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## **The Story of *West Virginia State Board of Education v. Barnette*: The Pledge of Allegiance and the Freedom of Thought**

“The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own.” With this confident declaration, the Supreme Court in *West Virginia State Board of Education v. Barnette* ruled that “no official, high or petty” possesses the authority to require any student to pledge allegiance to the flag of the United States.<sup>1</sup> That judgment, handed down in June of 1943 as American troops were engaged in combat in North Africa and the South Pacific, overruled a Court decision rendered only three years before. *Minersville School District v. Gobitis* had held that a student’s religious scruples against flag worship did not furnish the basis for a constitutional right to be exempted from a requirement to recite the pledge of allegiance.<sup>2</sup>

The Court’s odyssey from *Gobitis* to *Barnette* rewards study on several levels. Seldom in its history has a constitutional controversy generated such antipathy within the Court, such widespread civic violence directly attributable to a judicial decision, such anticipatory public recanting by individual justices, such a daring switch of rationale, such

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<sup>1</sup> *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641–42 (1943).

<sup>2</sup> *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940).

memorable and pointed prose in a majority opinion, and such persistent uncertainty regarding the grounds and limits of decision. Seldom has a case outcome seemed so obviously correct as that in *Barnette* and yet so difficult to justify.

### History

The controversy over the pledge of allegiance represented a clash between two relatively small but intense segments of the American public: the Jehovah's Witnesses and a congeries of private patriotic groups including the American Legion, the Veterans of Foreign Wars, and the Daughters of the American Revolution. The strength and fervor of their respective beliefs regarding the flag and the requirements of allegiance generated a bitter conflict of enduring constitutional significance.

The pledge of allegiance was written in two hours<sup>3</sup> by Francis Bellamy in 1892, a man variously described as a children's author, a socialist trade unionist, a nationalist, a minister, a muckraker, and a huckster.<sup>4</sup> Bellamy wrote it for the *Youth's Companion* as part of a national effort to celebrate the quadricentennial of Columbus's voyage. In part, Bellamy hoped to evoke the sense of an "indivisible" union that had survived the Civil War.<sup>5</sup>

The first state statute providing for a flag salute ceremony in the public schools was passed in New York in 1898, the day after the

<sup>3</sup> Cecilia Elizabeth O'Leary, *To Die For: The Paradox of American Patriotism* 161–62 (1999).

<sup>4</sup> See e.g., *id.* at 157–8; John W. Baer, *The Pledge of Allegiance: A Centennial History, 1892–1992* (1992), available at <http://history.vineyard.net/pledge.htm>. The last, unflattering characterization derives from the recent description of his descendant who claims that the pledge was written as part of an extended advertising campaign to increase flag sales. See Michael Bellamy, *The Last Page*, *Dissent*, Summer 2002, at 112.

<sup>5</sup> O'Leary, *supra* note 3, at 161. Bellamy flirted with including references to equality and fraternity in the pledge but decided these ideas were too progressive for the American public. "Liberty and justice for all" had ecumenical appeal and could serve both socialists and individualists. *Id.* See also Baer, *supra* note 4, *passim*.

During the Civil Rights Era, efforts were made to alter the pledge to include references to equality. In 1959, Rep. Charles Diggs of Michigan, a Legionnaire and the founder of the Congressional Black Caucus, introduced a joint resolution to amend the pledge so that the final clause read "liberty, equality, and justice for all." See H.R.J. Res. 400, 86th Cong. (1959); see also H.R.J. Res. 351, 87th Cong. (1961); H.R.J. Res. 386, 88th Cong. (1963). Similar resolutions were introduced by Representative Fulton of Pennsylvania. H.R.J. Res. 532, 86th Cong. (1959); H.R.J. Res. 835, 87th Cong. (1962); H.R.J. Res. 668, 88th Cong. (1963) (suggesting the language: "liberty, equality of opportunity and equal justice under law for all.").

commencement of the Spanish-American War.<sup>6</sup> In the aftermath of World War I, newly created veterans' organizations such as the American Legion and the Veterans of Foreign Wars took up the cause of promoting respect for the flag.<sup>7</sup> The Legion lobbied for state laws requiring that the flag be flown over public buildings, including schools, and that teachers devote at least ten minutes of each school day to patriotic exercises to foster "one hundred percent Americanism." It established a National Americanism Commission, which drafted a flag code in 1923 that was distributed to schoolchildren nationwide.<sup>8</sup> By 1940, the year of the *Gobitis* decision, nine states had laws requiring that flag salute exercises be held in the public schools and another eighteen had statutory provisions for teaching about the flag. Even in states without specific flag laws, the practice of having students pledge allegiance to the flag was widespread.<sup>9</sup>

Although federal officials had long encouraged its recitation, the pledge of allegiance was not officially adopted by the federal government until 1942, well after the *Barnette* litigation was underway. The federal statute of that year in essence enacted into law the American Legion's flag code. The law was unusual in that it deliberately lacked an enforcement mechanism.<sup>10</sup> It aimed to codify and establish national customs of respect for the flag.<sup>11</sup> No federal law directs that students must recite the pledge of allegiance in school, nor for that matter does any federal law require the recitation of the pledge by any civilian at any other venue.<sup>12</sup>

<sup>6</sup> David R. Manwaring, *Render Unto Caesar: The Flag Salute Controversy* 3 (1962).

<sup>7</sup> Peter Irons, *The Courage of Their Convictions* 16 (1988). The Ku Klux Klan was also active in flag-respect campaigns, using its involvement, in part, to represent itself as a mainstream organization. Manwaring, *supra* note 6, at 7.

<sup>8</sup> *Id.* at 6.

<sup>9</sup> *Id.* at 4-5.

<sup>10</sup> For one discussion of this feature, see *To Codify Rules on the Use of the Flag of the United States of America: Hearings on H.J. Res. 288 Before the Subcomm. Of the Comm. On the Judiciary, 77th Cong.* 7-9 (1942) (remarks of Representative Hobbs, Representative Hancock, Representative McLaughlin, and Francis Sullivan, Acting Director of the National Legislative Commission of the American Legion). The Representatives emphasize that the statute is "recommendatory material," and that codification serves citizens by providing a clear guideline for those who wish to show respect for the flag in a standard, customary way. The Legionnaire remarks that penalties are unnecessary, but that the intent is that "if the average person reads that it is an enactment of Congress, he will realize then that it is an official rule and that it should be obeyed...."

<sup>11</sup> It was also unusual in that its literal terms empowered the President (in his capacity as Commander in Chief of the armed forces) to alter, unilaterally and without Congressional approval, the terms of the custom as necessary. Joint Resolution of June 22, 1942, Pub. L. No. 623, § 8, 56 Stat. 377, 380 (current version at 4 U.S.C. § 10 (2000)).

<sup>12</sup> To become a naturalized citizen, a person must take an oath to, among other things, "bear true faith and allegiance" to the Constitution and laws of the United States. 8 U.S.C.

Legal requirements that school children recite the pledge arise entirely from state and local law.<sup>13</sup>

The pledge of allegiance at issue in *Barnette* and *Gobitis* differed from the pledge's contemporary format in that it made no explicit reference to God.<sup>14</sup> Nonetheless, the primary grievance of the Gobitases,<sup>15</sup>

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§ 1448(a)(4). In the case of *In re* Petition of Battle, 379 F.Supp. 334 (E.D. N.Y. 1974), a Jehovah's Witness who was prepared to swear true faith and allegiance but with the caveat that he could not vote, serve on a jury, or salute the flag was held nevertheless to satisfy this requirement. Other decisions have ruled, with one exception, that Witnesses who refused as a matter of principle to exercise the franchise or discharge jury duty could not be denied naturalization on that account. Compare *In re Piscattano*, 308 F.Supp. 818 (D. Conn. 1970); *In re Naturalization of Del Olmo*, 682 F.Supp. 489 (D. Or. 1988) with *In re* Petition for Naturalization of Matz, 296 F.Supp. 927 (E.D. Cal. 1969).

<sup>13</sup> Nearly every state has a provision in its code for patriotic exercises in the classroom that includes the opportunity or a requirement to recite the pledge of allegiance. *But see* Colo. Rev. Stat. § 22-1-106 (1989) (merely directing that teachers may teach students how to salute the flag when passing in parade, proper respect of the flag, and proper use of the flag in decoration and display); Ohio Rev. Code Ann. § 3313.602 (West 1997) (directing school boards to adopt a policy specifying whether or not the pledge will be part of the school program). Some states also have their own, often colorful, pledges of allegiance to the state flag. Michigan's rhymes: "I pledge allegiance to the flag of Michigan, and to the state for which it stands, 2 beautiful peninsulas united by a bridge of steel, where equal opportunity and justice to all is our ideal." Mich. Comp. Laws § 2.29 (1967). South Dakota's is aspirational: "I pledge loyalty and support to the flag and state of South Dakota, land of sunshine, land of infinite variety." S.D. Codified Laws § 1-6-4.1 (Michie 1992). New Mexico's is officially bilingual: "Saludo la bandera del estado de Nuevo Mejico, el simbolo zia de amistad perfecta, entre culturas unidas"; "I salute the flag of the state of New Mexico, the Zia symbol of perfect friendship among united cultures." N.M. Stat. Ann. §§ 12-3-7, 12-3-3 (Michie 1978). South Carolina's requires more than allegiance: "I salute the flag of South Carolina and pledge to the Palmetto State love, loyalty and faith." S.C. Code Ann. § 1-1-670 (Law. Co-op. 1977). Others refer, directly or indirectly, to God. *See e.g.* Kentucky's salute: K.R.S. § 2.035 "I pledge allegiance to the Kentucky flag, and to the Sovereign State for which it stands, one Commonwealth, blessed with diversity, natural wealth, beauty, and grace from on High,"; *See also* Louisiana, LA. Rev.Stat. 49.1 167; Mississippi, Miss. Code Ann. § 37-13-7.

<sup>14</sup> In 1942, the pledge of allegiance read "I pledge allegiance to the flag of the United States of America, and to the Republic for which it stands, one Nation indivisible, with liberty and justice for all." Joint Resolution of Dec. 22, 1942, Pub. L. No. 829, § 7, 56 Stat. 1074, 1077. The 1942 version also differs from the original wording. The original version pledged allegiance to "my flag." Concerns about the referent of this phrase when uttered by aliens prompted the substitution of "the flag of the United States of America." During the *Gobitis* litigation and at the start of the *Barnette* litigation, when reciting the pledge, one began with one's right hand over one's heart but then at "my flag" extended one's arm out toward the flag, palm turned up, for the remainder of the pledge. This too closely resembled the posture of the Nazi salute and was altered in December 1942. Compare § 7, 56 Stat. at 380 with § 7, 56 Stat. at 1077. The addition of "under God" after "one nation" did not happen until 1954. *See infra* text accompanying notes 153-62.

<sup>15</sup> Due to a clerk's error, although the family name is Gobitas, the parties' name in the case came to be known as "Gobitis." Shawn Francis Peters, *Judging Jehovah's Witnesses:*

the Barnetts, and the Jehovah's Witnesses generally was that the requirement to recite the pledge impaired their free exercise of religion. They objected that the salute represented a pledge of loyalty to a flag. In their view, were they to make such a pledge, even under legal compulsion, they would contravene the biblical requirement against serving other gods or graven images and violate their duty of supreme loyalty to God. They were willing instead to utter a pledge of allegiance that asserted ultimate loyalty to God, allegiance to all U.S. laws consistent with biblical law, and respect for the flag as a symbol of universal freedom and justice.<sup>16</sup>

Protests against flag salute requirements did not originate with the Jehovah's Witnesses. In 1916, in an episode that became famous in Chicago, an eleven-year-old African-American student named Hubert Eaves refused to salute the flag because of its association with racial discrimination and lynching.<sup>17</sup> Members of other sects, beginning with the Mennonites in 1918, refused to salute the flag for religious reasons.<sup>18</sup> Only when the issue became salient to the Jehovah's Witnesses, however, did this act of conscience evolve into a full-scale protest movement supported by constitutional litigation.

The Jehovah's Witnesses were established in 1870 in Pennsylvania. By 1938 the sect had over 28,000 active members within the United States and 72,000 internationally. Over the next five years, domestic membership tripled and international membership doubled. The Witnesses read the Bible as forecasting the imminent destruction of our world in a battle between Christ and Satan in which Christ will save only true, observant believers. While they do not believe in hell, they do believe that the faithful will be saved from annihilation and will enjoy resurrection and "everlasting life." Around 1914, Witness leaders began to advocate proselytizing by each and every member to convert sinners into true believers in preparation for the coming Armageddon. All Jehovah's Witnesses are regarded as ordained ministers with a duty to present every person with the choice to side with God or against him. This duty propelled members of the sect to engage en masse in boisterous forms of public address and dogged person-to-person and door-to-door efforts to deliver their message. At the time of the flag salute

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*Religious Persecution and the Dawn of the Rights Revolution* 38 (2000). Apparently, the Barnett name was also victim to clerical error and became "Barnette" in court documents. Manwaring, *supra* note 6, at 303 n.14.

<sup>16</sup> Brief for Appellees at 8-9, *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (No. 591).

<sup>17</sup> Eaves was arrested but the charges were dismissed at trial. O'Leary, *supra* note 3, at 231.

<sup>18</sup> See Manwaring, *supra* note 6, at 11-15.

controversy, their teachings included the view that all worldly organizations, including the United States government, were instruments of Satan.<sup>19</sup> Witnesses were instructed to obey the law so long as it did not conflict with their religious duties, but to regard the state as a temporary and spiritually corrupt entity of human design. Although the Witnesses had contempt for all other religious organizations, their leader described the Catholic Church as "the chief visible enemy of God, and therefore the greatest and worst public enemy."<sup>20</sup> These unusual beliefs, along with their proselytizing, gave this small group a high and controversial profile.

