

Introduction

The United States of America has a Constitution that is incredibly vague. This makes the Constitution flexible, and therefore lasting; however it also means that Supreme Court justices have many difficult cases come before them on the bench. There are a plethora of modes that the justices utilize when writing up their opinions; they are Originalism, Textualism, Precedent, Doctrinalism, Textual Reference, Living Constitution, Judicial Restraint, Judicial Activism, and Balancing Approaches. Though the justices never overtly cite a mode, at least one or two of them are seen in every justice's opinion—be it the majority opinion, a concurring opinion, or a dissent. This paper is going to discuss the modes used in the Supreme Court justices' differing opinions in the *Minersville School District v. Gobitis* (1940) and *West Virginia State Board of Education v. Barnette* (1943) cases. Understanding the modes and how they are used in judicial opinions is necessary for understanding the development of constitutional law in general. The Constitution, and often the laws, are incredibly vague and understanding how and why the justices decide cases makes the American political system less opaque.

Minersville School District v. Gobitis (1940)

The conflict in *Minersville School District v. Gobitis* arose when two young schoolchildren, Lillian and William Gobitis, aged twelve and ten, respectively, refused to participate in the mandatory flag salute at their school. They claimed their religion, Jehovah's Witness, forbade them from honoring anything higher than the Bible and therefore they could not pledge allegiance to the flag, as doing so would be honoring the flag and by extension the country, higher than their God. The legal question that is up for debate is if the Gobitis children's rights guaranteed to them in the First and Fourteenth amendments were being violated. Does the court have the right to deny religious freedoms if the cohesiveness of the nation is at risk?

Justice Frankfurter's Majority Opinion

The Supreme Court ruled 8-1 in favor of the Minersville School District; in other words, they decided that the Gobitis children did not have the right to refuse to participate in the Pledge of Allegiance. Justice Frankfurter wrote up the majority opinion. In it, he said the work of judges is never so difficult as when religious freedoms are vetted against the communal well being of the nation. Justice Frankfurter acknowledged that the government could have no say over what people believe or do not believe, even if someone's belief or disbelief insults somebody else. What Justice Frankfurter questions is whether or not the individual is allowed to continue to practice their belief if doing so puts the greater good of society at risk. According to Justice Frankfurter, "national unity is the basis of national security," and pledging allegiance to the flag in school is a practice that conjures in the children "an appreciation of the nation's hopes and dreams, its sufferings and sacrifices." If not everyone salutes the flag, says Justice Frankfurter, then there will be none of the glue that holds American society together: national cohesion.

One of the modes present in this opinion is Originalism. When a justice uses the Originalism mode, they are looking at the intentions of the Framers. The justice takes into account what they think the Framers were thinking and what they hoped to accomplish by writing something in, or leaving something out of, the Constitution. Supreme Court Justice Frankfurter did not use Originalism in his opinion; the mode makes an appearance in his write up precisely because he was explaining his desire to stay away from his interpretation of the Framers' thoughts; a fallacy in his mind because the justices would be "attributing to the framers of the Bill of Rights views for which there is no historic warrant." Justice Frankfurter does not want to speak for the Framers on the more vague issues, since it is difficult to find hard evidence of precisely what they meant.

Another mode that is present and used in the opinion is Precedent. The Precedent mode is being used when a justice calls upon a prior case and honors prior rulings. They look at the principles and rules laid out in the prior case, and follow the motto “stare decisis,” or “let the decision stand.” In *Minersville School District v. Gobitis*, Justice Frankfurter mentioned a number of past cases that influenced the way the Court decided this one. One such case is *Hudson Water Co. v. McCarter*, and he invites the reader to compare the present case to it. *Minersville* is a question of whether religious freedoms should have no limits in our society, while *Hudson Water* is a question of how strong the police powers should be. Referencing another case, *Schneider v. State of New Jersey*, in which the Court decided the threat of littering did not give a state the right to bar people from handing out religious pamphlets, Justice Frankfurter highlights the difference between not letting legislature decide how to achieve national unity, which he saw as the precursor to national security, and not letting people have freedom of speech because of a potential litter problem.

