]

Although the Jehovah's Witnesses had successfully challenged local and state laws concerning what they considered to be "icon worship," there were never any serious attempts by them, or any other group, to express displeasure with the policies of the American government by actual flag desecration during the 1930's and 1940's. That would change in the 1960's, and would have nothing to do with the Jehovah's Witnesses – at least directly. A combination of the Vietnam conflict, civil-rights protests, and radical politics created situations were the American Flag was physically assaulted and burned in protest. However, it would not be until 1989 when the Supreme Court of the United States, in *Texas v. Johnson*, ruled that burning the American Flag in political protest was a form of free speech, protected by the

Constitution's First Amendment.[xxxviii] In that ruling the court would reference *Barnette*.

In 1984, at the Republican National Convention held in Dallas, Texas, a member of the "Revolutionary Communist Youth Brigade," Gregory Lee Johnson, was arrested for setting the American Flag alight as a protest against the policies of the Reagan Administration. He was arrested, charged, and convicted under a Texas statute that prohibited the "desecration of a venerated object." As happened in the Witnesses' cases, Johnson appealed. His sentence was first upheld by a state court of appeals, but *the Texas Court of Criminal Appeals reversed, holding that the State, consistent with the First Amendment, could not punish Johnson for burning the flag in these circumstances.*[xxxix] Texas then brought the matter before the Supreme Court. In a 5 to 4 decision, the Supreme Court upheld the Texas Court of Criminal Appeals. Writing for the majority, Justice William J. Brennan stated that disagreeable ideas cannot themselves be banned by law, simply because they are disagreeable. Part of Brennan's opinion reads as follows:

> *If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. See, e.g., Hustler Magazine v. Falwell, 485 U.S. at 485 U. S. 55-56; City Council of Los Angeles v. Taxpayers for Vincent,466 U. S. 789, 466 U. S. 804 (1984); Bolger v. Youngs Drug Products Corp.,463 U. S. 60, 463 U. S. 65, 463 U. S. 72 (1983); Carey v. Brown,447 U. S. 455, 447 U. S. 462-463 (1980); FCC v. Pacifica Foundation, 438 U.S. at 438 U. S. 745-746; Young v. American Mini Theatres, Inc.,427 U. S. 50, 427 U. S. 63-65, 427 U. S. 67-68 (1976) (plurality opinion); Buckley v. Valeo,424 U. S. 1, 424 U. S. 16-17 (1976); Grayned v. Rockford,408 U. S. 104, 408 U. S. 115 (1972); Police Dept. of Chicago v. Mosley,408 U. S. 92, 408 U. S. 95 (1972); Bachellar v. Maryland,397 U. S. 564, 397 U. S. 567 (1970); O'Brien, 391 U.S. at 391 U. S. 382; Brown v. Louisiana, 383 U.S. at 383 U. S. 142-143; Stromberg v. California, 283 U.S. at 283 U. S. 368-369.*
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> *We have not recognized an exception to this principle even where our flag has been involved. In Street v. New York,394 U. S. 576 (1969), we held that a State may not criminally punish a person for uttering words critical of the flag. Rejecting the argument that the conviction could be sustained on the ground that Street had "failed to show the*

respect for our national symbol which may properly be demanded of every citizen," we concluded that "the constitutionally guaranteed 'freedom to be intellectually . . . diverse or even contrary,' and the 'right to differ as to things that touch the heart of the existing order,' encompass the freedom to express publicly one's opinions about our flag, including those opinions which are defiant or contemptuous."

Id. at 394 U. S. 593, quoting Barnette, 319 U.S. at 319 U. S. 642. Nor may the government, we have held, compel conduct that would evince respect for the flag.[xl]

Chief Justice William H. Rehnquist wrote a dissenting opinion that argued both for the "uniqueness" of the American Flag – in which he included poetry, the National Anthem, and references to national holidays – and the theory of "judicial restraint" championed by Oliver Wendell Holmes Jr. Rehnquist wrote:

The American flag, then, throughout more than 200 years of our history, has come to be the visible symbol embodying our Nation. It does not represent the views of any particular political party, and it does not represent any particular political philosophy. The flag is not simply another "idea" or "point of view" competing for recognition in the marketplace of ideas. Millions and millions of Americans regard it with an almost mystical reverence, regardless of what sort of social, political, or philosophical beliefs they may have. I cannot agree that the First Amendment invalidates the Act of Congress, and the laws of 48 of the 50 States, which make criminal the public burning of the flag. [xli]

Since *Johnson* various attempts to introduce a Constitutional Amendment to protect the American Flag have failed, largely because lawmakers realize that such an Amendment would create a contradiction by guaranteeing free speech in one Amendment, and restricting it in another. Contradictory laws cannot be enforced. Neither can opinions nor morality.