The leader of the group from 1916 to 1942, "Judge" Joseph Rutherford, had practiced law for sixteen years, including serving as counsel to the sect's founder, Charles Taze Russell. Rutherford was an energetic and confrontational leader who transformed the Witnesses into a sect given to relentless and sometimes intrusive mass proselytizing. During World War I, he served prison time under the Espionage Act for criticizing American entry into the war and urging all Witnesses to claim draft exemptions both as conscientious objectors and ordained ministers.<sup>21</sup> Rutherford was a pioneer in using the radio to organize religious proselytizing and protest.

Witness resistance to the pledge of allegiance first emerged at the grass roots level, possibly sparked by sympathy for the plight of co-religionists in Germany who were being persecuted for refusing to deliver the Nazi salute.<sup>22</sup> On September 30, 1935, Carleton Nicholls, a Jehovah's Witness, remained seated and refused to salute the flag during the opening exercises of his third grade class in Lynn, Massachusetts, announcing that he would not pay tribute "to the Devil's emblem." As a result, he was expelled from school.<sup>23</sup> Rutherford praised the boy in his weekly radio address and encouraged all Witnesses to follow Nicholls's example. In response, Jehovah's Witnesses all over the nation began refusing to salute the flag. Within one year of Rutherford's October 6,

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<sup>19</sup> Manwaring, *supra* note 6, at 29; M. James Penton, *Apocalypse Delayed: The Story of Jehovah's Witnesses* 138-39 (2d ed. 1997).

<sup>20</sup> Manwaring, *supra* note 6, at 24 (quoting Joseph F. Rutherford, *Enemies* 328 (1937)).

<sup>21</sup> Thousands of Jehovah's Witnesses were incarcerated for resisting the draft and constituted a hefty proportion of those jailed for draft resistance from World War I through the Vietnam War. Penton, *supra* note 19, at 142.

<sup>22</sup> See *infra* note 47.

<sup>23</sup> Nicholls's father and a friend, who had accompanied the boy to school that day to support his protest, were arrested for disturbing a public meeting. The friend was Edward H. James, a nephew of the novelist Henry James and philosopher William James. See Peters, *supra* note 15, at 165-66.

1935 radio address, some 120 Witnesses were expelled from school for not participating in flag ceremonies.

### Gobitis

The week after Rutherford's radio address, two Witnesses, twelve-year-old Lillian Gobitas and her ten-year-old brother William, stopped saluting the flag, prompting their expulsion from the Minersville, Pennsylvania school system. After fruitless efforts to achieve an administrative resolution, the students and their parents, supported by lawyers supplied by Rutherford as well as the American Civil Liberties Union, sued to enjoin the school board.

In the interim, the Gobitas children participated in home schooling. They were warned, however, that unless they attended a "qualified school" they would be sent to a reformatory. By removing the wall between their living and dining rooms, Witnesses Paul and Verna Jones created a cramped classroom in their home for all the Witness children in the region who faced a similar predicament. Two hour bus rides in a converted delivery truck were necessary for some of these students to reach their makeshift school.<sup>24</sup>

The federal district court<sup>25</sup> enjoined the Minersville School District from expelling the students or requiring them to participate in the flag ceremony and the Third Circuit Court of Appeals affirmed the decision.<sup>26</sup> With the financial backing of the American Legion and other patriotic societies, the school district appealed the case to the United States Supreme Court.<sup>27</sup> Both parties litigated the case with emphasis on the question whether the flag ceremony has religious significance. The school district contended that "[t]he act of saluting the flag has no bearing on what a pupil may think of his Creator or what are his relations to his Creator. . . . Like the study of history or civics . . . the salute has no religious implications."<sup>28</sup> On this point, the Gobitas brief joined issue with gusto: "The saluting of the flag of any earthly govern-

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<sup>24</sup> See Irons, *supra* note 7, at 27–28.

<sup>25</sup> *Gobitis v. Minersville Sch. Dist.*, 24 F.Supp. 271 (E.D. Pa. 1938).

<sup>26</sup> *Minersville Sch. Dist. v. Gobitis*, 108 F.2d 683 (3d. Cir. 1939).

<sup>27</sup> See Manwaring, *supra* note 6, at 116. The Gobitases' legal position was supported by amicus briefs from both the ACLU and the newly established Committee on the Bill of Rights of the American Bar Association. Irving Dilliard, *The Flag-Salute Cases*, in John A. Garraty, ed., *Quarrels that Have Shaped the Constitution* 285, 291–93 (rev. ed. 1987).

<sup>28</sup> *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 588 (1940) (argument for petitioners).

ment by a person who has covenanted to do the will of God is a form of religion and constitutes idolatry."<sup>29</sup>

In an opinion by then-recently-appointed Justice Felix Frankfurter, the Supreme Court reversed the courts below and vacated the injunction. In holding that the Witnesses could be compelled to salute the flag on pain of expulsion from school, the majority declined to decide whether the duty to pledge allegiance to a secular symbol amounts to a religious burden of First Amendment import. Instead, Justice Frankfurter seized the occasion to write into law two basic principles with resonance far beyond the immediate controversy.

The first principle was that general laws passed for secular purposes and enforced evenhandedly are never unconstitutional for failure to provide religious exemptions. Far from acknowledging a need to spare children from conflicts between school requirements and their religious duties as perceived by their parents, Frankfurter suggested that the schools might properly attempt to "awaken in the child's mind considerations as to the significance of the flag contrary to those implanted by the parent."<sup>30</sup>

The second principle underlying the *Gobitis* holding was that disputes over the meaning of religious liberty or the freedom of speech do not provide exceptions to the obligation of courts in constitutional cases to uphold the laws and practices of politically accountable branches of government "[e]xcept where the transgression of constitutional liberty is too plain for argument."<sup>31</sup> This principle received the most elaboration in Justice Frankfurter's opinion.

Justice Frankfurter explicitly sought to reject and refute the argument for a form of robust judicial review in cases involving civil liberties that had been introduced the previous term by Justice Harlan Fiske Stone in the now-famous footnote four of his majority opinion in *United States v. Carolene Products*.<sup>32</sup> An amicus brief filed in *Gobitis* by the Committee on the Bill of Rights of the American Bar Association had urged the Court to apply Justice Stone's *Carolene Products* theory to the case at hand.<sup>33</sup> It is noteworthy that among the several distinguished

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<sup>29</sup> *Id.* at 590 (argument for respondents).

<sup>30</sup> *Gobitis*, 310 U.S. at 599.

<sup>31</sup> *Id.*

<sup>32</sup> 304 U.S. 144, 152 n.4 (1938). There, while articulating a general posture of deference to legislative judgment, Justice Stone suggested the propriety of "a more exacting judicial inquiry" in cases "when legislation appears on its face to be within a specific prohibition of the Constitution," or "restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation," or involves such "prejudice against discrete and insular minorities" that the full and fair access of those groups to remedial political processes is questionable. *Id.*

<sup>33</sup> 1940 WL 47062. See also Manwaring, *supra* note 6, at 128; Donald L. Smith, *Zechariah Chafee, Jr.: Defender of Liberty and Law* 203-04 (1986).



lawyers who worked on that brief were Harvard law professor Zechariah Chafee, Jr.,<sup>34</sup> the legendary scholar of free speech, and Louis Lusky, subsequently a Columbia law professor, who had served as a law clerk for Justice Stone during the year he wrote his *Carolene Products* opinion.<sup>35</sup> Interestingly, despite Professor Chafee's prominent hand in the project,<sup>36</sup> the ABA brief contained no contention that the Freedom of Speech Clause of the First Amendment provided a basis for immunizing the Witness children from the obligation to recite the pledge; the brief advanced only claims grounded in the free exercise of religion and substantive due process.<sup>37</sup>

In private correspondence with Justice Stone, Justice Frankfurter characterized the *Gobitis* case as tragic. It represented, he thought, a foolish effort to extract respect for a symbol from religious recalcitrants. Frankfurter emphasized, however, that the responsibility to correct the folly lay with the legislature. Upholding the constitutionality of the requirement and leaving the issue to state legislatures would, he believed, put into practice the "true democratic faith of not relying on the Court for the impossible task of assuring a vigorous, mature, self-protecting and tolerant democracy."<sup>38</sup>

What is most striking about the *Gobitis* decision is the level of generality at which the Court engaged the issues presented. The majority opinion made little effort to assess either the Witnesses' burden or the government's efficiency interest in avoiding exemptions. For Justice Frankfurter, who emigrated from Austria to the United States when he was twelve years old and unable to speak English, the case was all about national identity and patriotic assimilation, matters so fundamental as to dwarf considerations of distinctive injury or incremental efficacy:

The ultimate foundation of a free society is the binding tie of cohesive sentiment. Such a sentiment is fostered by all those agencies of the mind and spirit which may serve to gather up the traditions of a people, transmit them from generation to generation, and thereby create that continuity of a treasured common life which

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<sup>34</sup> Smith, *supra* note 33, at 202-03.

<sup>35</sup> *Id.* at 202; Manwaring, *supra* note 6, at 126.

<sup>36</sup> Smith, *supra* note 33, at 202-04.

<sup>37</sup> Manwaring, *supra* note 6, at 126-31. Professor Chafee's brief did, however, cite some free speech cases in support of its *Carolene Products* contention that robust judicial review for the Witnesses' free exercise claims was warranted due to the structural barriers that made political relief most unlikely. 1940 WL 47062 at \*20 (citing *Stromberg v. California*, 283 U.S. 359, 369-370 (1931) and *Lowell v. Griffin* 303 U.S. 444, 452 (1938)).

<sup>38</sup> Dilliard, *supra* note 27, at 295 (quoting Letter from Justice Frankfurter to Justice Stone (May 27, 1940), in Alpheus Thomas Mason, *Security Through Freedom: American Political Thought And Practice* 217 (1955)).

constitutes a civilization. "We live by symbols." The flag is the symbol of our national unity, transcending all internal differences, however large, within the framework of the Constitution.<sup>39</sup>

The decision in *Gobitis* was by a vote of eight to one. Justices Black and Douglas joined the Frankfurter majority opinion.<sup>40</sup> Justice Stone was the lone dissenter.<sup>41</sup>

Stone's dissenting opinion is best considered an extension of his effort the year before in the *Carolene Products* case to mark out a sphere of constitutional controversy in which an independent judiciary has a major role to play. Stone was obviously troubled by what he took to be the Minersville School District's categorical disregard for the Witnesses' religious sensibilities. "[W]here governmental functions . . . conflict with specific constitutional restrictions, there must . . . be reasonable accommodation between them so as to preserve the essentials of both. . . . [C]ompelling the pupil to affirm that which he does not believe," was not a reasonable accommodation given the pedagogic alternatives available to the state "to inspire patriotism and love of country."<sup>42</sup> "The Constitution expresses more than the conviction of the people that democratic processes must be preserved at all costs."<sup>43</sup> Majoritarian institutions cannot always be counted on to respect the "freedom of mind and

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<sup>39</sup> 310 U.S. at 596.

<sup>40</sup> Roger K. Newman, author of the most detailed biography of Justice Black, offers the following explanation for Black's surprising vote:

Stone circulated a powerful dissent on the day before the conference at which Frankfurter's opinion was approved. Black did not know about Stone's plans. A majority of the Court, he later said, might have bolted from Frankfurter's opinion after reading Stone's dissent—the rush of work at the term's close prevented the justices' looking at the dissent until after the opinion came down—but Black, Douglas, and Murphy found Frankfurter's argument so moving they had assured him they would support him and were loath to break their word. Immediately, "we knew we were wrong," Black told an obituary writer in 1967, but "we didn't have time to change our opinions. We met around the swimming pool at Murphy's hotel and decided to do so as soon as we could." At once they notified Stone that they would stand with him at the first opportunity. Over a half century later, Black's excuse still sounds lame. . . . Unmentioned in all his (and Douglas's) rationalizations are the forcefulness of [Chief Justice] Hughes's statement at conference and that no justice wished to change his position to vote against Hughes.

Roger K. Newman, *Hugo Black: A Biography* 284–85 (1994).

<sup>41</sup> Justice Frank Murphy drafted a dissenting opinion but eventually scrapped it and joined the majority. Murphy's leading biographer concludes: "What seems to have occurred is that an indecisive freshman justice who had served on the Court only a few months discussed his proposed dissent with the chief justice [Hughes], who persuaded him to go along with the Court." Sidney Fine, *Frank Murphy: The Washington Years 185–86* (1984).

<sup>42</sup> 310 U.S. at 603–4 (Stone, J., dissenting).

<sup>43</sup> *Id.* at 606.

spirit."<sup>44</sup> And contrary to Justice Frankfurter, Stone declared that "it is the function of the courts to determine whether such accommodation is reasonably possible."<sup>45</sup> In the present case, "we have such a small minority entertaining in good faith a religious belief, which is such a departure from the usual course of human conduct, that most persons are disposed to regard it with little toleration or concern."<sup>46</sup>

The Court's ruling upholding the power of the school board to require all children, including the Witnesses, to salute the flag was handed down June 3, 1940, as routed French and British troops were desperately being evacuated from Dunkirk. Many Americans regarded the Witnesses' refusal to recite the pledge as evidence of disloyalty and of their sympathy and even collaboration with the Nazi regime.<sup>47</sup> Fears at the time ran high about a "fifth column," a largely imagined network of domestic spies and enemies.<sup>48</sup> The Witnesses were suspected by some of involvement in such a network. These misguided suspicions were only reinforced as the Witnesses persisted in their refusal to recite the pledge even after *Gobitis* was handed down.<sup>49</sup>

In the weeks following the Supreme Court's decision, there were hundreds of violent attacks against Witnesses and their property, some abetted by local law enforcement officials.<sup>50</sup> In Richwood, West Virginia,

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 603.

<sup>46</sup> *Id.* at 606.