The next case mentioned in Justice Frankfurter’s majority opinion is *Hamilton v. Regents*. The case involved students who did not want to take mandatory military science classes at the University of California, claiming it went against their religion. The Court stated that the college had the right to demand students to take the class; there is a distinction between believing in war, which goes against their religion, and taking a military science class. This case dates back to the 1930s and Justice Frankfurter uses it as an example of how long our country has debated over religious freedom. Justice Frankfurter next lists four cases, including *Hamilton*, all having to do with religious freedoms. In all cases, the Court decided against religious freedom because to rule in favor for it, in these cases, would shake the very core of what keeps our society “orderly, tranquil, and free.” Justice Frankfurter references these cases, *Reynolds v. United States*, *Davis v.*

Beason, *Selective Draft Law Cases*, and *Hamilton v. Regents*, because he uses the same logic to explain the Court's decision in *Minersville*. Justice Frankfurter cites another case, *Halter v. Nebraska*, to say that the flag is the symbol of national unity, and because national unity is the root of national security, the flag must inherently be more important than anything.

Another mode utilized by Justice Frankfurter is Judicial Restraint. When a justice uses this mode, they almost certainly decide that the law in question is constitutional. The justice does not want to take power away from the legislature, as can be seen in Justice Frankfurter's opinion. He goes out of his way to defer to legislation more than once. The core of our society, which Justice Frankfurter is attempting to keep "orderly, tranquil, and free," is in place because of the laws. Justice Frankfurter is hesitant to speak against the legislatures on how to best assure that children who attend public schools are attached to their country.

Another mode that is present in *Minersville* is the Balancing Approach. In the opening paragraph of his opinion, Justice Frankfurter recognized that the Court was facing a case that involved the rights of the individual's "liberty of conscience" and the "nation's fellowship." The Court had to weigh the interests of the individual or the few against the interests of the nation. In this case, the Court chose to protect the interests of the many and ruled against the Gobitis children.

Justice Stone's Dissenting Opinion

Justice Stone did not agree with the other eight members on the bench; he was the sole dissenter of the *Minersville School District v. Gobitis* case. Like the others, Justice Stone saw that the legal battle was one between public good and religious freedom; however, unlike his colleagues, he found no evidence to condone a violation of the First and Fourteenth amendments. Justice Stone admitted that the liberties guaranteed in the Constitution are in many cases

debatable, but that in this case the school board was treading on the religious minority so overtly and unfairly that in his mind there could be no question as to who should have won the case.

Originalism is present in Justice Stone's dissenting opinion. Unlike Justice Frankfurter, who referenced the Framers to show that their exact views could not be reliably gotten at in this case, Justice Stone relied heavily on his interpretation of the intentions of the Framers. While the majority on the Court was seeking to protect society's welfare from the potential havoc coming from the Gobitis children not saluting the flag, Justice Stone believed that the Framers would not have wanted the religious freedom of anyone, especially children, to be violated, and that there were other ways to ensure children's patriotism besides saying the Pledge of Allegiance.

Another mode that Justice Stone uses in his dissenting opinion is Textualism. Justices using this mode are looking at the plain wording of the Constitution. They are looking at what is written down by the Framers, and it can be argued that by necessity they are also taking into consideration what the Framers left out. Taking into account what is written explicitly on the document, Justice Stone wrote that while the Constitution plainly says that citizens must be loyal to their country; However, Justice Stone points out what is not present in the Constitution as well: that this loyalty should override the protection of freedom of speech and religion.

Justice Stone also uses the Precedent mode in his opinion. He uses the case *United States v. Carolene Products Co.* to emphasize the fact that the Court has in the past protected minorities from the sometimes-domineering legislatures when they tend to start overriding those political processes that are supposed to protect the minority. He also uses the case *Pierce v. Society of Sisters* to emphasize the Court's previously unrestrained behavior when restricting the actions of legislatures when he said legislatures were constraining the civil liberty of racial and religious minorities.

