

**Case Study Analysis**  
***West Virginia v. Barnette* (319 U.S. 624[1943])**  
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Case Information

*West Virginia State Board of Education v. Barnette*  
Argued 11 March 1943  
Decided 14 June 1943

Topic

The right of students to be protected from being forced to salute the American flag and recite the Pledge of Allegiance in public schools.

Point of Law in Dispute

The First Amendment of the Constitution of the United States  
Specifically, the “Free Speech Clause.”

Text: *Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.*

Facts of the Case

In 1940, the Supreme Court held in *Minersville School District v. Gobitis* that democratic recourse to alter policy was the preferred remedy to a condition in which children of Jehovah’s Witnesses were compelled to stand, salute the flag, and recite the Pledge, an action to which they objected on religious grounds.

In 1942, the West Virginia Board of Education ordered teachers and students to be required to salute the flag, and that refusal to salute the flag to be considered insubordination, punishable by expulsion. The expelled child would not be readmitted until the child complied, and would be considered “unlawfully absent” for the duration of the expulsion, which placed parents of children so expelled in danger of prosecution.

Walter Barnette, a Jehovah’s Witness, brought suit in U.S. District Court as an “et al” on behalf of both his family and others in the same situation. They sought an injunction to restrain enforcement of the 1942 WVBOE order against Jehovah’s Witnesses. They cited their literalist interpretation of The Bible, specifically Exodus 20:4-5.

Text: *Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; thou shalt not bow down thyself to them nor serve them.*

Children of Jehovah's Witnesses, citing this precedent, had refused to comply with the order. Consequently, some of them had been expelled specifically for this refusal – under the WVBOE order – and parents had indeed been prosecuted.

The District Court ruled in favor of the plaintiff (Barnette) and issued the injunction. The defendant (The State of West Virginia) appealed. The U.S. Supreme Court granted *certiorari*.

The appellant (The State of West Virginia) cited the 1940 *Gobitis* case extensively, which they argued had already effectively answered questions of constitutionality regarding the saluting of the flag.

The American Legion filed an *amicus* brief in support of the appellant.

The appellee (Barnette, represented by Hayden Covington, who holds the record for most successful arguments before the U.S. Supreme Court) attacked the *Gobitis* decision (which the seated Justices had already indicated was questionable in their opinion) as being overly deferential to the legislature, which he argued effectively undermined the First Amendment. The legislature, the appellee posited, had effectively signed into law the right to persecute Jehovah's Witnesses.

The American Bar Association's Committee on the Bill of Rights filed an *amicus* brief in support of the appellee, as did the American Civil Liberties Union, both advocating the laying aside of the *Gobitis* precedent.

### Decision

The Court overturned *Gobitis*, siding with the appellee and upholding the District Court ruling in a 6-to-3 decision.

**The Court held that compelling students in the American public schools to salute the flag and recite the Pledge of Allegiance is unconstitutional, as it violates students' First Amendment rights.**

Justice Robert Jackson wrote for the majority, and rebuffed the four tenets of Justice Felix Frankfurter's majority decision in *Gobitis*.

#### 1. The Flag as National Symbol

Frankfurter: The flag is a national symbol, and can be legislated into roles "to promote in the minds of children who attend the common schools an attachment to the institutions of their country."

Jackson: "A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn."

## 2. The Need for National Unity

Frankfurter: “National unity is the basis of national security. To deny the legislature the right to select appropriate means for its attainment presents a totally different order of problem from that of the propriety of subordinating the possible ugliness of littered streets to the free expression of opinion through handbills.”

Jackson: “Those who begin the coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.”

## 3. The Right of the Individual

Frankfurter: “Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs.”

Jackson: “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.”

## 4. Constitutionality and Local Authority

Frankfurter: “[T]he court-room is not the arena for debating issues of educational policy. It is not our province to choose among competing considerations in the subtle process of securing effective loyalty to the traditional ideals of democracy, while respecting at the same time individual idiosyncrasies among a people so diversified in racial origins and religious allegiances. So to hold would in effect make us the school board for the country. That authority has not been given to this Court, nor should we assume it.”

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

### Concurring Opinion

Justices Black and Douglas authored a concurring opinion, which stated in part, “Words uttered under coercion are proof of loyalty to nothing but self-interest.”

### Implications

School leaders must, under law and by precedent established in *Barnette*, guarantee and safeguard the rights of students under the First Amendment. Students cannot be explicitly compelled, or placed in a situation in which compulsion is inferred or compliance is coerced, to salute the flag, to recite the Pledge, or otherwise engage in an act of “patriotism” where symbols and rituals are concerned.

PWCS Regulation 052.01-1 addresses this. “This opportunity to participate is not compulsory and shall be provided through school-wide participation using the intercom or through individual teachers who may desire to lead their class in the Pledge. All students, teachers, and any visitors in the school shall stand respectfully while the Pledge is being said. Individuals who, for religious or other deep personal convictions, do not choose to participate in the Pledge of Allegiance shall stand or sit quietly out of respect for the views of others and shall make no display that disrupts or distracts others who are reciting the Pledge.”

It can be argued that the requirement of non-participants to be non-disruptive is the sum extent of what the Division can enforce.

Indeed, there are teachers in the Division who exercise their constitutional First Amendment right to sit quietly and continue working non-disruptively during the saluting of the flag.

There are teachers in the Division who require that students stand. This is considered a compulsory saluting gesture, and cannot be enforced. The Regulation bears this out by giving individuals the right to “stand or sit quietly.”