<sup>47</sup> Manwaring, *supra* note 6, at 30. Ironically, the Witnesses viewed the required pledge as an imported mechanism of Nazi oppression aimed particularly at them. Although they misperceived the impetus and historical origins of the pledge, the Witnesses' fears of the Nazis were well grounded. The Nazis outlawed the movement's activities in 1933, and in response the Witnesses refused to deliver the Nazi salute. Approximately 10,000 Jehovah's Witnesses in Germany were sent to concentration camps. *Id.*; see also J.S. Conway, *The Nazi Persecution of the Churches, 1933-45*, at 196 (1968) ("Foremost among the opponents of Nazism were the Jehovah's Witnesses, of whom a higher proportion (97 per cent) suffered some form of persecution than any of the other churches. No less than a third of the whole following were to lose their lives as a result of their refusal to conform or compromise.") The Witness movement was also banned in Canada and Australia for a short period of years in the 1940s. Witnesses have suffered a variety of forms of persecution in a number of other countries as well, among them Spain, Italy, Greece, Argentina, Egypt and Indonesia. Penton, *supra* note 19, at 133, 135.

<sup>48</sup> For a study of how this "largely chimerical" threat "gripped the American public mind in the period preceding the Pearl Harbor attack and continuing through the first year of United States intervention in the Second World War," see Francis MacDonnell, *Insidious Foes: The Axis Fifth Column and the American Home Front* vii (1995).

<sup>49</sup> Peters, *supra* note 15, at 72-3. "Fifth column" fears were also frequently cited as the reasons for the forced internment of Japanese immigrants and Japanese-American citizens from the West Coast. See MacDonnell, *supra* note 48, at 82-90.

<sup>50</sup> Victor W. Rotnem and F.G. Folsom, Jr., *Recent Restrictions Upon Religious Liberty*, 36 Am. Pol. Sci. Rev. 1053, 1061 (1942).

a group of American Legion vigilantes, led by a sheriff's deputy, forced several Witnesses to drink large quantities of castor oil, roped them together, then paraded them through the town. Over five hundred taunting citizens followed the procession, which at one point was halted for an impromptu flag salute ceremony and a reading of the American Legion constitution. Finally, the Witnesses were marched to the edge of town, where they found their automobiles painted with swastikas and graffiti accusing them of being "Hitler's spies" and a "Fifth Column."<sup>51</sup> A Rawlins, Wyoming mob beat up five Witnesses, three men and two women, and burned their cars; in another Wyoming community, a member of the sect was literally tarred and feathered.<sup>52</sup> Two months after the *Gobitis* decision, in August 1940, Albert Walkenhorst was lured from his home in Norfolk, Nebraska, by a group of vigilantes posing as fellow Witnesses and castrated.<sup>53</sup> A month later, near Little Rock, Arkansas, a Jehovah's Witnesses convention ground was assaulted by workers from a federal pipeline project wielding as weapons screwdrivers, pipes, and firearms; two Witnesses were shot and four others were hospitalized.<sup>54</sup>

Although vigilante activity against the Witnesses increased dramatically following the Court's flag salute ruling, there had been disturbing incidents earlier that year. In April of 1940, Walter Chaplinsky, a vociferous Jehovah's Witness preaching in Rochester, New Hampshire, was surrounded by a group of men who scornfully invited him to salute the flag. While one veteran attempted to pummel Chaplinsky, the town marshal looked on, warned the Witness that things were turning ugly, but refused to arrest the assailant. After the marshal left, the assailant returned with a flag and attempted to impale Chaplinsky on the flagpole, eventually pinning him onto a car while other members of the crowd began to beat him. A police officer then arrived, not to detain or disperse members of the mob but to escort Chaplinsky to the police station. En route, the officer and others who joined the escort directed epithets at the hapless Witness. When Chaplinsky responded in kind, calling the marshal who had reappeared "a damn fascist and a racketeer," he was arrested for, and later convicted of, using offensive language in public.<sup>55</sup>

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<sup>51</sup> Peters, *supra* note 15, at 89-92.

<sup>52</sup> Manwaring, *supra* note 6, at 165.

<sup>53</sup> Peters, *supra* note 15, at 95.

<sup>54</sup> Manwaring, *supra* note 6, at 165-66.

<sup>55</sup> Peters, *supra* note 15, at 211-15. The conviction was upheld unanimously on appeal to the Supreme Court. The decision gave rise to the "fighting words" doctrine, a principle holding that speech that by its "very utterance inflict[s] injury or tend[s] to incite an immediate breach of the peace" is not subject to First Amendment protection. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). The Court's opinion included no mention of

The American Civil Liberties Union collected reports of these assaults. Its records, which were forwarded to the Justice Department, indicated that in 1940 attacks were mounted against nearly 1500 Jehovah's Witnesses in 335 separate incidents in 44 states.<sup>56</sup> After reviewing the files, Justice Department attorneys Victor W. Rotnem and F. G. Folsom, Jr., observed: "Almost without exception, the flag and the flag salute can be found as the percussion cap that sets off these acts."<sup>57</sup> In Litchfield, Illinois, vigilantes pulled Witness Bob Fischer from his car, draped a flag over the hood, and when he refused their demand that he salute the flag, slammed his head against the hood for nearly thirty minutes as the chief of police looked on. One participant later bragged, "We almost beat one guy to death to make him kiss the flag."<sup>58</sup> A Connorsville, Indiana mob went on the attack after the rancorous trial of Witnesses Grace Trent and Lucy McKee for flag desecration, sedition, and riotous conspiracy. The attorney for the defendants, his wife, and several other Witnesses who attended the proceedings were beaten and chased out of town. The behavior of the defendants that provoked the prosecution and the vigilantes' wrath consisted of distributing literature opposing the compulsory pledge of allegiance and refusing to salute a Legionnaire's flag lapel pin.<sup>59</sup> The Boston Globe reported that after the Witnesses' Kingdom Hall in Kennebunk, Maine was burned, "someone affixed a small American flag to the charred front of the hall."<sup>60</sup> Reporter Beulah Amidon observed a crowd "in an unnamed hamlet in the Deep South" throwing pieces of wood and rubble at a procession of seven Jehovah's Witnesses. When she asked the local sheriff, who was enjoying the spectacle, what had caused the disturbance, he explained that the Witnesses were being run out of town: "They're traitors—the Supreme Court says so. Ain't you heard?"<sup>61</sup>

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the incident with the flag, the crowd's attack on Chaplinsky, or the acquiescence of town officials.

<sup>56</sup> Peters, *supra* note 15, at 100.

<sup>57</sup> Rotnem and Folsom, *supra* note 50, at 1062. In the World War I period, the nation had endured somewhat similar episodes of "patriotic" vigilantism and state persecution for what was considered inadequate respect for the flag by German-Americans, Germans, African-Americans, ministers, socialists, unionists, and peace activists. O'Leary, *supra* note 3, at 234–35.

<sup>58</sup> Peters, *supra* note 15, at 85–87.

<sup>59</sup> *Id.* at 125, 130–36. For these transgressions the two Witnesses were convicted and sentenced to 2 to 10 years in prison. Trent and McKee eventually prevailed on appeal but not before enduring a year and a half of incarceration and efforts by local officials to deny them legal representation as well as access to a court transcript. *Id.* at 130–38; Manwaring, *supra* note 6, at 166.

<sup>60</sup> Peters, *supra* note 15, at 79 (quoting Boston Globe, June 10, 1940).

<sup>61</sup> *Id.* at 83–84 (quoting Beulah Amidon, "Can We Afford Martyrs?", Survey Graphic 457 (Sept. 1940)).

The impact of *Gobitis* on schoolchildren was also widespread and severe, if less gruesome. In early 1940, before the Court's decision, school expulsions of Witnesses had occurred or were in process in fifteen states.<sup>62</sup> According to the Witnesses' records, in the wake of *Gobitis* over two thousand children of their faith were expelled from school for refusal to pledge allegiance to the flag, with such expulsions occurring in each of the forty-eight states.<sup>63</sup>

There can be no doubt that the enmity the Witnesses aroused stemmed in large part from their scruples against saluting the flag. Their resistance to military service also contributed to the climate of hostility and violence they encountered. Moreover, throughout the 1930s and 1940s, the sect adopted unusually aggressive mass proselytizing tactics. During that period, thousands of Witnesses were arrested in connection with their often intrusive preaching and pamphleteering in streets and parks, on public sidewalks, and in the doorways of private residences.<sup>64</sup> In those street campaigns, they gave persistent voice to their leader Joseph Rutherford's contemptuous attitude toward other religions, especially the Roman Catholic Church. In their literature, they ridiculed the veterans' organizations that promoted flag worship, labeling their principal nemesis "the un-American Legion."<sup>65</sup> Zechariah Chafee, co-author of an amicus brief in *Gobitis* in support of the Witnesses,<sup>66</sup> characterized the group on another occasion as "a sect distinguished by great religious zeal and astonishing powers of annoyance."<sup>67</sup>

### *Barnette*

Against this background, the Supreme Court decided to revisit the constitutional issues in 1943 in *West Virginia State Board of Education v. Barnette*. Much had changed in the three years since *Gobitis*. The nation was fully engaged in war, rather than simply apprehensive about its near prospect. Fears of a Nazi fifth column, though, had abated.<sup>68</sup> The personnel of the Supreme Court had also changed, with two members of

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<sup>62</sup> See Manwaring, *supra* note 6, at 187.

<sup>63</sup> *Id.*

<sup>64</sup> See Peters, *supra* note 15, at 125.

<sup>65</sup> *Id.* at 73.

<sup>66</sup> See Smith, *supra* note 33, at 202-04.

<sup>67</sup> Zechariah Chafee, Jr., *Free Speech in the United States* 399 (1941).

<sup>68</sup> See MacDonnell, *supra* note 48, at 8: "In the autumn of 1942, fears about the Axis Fifth Column declined precipitously. The Allies' move to the offensive, the failure of any effective domestic spy threat to emerge, and the reduced intensity of government warnings to the public calmed home-front anxieties."

the *Gobitis* majority, Chief Justice Charles Evans Hughes and Justice James McReynolds, having retired—replaced by Roosevelt appointees Robert Jackson and Wiley Rutledge. Equally important, as it turned out, three members of the *Gobitis* majority, Justices Black, Douglas, and Murphy, had changed their minds about the constitutional questions presented by compulsory flag ceremonies in public schools, and had said so in a dissent in a case involving a different issue of religious liberty.<sup>69</sup> This signal encouraged Witness attorney Hayden Covington to search for a case through which to overturn *Gobitis*.<sup>70</sup>

Shortly after the *Gobitis* decision was announced, the West Virginia legislature passed a statute requiring all schools in the state, public and private, to offer regular courses in history and civics “‘for the purpose of teaching, fostering and perpetuating the ideals, principles and spirit of Americanism.’”<sup>71</sup> A little over a year later, the state Board of Education adopted a resolution requiring all public school teachers and students to participate in “the salute honoring the Nation represented by the Flag.” The resolution included extended verbatim passages from Justice Frankfurter’s majority opinion in *Gobitis*, and provided that “refusal to salute the Flag be regarded as an act of insubordination, and shall be dealt with accordingly.”<sup>72</sup> The sanction specified by state law for such insubordination was expulsion from school with readmission to be denied “until such requirements and regulations be complied with.”<sup>73</sup> Parents and legal guardians of children who were absent from school were subject to prosecution; the eligible penalties included imprisonment.

Many Witness children continued to refuse to say the pledge and were expelled from West Virginia schools. The McClures, the Stulls, and the Barnetts were related to one another and to a family whose members had been victimized in the Richwood incident. They all had children expelled for failure to say the pledge and two of the parents were convicted for their children’s failure to attend school (though the state then dropped the parents’ case on appeal). Attorneys for the Jehovah’s Witnesses brought a class action on their behalf and on behalf of others similarly situated to enjoin enforcement of the flag salute requirement.<sup>74</sup>

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<sup>69</sup> See *Jones v. Opelika*, 316 U.S. 584, 623–24 (1942) (Black, Douglas, and Murphy, J.J., dissenting).

<sup>70</sup> Peters, *supra* note 15, at 245.

<sup>71</sup> *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 625 (1943) (quoting W. Va. Code § 1734 (Supp. 1941)).

<sup>72</sup> *Id.* at 626 (quoting W. Va. State Bd. of Educ., Resolution (Jan. 9, 1942)).

<sup>73</sup> *Id.* at 629 (quoting W. Va. Code § 1851 (Supp. 1941)).

<sup>74</sup> Manwaring, *supra* note 6, at 210–11. Three separate state actions had been brought for injunctive relief, all of which had been denied without hearing. *Id.*

As in *Gobitis*, they prevailed in federal district court.<sup>75</sup> The opinion for a special three-judge panel was written by Fourth Circuit Judge John J. Parker. Twelve years earlier, Judge Parker had been nominated by President Hoover to the United States Supreme Court but was denied Senate confirmation by two votes, apparently on account of his conservative rulings in labor cases and because of a speech he gave while running for governor in North Carolina in which he defended the disfranchisement of black citizens.<sup>76</sup> The court's judgment in favor of the Witnesses was extraordinary in light of the recent *Gobitis* precedent from the Supreme Court. Judge Parker surmounted that obstacle by noting that "[o]f 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."<sup>77</sup> Finding the flag salute "violative of religious liberty when required of persons holding the religious views of plaintiffs," the opinion stated "we feel that we would be recreant to our duty as judges, if through a blind following of a decision which the Supreme Court itself has thus impaired as an authority, we should deny protection to rights which we regard as among the most sacred of those protected by constitutional guaranties."<sup>78</sup> The case was then appealed by the state directly to the United States Supreme Court.

By a vote of six to three, the Court affirmed the district court's injunction against compelling any student to participate in the flag ceremony. Justice Robert Jackson's majority opinion is among the most eloquent to be found in the whole of the U. S. Reports.<sup>79</sup>

"[T]he issue as we see it," said Justice Jackson "does [not] turn on one's possession of particular religious views or the sincerity with which they are held."<sup>80</sup> For "[i]t is not necessary to inquire whether non-conformist beliefs will exempt from the duty to salute unless we first find power to make the salute a legal duty."<sup>81</sup> Justice Frankfurter's opinion in *Gobitis* had skipped over this preliminary step with nary a misgiving. "That the flag-salute is an allowable portion of a school program for those who do not invoke conscientious scruples is surely not

<sup>75</sup> *Barnette v. West Va. State Bd. of Educ.*, 47 F.Supp. 251 (S.D. W. Va. 1942).