Justice Stone uses one last mode in his opinion—Judicial Activism. Justices using this mode are more willing to strike laws down. They are concerned with protecting the essential freedoms of the citizens and they are not comfortable deferring to legislatures. This is perhaps the most apparent mode in Justice Stone’s differing opinion. Justice Stone is obviously pushing to deem the law unconstitutional, and he does not believe that the legislature has the authority to threaten essential freedoms like the freedom of religion and speech with no better reason than that of a flag salute. In a statement that combines both his view of the lack of authority the legislature has over this matter and his worry about the civil liberties being deprived to the minorities, he says, “careful scrutiny of legislative efforts to secure conformity of belief and opinion . . . is especially needful if civil rights are to receive any protection.” Justice Stone felt that essential freedoms needed protecting and that the legislature was not the governmental authority that should do it.

West Virginia State Board of Education v. Barnette (1943)

After the *Gobitis* case, the Board of Education in West Virginia passed a law making the flag salute mandatory. Those who refused to participate were seen as insubordinates, and they were expelled. *West Virginia State Board of Education v. Barnette* was brought to court in an effort to defend Jehovah’s Witnesses from their unfair treatment under this law. As already mentioned, participants of this religion believe that saluting the flag is an insult to their God; it is stated in Exodus that they cannot hold any earthly thing higher than Him. The children who are being expelled are also being threatened with the possibility of being sent to a reformatory where they take children who are prone to criminal behavior. This case’s purpose is to reconsider the decision made in *Gobitis*, and the conflict is “between authority and the rights of the individual”;

in other words, between the right of the state to use compulsion to make schoolchildren recite the flag salute, and the right of the children to not say anything they do not agree with.

Justice Jackson's Majority Opinion

The Supreme Court decided in a 6-3 decision to overturn the *Gobitis* case. Justice Jackson wrote up the majority opinion. Justice Jackson wrote that the *Gobitis* case focused on whether the need for national unity was reason enough for the compulsory flag salute. This question assumes that the state has the power to enforce such a thing, while in actuality this is not a guaranteed power; it is “unquestioned general rule.” Justice Jackson is examining, rather than assuming, the existence of this power; he is not questioning that national unity was the endgame in *Gobitis*, he is questioning the legality of the compulsion. Justice Jackson's majority opinion uses many of the modes, which help to explain his interpretation of the Constitution. This paper will not examine the most obvious of modes, Precedent, because this case is in existence wholly because of *Gobitis*.

The first mode present in Justice Jackson's majority opinion is Originalism. Justice Jackson analyzes a quote from Lincoln used in the original *Gobitis* case: “Must a government of necessity be too strong for the liberties of its people, or too weak to maintain its own existence?” Justice Jackson claims that Lincoln did not want this statement to be interpreted to say that expelling a few children for staying silent during a flag salute was proving the so-called “strength” of the government. Justice Jackson believes that this is not a question of strong versus weak government, but instead a question of individual freedom versus disciplined uniformity.

Another mode that can be seen in Justice Jackson's write up is that of Textualism. The main argument that the Court gives for overturning the *Gobitis* case was that refusing to do so would be a flagrant disregard of the due process clause in the Fourteenth Amendment. Justice

Jackson noted that the Fourteenth Amendment protected citizens against all “creatures” of the state, including Boards of Education. Justice Jackson was tuned in to what the actual words of the amendments said and did not take into account anything else. Textualism is seen again when Justice Jackson is analyzing the meaning of the Bill of Rights and says that the document “denies those in power any legal opportunity to coerce that consent” needed by the governed to govern.

Another mode utilized by Justice Jackson is the Living Constitution. This mode is used when there is recognition by the justices that the values of society are different from the time the Framers wrote the Constitution to the present day. The justices, when using this mode, are looking at the Constitution and are making it applicable to the present time versus the past. Justice Jackson wrote that the principles in the Bill of Rights “grew in soil which produced” the thoughts and values used in a type principle known as *laissez-faire*, a principle that we do not value anymore. Justice Jackson believes that these rights must be put in “a soil in which the *laissez-faire* concept or principle . . . has withered,” because that is the only way that the rights can be properly applied to this case.

