

Remembering, Studying, and Living Up to *Barnette*

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On June 14, 2018, people in the United States—many, and indeed most, people, I hope—will mark and celebrate the 75th anniversary of the Supreme Court’s decision in *West Virginia State Board of Education v. Barnette*.¹ In that landmark decision, the Court struck down as unconstitutional the State’s requirement that all public school teachers and students participate in a salute to the American flag and a recitation of the Pledge of Allegiance.

The case was brought on behalf of students who were Jehovah’s Witnesses. Believing that the Bible forbids them to bow down to graven images,² they refused to salute the flag. For that refusal, they were expelled from school. Expulsion made the children unlawfully absent, subjecting them to delinquency proceedings and their parents to criminal prosecution.

The *Barnette* decision was announced in Justice Robert H. Jackson’s opinion for Court. He explained that the flag salute requirement violated the children’s constitutional rights, which exist to strengthen

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For an archive of selected Jackson List posts, many of which include document images or photographs, visit <http://thejacksonlist.com>. This essay is posted there as a PDF file with “live” hyperlinks.

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¹ 319 U.S. 624 (1943), available at www.law.cornell.edu/supremecourt/text/319/624.

² See Exodus 20:4-6: “You must not make for yourself a carved image or a form like anything that is in the heavens above or that is on the earth underneath or that is in the waters under the earth. You must not bow down to them nor be induced to serve them, because I Jehovah your God am a God exacting exclusive devotion, bringing punishment for the error of fathers upon sons, upon the third generation and upon the fourth generation, in the case of those who hate me; but exercising loving-kindness toward the thousandth generation in the case of those who love me and keep my commandments.” (From the Online Bible, at www.jw.org/en/publications/bible/exodus/20/#v-4.)

"individual freedom of mind in preference to officially disciplined uniformity..."³

Although all of Justice Jackson's *Barnette* opinion bears rereading, some particularly wise words to consider are his closing paragraphs:

The case is made difficult not because the principles of its decision are obscure, but because the flag involved is our own. Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous, instead of a compulsory routine, is to make an unflattering estimate of the appeal of our institutions to free minds. 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.

We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power, and 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.⁴

³ *Barnette*, 319 U.S. at 637.

⁴ *Id.* at 641-42.

In the views of many, *Barnette* is a high point in U.S. Supreme Court history and constitutional law and one of Justice Jackson's very finest judicial opinions. His words in *Barnette* continue to ring, loudly and true, to people who think them through.

One example came from the Supreme Court itself in June 2013, *Barnette*'s 70th anniversary year and month. In *Agency for International Development v. Alliance for Open Society International, Inc.*, the Court struck down as unconstitutional the part of an international program to combat HIV/AIDS that required grant recipients to "pledge allegiance to the Government's policy of eradicating prostitution."⁵

With regard to that government effort to compel a pledge, Chief Justice Roberts wrote for the Supreme Court that "we cannot improve upon what Justice Jackson wrote for the Court 70 years ago: '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.'"⁶

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Some links—

- *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943)—[click here](#);
- the published version of a 2006 roundtable discussion featuring the case-winning litigants, sisters Gathie and Marie Barnett (whose surname got misspelled at some point in the litigation) and related commentary—[click here and then download](#);
- a Jackson List post from 2013, "*Barnette* at 70"—[click here](#);

⁵ 570 U.S. ___, ___, 133 S. Ct. 2321, 2331 (2013), available at www.law.cornell.edu/supremecourt/text/12-10.

⁶ *Id.* (quoting *Barnette*, 319 U. S. at 642).

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- another 2013 Jackson List post, “Arguing *Barnette*, et al.”—[click here](#); and
- a 2010 Jackson List post, “The Newest *Barnette* Sister”—[click here](#).