<sup>76</sup> See Richard L. Watson, Jr., *The Defeat of Judge Parker: A Study in Pressure Groups and Politics*, 50 Miss. Valley Hist. Rev. 213 (1963).

<sup>77</sup> 47 F.Supp. at 253.

<sup>78</sup> *Id.*

<sup>79</sup> For a study of the rhetorical qualities of the various opinions in *Gobitis* and *Barnette*, see Robert A. Ferguson, *The Judicial Opinion as Literary Genre*, 2 Yale J. L. & Humanities 201 (1990).

<sup>80</sup> *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 634 (1943).

<sup>81</sup> *Id.* at 635.



debatable,"<sup>82</sup> Frankfurter had said. Three years later, however, Jackson and the majority in *Barnette* found just such a debate to be of the essence: "We examine rather than assume existence of this power and, against this broader definition of issues in this case, reexamine specific grounds assigned for the *Gobitis* decision."<sup>83</sup> In questioning the general power of government to compel participation in a flag salute, the Court transformed the case from a dispute over special religious exemptions to one that implicated the freedom of speech of all students, including those whose objections to participation derived from moral or political rather than religious scruples. This re-conception of the central constitutional issues at stake came largely at the Court's own initiative. The briefs of the Witnesses and their amici had focused almost exclusively on freedom of religion, as had the briefs in *Gobitis*.<sup>84</sup>

One of the "specific grounds" that Justice Jackson reexamined concerned the high level of generality at which the *Gobitis* Court addressed the flag salute issue. Justice Frankfurter had perceived in the controversy "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?'"<sup>85</sup> Justice Jackson would have none of this hyperbole: "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."<sup>86</sup> Jackson followed this left jab at Frankfurter with a right hook that must have stung the self-appointed guardian of the judicial craft: "Such oversimplification, so handy in political debate, often lacks the precision necessary to postulates of judicial reasoning."<sup>87</sup>

In *Gobitis*, Justice Frankfurter had expressed concern that a judicial intervention on behalf of the Witnesses "would in effect make us the school board for the country."<sup>88</sup> In *Barnette*, Justice Jackson answered

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<sup>82</sup> *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 599 (1940).

<sup>83</sup> 319 U.S. at 636.

<sup>84</sup> See Manwaring, *supra* note 6, at 65, 89-90, 217-24. The brief filed by Hayden Covington, attorney for the Witnesses, had included the contention that the compulsory flag salute violates the freedom of speech on analogy to the right, established in *Stromberg v. California*, 283 U.S. 359 (1931), not to be punished for displaying a flag associated with disfavored ideas or regimes. This argument was dwarfed in Covington's brief, however, by the arguments based on the Religion Clauses. Manwaring, *supra* note 6, at 217-20.

<sup>85</sup> 310 U.S. at 596 (quoting President's Message to Congress in Special Session (July 4, 1861)).

<sup>86</sup> 319 U.S. at 636.

<sup>87</sup> *Id.*

<sup>88</sup> 310 U.S. at 598.

this point with an argument that could have come straight out of Madison's Federalist No. 10. School boards, said Jackson, "have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights." In fact, "small and local authority may feel less sense of responsibility to the Constitution, and agencies of publicity may be less vigilant in calling it to account." He contrasted Congress's respect for minority scruples "in making flag observance voluntary" and providing for conscientious objection "in a matter so vital as raising the Army."<sup>89</sup> Justice Frankfurter's trust in local school officials in a matter touching the rights of reviled minorities seemed to Jackson quite misplaced: "There are village tyrants as well as village Hampdens, but none who acts under color of law is beyond reach of the Constitution."<sup>90</sup>

The majority opinion in *Gobitis* had called for judicial deference not only to local officials but also to the state political processes that might serve as a remedy for the transgressions of village tyrants. The Witnesses remained free, in this view, 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."<sup>91</sup> In *Barnette* Justice Jackson confronted this argument directly with an unabashed defense of the judicial role:

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.<sup>92</sup>

In response to Justice Frankfurter's assertion in *Gobitis* that courts possess "no marked and certainly no controlling competence"<sup>93</sup> to resolve the flag salute controversy, Justice Jackson stated: "[W]e act in these matters not by authority of our competence but by force of our commissions. . . . [H]istory authenticates . . . the function of this Court when liberty is infringed."<sup>94</sup>

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<sup>89</sup> 319 U.S. at 637-38.

<sup>90</sup> *Id.* at 638.

<sup>91</sup> 310 U.S. at 600.

<sup>92</sup> 319 U.S. at 638.

<sup>93</sup> 310 U.S. at 597-98.

<sup>94</sup> 319 U.S. at 640.

Finally, Justice Jackson considered the extended argument in the *Gobitis* majority opinion that national security rests on a form of national unity symbolized by the common gesture of pledging allegiance to the premier symbol of the nation. Justice Frankfurter had said in *Gobitis*: “The ultimate foundation of a free society is the binding tie of cohesive sentiment.”<sup>95</sup> Jackson did not question the legitimacy or the importance of national unity as a goal of governmental policy. “The problem,” he said, “is whether under our Constitution compulsion as here employed is a permissible means for its achievement.”<sup>96</sup> He concluded that it is not.

This question of the respective roles of governmental persuasion and coercion activated in Jackson’s mind a theme to which he would return in later cases involving the interpretation of the First Amendment: how best to preserve what Madison once termed “that moderation and harmony” on which stable government depends, particularly in a democracy.<sup>97</sup> “Struggles to coerce uniformity of sentiment” have a rich historical pedigree, Jackson observed. “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.”<sup>98</sup> Whatever the objective, the destructive dynamic is the same:

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. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing.<sup>99</sup>

The opinion canvassed various programs through the ages to coerce unity, from the Roman drive to stamp out Christianity to the persecution of religious dissenters by the Inquisition to the Russian extermina-

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<sup>95</sup> 310 U.S. at 596.

<sup>96</sup> 319 U.S. at 640.

<sup>97</sup> James Madison, *A Memorial and Remonstrance Against Religious Assessments*, ¶ 11, reprinted in *Writings* 29 (Jack N. Rakove ed., 1999). Subsequent cases in which Justice Jackson explored the challenge of maintaining the spirit of moderation in a regime of freedom of speech include *Beauharnais v. Illinois*, 343 U.S. 250, 287 (1952) (Jackson, J. dissenting); *Terminiello v. City of Chicago*, 337 U.S. 1, 13 (1949) (same); and *Kunz v. New York*, 340 U.S. 290, 295 (1951) (same).

<sup>98</sup> 319 U.S. at 640.

<sup>99</sup> *Id.* at 640–41.

tion of Siberian exiles to "the fast failing efforts of our present totalitarian enemies."<sup>100</sup>

These horror stories, it must be said, seem rather more severe than the school suspensions and expulsions explicitly at issue in the case at bar. One might have expected Justice Jackson to acknowledge the wave of vigilante violence in response to *Gobitis* as well as the degree of state acquiescence in this perverted form of patriotic fervor. He refrained, however, on the advice of Chief Justice Stone, who hoped to forestall the perception that the overruling of *Gobitis* stemmed from political or humanitarian rather than strictly legal considerations.<sup>101</sup> Instead, Jackson resorted to the slippery slope: "the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings."<sup>102</sup>

A key step in Justice Frankfurter's *Gobitis* argument had been that the governmental interest in national unity is of a different order, more fundamental than the interests at stake in the ordinary run of constitutional controversies. In *Barnette*, Jackson rejected the implication that a diminution of liberty follows from any such scaling of state interests: "[F]reedom 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."<sup>103</sup> Indeed, if the issue is to be joined at the level of constitutional first principles, Justice Jackson indicated, it is the Witnesses who must prevail:

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.<sup>104</sup>

In a finishing flourish, the majority opinion in *Barnette* explicitly overruled *Gobitis*.

Justices Black and Douglas wrote a joint concurring opinion in *Barnette* in order to explain their voting to overrule a decision they had joined. Their concurrence introduced a supplementary rationale for the

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<sup>100</sup> *Id.* at 641.

<sup>101</sup> As the draft opinion was circulated within the Court, Chief Justice Stone repeatedly urged Justice Jackson to eliminate references to the violence against the Witnesses. See Peters, *supra* note 15, at 251.

<sup>102</sup> 319 U.S. at 641.

<sup>103</sup> *Id.* at 642.

<sup>104</sup> *Id.*

Court's decision. Although Black and Douglas joined Justice Jackson's majority opinion, and not just its result,<sup>105</sup> the reasons they gave for their change of position from *Gobitis* sounded exclusively in *religious* liberty, not the freedom of speech that Justice Jackson invoked. A strictly religious rationale would have narrower scope because a free speech rationale would apply to all students, even those whose objections were not religiously grounded. Justices Black and Douglas characterized the West Virginia requirement as "a form of test oath" that, like all such loyalty oaths, is ultimately self-defeating in its invitation to insincere attestation.<sup>106</sup> As such, the compelled recitation served no genuine state interest. Rather, "[t]he ceremonial, when enforced against conscientious objectors, more likely to defeat than to serve its high purpose, is a handy implement for disguised religious persecution."<sup>107</sup> Their conclusion that the compulsory dimension of the flag salute ceremony served no legitimate state interest perhaps explains how Black and Douglas could have joined Justice Jackson's majority opinion, with its exclusive reliance on the freedom of speech, even as they articulated the problem solely in terms of religious persecution.<sup>108</sup>

Justices Reed and Roberts, who also had been members of the *Gobitis* majority, reaffirmed their adherence to "the views expressed by the Court" in that decision and to the position that a school board can require all students to salute the flag. Their one-sentence dissenting opinion did not address Justice Jackson's new free speech rationale.<sup>109</sup>

Justice Frankfurter submitted a dissenting opinion that reads as a combined jeremiad and lamentation from a constitutional prophet wounded by the jurisprudential heresies of his colleagues on the bench.<sup>110</sup>

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<sup>105</sup> We know this because the Jackson opinion is labeled in the Reports the "Opinion of the Court." Without Black and Douglas there would have been no such Court majority, only a plurality.

<sup>106</sup> 319 U.S. at 643-44 (Black and Douglas, J.J., concurring).

<sup>107</sup> *Id.*

<sup>108</sup> Justice Murphy contributed a separate concurrence explaining his change of view since *Gobitis*. He sidestepped the issue of whether freedom of expression or religious freedom in particular was at issue by defining the right in dispute as "the freedom of the individual to be vocal or silent according to his conscience or personal inclination." *Id.* at 646 (Murphy, J., concurring).

<sup>109</sup> 319 U.S. at 642.

<sup>110</sup> One of his biographers found the *Barnette* decision to be a pivotal moment in Justice Frankfurter's judicial career:

Psychologically, the period marked off by *Barnette* and the end of the 1942 term produced in Frankfurter a sense of being under siege. Unexpectedly, he found himself in a position of opposition; his leadership had been rejected. He would react in a manner that had become a familiar part of this psychological makeup. The reaction

The opening sentence reveals how thoroughly he personalized the issue: "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."<sup>111</sup>

There followed fully twenty-five pages of heartfelt advocacy of his trademark philosophy of judicial deference to the constitutional understanding and responsibility of the electorally accountable institutions of governance in *all* cases, not excluding those involving small, unpopular—and, some would assert, politically defenseless—minorities. "It can never be emphasized too much," Frankfurter admonished his brethren, "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."<sup>112</sup> His preferred standard for identifying a constitutional violation under the First Amendment was not different from the deferential standard the majority had come to embrace for cases of economic regulation challenged under the Due Process Clause: "whether legislators could in reason have enacted such a law."<sup>113</sup>

Justice Frankfurter took umbrage not only at the majority's expansive conception of the judicial role in cases touching the individual conscience but also its promiscuous use of history:

The flag salute exercise has no kinship whatever to the oath tests so odious in history. For the oath test was one of the instruments for suppressing heretical beliefs. Saluting the flag suppresses no belief nor curbs it. Children and their parents may believe what they please, avow their belief and practice it. It is not even remotely suggested that the requirement for saluting the flag involves the

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would be particularly bitter, for this time his opponents were former allies; the challenge was in a domain where he had every reason to anticipate complete success; and he had no choice but to remain where he was and fight it out.

H.N. Hirsch, *The Enigma of Felix Frankfurter* 176 (1981). See also James F. Simon, *The Antagonists: Hugo Black, Felix Frankfurter and Civil Liberties in Modern America* 118–19 (1989).

<sup>111</sup> 319 U.S. at 646 (Frankfurter, J., dissenting). Apparently, Justices Jackson and Frankfurter had a tense personal history regarding matters of patriotism and war preparation, including the flag salute question. Secretary of the Interior Harold Ickes reported in his diary that the night before the *Gobitis* decision was announced, Jackson (then Attorney General) and Frankfurter had argued long into the night, exchanging sharp words regarding "the European situation." 3 *The Secret Diary of Harold L. Ickes: The Lowering Clouds, 1939–1947*, at 199 (1954). Ten days later, "Bob Jackson told [a Cabinet meeting] about the hysteria that is sweeping the country against aliens and fifth columnists. He is particularly bitter about the decision recently handed down by the Supreme Court in the Jehovah's Witness case." *Id.* at 211.

<sup>112</sup> 319 U.S. at 647.

<sup>113</sup> *Id.*

slightest restriction against the fullest opportunity on the part both of the children and of their parents to disavow as publicly as they choose to do so the meaning that others attach to the gesture of salute. All channels of affirmative free expression are open to both children and parents.<sup>114</sup>

Thus, Justice Frankfurter forthrightly denied the incongruity that the Court majority had posited in defense of its holding. "To sustain the compulsory flag salute," Justice Jackson had stated, "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."<sup>115</sup>

### *Justifying the Decision*

The more intuitive ways to explain *Barnette* and the opinion's most eloquent passages do not, on their own, provide a solid foundation for the Court's decision. In fact, *Barnette* turns out to be surprisingly difficult to defend. Take, for example, Justice Jackson's stirring declaration that no orthodoxies of word or act in politics, nationalism, or religion may be prescribed by the state. Although the passage is inspiring and has been quoted in many prominent opinions,<sup>116</sup> the Court's maxim threatens to be overbroad. At the least, it fails to provide guidance as to its own limit.

