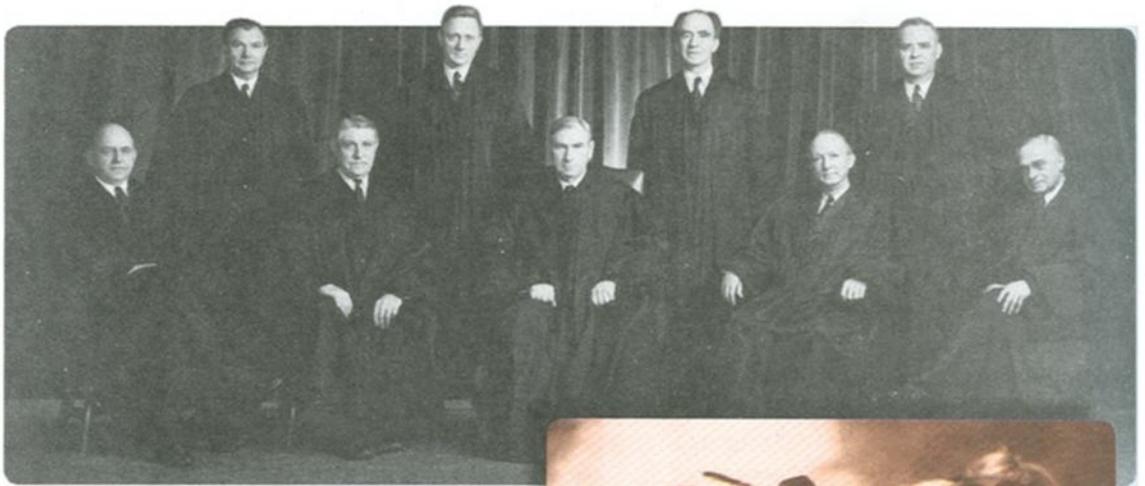


# From *Gobitis* to *Barnette*: A Primer

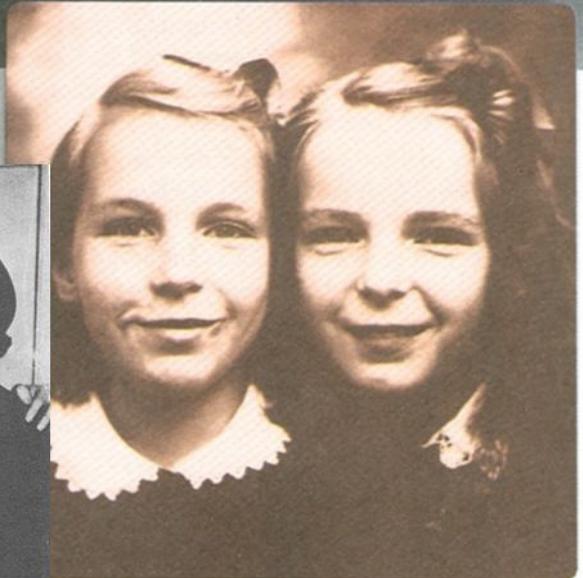
By Dan Seligman



The Justices of the Supreme Court of the United States who rejected compulsory flag saluting by a vote of 6 to 3 in the *Barnette* case, reversing the earlier decision in *Gobitis*.



William, Walter and Lillian Gobitis



Marie and Gathie Barnette

Compliments of the



# **From *Gobitis* to *Barnette*: A Primer**

**By Dan Seligman**

The principal of Slip Hill Grade School near Charleston, West Virginia stopped the two young Barnette sisters at the doorstep of the school one day in the spring of 1942. Was it true, he asked, that they would not salute the flag and say the Pledge of Allegiance? Yes, Marie, 9, and her sister Gathie, 11, said. “We told him it was because we believed that pledging allegiance to a flag was an act of worship, and we could not worship anyone or anything but our God Jehovah,” Gathie recalled years later.

If that was the case, the principal said, he had no choice. West Virginia’s Board of Education had said saluting the flag and saying the pledge were requirements of attendance. Marie and Gathie Barnette would have to go home and could not come back unless they complied with the Board of Education’s requirements.

The Barnette sisters went home. Out of their refusal to follow the requirements, a great Supreme Court case was born, one that would make the

“Barnette” name<sup>1</sup> synonymous with the notion that the Constitution of the United States protects religious beliefs from coercion by state or local officials.<sup>2</sup>

It was, at best, an awkward time to engage in civil disobedience and refuse a school board order – or say no to a school principal on grounds that there was a higher law, something more important than patriotism. Only months earlier, the Japanese had bombed the U.S. naval base at Pearl Harbor, Hawaii, and the United States was at war.