It could be argued that another mode that is present in Justice Jackson’s majority opinion is Polling Jurisdictions. This mode is present when a justice looks to other states or countries to see how they have handled a similar problem. In his opinion, Justice Jackson looks back at history and all the times that compulsion has been used in the past, whether in the quest for racial or territorial security, trying to gain support for a regime, or religious reasons. No matter the reason, history shows that “compulsory unification of opinion achieves only the unanimity of the graveyard.” The Court, by taking this into consideration, was able to learn from the mistakes of others and decide accordingly.

Justice Black’s Concurring Opinion

Justice Black agreed with the majority opinion, though he felt it necessary to write up an opinion of his own. This is because he was on the Supreme Court when it heard the *Gobitis* case, and he was one of the justices who decided that enforcing the flag salute was constitutional. Justice Black wanted the opportunity to explain why he changed his stance on this issue. Justice Black agrees entirely with the majority opinion that the First and Fourteenth Amendments were violated; he writes mostly to explain his change of mind. Therefore, unlike the other opinion write-ups, there are few modes used because the justice does not have the responsibility of defending his entire argument.

A mode that is present in Justice Black's concurring opinion is Precedent. Justice Black uses *Jones v. Opelika* case to prove that the principle that they were attempting to apply in the *Gobitis* case is a good one. While the principle did not deliver the justice they hoped it would, the principle was applied in *Jones* as well, and there it worked like it should.

Justice Murphy's Concurring Opinion

Justice Murphy also concurs with the majority opinion. Though he acknowledges that the reasons for potentially wanting to compel the flag salute—not wanting to interfere with a state's decision, the fact that the flag is a symbol of so much importance to the nation—are strong, Justice Murphy writes that he cannot justify an individual's "invasion of freedom and privacy" for the enforcement of it. Justice Murphy believes that any sort of nationalistic feelings generated by compulsion are going to be far outnumbered by the feelings of injustice done. To ensure nationalism in its purest sense, Justice Murphy writes that "the example of persuasion" will do wonders compared to compulsion or force.

The Textualism mode is prevalent in Justice Murphy's opinion. When explaining why he feels it would be so hard for him to justify a judicial mandate to uphold the *Gobitis* decision,

Justice Murphy talks about rights that the Constitution “specifically shelters.” These rights include the freedom to believe in what God or religion one wants “according to the dictates of one’s conscience.” Justice Murphy is calling upon the actual meaning of the words in the Constitution here as well as later on in his opinion, where he states that the rights of thought and religion include the right to not only speak freely but the right to stay silent.

Justice Frankfurter’s Dissenting Opinion

Justice Frankfurter dissented with the Court’s decision in *West Virginia State Board of Education v. Barnette*. This is unsurprising, given that Justice Frankfurter wrote up the majority opinion in the *Gobitis* case. This time around, Justice Frankfurter does not see the matter at hand as question of whether the potential threat to national unity is reason enough to compel children to salute the flag, even if it is against their wishes; instead, Justice Frankfurter claims that the only thing justices need to be concerned with when deciding this case is whether the legislature could have enacted the law.

In his dissenting opinion, Justice Frankfurter uses two modes at once. These are Precedent and Judicial Restraint. The overlapping use of these modes can be seen in his reference to the case *Missouri, K. & T. Ry. Co. v. May*. In *Missouri*, Justice Holmes argued that legislature and courts are equally important to the preservation of the people’s welfare. This is an argument that resonates with Justice Frankfurter, who claims in this opinion that “responsibility for legislation lies with legislatures,” a phrase that shows how he is prone to Judicial Restraint. Justice Frankfurter believes that the Court’s “only and very narrow function” is to decide if the legislature is acting within their authority. Since he determined that the legislature was within their right to make the law, Justice Frankfurter thought said law should be upheld and therefore dissented from the majority opinion.