If the assertion is that the state itself cannot take strong, even unequivocal, positions on matters of politics and nationalism, then it seems unsustainable.<sup>117</sup> Surely the state may design and execute a curriculum that takes firm stands such as these: that democracy is a superior form of government to tyranny or aristocracy; that the Constitution is legitimate and worthy of fidelity; and that public and private racial, religious, and gender discrimination are wrong. It seems perfectly

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<sup>114</sup> *Id.* at 663-64.

<sup>115</sup> 319 U.S. at 634.

<sup>116</sup> See, e.g., *Texas v. Johnson*, 491 U.S. 397, 415 (1989); *Wallace v. Jaffree*, 472 U.S. 38, 55 (1985); *Board of Educ. v. Pico*, 457 U.S. 853, 870 (1982); *Branti v. Finkel*, 445 U.S. 507, 513 n.9 (1980); *Aboud v. Detroit Bd. Of Educ.*, 431 U.S. 209, 232 n.28, 235 (1977); *Elrod v. Burns*, 427 U.S. 347, 356 (1976) (Brennan, J., plurality opinion); *Street v. New York*, 394 U.S. 576, 593 (1969); *Schwartz v. Bd. of Bar Exam.*, 353 U.S. 232, 244 n.15 (1957); see also, e.g., *Webster v. Reproductive Health Services*, 492 U.S. 490, 572 n.17 (1989) (Stevens, J., concurring in part and dissenting in part); *Connell v. Higginbotham*, 403 U.S. 207, 209-10 (1971) (Marshall, J., concurring in the result); *Scales v. United States*, 367 U.S. 203, 267-68 (1961) (Douglas, J., dissenting); *Barenblatt v. U.S.*, 360 U.S. 109, 148 (1959) (Black, J., dissenting); *First Unitarian Church of L.A. v. County of Los Angeles*, 357 U.S. 545, 548 (1958) (Douglas, J., concurring).

<sup>117</sup> See Steven Shiffrin, *Government Speech*, 27 U.C.L.A. L. Rev. 565, 567-68 (1980).

proper for the state to require students to take courses that expose them to the state's positions on these matters.

Though it is more plausible to declare that the state must maintain a posture of neutrality when it comes to religious matters, that obligation does not supply a stable foundation for *Barnette* either. The wording of the pledge at issue in *Barnette* did not include any reference to God and took no explicit stance on any religious question. And, Justice Jackson's opinion represented itself as relying on the Free Speech Clause of the First Amendment, not the Religion Clauses. For the "no religious orthodoxy" principle to justify the outcome in *Barnette*, the decision would have to be interpreted as allowing individual citizens to define what, for them, counts as an illicit establishment or interference with free exercise. While the holding of *Barnette* may be justifiable on establishment or free exercise grounds, the principle cannot be that any citizen who considers a law to be a form of establishment or an illicit interference with her free exercise rights is ipso facto correct. Such a view would create a limitless exception for those who claim religious exemptions from otherwise valid laws.

So what is it about the case of compelled speech that differentiates it from curriculum requirements? One might be tempted to say that compelled speech violates a basic right not just to speak but to choose whether to speak at all. On this view, for the right of freedom of speech to be meaningful, one must be able to remain silent. Yet surely it is not always true that for the right to particular treatment or to engage in a specific activity to be meaningful one must have the option to elect different treatment or to refuse to so act. For example, the right to be free from torture retains its value even in environments in which people have no opportunity to waive the protection against torture. The right to life may have great importance even if there is no corresponding right to die.

But there is more to the idea that the right to speak entails a right *not* to speak than there is to the general claim that a right to particular treatment or to engage in specific activity implies a right to reject that treatment or to refuse that activity. For the right of free speech to be fully meaningful, the conditions for sincere, deliberate communication should be satisfied. People should have the opportunity to express what they mean at the times, places, and discursive junctures they find appropriate. To have to speak prematurely may interfere with a person's deliberative process and force him to speak before his thoughts are adequately settled. Or it may impede strategically timed interventions. The right not to speak also protects both the First Amendment and privacy interests individuals have in controlling how they represent and express themselves to others. Further, in a hostile atmosphere, the right



to be silent or to remain anonymous may provide social cover for dissenters.

Nonetheless, though this argument for a right not to speak has powerful application in some contexts, it does not clearly pertain to the right at issue in *Barnette*. For the mandatory recitation of the pledge did not require any individual to speak her mind or to make any statement that even appeared to represent her thoughts as an individual. Quite the contrary! If a student participated in the mandatory pledge, no observer who knew the conditions of the exercise could reasonably conclude that the recitation represented the speaker's viewpoint. If one were interested in remaining silent or anonymous, in functional terms, then one should participate. Abstention or exemption from the practice, not participation, causes self-exposure.

Much the same may be said in reply to the suggestion that the mandatory pledge interferes with a right to express oneself to others. There is really scant risk here that a participant will be understood or misunderstood as communicating her personal patriotism or her authentic pledge of allegiance. A reasonable observer would not take communication to be going on at all. Or, rather, a reasonable observer would take any communication to be emanating from the state.

Those who claim that the problem with compelled speech of this sort is that the state is forcing false, inauthentic, or misleading communication must also grapple with Justice Frankfurter's point that there was no penalty attached to later disavowing the contents of the pledge.<sup>118</sup> Those who deplored its content or the requirement that one say the pledge could clarify their stance on the forced conditions of the recitation. For that matter, those who endorsed the pledge sincerely could always clarify the authenticity of the sentiments they recited. While the risks of miscommunication may be present when a compulsory speech requirement is unknown by the audience or when speakers are constrained from clarifying their position, these were not the conditions disputed in *Barnette*.

What, then explains *Barnette* if standard appeals to neutrality, anonymity, and the constitutional interest in unrestricted and undistorted communication fail? As we have argued, efforts to explain *Barnette* that focus on the direct effect the recitation requirement has on the speaker-audience relationship are strained at best. Speakers are not really at risk of being misunderstood or involuntarily exposed. The focus of constitutional concern should be turned inwards towards speakers, not outwards towards their audiences. We suggest that what underpins *Barnette* is the First Amendment interest in the speaker's freedom of thought and

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<sup>118</sup> Justice Rehnquist echoes this point in his dissent in *Wooley v. Maynard*, 430 U.S. 705, 722 (1977) (Rehnquist, J., dissenting).

freedom of conscience. The main constitutional defects with the mandatory pledge lie in the attitude and the message the recitation requirement conveys toward the speaker and the risks that such a requirement will exert an untoward and inappropriate influence on the speaker's freedom of thought.

These themes were prominent in Justice Jackson's opinion but have often been submerged or underemphasized in subsequent reconstructions of the meaning of *Barnette*. Noting that in the United States "[w]e set up government by the consent of the governed," the opinion stated that "the Bill of Rights denies those in power any legal opportunity to coerce that consent."<sup>119</sup> And Jackson concluded the majority opinion with the declaration that the compulsory flag salute "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."<sup>120</sup> What was constitutionally offensive about the mandatory pledge scheme at issue in *Barnette* and *Gobitis* was not that the government had a substantive view about obedience to the law and the meaning of America. Rather, what was wrong was the means used to try to elicit the public's agreement.

There is, we believe, a fundamental difference between the state voicing the view that patriotic people would pledge allegiance to a flag and would regard the flag and the country as standing for liberty and justice, and the state requiring that individuals attest and enact this view in their own voice, however insincerely. Requiring potentially insincere recitation, and especially rote and periodic recitation, poses constitutional problems because it utilizes disrespectful methods of communication and persuasion. These methods constitute efforts forcibly to inculcate and to instill rather than to persuade through direct, transparent arguments, reasons, or even direct, transparent emotional appeals. By employing such disrespectful methods, the government contradicts presuppositions about moral character that underlie the First Amendment.

There are two basic difficulties with required recitations of substantive views. First, such methods explicitly manifest indifference to the actual thoughts and judgments of the person required to speak. It is of no importance whether the speaker agrees or disagrees, is sincere or insincere. This implicit attitude, latent in the requirement, is already at odds with an underlying constitutional respect for individuals' First Amendment right to develop, voice, and exercise independent opinions and commitments. It is hard to articulate a rationale that makes sense of

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<sup>119</sup> 319 U.S. at 624.

<sup>120</sup> *Id.* at 642.

compelled recitation that is consistent with an attitude of respect for sincere statement and independent judgment.

For what is the point of such a requirement given that, as was previously discussed, the recitation should not be taken by an audience as an authentic expression of the reciter's beliefs and attitudes? Perhaps the reciter is being used as a means for broadcasting the government's message. Or the point may be, as some defenders of the mandatory pledge freely advertise, to "instill" in the reluctant student the government's view about patriotism—to engender sincere belief by requiring repeated, possibly insincere, recitation.

Using the speaker merely as a means for disseminating and saturating the environment with the government's message fails to exhibit respect for individual dignity and intellectual independence. Compelled speech differs importantly from legitimate efforts to teach or persuade students of such things as the contents of the pledge, its vision of America, and the worthiness of allegiance. Presenting to students information, ideals, visions, reasons, and arguments for their evaluation, deliberation, and assessment manifests a clear division between the proponent of the views (the state) and the intended audience (the students). This separation intrinsically recognizes the distinctness of the audience in a way that compelled speech requirements do not. The latter literally conflate the speaker and the intended audience and mark no explicit recognition of the separation between them.

Moreover, educational efforts keyed to persuasion go further and show more nuanced attention to the beliefs of students. A teacher who employs the pedagogy of persuasion engages with the questions and doubts of her students. Such a teacher actively nurtures the evaluative and deliberative capacities of students to help them arrive at conclusions that are truly their own. Such interactions show respect for the judgments and attitudes of students, in contrast to the indifference manifest in recitation requirements.

Finally, addressing students as an audience, instead of corralling them into speaking, recognizes a virtue that contributes in a comprehensive way to the various purposes served by the freedom of speech. Many different values of the First Amendment depend upon or are enhanced by sincerity on the part of individual citizens. Justice Jackson invoked the importance of sincerity when he scathingly described the compulsory flag salute as designed either to produce "unwilling converts" or assent simulated "by words without belief and by a gesture barren of meaning."<sup>121</sup> If some part of the value and justification of the First Amendment rests upon an interest in approaching and appreciating the truth, this effort is vastly facilitated by speakers giving voice to what they

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<sup>121</sup> 319 U.S. at 633.

actually believe has merit (or may have merit, or is at least worth grappling with). The same may be said of the connection between sincerity and views of freedom of speech that emphasize the importance of speakers' interests in expressing themselves. An ethic of sincere belief in the truth of one's professions helps to focus the collective attention of the populace on the ideas that hold the most promise of meeting the various human needs, whether practical or intellectual. An ethic of sincere belief also focuses citizens' interest and attention on truth, whereas state measures that flaunt an indifference to sincerity encourage cynicism and ambivalence about the value of truth.

The same may be said even more forcefully of the importance of sincerity in arguments for freedom of speech that stress its role in facilitating mutual understanding among citizens who appreciate each others' needs and concerns and who strive to forge political accommodations on the basis of this appreciation. Genuine understanding and accommodation depend upon citizens' voicing their needs sincerely and abstaining, so far as possible, from grandstanding, manipulation, and other forms of cynical gamesmanship.<sup>122</sup> A serious defect of substantive recitation requirements is that, at best, they manifest indifference to a character virtue that should be encouraged and supported if the values of the First Amendment are to be well realized.

A related, perhaps more important, concern is that a recitation requirement places a person who strives to be sincere, but who does not believe the contents of the recitation, in a dilemma: either disobey the law or fail to practice the character virtue, a virtue that supports and is presupposed by the constitutional structure. Citizens who read the pledge to assert that the nation is in fact providing liberty and justice for all but who doubt that this claim is true must fail to satisfy either the

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<sup>122</sup> Meir Dan-Cohen has illuminatingly discussed contexts in which sincerity is not expected from a speaker. We are not troubled by the employer requirement that the telephone operator thanks us for using that company's service, although that gratitude is unlikely to be a sincere, heart-felt expression on the part of the employee; we might well be troubled and disconcerted if he really did care (though, perhaps it is a worthy aspiration that the workplace be that inspiring). Meir Dan-Cohen, *Harmful Thoughts: Essays on Law, Self, and Morality* 246-49 (2002). Dan-Cohen's point is partly that there are contexts in which it is ordinary and reasonable for speech to be required of a person that fits a role she is asked to perform but with which she is not identified. *Id.* Insincere utterances may even have a place in school. They may reasonably be elicited in language instruction courses, for instance. We may ask Johnny to announce his intention to learn the salsa so as to teach him how to pronounce the relevant words. We need not dispute this. For at the least, utterances *qua* citizen are not a context in which insincerity is reasonably expected and transparently associated with a role with which one is not supposed to identify. There is no well-defined role with clear, discrete boundaries comparable to the employee or to the language learner that the pledge reciter is to occupy that justifies the indifference to sincerity. The state's defense of its practice cannot rely on the idea that it is reasonable to expect disassociation on the part of the citizen from the role of the citizen.

duty of obedience or the duty of sincerity. The functioning of a free republic depends on the widespread honoring of both duties.