i My thanks to Ted Kaye, Editor of the Portland Flag Association's newsletter, and Membership Committee adviser for the North American Vexillological Association, for his suggestions, advice, and corrections; and to Dr. Henry W Moeller, author of "Shattering an American myth: Unfurling the history of the stars and stripes" for his corrections and encouragement.

ii Man gets 13 years, 9 months for flag insult, TURKISH WEEKLY, 27 March 2015

iii The powerful Union veterans organization, Grand Army of the Republic (GAR), played a substantial, if not the major, role in urging schools to place American Flags in their classrooms.

iv Mother of Invention, FLAG – AN AMERICAN BIOGRAPHY, Marc Leepson, p.40-41

v The Pattern for Stars Artifact, BETSY ROSS'S FIVE POINTED STAR, John Balderston Harker, p.89. (the author is Betsy's great-great-grandson.) A pattern for a five-pointed star was found in a safe belonging to the Society of Free Quakers. Opened in 1922, the pattern was signed, "H. C. Wilson, Betsy Ross pattern for stars -c"

vi See Chapter 11, BETSY ROSS'S FIVE POINTED STAR, John Balderston Harker

vii One Nation Indivisible, FLAG – AN AMERICAN BIOGRAPHY, Marc Leepson, p. 164

viii ibid

ix One Nation Indivisible, FLAG – AN AMERICAN BIOGRAPHY, Marc Leepson, p. 168

x The phrase "under God" had come into use as early as 1948 as an unofficial amendment to the Pledge. See "Addition of 'under God'" in the article "Pledge of Allegiance," http://en.wikipedia.org/wiki/Pledge_of_Allegiance

xi Icon, The American Heritage Dictionary, 1975, p. 653

xii It is not my purpose to present a history of the Jehovah's Witnesses, as information on this group is ubiquitous. A "Google" search for "Jehovah's Witnesses" turned up 6,110,000 references. Although sometimes maligned, WIKIPEDIA is a good starting point for anyone wishing to research the Witnesses.

xiii Charles Taze Russell, WIKIPEDIA, http://en.wikipedia.org/wiki/Charles_Taze_Russell

xiv Joseph Franklin Rutherford, WIKIPEDIA, http://en.wikipedia.org/wiki/Joseph_Franklin_Rutherford

xv Why Don't Jehova's Witnesses Go to War?, http://www.jw.org/en/jehovahs-witnesses/faq/why-dont-you-go-to-war/, Jehova's Witnesses

xvi See "JEHOVAH'S WITNESSES", THE AMERICAN PEOPLES ENCYCLOPEDIA, 1952, entry p11-599, p11-600, by W. E. Garrison. Garrison, an American educator who taught church history at the University of Chicago, writes, "The Witnesses have clashed with the police and with local, state, and national government on many occasions, on account of their energetic methods of propaganda and their resistance to military service and to the usual symbols of civic loyalty.''

xvii Jehovah's Witnesses and compulsory flag pledges, http://en.wikipedia.org/wiki/Minersville_School_District_v._Gobitis

xviii A court clerical error would change the family surname from "Gobitas" to "Gobitis" and the spelling would remain in error in the Supreme Court decision

xix See endnote #8, Minersville School District v. Gobitis, http://en.wikipedia.org/wiki/Minersville_School_District_v._Gobitis

xx Letter, Billy Gobitas to Minersville, Pennsylvania, school directors, explaining why the young Jehovah's

Witness refused to salute the American flag, 5 November 1935. (William Gobitas Papers), Library of Congress, http://lcweb2.loc.gov/cgi-bin/query/r?ammem/mcc:@field%28DOCID+@lit%28mcc/016%29%29

xxi Frankfurter thus gave credence to the notion that school districts were, in fact, local governments in themselves.

xxii 310 U.S. 586 (1940), MINERSVILLE SCHOOL DISTRICT, BOARD OF EDUCATION OF MINERSVILLE SCHOOL DISTRICT, ET AL. v. GOBITIS ET AL., No. 690, Supreme Court of United States, http://scholar.google.com/scholar_case?case=3946249041792057132&q=Wooley+v.+Maynard&hl=en&as_sdt=6,39&as_vis=1

xxiii For a excellent book on the Supreme Count of the United States see OVERRULED – THE LONG WAR FOR CONTROL OF THE U.S. SUPREME COURT by Damon Root, Senior Editor at Reason magazine and Reason.com. Root does an excellent job of explaining the concepts of both "judicial review" and "judicial deference."

