

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

I (Still Won't) Pledge Allegiance to the Flag

Three Big Things:

1. After the Supreme Court's decision in *Minersville v. Gobitis* (1940), state legislatures and public school districts doubled-down on insisting all students salute the American flag and recite the Pledge of Allegiance regularly. Jehovah's Witnesses took the Bible's exhortation to "have no other gods before me" quite seriously and refused.
2. Despite the Court's nearly unanimous opinion in *Gobitis*, several justices soon began regretting their decision. The Court's membership also changed quickly in a few short years.
3. *West Virginia State Board of Education v. Barnette* reversed *Gobitis* and became a landmark case for the protection of First Amendment freedoms.

Background

After the Supreme Court's decision in *Minersville School District v. Gobitis* (1940), harassment and violence towards Jehovah's Witnesses surged dramatically across the United States. Many felt validated and encouraged by the Court's decision, which in their mind had essentially prioritized loyalty and being a good American over freedom of religion, speech, or association. It didn't help that the U.S. entered World War II shortly thereafter, making patriotism and loyalty towards one's nation and the flag which represented it even more essential in the minds of many. Deviance was perceived as not merely suspect, but dangerous.

Only a few decades before *Gobitis* was the first "Red Scare," in which all things foreign or strange were suspected of undermining the American way of life and thus required hostile, or even violent response. A decade after *Barnette*, Congress would launch hearings into the "Communist infiltration" of government, publishing, and the entertainment industry, resulting in hundreds – possibly thousands – of loyal citizens losing their livelihoods and enduring ostracism by friends and neighbors.

In other words, being the "other" in the 20th century wasn't simply a matter of suspicious glances or provocative tweets. It meant you literally weren't safe just going about your business, no matter how hard you worked, how many taxes you paid, or how devoted you were to your faith and your family. The Jehovah's Witnesses weren't Communists, of course – but they were weird and often unpleasant. So... close enough.

A Free, Public Re-Education

As is so often the case, persecution only strengthened the resolve of the Jehovah's Witnesses. Their kids still refused to have other gods before the Big One. It was a mere three years before almost the exact same case as *Gobitis* came before the High Court once again. This time, however, the results would be a tiny bit different.

Following the Court's decision in *Gobitis*, West Virginia and other states upped their citizenship game and began requiring more intensive public school courses in history, civics, and Constitutional studies. They wanted there to be no doubt about the meaning of traditional American values, like "recite what we tell you and salute the symbols we choose or pay the price!" The West Virginia Board of Education issued a statewide resolution requiring the Pledge and flag salutes at all public school events; refusal to participate would be considered "insubordination" and dealt with harshly. The statute quoted extensively from the Majority Opinion in *Gobitis* by way of justification.

So... *Ouch*.

West Virginia and other states *did* allow some modification of the stiff-arm salute now associated with the Nazi Party. (Presumably, it was OK to *behave* like fascists as long as one used a slightly different *arm motion* while so doing.) They also tweaked the rules concerning expulsion. Children not saluting the flag and saying the Pledge would be sent home, after which parents would be prosecuted for not having them in school – rubbing salt into their state-inflicted wounds with a sort of “What? We’re just trying to help!” earnestness.

Marie and Gathie Barnette were Jehovah’s Witnesses who quietly refused to swear allegiance to anyone or anything other than the Lord their God. They were expelled, and once again the Witnesses began legal proceedings, despite the Court’s decision only a few years before.

Cases like the Barnettes’s don’t magically appear before the Supreme Court, of course. They’re filed in the appropriate local court first, then appealed up through the hierarchy. *Barnette v. West Virginia State Board of Education* (the Barnettes were initially the plaintiffs, hence the name reversal) began in the U.S. District Court for the Southern District of West Virginia and was heard by a three-judge panel in 1942.

District Courts are generally expected to follow the precedents set by those up the food chain – the Supreme Court or, lacking clarity from D.C., the closest District Court of Appeals. There are many cases involving issues not specifically addressed by the higher courts, of course, and from time to time there may be a rogue judge or two who go against the grain, but normally a case like *Barnette* should have been fairly straightforward, given its similarity to *Gobitis* a few short years prior. Clearly the district court would decide for the schools and everyone could go home.