We do not suggest that the First Amendment should be interpreted so as to enhance the character virtues that we have identified simply because those virtues are intrinsically worth promoting. Nor do we claim that the First Amendment presupposes a character ideal that judicial interpretation should strive to promote as part of an effort to approximate or approach an ideal society. Instead, our argument is that the successful operation of an ongoing, stable freedom of speech culture in our actual, non-ideal society presupposes that, by and large, citizens exhibit and practice concern for the truth, sincerity, and minimal forms of intellectual independence. Given the commitment represented by the First Amendment, it is inconsistent for the state to implement laws that undermine these character traits. Likewise, it is inconsistent for the state to show significant forms of disrespect for the requisite character traits or otherwise to cast profound doubt upon the state's commitment to protecting the conditions necessary for the successful operation of a vital freedom of speech culture.<sup>123</sup>

These issues about character connect to a second major problem with compelled speech requirements of the sort at issue in *Barnette*. Recitation requirements threaten to interfere with freedom of thought. They may represent illicit efforts to influence the speakers' thoughts in a covert, opaque way that circumvents critical reflection and exploits speakers' character virtues.

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<sup>123</sup> For two quite different elaborations of the claim that a concern for character constitutes a major justification for the freedom of speech, see Vincent Blasi, *Free Speech and Good Character: From Milton to Brandeis to the Present*, in *Eternally Vigilant: Free Speech in the Modern Era* 61 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002), and Lee C. Bollinger, *The Tolerant Society: Freedom of Speech and Extremist Speech in America* (1986). In an interesting article that addresses many of the problems that we discuss, Abner S. Greene maintains that the right to be excused from a patriotic recitation requirement cannot be derived from the freedom of speech but rather must rest upon an unenumerated, generalized right of autonomy, which he finds to be of constitutional pedigree. See Abner S. Greene, *The Pledge of Allegiance Problem*, 64 *Fordham L. Rev.* 451, 473–75, 480–82 (1995). We believe that our argument from character properly connects the freedom from forced recitation to the freedom of speech, thereby supplying a rationale for the *Barnette* majority's invocation of the First Amendment.

One of the implications of this emphasis on character is that the *Barnette* principle does not extend to claims by corporate entities to be free from compelled speech or forum access requirements. See, e.g., *Pacific Gas & Electric Co. v. Public Utilities Comm'n*, 475 U.S. 1 (1986); *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980); *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997). The character-based rationale is applicable only to natural persons. In some contexts, there might be instrumental reasons, or reasons deriving from notions of institutional autonomy, for protecting non-natural actors from certain compelled speech requirements. See, e.g., *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). They are reasons, however, that gain no support from *Barnette* as we understand the decision.

As we have argued, there is a central First Amendment interest in preserving the integrity of the process of thought and speech production. The speaker, as well as the community of which she is a part, has an interest in her thinking and reasoning about subjects sincerely and authentically. Compelled speech may threaten to interfere with the achievement of this interest. For reasons unrelated to whether the contents have inspired her appreciation or assent, having to repeat a message over and over again may influence what and how a person thinks. The things a person finds herself regularly doing and saying will have an understandable impact on what subjects she thinks about: their regular presence may predictably have an influence on what topics seem salient. The message will become familiar to her. Its regularity may become a comfort and an internal source of authority for consultation. Commonly heard sentiments may become comfortable sentiments. Commonly *voiced* sentiments have an even more intimate relation to the self and may have a greater influence on a person's thoughts.

This worry is open to an obvious objection. Since the speaker (as well as her audience) knows that the speech is compelled, won't this knowledge have an impact on how great is the influence of her compelled recitation on what she thinks? Is it not less likely that these spoken words will become a source of intuitive reliance than in cases in which the element of compelled recitation is absent? Won't the recited sentiments be segregated in the speaker's mind as having a compelled, special origin?

The brief reply to this objection is that it seems reasonable to posit that speakers have an interest in avoiding an analog to cognitive dissonance. They have an interest in avoiding what might be termed performative dissonance: a state of conflict or tension between what a person says or appears to say and what a person thinks. Speakers have an interest in the opportunity to develop forthright practices, habits, and character traits of thought and assertion. In particular, those who strive to be sincere aim to develop the habit of saying what they believe to be true, especially about topics of importance; they strive to avoid such performative dissonance. This interest provides some subtle internal pressure to conform their thoughts to their utterances and vice versa. Where the utterances cannot be altered, because they are compelled, the impulse to avoid performative dissonance may exert subtle, perhaps unconscious pressure to alter one's thoughts to conform to the content of one's utterances.<sup>124</sup> This form of influence takes advantage of speakers'

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<sup>124</sup> Some results in cognitive psychological research may lend support. See, e.g., Robert W. Levenson et al., *Voluntary Facial Action Generates Emotion-Specific Autonomic Nervous System Activity*, 27 *Psychophysiology* 363, 364, 368, 376, 382 (1990) (exercises directing actors and non-actors to configure their faces as though they were experiencing emotion as well as those directing subjects to relive a past emotional experience significant-

efforts and impulses to be sincere in order, as many proponents of the pledge advertise, to “inculcate” patriotic sentiments. This is an insidious way to attempt to instill a message or attitude in the public. While it may often be perfectly legitimate for the government to take a substantive position and attempt to persuade citizens of its merits, it is illegitimate to try to do so indirectly by bypassing their critical capacities and attempting to exploit a character virtue, sincerity, that is integral to the value of free expression.

To defend the recitation requirement on the ground that speakers could internally exempt themselves from efforts at sincerity in this context may be overdemanding of speakers. It requires them sometimes to evince sincerity when speaking about public matters and at other times to adopt a posture of pretense. It would be reasonable for speakers to resist developing such flexibility. Such compartmentalization may be psychologically costly and difficult to achieve. Certain kinds of utterances reasonably have special gravity for speakers: e.g., oaths, promises, attestations—even the occasional informal but solemn affirmation. Their significance to speakers and audiences may be reduced if these utterances are issued insincerely or if usage becomes such that their linguistic context does not unequivocally convey the speaker’s (contextual) meaning. It is important to some religious persons, for example, not to “take the Lord’s name in vain,” even when a swearing utterance is understood by the speaker and the audience not to be serious.<sup>125</sup> Significant civic

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ly influenced subjects’ current mental and emotional states); Paul Ekman and Richard J. Davidson, *Voluntary Smiling Changes Regional Brain Activity*, 4 *Psychological Science* 342, 345 (1993) (distinguishing between the presentation of voluntary and involuntary smiles but finding that deliberately produced smiles generate some of the brain activity associated with positive emotions); Robin Damrad-Frye and James D. Laird, *The Experience of Boredom: The Role of the Self-Perception of Attention*, 57 *J. Personality and Social Psychology* 315, 315 (July–Dec. 1989) (reporting “[m]uch research” that “people . . . induced to act as if they held particular emotions, attitudes, motives, or beliefs” report later having these mental states). The studies tend to confirm the view that actions can influence feelings and beliefs, not just reflect them. Some of these studies conflate more behaviorist views (that the relevant mental states are identical to a set of activities) and epistemological views (that one’s mental states are known by observing one’s behavior) with the causal thesis we are interested in (that the relevant mental states may be caused by and not only causes of the relevant activities). See, e.g., *id.* One might believe the causal thesis without agreeing about its underlying mechanism and without subscribing to one of the tenets of self-perception theory: that agents infer their mental states from their activities and these inferences either constitute their mental states or cause these mental states to happen.

<sup>125</sup> Analogously, there may be practices it is important not to *pretend* to engage in. Some parents object to their children playing with toy guns because they think it may be important to our resistance to killing not to pretend to kill. In an editorial written just after the inclusion of “under God” in the Pledge of Allegiance, an actively religious, Christian academic voiced his general objections to public pressure to attest to religious belief. Arguing that “the only respectable reason for professing a religion is the conviction

performances may be cheapened if people engage in them insincerely or pretend at them.

### *Children & The First Amendment*

It might be objected that the fact that the affirmation requirement involved children poses a problem for this analysis of *Barnette*. Perhaps adults should not be compelled to affirm messages they may not believe. But the best reasons for that prohibition do not apply to children, at least not obviously. Adults have reached the age of majority and crossed a threshold of informed independence such that their judgments and preferences deserve respect. Children, however, must mature, gain experience, and acquire a minimum of knowledge before they can be said to have the full set of cognitive and emotional resources necessary for the meaningful exercise of intellectual autonomy. We are not required to treat them as though they have already reached that stage. To the contrary, we have a responsibility to educate them as well as possible. Evidence still suggests that rote learning can be highly effective.<sup>126</sup> Thus, it might be argued that children are legitimate subjects of forced civic inculcation and compulsory training in patriotism.<sup>127</sup>

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that it is true," he expressed concern that efforts to inculcate religious practice or belief through "non-spiritual pressures" dilute or otherwise have a corrupting influence on religion and religious belief. Hoxie N. Fairchild, *Religious Faith and Loyalty*, The New Republic, October 11, 1954, at 11, 12.

<sup>126</sup> See, e.g., Carol Muske-Dukes, *A Lost Eloquence*, 27 Am. Educ. 42, 42-3 (2003) (discussing advantages of rote memorization of poetry); Florence Myles et al., *Rote or Rule? Exploring the Role of Formulaic Language in Classroom Foreign Language Learning*, 48 Language Learning 323, 359 (1998) (study showing rote learning facilitated early stages of foreign language acquisition); Marilee Rist, *Learning by Heart*, 14 Exec. Educ. 12, 12-19 (1992) (discussing controversy over and success rates of rote methods).

<sup>127</sup> For a strong expression of this position see Joseph Tussman, *Government and the Mind* 51-85 (1977):

There is no society which does not recognize the distinction or mark by some right of passage, the movement from one condition to the other—the achievement, as we would say, of the age of consent. No single set of principles can adequately govern both minor and adult; we need both caterpillar principles and butterfly principles. *Republic* is a discussion of the raising of children; *On Liberty* is a discussion of the governing of adults. They are complementary works about different generations. John Stuart Mill would have been horrified by the application of the principles of *On Liberty* to children. . . .

The natural right of self-preservation lies behind not only the traditionally asserted powers of war or defense, but also the universally claimed right of the community to shape its children. More fundamental and inalienable than even the war power stands the tutelary power of the state, or, as I shall call it, the teaching power. *Id.* at 53-54.



In response to this argument, we contend that there is an important constitutional distinction to be drawn between compulsory education and compulsory inculcation. Educational methods convey information, arguments, ideas, and views to children, often by means of required exercises. But they do so in ways that explicitly and implicitly treat the child as a distinct, independent mind whose genuine understanding is the objective. The child's agreement may well be sought and usually does follow, but methods that are educational in the fullest sense elicit agreement through developing understanding and earning assent. Education methods, as we conceive them, often require a student to demonstrate comprehension, even mastery, of a position. They do not, however, require her to agree with the position or represent herself as sincerely embracing it. Moreover, education methods do not attempt to produce agreement by bypassing the student's critical understanding. To accept this distinction between education and compulsory inculcation, one need not condemn rote learning as such. But rote learning involving normative judgments or commitments is indeed problematic, especially when it involves declarations of belief or affirmation by students.<sup>128</sup>

Furthermore, transmitting the central ideals of citizenship by inculcation rather than education is likely to be counter-productive. The obedience and patriotism that inculcation produces may be rigid and brittle if they are not encouraged to develop on the basis of understanding and tolerant persuasion.<sup>129</sup> Views that are the product of indoctrina-

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<sup>128</sup> Do these arguments suggest that mandatory exercises in which "The Star-Spangled Banner" is sung are constitutionally vulnerable? It seems a borderline case. It is, we think, worth being sensitive to the fact that that song, as do many other patriotic songs, makes implicit normative claims about the achievements and genuine aspirations of the country that some, in good faith, might dispute, e.g., that this really is a land of, or that genuinely aspires to, freedom. Melodies also serve as powerful mnemonic devices and so may nest deeply in singers' minds. Songs represent a more complex case than recitations, however, because, except in the charming fiction of musicals, people rarely burst out in song to communicate their own views and thoughts. Songs are usually sung "in role" and in this way differ from standard forms of discursive communication. See *supra* note 122. In that respect, the concerns about the difficulties and frailties of self-imposed compartmentalization may be more attenuated in this case.

What about teaching the Pledge of Allegiance by rote in order to study its poetic meter? Is this ruled out by our argument? The context and purposes in which rote learning happens matter enormously, we believe, and make a difference as to whether the character traits associated with sincerity are implicated. Nonetheless, in this case, it seems highly unlikely that the Pledge of Allegiance would merit study for its poetic achievements. Such a claim should be scrutinized quite carefully as very likely to be pretextual. Requiring students to memorize Lincoln's Gettysburg Address would be quite a different matter.

<sup>129</sup> One international study found a strong correlation between "extensive" use of patriotic ritual in the classroom and a cluster of attitudes showing strong support for the government, a high level of civic participation, but a low level of support for democratic values. The United States was an example of a nation whose students tended to fit this

tion can degenerate into reflexive reactions. When that occurs, such views escape the ongoing scrutiny that yields a deeper and stronger form of sincere affirmation. As Justices Black and Douglas observed in *Barnette*, “[w]ords uttered under coercion are proof of loyalty to nothing but self-interest. Love of country must spring from willing hearts and free minds. . . .”<sup>130</sup>

But does this view, that civic education is constitutionally permissible but civic inculcation is not, wrongly attribute to children the capacities of adults? We think not. The requirement that loyalty be a product of education does not presuppose that children have the full panoply of capacities and virtues of adult citizens. Recall that our interpretation and defense of *Barnette* is not a conventional argument from autonomy. Rather, it derives from the assumption that a person’s youth and schooling are the primary time and place at which the moral, civic, and intellectual virtues, virtues essential to the functioning of a democratic society, are developed. Sincerity, authenticity, tolerance, responsibility for one’s beliefs, and intellectual independence cannot emerge and flourish in a context of inculcation and are not easily or reliably acquired later in life. Hence the importance of the developmental years to the realization of a culture that sustains and celebrates the freedom of speech.<sup>131</sup>

### *Extending Barnette*

Because the school setting is so crucial to the development of civic and personal character, teachers play a special role in nurturing the First Amendment virtues. Accordingly, it is important that teachers exemplify and practice that which they aim to produce by means of

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pattern, more than many other industrialized, democratic nations. Judith V. Torney et al., *Civic Education in Ten Countries* 230–33 (1975).

<sup>130</sup> *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 644 (1943) (Black and Douglas, J.J., concurring).