Division staff should be thoroughly counseled on the fact that they cannot require students to stand, salute, and/or recite during the morning ritual prescribed by the Division. This may be as simple as altering the verbal directive from “stand up” or “please stand” to something less instructive, such as “you may stand.” Teachers who currently chastise, correct, or otherwise intervene with non-participating students should be counseled to discontinue this infringement upon the rights of those students.

## Addendum: Code of Virginia

The Virginia Department of Education revised its publication “Board of Education Guidelines; Recitation of the Pledge of Allegiance” on 1 July 2001.

The Commonwealth statute governing the Pledge is §22.1-202 of the Code of Virginia, which requires every school board to require the “daily recitation of the Pledge of Allegiance in each classroom of the school division.”

The Code further states, “During such Pledge of Allegiance, students shall stand and recite the Pledge while facing the flag with their right hands over their hearts or in an appropriate salute if in uniform; however no students shall be compelled to recite the Pledge if he, his parent or legal guardian objects on religious, philosophical, or other grounds to his participating in this exercise. Students who are thus exempt from reciting the Pledge shall remain quietly standing or sitting at their desks while others recite the Pledge and shall make no display that disrupts or distracts others who are reciting the Pledge.”

The Board of Education guidelines and indeed even the Code, like so many documents that exist in parts of America that disdain rulings that infringe upon their perceived sovereign rights to selectively ignore portions of the Constitution of the United States while holding other aspects of it up to gospel, works in *double-speak*.

The Recitation Guidelines state, “However, court rulings since *Barnette* have supported the authority of many state legislators to enact laws requiring students to recite the Pledge as long as the school exempts students who choose not to participate for religious, philosophical, or personal reasons.” In other words, the BOE language – borne out in LEA policy here in PWCS – essentially states that it is okay to require students to recite the Pledge, as long as students are not *really* required to recite the Pledge.

This kind of subtle manipulation is educationally reprehensible. I pose the two conditions as hypothetical conversations. Let us take the former, a true adherence to the *West Virginia v. Barnette* ruling, as a conversation between a teacher, a student, and the blindfolded specter of The Law.

Teacher: “You must stand and salute the flag.”

Student: “I am not required to do so.”

The Law: “The child is right. The child is not required to do so.”

Compare this to the Virginia-supported version.

Teacher: “You must stand and salute the flag.”

Student: “I am not required to do so.”

Teacher: “You *are* required to do so.”

The Law: “The teacher is right. You *are* required to do so.”

Most children will simply *follow The Law*. However, if this were the terminus of the conversation, would it not fly in the face of *Barnette*? Indeed, the conversation, carried to its conclusion, should follow thusly:

Teacher: “You must stand and salute the flag.”

Student: “I am not required to do so.”

Teacher: “You *are* required to do so.”

The Law: “The teacher is right. You *are* required to do so.”

Student: “I am *not* required to do so. It is my First Amendment right.”

The Law: “The child is right. The child is *not* required to do so.”

Teacher and Student: “But you just said...”

The Law: “I said what I said. Take it up with the courts.”

The ludicrous nature of laws that speak around other laws lends to the ongoing confusion that, I believe, is designed to tacitly push students into participation.

*Goetz v. Ansell*, (477 F.2d 636 [2d. Cir. 1973]) held that students must be allowed to sit silently during the salute of the flag, which effectively upheld *State v. Lundquist* (278 A. 2d 263 [1971]), which overturned a Maryland statute compelling students to stand regardless of participation.

One additional aspect of the Code that raises the eyebrow is Paragraph D of §22.1-202, which assigns the Attorney General – the highest prosecutorial lawyer in the Commonwealth – to defend LEAs in enforcing the stated provisions. It seems an unnecessary statement of force, and I cannot help but infer a simmering intimidation beneath the language in this section of the Code.

### The Myers Case

In 2005, *Myers v. Loudoun County Public Schools* (418 F.3d 395 [4th Cir. 2005]) held that the Virginia statute does not violate the Establishment Clause.

Edward Myers held that the Virginia Recitation Statute (the aforementioned §22.1-202) was unconstitutional as it violated, in his view, the Establishment Clause of the First Amendment. He alleged that the daily recitation requirement was tantamount to a “state civil religion,” specifically one that Myers termed “God and Country as state supported religion.” He cited the inclusion of “under God” in the pledge as an indicator that the pledge was not exclusively secular, but now religious in nature.

Thirty five states filed *amicus* briefs in support of the Virginia Recitation Statute.

Using the *Lemon* test, the District Court held that the statute did not meet the test, as it was not a religious exercise.

Having read the text of the decision in *Myers*, I believe that the single greatest liability in the case was Mr. Myers himself, who seems to have represented himself despite not

being an attorney, and who made claims of personal injury rather than focusing on the legal injury caused to his children. He further diluted his argument with a number of sweeping claims that at times seem excessive even to this author.

Indeed, the court in *Myers* held that Mr. Myers did not have the right to litigate on behalf of his children, upholding rulings by most of its sister courts, though it did not rule on the question of law in the case with that caveat as an influence.

The court ultimately upheld the lower court ruling denying that Mr. Myers (or more rightly his children) suffered legal injury, and cited the landmark *Marsh v. Chambers* case of 1983, in which a Nebraska taxpayer alleged that Nebraska's policy of using public funds to pay a chaplain for his/her time to open each State legislative day with prayer violated the Establishment Clause. The *Marsh* court stated with unwavering straightforwardness that...

*To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an establishment of religion or a step toward establishment; it is simply a tolerable acknowledgement of beliefs widely held among the people of this country.*

At face value, the idea of tolerating the majority view is not, perhaps, objectionable. But the statutory defense of organized, taxpayer funded prayer does not differentiate between extreme examples.