Only it didn’t.

“Ordinarily We Would Feel Constrained...”

In a rather bold move, the three-judge court not only decided in favor of the Barnettes but made no effort to justify their decision by pretending this case was in some way different than its predecessor. Instead, they simply explained their reasoning based on developments since *Gobitis*, along with their own interpretation of the law and the Bill of Rights. Taken together, it’s a written opinion as eloquent as anything coming from the Supremes in those days:

Ordinarily we would feel constrained to follow an unreversed decision of the Supreme Court of the United States, whether we agreed with it or not. It is true that decisions are but evidences of the law and not the law itself; but the decisions of the Supreme Court must be accepted by the lower courts as binding upon them if any orderly administration of justice is to be attained. The developments with respect to the Gobitis case, however, are such that we do not feel that it is incumbent upon us to accept it as binding authority. Of the seven justices now members of the Supreme Court who participated in that decision, four have given public expression to the view that it is unsound, the present Chief Justice in his dissenting opinion rendered therein and three other justices in a special dissenting opinion in Jones v. City of Opelika...

There is, of course, nothing improper in requiring a flag salute in the schools. On the contrary, we regard it as a highly desirable ceremony calculated to inspire in the pupils a proper love of country and reverence for its institutions. And, from our point of view, we see nothing in the salute which could reasonably be held a violation of any of the commandments in the Bible or of any of the duties owing by man to his Maker. But this is not the question before us...

Courts may decide whether the public welfare is jeopardized by acts done or omitted because of religious belief; but they have nothing to do with determining the reasonableness of the belief. That is necessarily a matter of individual conscience. There is hardly a group of religious people to be found in the world who do not hold to beliefs and regard practices as important which seem utterly foolish and lacking in reason to others equally wise and religious; and for the courts to attempt to distinguish between religious beliefs or practices on the ground that they are reasonable or unreasonable would be for them to embark upon a hopeless undertaking and one which would inevitably result in the end of religious liberty.

There is not a religious persecution in history that was not justified in the eyes of those engaging in it on the ground that it was reasonable and right and that the persons whose practices were suppressed were guilty of stubborn folly hurtful to the general welfare...

That last bit echoed Justice Stone's dissent in *Gobitis*. When Justice Robert H. Jackson subsequently penned the Majority Opinion in *Barnette*, he explored the same theme just as poignantly.

Nine Justices, One Hundred and Eighty Degrees

The State appealed the case up the ladder and the Supreme Court was given an opportunity to try again. This time, they ruled 6–3 in favor of the Jehovah's Witnesses. The majority focused less on *religious freedom* for Jehovah's Witnesses and more on *freedom of speech* (or lack thereof) in general. It's not just that children of certain faiths should be free to respectfully abstain from public recitations of mandatory patriotism, they argued – it was bigger than that. There are certain core liberties which should be protected for *everyone*, regardless of the specific belief system or point of view involved:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

It was important to the decision that the children's abstention didn't interfere with the rights of those around them to go right ahead and say the pledge. Their defiance wasn't disruptive in and of itself:

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 non-disruptive element matters in this context because “disruption of the learning environment” is often sufficient to allow authorities to restrict behaviors in a school setting which would typically be protected in the larger adult world. (A generation later, the non-disruptive impact of black armbands worn to protest the Vietnam War will be central to the Court's protection free speech for high school students in *Tinker v. Des Moines*, 1969.)

In essence, the Court supported the concept of encouraging patriotism and national unity; it rejected the suggestion by the State that the best way to do this was mandatory rituals – especially when they violated the conscience of those involved.

Aftermath

Barnette was a turning point for jurisprudence involving the freedoms enshrined in the Bill of Rights. Initially, the first ten Amendments were added to the new Constitution as limits on what the *federal* government could do or demand of individuals. While state constitutions might offer similar protections for speech, religion, etc., there was no national standard for such things until the first half of the 20th century, when the Court began utilizing the Fourteenth Amendment (ratified just after the Civil War, in 1868) to apply the protections and ideals of the Bill of Rights to the relationship between citizens and state or local government as well.