<sup>131</sup> Louis Michael Seidman criticizes our argument on the grounds that it implausibly assumes that absent the pressures exerted by mandatory recitation, children will engage rationally with the arguments for the propositions and attitudes manifested and implied by the pledge. To the contrary, Seidman claims, children are subject and responsive to all forms of social and parental pressure that attempts to evade their rational processes; the pledge is a legitimate form of counter-pressure. Louis Michael Seidman, *Silence and Freedom* 158–9 (2007). Although Seidman is surely right to emphasize that the state is not the only entity to attempt to influence children through means that circumvent and bias their judgment, it is not clear that this warrants the state’s adopting “similar tactics” given its tremendous power and its commitment to the values propelling the First Amendment. The Constitution may require the state to act as an exemplar with respect to the conditions supporting free speech and the character traits that support it, even if many of its citizens do not.

education. This is one of the reasons why we believe that *Barnette*, correctly applied, protects teachers from being compelled to lead or recite the pledge. Several lower court cases since *Barnette* have considered whether a public school teacher can be required to lead his students in pledging allegiance to the flag. Most courts have recognized a teacher's right not to be so compelled as a condition of employment, at least when the school has alternative means of conducting the ceremony for willing students.<sup>132</sup> The pedagogic spectacle of insincere recitation that such an obligation entails is deeply antithetical to the character ideal that informs the *Barnette* decision.

Adults, of course, typically are less impressionable than children. That does not render compelled affirmations by adults entirely innocuous, however. Although they have greater resources to resist efforts to bypass their deliberative faculties, adults are not immune to efforts at subconscious influence and the cognitive pressures associated with what we have labeled performative dissonance. A duty of public affirmation, with a desired job hanging in the balance, asks a teacher to embody the virtues necessary for a successful free speech culture by conducting a war within himself. Enforcing such obligations also sends a confusing message to children about the real level of tolerance for conscientious abstention. Mandating affirmations that may be ambivalent or equivocal undermines the First Amendment's character ideal by placing in doubt whether sincerity and independence are, in fact, honored by the state.

These concerns are not alleviated by the fact that persons with scruples against reciting the pledge of allegiance are not required to accept employment as public schoolteachers. Even if public employment is not a right, it cannot be conditioned on the waiver of a free speech opportunity or immunity absent some reason to consider the assertion of the free speech prerogative to be antithetical to the demands of the job. To find such a conflict in a teacher's unwillingness to lead a flag salute would imply that dissenters with scruples are not fit role models but rather persons of questionable civic status who cannot discharge the high office of teaching children. *Barnette* precludes such a crude and cruel characterization. Nor can the demands of administrative efficiency

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<sup>132</sup> See *Russo v. Central Sch. Dist.*, 469 F.2d 623 (2d Cir. 1972); *Hanover v. Northrup*, 325 F.Supp. 170 (D. Conn. 1970); *State v. Lundquist*, 278 A.2d 263 (Md. 1971); *Opinion of the Justices to the Governor*, 363 N.E.2d 251 (Mass. 1977). In *Russo*, the court noted that the complainant was a probationary teacher who co-taught a class with a regular member of the faculty who did not object to leading the pledge. 469 F.2d at 625. In *Palmer v. Board of Education*, 603 F.2d 1271 (7th Cir. 1979), the court upheld the firing of a kindergarten teacher for refusing both to lead the pledge and other acts of patriotism, as well as to teach patriotic lessons including why Lincoln's birthday is celebrated. In a subsequent dictum the *Palmer* holding was described by the Seventh Circuit to stand for the proposition that as a general matter teachers can be required to lead the pledge. See *Sherman v. Community Consol. Dist.* 21, 980 F.2d 437, 439 (7th Cir. 1992) (Easterbrook, J.).

justify the requirement that all teachers pledge allegiance to the flag. Means can be found to facilitate the holding of the flag salute even if for reasons of conscience the regular teacher is unavailable to lead it.

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One case that has troubled some observers as a possibly implausible extension of *Barnette* is *Wooley v. Maynard*.<sup>133</sup> The state of New Hampshire issued license plates whose border featured the state motto: "Live Free or Die." The Maynards, also Jehovah's Witnesses, objected to having to display the slogan because their religious understanding of the conditions of life's value was significantly more encompassing. Mr. Maynard covered the slogan with tape, was fined, and then jailed for failure to pay the fines. In litigation, the Maynards claimed a right not to speak and the state claimed a right to voice its own commitments through its own property. The Maynards prevailed on the ground that *Barnette* guaranteed them a constitutional right not to speak.

Does this outcome make sense on the rationale for *Barnette* that we have articulated? A license plate, after all, does not implicate or involve the driver to the degree that the recitation requirement at issue in *Barnette* did. The driver need never articulate the words of the motto, much less repeat them by rote. These differences, we agree, make *Wooley* a harder case. But *Barnette*'s rationale still has substantial traction here.

As in *Barnette*, the state's imposition of the speech and the forced association with the individual betrays complete indifference to the attitudes and beliefs of those made to become the courier for the state's ideological message. Drivers are being used as a means to convey the state ideal and the state is explicitly uninterested in whether its bearers agree with it or not. The *Wooley* Court explained:

Here, as in *Barnette*, we are faced with a state measure which forces an individual, as part of his daily life—indeed constantly while his automobile is in public view—to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable. In doing so, the State "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."<sup>134</sup>

True, New Hampshire drivers were not made to utter the words of the motto. But as the Court noted, they were forced to display those words on belongings that are commonly identified with them as individuals, as distinguished from currency and coins. The latter are objects that are exchanged and not identified with the person, whereas one's words,

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<sup>133</sup> 430 U.S. 705 (1977).

<sup>134</sup> *Id.* at 715 (quoting *Barnette*, 319 U.S. at 642).

clothes, and cars usually are.<sup>135</sup> This sort of association may not have the same causal influence on one's beliefs as repetition does, but there still is reason to worry that some persons will subtly adapt their beliefs to fit those ideas with which they are publicly identified, even if the identification results from legal compulsion. Surely the rationale of *Barnette* would be violated if a state or municipality were to require all its citizens to wear a pin depicting the American flag.

There is a further consideration at play in *Wooley*. Along with the t-shirt, the back of one's car is one of the very few places in which, in our culture, average people regularly engage in speech directed at the general public.<sup>136</sup> The license plate motto not only is inserted into what for many persons is their principal forum for political advocacy, but unlike in *Barnette*, the state's compelled affirmation rides alongside an individual's actual speech constantly and simultaneously. It thus threatens, in a way that a recitation requirement often may not, to distract, dilute, and possibly even contradict a driver's own sincere speech. Imagine the mixed message of a New Hampshire motorist who, prior to the Court's ruling in *Wooley*, displayed both a peace symbol on his bumper and the mandatory state motto on his license plate.

### Aftermath

In contrast to the well-documented surge in violence following *Gobitis*, the impact of the *Barnette* decision on vigilante violence directed against the Jehovah's Witnesses is not easily assessed. In quantitative terms, the violence had subsided considerably by the end of 1942, several months prior to the Court's ruling, owing in part to the diminution of fifth column anxieties.<sup>137</sup> By no means, however, did the Witnesses gain the freedom to enjoy their First Amendment rights in peace. Writing in 1962, David R. Manwaring, author of the most detailed study of the flag salute controversy, observed that although "1943 seems to have seen the last of the special *concentrations* of persecution," intermittent physical

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<sup>135</sup> In an interesting discussion of forms of ownership that implicate identity, Meir Dan-Cohen cites the relationship to one's car as exemplary. Dan-Cohen, *supra* note 122, at 268–71. We differ, somewhat, between us about how significant is the degree of connection and identification between the individual and her car. One of us is an Angelena; the other resides in Manhattan.

<sup>136</sup> James W. Endersby & Michael J. Towle, *Tailgate Partisanship: Political and Social Expression Through Bumper Stickers*, 33 *The Social Science Journal* 308, 308 (1996) (discussing bumper stickers as a common form of individual political expression); *see also* John E. Newhagen & Michael Ancell, *The Expression of Emotion and Social Status in the Language of Bumper Stickers*, 14 *Journal of Language and Social Psychology* 312 (1995).

<sup>137</sup> *See* Manwaring, *supra* note 6, at 169–73; MacDonnell, *supra* note 48, at 8.

violence continued to form a backdrop to the Witnesses's proselytizing.<sup>138</sup> The proselytizing itself appears to have been fairly effective. Estimates of active membership in the Jehovah's Witnesses in the United States place their growth from slightly over 72,000 in 1943 to over 187,000 by 1955,<sup>139</sup> reaching five million by 1996.<sup>140</sup>

Neither the sobering episodes of brutal attacks against the Witnesses nor the resolution of the recitation controversy in *Barnette* dampened official or cultural flag fervor.<sup>141</sup> Ironically, the flag code has introduced more orthodoxies in the years since *Barnette*. For example, the 1942 federal statute declared explicitly that citizens could show adequate respect to the flag even if they did not say the pledge but stood in silence while the pledge was recited.<sup>142</sup> In 1976, the declaration that standing evinces adequate respect was removed from the flag statute without discussion or explanation.<sup>143</sup> The statute was also amended that

<sup>138</sup> Manwaring, *supra* note 6, at 240. Efforts to regulate and restrict their proselytizing methods, and litigation in response, continue to this day. See, e.g., *Watchtower Bible and Tract Soc'y of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150 (2002) (invalidating, under the First Amendment, a requirement that a permit be obtained before engaging in door-to-door advocacy).

<sup>139</sup> Manwaring, *supra* note 6, at 20. International figures put them at over 700,000 in 1957 and well over 2 million by 1977. Penton, *supra* note 19, at 84.

<sup>140</sup> Jerry Bergman, *Jehovah's Witnesses: A Comprehensive and Selectively Annotated Bibliography* 1 (1999).

<sup>141</sup> More recently, in the wake of September 11, some Arab-Americans felt pressure to display flags as a self-protection measure. See, e.g., Nahal Toosi, *Civic Duty, Civil Rights*, Milwaukee Journal Sentinel, Dec. 2, 2001, at 1A (Arab and Arab-American owned businesses hang flags to express patriotism and to fend off attack); Michael Luo, *For One Arab-American Family, the Flag is Both a Symbol and a Shield*, Associated Press, Oct. 7, 2001, available at DIALOG, File no. 258; *Behind the Flags, Feelings of All Stripes*, Portland Press Herald (Me.), Oct. 1, 2001, at 1A (reporting an episode in Detroit in which a group of white residents confronted Arab-Americans and ordered them to "go home" while waving flags and in which the Arab-Americans responded by waving flags back as a response); Elizabeth W. Crowley, *Shafts of Hate Strike Aimlessly on South Shore*, The Patriot Ledger (Quincy, Mass.), Sept. 19, 2001, at 9 (reporting on violence and boycotts against Arab-Americans and the use of flag displays as defensive protection). See also Robert Snell, *We the People*, Lansing State Journal, July 4, 2002, at 1A (Chinese Americans and immigrants encouraged to fly the flag to dispel suspicion and to improve their image).

<sup>142</sup> During the 1970s, the question whether a student can be required to stand in silent attention while classmates recite the pledge was litigated in three federal circuits. All ruled that under *Barnette* an objecting student cannot be required to stand, or even to choose between standing or leaving the room, so long as her conduct while remaining in the room is not disruptive. See *Goetz v. Ansell*, 477 F.2d 636 (2d Cir. 1973); *Lipp v. Morris*, 579 F.2d 834 (3d Cir. 1978); *Banks v. Bd. Of Pub. Instruction*, 314 F.Supp. 285 (S.D. Fla. 1970), *aff'd* 450 F.2d 1103 (5th Cir. 1971).

<sup>143</sup> Compare Joint Resolution of Dec. 22, 1942, Pub. L. No. 829, § 7, 56 Stat. 1074, 1077 ("citizens will always show full respect to the flag when the pledge is given by merely standing at attention") with 4 U.S.C.A. § 4 (2000).

year to include the astonishing declaration that “[t]he flag represents a living country and is itself considered a living thing.”<sup>144</sup> One might have thought that the assertion that the flag is itself a living creature would have given some pause both for metaphysical reasons and from heightened concern about the reservation some religious people might have about pledging allegiance to a living thing that is not God. Strangely, this clause received no comment or explanation in the Senate hearings devoted to the proposed amendments.<sup>145</sup>

Controversies over homage to the flag have continued to play a prominent role in national politics and in Supreme Court jurisprudence. The issue figured prominently in the 1988 presidential campaign when candidate Michael Dukakis was criticized for his decision as governor of Massachusetts to veto a bill requiring teachers to lead the pledge. He cited in his defense an advisory opinion by the Supreme Judicial Court of Massachusetts holding that a state statute imposing that obligation on public school teachers would violate the First Amendment.<sup>146</sup> But Dukakis’s successful opponent, George H. W. Bush, made much of the issue on the campaign trail, pointedly leading his audiences in mass recitals of the Pledge of Allegiance. Bush asked about Dukakis, “What is it about the American flag which upsets this man so much?”<sup>147</sup> Twenty years later, Barack Obama proved more adroit. Obama had earlier chosen not to don a flag lapel pin because he thought the gesture would substitute

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<sup>144</sup> Joint Resolution of July 7, 1976, Pub. L. No. 94-344, 90 Stat. 810, 812 (current version at 4 U.S.C. § 8 (2000)). Odder still, this ontological declaration is quietly nested within a paragraph discussing the use of the flag motif as or adorning apparel. See also *Smith v. Goguen*, 415 U.S. 566, 603 (1974) (Rehnquist, J., dissenting) (noting that the flag is a unique physical object, “[it] is not just another ‘thing,’ and it is not just another ‘idea’”).

<sup>145</sup> However, pages of the hearings focus on the next sentence of the statute concerning the placement of flag lapel pins and discuss whether a lapel pin may be respectfully worn in places other than the left lapel, such as one’s tie. See *Flag Code Revision: Hearing Before the Subcomm. on Fed. Charters, Holidays, and Celebrations of the Comm. on the Judiciary*, 93rd Cong. 17–18 (June 7, 1974) (Testimony of Allen W. Finger, Executive Secretary, U.S. Flag Found., and Mrs. William D. Leetch, Honorary Vice Pres., Am. Coalition of Patriotic Soc., Inc.).