xxiv Holmes's view of law, OVERRULED – THE LONG WAR FOR CONTROL OF THE U.S. SUPREME COURT by Damon Root, Palgrave Macmillan, p43

xxv Mr. Justice Jackson's Opinion of the Court, preamble, 319 U.S. 624 (1943), WEST VIRGINIA STATE BOARD OF EDUCATION ET AL. v. BARNETTE ET AL., No. 591., Supreme Court of United States. 14 June 1943

xxvi Many local school districts also included The Lord's Prayer

xxvii See JONES v. CITY OF OPELIKA. BOWDEN et al. v. CITY OF FORT SMITH, ARK. JOBIN v. STATE OF ARIZONA (https://www.law.cornell.edu/supremecourt/text/316/584). This is another Jehovah's Witnesses case that came before the Supreme Court, this time dealing with local ordinances requiring licenses taxes to distribute or sell religious literature. Writing the majority opinion, Justice Reed laid out the background of the case: "By writ of certiorari in Nos. 280 and 314 and by appeal in No. 966 we have before us the question of the constitutionality of various city ordinances imposing the license taxes upon the sale of printed matter for nonpayment of which the appellant, Jobin, and the petitioners, Jones, Bowden and Sanders, all members of the organization known as Jehovah's Witnesses, were convicted." The Court upheld the governments' positions. Writing a dissenting opinion, Justices Murphy, Black, and Douglas 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, 60 S.Ct. 1010, 84 L.Ed. 1375, 127 A.L.R. 1493, 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 that it was also 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 opinions in these and in the Gobitis case do exactly that. "

xxviii Latin for "friends of the court"

xxix "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise

thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. " - US Constitution, First Amendment of ten known as the "Bill of Rights."

xxx Justice Jackson would later become the chief U.S. prosecutor at the Nuremberg trials

xxxi 319 U.S. 624, West Virginia State Board of Education v. Barnette (No. 591), Argued: March 11, 1943, Decided: June 14, 1943, LEGAL INFORMATION INSTITUTE, CORNELL UNVERSITY, https://www.law.cornell.edu/supremecourt/text/319/624

xxxii The Fourteenth Amendment is important to this case because it extends the Bill of Rights, which had at one time been interpreted as applying to only the federal government, to the various states as well.

xxxiii 319 U.S. 624, West Virginia State Board of Education v. Barnette (No. 591), Argued: March 11, 1943, Decided: June 14, 1943, LEGAL INFORMATION INSTITUTE, CORNELL UNVERSITY, https://www.law.cornell.edu/supremecourt/text/319/624

xxxiv The "Due Process Clause" refers to the phrase, "without due process of law," that occurs in the Fifth and Fourteenth Amendments to the Constitution.

xxxv Public Law 77-623, Chapter 435, by the 77th Congress of the United States. See http://en.wikisource.org/wiki/Public_Law_77-623. "Prior to Flag Day, June 14, 1923, neither the federal government nor the states had official guidelines governing the display of the United States' flag. On that date, the **National Flag Code** was constructed by representatives of over 68 organizations, under the auspices of the National Americanism Commission of the American Legion. The code drafted by that conference was printed by the national organization of the American Legion and given nationwide distribution." - from http://en.wikipedia.org/wiki/United_States_Flag_Code, HISTORY

xxxvi On 24 June 1912 President William Howard Taft signed Executive Order 1556, a document that established official specifications for the Flag of the United States. This order has been modified over the years with respect to the arrangement and proportions of the stars, but the original aspect ratio for the overall flag, and the proportions pertaining to the Union (the canton, or "blue area" of the flag) remain unchanged. An official U.S. Flag has an aspect ratio of 1.9:1, or in layman's language, it is nearly twice as long as it is wide. The Union extends outward 4/10 of the flag's length, and extends downward to the bottom of the 7th stripe. Executive Order 10834, signed into law by President Dwight David Eisenhower on 21 August 1959, is the document covering the 50-star flag. And on 7 July 1976, this order was incorporated into Public Law 94-344, making it the law of the land.

xxxvii Public Law 94-344, by the 94th Congress of the United States. See http://en.wikisource.org/wiki/Public_Law_94-344/ Few citizens of the United States know that there are specific proportions for the American Flag and that the most common size sold – 3 feet by 5 feet – does not meet the Flag Code. However, like most of the other provisions in the Code, there is no enforcement of the provision for flag specifications.

xxxviii Texas v. Johnson, 491 U.S. 397 (1989), Supreme Court of the United States. See https://supreme.justia.com/cases/federal/us/491/397/

xxxix ibid

xl OPINION, Texas v. Johnson ,491 U.S. 397 (1989), Supreme Court of the United States. See

https://supreme.justia.com/cases/federal/us/491/397/case.html#410

xli ibid