Even then, the Court often drew a broad distinction between protecting *belief* and allowing religiously-driven *behavior* which violated state or local law. This “belief-action doctrine” was most clearly expressed in *Reynolds v. United States* (1878), a case involving the 19th century’s most vilified religious group, the Church of Jesus Christ of Latter Day Saints – more popularly known as the Mormons.

At issue was the practice of polygamy, and whether or not one’s sincerely held religious convictions could override legal prohibitions against a practice steeped in history, practiced peacefully among consenting adults, and harming no one. This being the U.S., the answer was inevitable: of course not, because *eeewww!*

Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices...

Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?

So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.

The basic principle still holds – there are laws and expectations every citizen must heed, regardless of belief system or personal creed. After *Barnette*, though, sincerely held religious convictions gained substantial ground in terms of what they could or couldn’t be used to justify, both in the world of public education and beyond. Also magnified was the idea that fundamental freedoms like those guaranteed in the Bill of Rights shouldn’t have to wait on legislatures or the next election to find protection – an approach which would be applied to full effect by the Warren Court of the 1950s and 1960s.

The Court’s reversal in *Barnette* didn’t eliminate suspicion or violence towards Jehovah’s Witnesses, but it did at least remove the illusion of federal sanction for such actions, which dropped in both number and severity. America had other things to worry about, and over time the Witnesses started making some effort to be less off-putting whenever possible without compromising their beliefs.

Three-quarters of a century later, they still don’t pledge their allegiance to anyone’s flag. Nor do they have to.

Excerpts from *West Virginia State Board of Education v. Barnette* (1943), Majority
Opinion by Justice Robert H. Jackson
{*Edited for Readability*}

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...

Here... we are dealing with a compulsion of students to declare a belief. They are not merely made acquainted with the flag salute so that they may be informed as to what it is or even what it means. The issue here is whether this slow and easily neglected route to aroused loyalties constitutionally may be short-cut by substituting a compulsory salute and slogan...

There is no doubt that, in connection with the pledges, the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality is a short-cut from mind to mind. Causes and nations, political parties, lodges, and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design. The State announces rank, function, and authority through crowns and maces, uniforms and black robes; the church speaks through the Cross, the Crucifix, the altar and shrine, and clerical raiment. Symbols of State often convey political ideas, just as religious symbols come to convey theological ones. Associated with many of these symbols are appropriate gestures of acceptance or respect: a salute, a bowed or bared head, a bended knee. A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn...

It is also to be noted that the compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind. It is not clear whether the regulation contemplates that pupils forego any contrary convictions of their own and become unwilling converts to the prescribed ceremony, or whether it will be acceptable if they simulate assent by words without belief, and by a gesture barren of meaning.

It is now a commonplace that censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish... But here, the power of compulsion is invoked without any allegation that remaining passive during a flag salute ritual creates a clear and present danger that would justify an effort even to muffle expression. To sustain the compulsory flag salute, we are required to say that a Bill of Rights which guards the individual's right to speak his *own* mind left it open to public authorities to compel him to utter what is *not* in his mind....

It was said [in the *Gobitis* decision] that the flag salute controversy confronted the Court with

the problem which Lincoln cast in memorable dilemma: "Must a government of necessity be too strong for the liberties of its people, or too weak to maintain its own existence?", and that the answer must be in favor of strength...

It may be doubted whether Mr. Lincoln would have thought that the strength of government to maintain itself would be impressively vindicated by our confirming power of the State to expel a handful of children from school. Such oversimplification, so handy in political debate, often lacks the precision necessary to postulates of judicial reasoning. If validly applied to this problem, the utterance cited would resolve every issue of power in favor of those in authority...

Government of limited power need not be anemic government. Assurance that rights are secure tends to diminish fear and jealousy of strong government, and, by making us feel safe to live under it, makes for its better support. Without promise of a limiting Bill of Rights, it is doubtful if our Constitution could have mustered enough strength to enable its ratification. To enforce those rights today is not to choose weak government over strong government. It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end...

The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures – Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights...

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections...

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 by many good, as well as by evil, men. Nationalism is a relatively recent phenomenon, but, at other times and places, the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity. As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be... Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. 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... We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.

