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## THE PROTEAN PROGRESSIVE FREE SPEECH CLAUSE

by Corbin K. Barthold

Felix Frankfurter was a man of the Left. He wrote often for *The New Republic*, and he helped found the ACLU. He lobbied the United States to recognize the Soviet Union during the Russian Civil War. He was the foremost proponent of a new trial for the anarchists Sacco and Vanzetti.

While Frankfurter was agitating and organizing as a professor at Harvard Law School in the 1910s and '20s, the Supreme Court was striking down state licensing requirements, consumer-protection rules, and wage-and-hour laws. Like many on the Left of that day, therefore, Frankfurter believed in judicial restraint. Justice Louis Brandeis captured the contemporary progressive attitude in a 1932 dissent. "It is one of the happy incidents of the federal system," he wrote, "that a single courageous state may, if its citizens choose, serve as a laboratory" and "try novel social and economic experiments without risk to the rest of the country."

Brandeis's great ally on the court was Justice Oliver Wendell Holmes, Jr. It was not progressive principle that made Holmes a restrained judge; it was a bullet in the neck in the Civil War. "What damned fools people are who believe things," he once told the socialist professor Harold Laski. Although he said it of a pacifist in a case before the court, the line captures how he saw most things, including judging. Oddly enough, the idealistic Frankfurter worshiped the cynical Holmes. A justice willing to uphold social legislation he thought pointless, even ridiculous, was in Frankfurter's eyes the pattern of a sound judge. This might explain why Frankfurter's own judicial principles would remain fixed as times changed.

And change they did. Frankfurter became a justice in 1939. The next year, on behalf of an 8-1 majority of the court, he declared that the First Amendment has nothing to say about the expulsion from school of Jehovah's Witnesses who refuse to pledge allegiance to the flag of the United States. Local governments must, Frankfurter thought, have the "authority to safeguard the nation's fellowship." Just three years later, however, in *West Virginia State Board of Education v. Barnette* (1943), the court voted 6-to-3 to overturn Frankfurter's opinion. "If there is any fixed star in our constitutional constellation," Justice Robert Jackson wrote for the majority, "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."

Now in dissent, Frankfurter fumed about judges who write their "private notions of policy into the Constitution." "It must be remembered," he wrote, quoting Holmes, "that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."

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True, but not a very compelling point in a case about forcing schoolchildren to swear an oath against their (and their parents') will.

Shortly after the First World War, in fact, Holmes had started to take a more expansive view of the Free Speech Clause. "When men have realized that time has upset many fighting faiths," he explained in dissent in *Abrams v. United States* (1919), "they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas." When it came to free speech, Holmes could use his old philosophical skepticism to justify a new judicial assertiveness. His pivot was driven in part by distress at the persecution Frankfurter and Laski suffered at Harvard for their radical views. Yet Frankfurter himself remained in awe of the Holmes who told Laski, just a year after *Abrams*, that if the people want to go to hell, a judge's job is to help them along.

Frankfurter clashed often with a group of justices, led by William Brennan and William Douglas, who placed little stock in text, precedent, or history. This activist wing became increasingly dominant. Frankfurter's hour was past—or, rather, had never come. When Brennan, writing for the court in *Baker v. Carr* (1962), overturned a raft of precedents on the way to declaring that legislative redistricting decisions can be challenged in court, Frankfurter issued a long and bitter dissent, suffered a stroke, and retired.

Frankfurter complained that the court's hard left produced opinions that were "shoddy" and "result-oriented." He might have added "anarchic." In 1968 a man wore a jacket emblazoned with the words "F\*\*\* the Draft" in a courthouse. He was arrested and prosecuted for "disturbing the peace . . . by offensive conduct." In his final months on the court, John Marshall Harlan wrote the decision in the man's appeal. An heir, in many ways, of Holmes, Brandeis, and Frankfurter, Harlan set a trend for many later conservative justices by "evolving" on the bench. His opinion in *Cohen v. California* (1971) declared the protester's conviction inconsistent with the First Amendment.

Because the offensive-conduct statute applied throughout the state, the defendant, Harlan concluded, was not "on notice" that "certain kinds of otherwise permissible speech or conduct would . . . not be tolerated in certain places." Harlan dodged the key question—what counts as offensive conduct *in a courthouse*—by denying that the law can turn on context or matters of degree. Having thus oversimplified the case (and infantilized every citizen), he was free to ask simply whether a state may ban the use of expletives in public. At that point he could at least have knocked down his straw man with a straightforward "no". Instead Harlan offered a paean to vulgar relativism, a tract now remembered mainly for the assertion that "one man's vulgarity is another's lyric." As Robert Bork noted in *The Tempting of America*, that statement is a challenge to all laws on all subjects. "After all, one man's larceny is another's just distribution of goods."

Does *Cohen* remain a totem of left-wing free-speech jurisprudence? The court's progressives seem to have reversed gear. Take the court's decision earlier this month in *Barr v. American Association of Political Consultants Inc.* The Telephone Consumer Protection Act bans almost all robocalls to cell phones. The Act contains an exception for robocalls that seek to collect a debt owed to the federal government. At issue in *Barr* was whether this carveout violates the First Amendment. While acknowledging that robocalls are widely despised, the court concluded, by a vote of 6-to-3, that the government nonetheless may not engage in content-based discrimination, baselessly favoring some robocalls over others.

Writing for himself and Justices Ginsburg and Kagan, Justice Breyer argued in dissent that robocalls are not vital to core "First Amendment objectives," such as protecting people's ability "to

speak or to transmit their views to government.” Congress, in Breyer’s view, should have greater leeway to impose “ordinary regulatory programs” that pose “little threat” to the exchange of thought. Maybe so—but this is not the outlook on display in *Cohen*. Say the government prohibits writing political statements on tax returns. According to the *Barr* dissent, “it is hard to imagine” that such a rule would “threaten political speech in the marketplace of ideas.” Don’t count on the wing of the court that let a man say “F\*\*\* the Draft” in a courthouse in 1968 to let you say “F\*\*\* Taxes” on a tax form today.

Why has the court’s left wing lost its enthusiasm for free-speech absolutism? One factor is the emergence on the court of a right wing that upholds the free-speech rights of corporations. No longer the only ones patrolling constitutional boundaries, the progressives are more careful about loose rights talk.

Another factor might soon come to the fore. If the Left conquers American culture, sheds liberal values, and becomes a force for conformity, will the progressive justices shift in turn? In the case of a child expelled from school for refusing to acknowledge, and renounce, her privilege, would they chastise the wielders of power and discuss the “fixed star in our constitutional constellation”? Or would they gain a new understanding of Justice Frankfurter’s belief in the value of making parents accept “the training of [their] children in good citizenship”? In the appeal of a man charged with offensive conduct for wearing, amid a hostile crowd, a jacket maligning political correctness, would they use *Cohen* to lecture the easily offended about simply “avert[ing] their eyes” to avoid further “bombardment of their sensitivities”? Or might they suddenly see wisdom in the *Cohen* dissenters’ claim that “absurd and immature antic[s]” are conduct rather than speech?