The peculiar statutory assertion that the flag is itself alive may derive from a typically hyperbolic remark of flag enthusiast Gridley Adams, former chair of the National Flag Code Committee and founder of the United States Flag Foundation. He declared “[t]he National Flag represents the living country and is itself considered a living thing . . . every star a tongue, every stripe articulate.” E.J. Kahn, Jr., *Profiles: Three Cheers for the Blue, White and Red*, *The New Yorker*, July 5, 1952, at 29, 29 (quoting an unspecified publication of Adams) (ellipsis in original).

<sup>146</sup> See *Opinion of the Justices to the Governor*, 363 N.E. 2d 251 (Mass. 1977); Robert Justin Goldstein, *Flag Burning & Free Speech: The Case of Texas v. Johnson* 88–89 (2000).

<sup>147</sup> Goldstein, *supra* note 146, at 88–89.

empty symbolism for true patriotism. After that choice became a campaign issue, he wore the pin.<sup>148</sup>

In 1989, in a five to four decision with a most unusual division among the Justices, the Supreme Court upheld the First Amendment right of Gregory Lee Johnson to burn a flag as part of a political protest at the 1984 Republican National Convention.<sup>149</sup> Justice Brennan's majority opinion frequently invoked *Barnette*. His most stirring line paralleled the rhetorical structure of Justice Jackson's famous remarks about constitutional astronomy, declaring "[i]f 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. We have not recognized an exception to this principle even where our flag has been involved."<sup>150</sup> The decision sparked a firestorm of protests and congressional activity. In response to the Court's decision, Congress quickly passed a federal statute to protect the flag against deliberate mutilation or defacement. The next year, a divided Court invalidated that statute. The Justices once again disputed whether the government has a valid interest in preserving the symbolic value of the flag and whether that interest could outweigh the free speech interests of those who would deface the flag for expressive purposes.<sup>151</sup> Although *United States v. Eichman* decisively settled the constitutionality of efforts to protect the flag from expressive destruction, it did not settle the political issue. Repeatedly, proposed amendments to the Constitution have been introduced that would grant to Congress the power to prohibit flag desecration. The House of Representatives has approved the proposals by the required two-thirds supermajority on four occasions, but the amendment has never passed the Senate.<sup>152</sup>

Perhaps the most important development in the flag salute controversy in the years since *Barnette* was the insertion in 1954 of the words "under God" in the wording of the pledge of allegiance. The Knights of Columbus, a Catholic fraternal organization, achieved its goal of adding the reference to a deity after campaigning for only two years. In the Congressional hearings, discussion of the change was again surprisingly

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<sup>148</sup> See Jim Rutenberg & Jeff Zeleny, *The Politics of the Lapel, When It Comes to Obama*, N.Y. Times, May 15, 2008, at A27.

<sup>149</sup> *Texas v. Johnson*, 491 U.S. 397 (1989). Justice Brennan's opinion for the Court was joined by Justices Marshall, Blackmun, Scalia, and Kennedy. Chief Justice Rehnquist and Justices White, O'Connor, and Stevens dissented.

<sup>150</sup> *Id.* at 414 (citations omitted).

<sup>151</sup> See *United States v. Eichman*, 496 U.S. 310 (1990).

<sup>152</sup> *Flag-Burning Debate Again Raises Hackles on the Hill*, Chicago Tribune, July 18, 2001, at 15.



brief. The inclusion of “under God” was thought necessary to distinguish the American system of government from communism and to underscore the commitment to inalienable, individual rights guaranteed by God.<sup>153</sup>

This revision of the pledge added a major doctrinal complication to the question whether it is sufficient for a school district to excuse objecting students from the obligation to pledge allegiance while continuing to conduct the flag ceremony for students who prefer to participate or choose not to assert their right to be excused. For the addition of the phrase “under God” raises an Establishment Clause issue, especially after the Supreme Court’s landmark school prayer decision, which occurred eight years after the revision of the pledge. In *Engel v. Vitale*<sup>154</sup> the Justices ruled, with only one dissenting vote, that even if objecting students are excused from participating, a public school may not conduct a daily classroom ceremony in which a state-authored prayer is recited.

The *Engel* precedent raises two questions about the constitutional status of the pledge in the post-*Barnette* era. First, with “under God” now a part of the pledge, might *Engel* support the transformation of the *Barnette* principle from a student’s right to be excused into a denial of the power of public schools to conduct the pledge of allegiance ceremony even for students who do not object to participating? The Court was at pains in *Engel* to deny that implication: “patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance.” Although Justice Black’s majority opinion did not mention the flag ceremony specifically, it did observe that “there are many manifestations in our public life of belief in God,” not all of them problematic under the Establishment Clause.<sup>155</sup> Subsequent challenges to public school ceremonies that excused objecting students but employed the post-1954 “under God” version of the pledge produced a division among the federal circuits and, in 2002, a groundswell of patriotic indignation.<sup>156</sup>

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<sup>153</sup> H. J. Res. 243 and Other Bills on Pledge of Allegiance: Hearing Before the Subcomm. No. 5 of the Comm. on the Judiciary, 83rd Cong. 7, 13, 37 (1954) (statement of Rep. Louis C. Rabaut, Rep. Charles G. Oakman, and Rep. Peter W. Rodino). See also the cited excerpts of Reverend Doeherty’s influential sermon on the subject at 99 Cong. Rec. 7763 (1954).

<sup>154</sup> 370 U.S. 421 (1962).

<sup>155</sup> *Id.* at 435 n.21.

<sup>156</sup> Compare *Sherman v. Community Consol. Dist.* 21, 980 F.2d 437 (7th Cir. 1992) with *Newdow v. United States Congress*, 292 F.3d 597, 608 (9th Cir. 2002). *Newdow*’s holding, that the “under God” passage of the contemporary pledge violated the Establishment Clause, was overturned on grounds that *Newdow*, the non-custodial parent who brought the case on behalf of his daughter, lacked standing. *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1 (2004). The controversy over *Newdow* prompted the introduction of

Justice Jackson's majority opinion in *Barnette* cannot help one to decide whether the inclusion of a passing reference to a deity gives the pledge ceremony theological import for purposes of the constitutional prohibition on the establishment of religion. Much of the doctrinal importance of *Barnette* lies in the fact that the Court rested its decision on the Freedom of Speech and not the Religion Clauses of the First Amendment. In our judgment, the Court's holding and opinion in *Barnette* does not (and does not aim to) provide guidance regarding what sorts of reference to religion raise questions of improper endorsement. The emphasis on character that we take to be at the heart of Justice Jackson's rationale is consistent with an accommodating approach to "ceremonial deism" but also with the competing view that an impermissible endorsement occurs whenever the official words of the nation affirm a particular religious understanding, even if that understanding is widely shared and expressed in purportedly ecumenical terms.

Second, whether or not the pledge refers to God, might the *Engel* approach be the sounder one? Even without compulsion to participate, might it be contrary to the First Amendment's character ideal to expose students in the authoritative context of the school environment to a ritual aimed to win over their hearts without appealing to their judgment? On that issue, the justification for the *Barnette* decision that we have identified has implications.

One might disapprove of all forms of rote patriotic recitation, at least when conducted on a daily basis in an educational environment, on the ground that such ceremonies undermine the First Amendment character ideal of a citizenry given to independent judgment, particularly regarding matters of political loyalty and consent. That objecting students are not required to participate does not fully address the problem, in this view. For the political independence of students who voluntarily pledge allegiance to the flag day after day matters just as much, and possibly is more at risk, as that of students who assert their right to be excused. Moreover, we might worry that some students who object to participating in a collective, school-sponsored flag salute will fail to assert their constitutional right to be excused for fear of incurring the displeasure or worse of their teachers and classmates.<sup>157</sup>

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many resolutions in Congress, all aimed to reaffirm the inclusion of "under God" within the pledge. On November 13, 2002, one such reaffirmation was signed into law. Among other things, the statute included a criticism of *Newdow* and the assurance that the nation's motto continues to be "In God We Trust." Reaffirmation—Reference to One Nation Under God in the Pledge of Allegiance, Pub. L. No. 107-293, §§ 1, 3, 116 Stat 2057, 2060 (2002).

<sup>157</sup> Peer pressure of this sort was a major consideration in the Court's ruling that the inclusion of a religious invocation and benediction in a graduation ceremony violates the Establishment Clause. See *Lee v. Weisman*, 505 U.S. 577, 592-4 (1992). Indeed, in a

These concerns are not trivial. There is something profoundly troubling about a ceremony that, particularly when conducted in the lower grades, has the aim or effect of programming impressionable children to hold, if not a set of specific beliefs, at least a set of specific attitudes toward their country.<sup>158</sup> That students collectively voice their allegiance before they fully understand its meaning only enhances the risk that patriotic sentiments will become default—and ultimately shallow—attachments that are seated before they are comprehended, appreciated, and freely adopted. This form of inculcation is rather different from the use of rote or drill to instill knowledge of the multiplication tables or to provide the foundation for lasting appreciation of a poem.

We question the constitutionality of routine, ostensibly voluntary pledge exercises for the very young. Our misgivings are not nearly so strong, however, regarding flag ceremonies for students who have reached the minimal level of sophistication necessary to understand both the pledge and their right to exempt themselves from participation. We conclude that the better reading of *Barnette* is that it protects such

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probing discussion of *Barnette*, Louis Michael Seidman observes that the *Barnette* protection may disrupt individual students' privacy and their freedom to be silent. Once the protection is in place, it becomes reasonable for observers to infer that students who recite the pledge agree with it, because dissenters would decline to participate. Whereas the mandatory pledge impedes observers from drawing reasonable inferences about students' beliefs and thereby creates cover for dissenters who do not wish to be identified, if the *Barnette* protection is in place, dissenters must either reveal themselves or risk being misunderstood. Seidman, *supra* note 131, at 155–7.

Seidman's argument, taken at face value, does not so much suggest that the right not to recite the pledge disrupts individual freedom. Rather, it calls into question *Barnette*'s compromise that a required pledge is constitutional so long as it has an opt-out provision. The argument he makes closely resembles the argument in *Lee* against allowing prayer in schools with an opt-out provision; just as the flaws of the opt-out system do not really themselves provide sustenance for the claim that mandatory prayer is constitutional, so too this argument at best shows that *Barnette*'s protection may not sweep far enough. This connects to a further response: the bite of Seidman's argument and the concern it evokes for dissenters turns on the fact that a required pledge with an opt-out provision still puts substantial pressure on all students to participate. Given the content of the pledge and the official and social pressures associated with a required pledge, some students are likely to feel so exposed and vulnerable if they opt out that feigned or insincere recitation will seem the lesser evil. These pressures may cast doubt on the claim that observers of students reciting the pledge would have warrant to conclude that the students agreed with its contents.

<sup>158</sup> See e.g., Robert Hess and Judith Torney, *The Development of Political Attitudes in Children*, 16, 26, 29–30, 105–8 (1967) (While the flag provides a symbol that facilitates national identification, young children in the first and second grades do not so much grasp the meaning of the pledge as they grasp a “basic tone of awe for government” and that adults highly value it. The flag rituals operate as “indoctrinating acts that cue and reinforce feelings of loyalty,” and “unquestioning patriotism.” They “establish an emotional orientation toward country and flag even though an understanding of the meaning of the words and actions has not been developed.”)

students from being required to participate in a flag salute but not from the burden of having to opt out, in one way or another, from such a ritual. The threat to democratic character inherent in patriotic ritual is greatly reduced when the element of legal compulsion is removed and the phenomenon of conscientious objection is legitimated by the constitutional regime. So long as school authorities take care to treat objecting students with respect, and insist that fellow students do the same, the loss of privacy and the sense of separation attendant to opting out of the ceremony are best treated as the natural, and not entirely unhealthy, incidents of dissent in a designedly contentious political culture. One might even consider the practice of dissenters publicly asserting their right to be excused from the patriotic catechism to be character building in the First Amendment sense, both for the dissenters themselves and for the other students who witness conscientious objection in action.

Do these grounds then suggest that *Engel* took too radical a turn? Why should the pledge be treated differently from prayer? To that question there is, in our judgment, a ready answer. The linchpin of the Supreme Court's school prayer jurisprudence holding that a right to be excused is insufficient under the Establishment Clause is the basic proposition that "it is no part of the business of government to compose official prayers."<sup>159</sup> As explained above, one cannot say that it is no part of the business of government to attempt to foster a widely shared, collectively articulated, even if not universally embraced, sense of national identity.

It was confidence that such a national identity could be achieved without compulsion, not indifference to whether it could be achieved, that led the Court in *Barnette* to say:

[W]e 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.<sup>160</sup>

This insistence that love of country and freedom of thought are complementary "even when a nation is at war"<sup>161</sup> may prove to be *Barnette*'s most important legacy. The idea is hardly novel. Its roots go back at least as far as Pericles' Funeral Oration of 431 B.C.<sup>162</sup> Despite its appeal,

<sup>159</sup> *Engel v. Vitale*, 370 U.S. 421, 425 (1962).

<sup>160</sup> *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943).

<sup>161</sup> See Harry Kalven, Jr., *Foreword: Even When a Nation Is at War*, 85 Harv. L. Rev. 3 (1971).

<sup>162</sup> See Thucydides, *History of the Peloponnesian War* 146-50 (Rex Warner tr., M.I. Finley, ed., 1954); W. Robert Connor, *Thucydides* 70-71 (1984).

however, the claim is destined to remain controversial, especially in each new period of military mobilization. Sound but demanding ideas depend for their survival on articulate renewal. Justice Jackson's opinion for the Court in *West Virginia State Board of Education v. Barnette* is best read not as a doctrinal breakthrough or a justificatory tour de force but rather, and more impressively, a timely and memorable reiteration of an ancient truth.

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