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... [The] 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.

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. If there are any circumstances which permit an exception, they do not now occur to us.

Excerpts from *West Virginia State Board of Education v. Barnette* (1943), Dissenting
Opinion by Justice Felix Frankfurter
{Edited for Readability}

One who belongs to the most vilified and persecuted minority in history [*Author's Note: Justice Frankfurter was Jewish*] 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...

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 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...

Under our constitutional system, the legislature is charged solely with civil concerns of society. If the avowed or intrinsic legislative purpose is either to promote or to discourage some religious community or creed, it is clearly within the constitutional restrictions imposed on legislatures, and cannot stand. But it by no means follows that legislative power is wanting whenever a general nondiscriminatory civil regulation, in fact, touches conscientious scruples or religious beliefs of an individual or a group...

It is, of course, beyond our power to rewrite the State's requirement by providing exemptions for those who do not wish to participate in the flag salute or by making some other accommodations to meet their scruples. That wisdom might suggest the making of such accommodations, and that school administration would not find it too difficult to make them, and yet maintain the ceremony for those not refusing to conform, is outside our province to suggest. Tact, respect, and generosity toward variant views will always commend themselves to those charged with the duties of legislation so as to achieve a maximum of good will and to require a minimum of unwilling

submission to a general law. But the real question is, who is to make such accommodations, the courts or the legislature?

This is no dry, technical matter. It cuts deep into one's conception of the democratic process... A court can only strike down. It can only say "This or that law is void." It cannot modify or qualify, it cannot make exceptions to a general requirement... If the function of this Court is to be essentially no different from that of a legislature, if the considerations governing constitutional construction are to be substantially those that underlie legislation, then indeed judges should not have life tenure, and they should be made directly responsible to the electorate...

The constitutional protection of religious freedom terminated disabilities, it did not create new privileges. It gave religious equality, not civil immunity. Its essence is freedom from conformity to religious dogma, not freedom from conformity to law because of religious dogma... [T]he lawmaking authority is not circumscribed by the variety of religious beliefs – otherwise, the constitutional guaranty would be not a protection of the free exercise of religion, but a denial of the exercise of legislation.

The essence of the religious freedom guaranteed by our Constitution is therefore this: no religion shall either receive the state's support or incur its hostility. Religion is outside the sphere of political government. This does not mean that all matters on which religious organizations or beliefs may pronounce are outside the sphere of government. Were this so, instead of the separation of church and state, there would be the subordination of the state on any matter deemed within the sovereignty of the religious conscience... The validity of secular laws cannot be measured by their conformity to religious doctrines. It is only in a theocratic state that ecclesiastical doctrines measure legal right or wrong.

An act compelling profession of allegiance to a religion, no matter how subtly or tenuously promoted, is bad. But an act promoting good citizenship and national allegiance is within the domain of governmental authority, and is therefore to be judged by the same considerations of power and of constitutionality as those involved in the many claims of immunity from civil obedience because of religious scruples...

Law is concerned with external behavior, and not with the inner life of man. It rests in large measure upon compulsion... The consent upon which free government rests is the consent that comes from sharing in the process of making and unmaking laws. The state is not shut out from a domain because the individual conscience may deny the state's claim. The individual conscience may profess what faith it chooses. It may affirm and promote that faith – in the language of the Constitution, it may "exercise" it freely – but it cannot thereby restrict community action through political organs in matters of community concern, so long as the action is not asserted in a discriminatory way, either openly or by stealth. One may have the right to practice one's religion and at the same time owe the duty of formal obedience to laws that run counter to one's belief...

The uncontrollable power wielded by this Court brings it very close to the most sensitive areas of public affairs. As appeal from legislation to adjudication becomes more frequent, and its consequences more far-reaching, judicial self-restraint becomes more, and not less, important, lest we unwarrantably enter social and political domains wholly outside our concern. I think I appreciate fully the objections to the law before us. But to deny that it presents a question upon which men might reasonably differ appears to me to be intolerance. And since men may so reasonably differ, I deem it beyond my constitutional power to assert my view of the wisdom of this law against the view of the State of West Virginia.