Slip Hill Grade School – with 20 or 25 students – was so poor it had only a picture of a flag. In front of that picture, all students were required at the designated time to stand with their right hands over their hearts, and recite the familiar words:

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.<sup>3</sup>

According to West Virginia’s Board of Education, refusal to salute the flag “shall be regarded as an act of insubordination; and shall be dealt with accordingly.”<sup>4</sup>

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<sup>1</sup> The family spelled its name “Barnett.” In the court filings, the name was misspelled. For purposes of consistency, I have spelled the name as it appears in the federal court records.

<sup>2</sup> The First Amendment of the Constitution states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof....” The Amendment was adopted as part of the Bill of Rights in 1791. By the time the Barnette case came before the U.S. Supreme Court, it was well settled law that the scope of the First Amendment also protected citizens against actions by state officials. The Court reached that result by incorporating the First Amendment protections into the Fourteenth Amendment, adopted in 1868 (no state shall “deprive any person of life, liberty or property, without due process of law”). Left unanswered was whether expelling children from public schools was permissible under the Fourteenth Amendment.

<sup>3</sup> The words “under God” were added by Congress in 1954.

<sup>4</sup> West Virginia Board of Education Resolution, January 9, 1942.

The Barnette sisters and their parents were members of Jehovah's Witnesses, an evangelical Christian denomination formed in the 1800s in Pennsylvania. According to their beliefs, they could not salute the flag because the Bible – the 20th chapter of Exodus – stated: "Thou shalt not make unto thee any graven image....Thou shalt not bow down thyself to them nor serve them for I the Lord thy God am a jealous God ...." Saluting and pledging to the flag were equivalent to honoring a "graven image" for Jehovah's Witnesses and violated God's laws.

To the Barnette sisters, it was God's kingdom and its laws, not a secular government, to which they pledged allegiance. They respected the flag and stood silently while their classmates recited the pledge, but place their hands over their hearts and say the words? No, they could not do that.

"A time of hysteria" – that's how a cousin of the Barnettes, Dave McClure, described the general mood in those days. McClure was 11 when he was expelled from his school near Charleston, West Virginia in 1942. Nonetheless, he walked a mile to school every day for two weeks in a row to attend class, only to be turned away each time.

Would he salute the flag? his teacher asked each morning. "No," he replied, and back home he walked.

Ironically, West Virginia law held the parents of the Jehovah's Witness children liable to prosecution for having encouraged truancy, a misdemeanor subject to a \$50 fine and 30 days in jail. It did not matter that the kids wanted to be

in school – and sought to go every day. West Virginia law – and the laws of other states as well – exposed the parents of the “truant” child to criminal charges.<sup>5</sup>

It was not an idle threat. A prosecutor obtained a warrant against Dave McClure’s mother as a result of his coerced absence from school. The Barnette sisters’ father had to appear in local court, too, on truancy charges. Eventually, the matter was dropped.

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Five hundred miles away, at the Jehovah’s Witness headquarters in Brooklyn, New York, a young Texas-born lawyer named Hayden Covington learned of the Barnettes’ case.

Covington and sympathetic lawyers around the country had argued cases in state and federal courts, even before the U.S. Supreme Court, seeking to overturn restrictions that prevented the Witnesses from handing out leaflets on a street corner or going door-to-door to preach.

Five years before the Barnette case, in 1937, the Witnesses challenged a mandatory flag salute requirement in Minersville, Pennsylvania, where school officials expelled Witnesses Lillian Gobitis, 12, and her younger brother, William, 10, because they refused both to recite the pledge and to salute the flag.<sup>6</sup>

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<sup>5</sup> In McClure’s case, it was a truant officer who caused his expulsion. The officer made the rounds of schools in his territory and asked if there were any students who refused to salute the flag. McClure’s teacher identified him. When McClure – who described himself as a good student with a perfect attendance record – refused to salute, he was expelled.

<sup>6</sup> The federal court filings misspelled their name, too. It was Gobitas, not Gobitis. I have used the court spelling for consistency.

At first, the Witnesses met with success. A federal district court judge ruled in their favor: he held that Pennsylvania's mandatory flag salute requirement was unconstitutional and ordered the school district to allow the Gobitis children to return.<sup>7</sup>

A federal appeals court upheld the decision, noting in a footnote that in Germany, Adolf Hitler said he considered the Jehovah's Witnesses to be "quacks" and had dissolved their society and confiscated their literature.<sup>8</sup> The implication was clear: such persecution went on in Nazi Germany, but the United States was different.

The Minersville school superintendent was unimpressed. He called the decision a "hodge-podge of perverted quotations" from judges who believe that "little children have the right and the ability to formulate religious beliefs and conscientious objections."<sup>9</sup> The school district appealed to the U.S. Supreme Court, where at last it received support.

By an 8-1 vote, the Supreme Court in 1940 reversed the lower courts and upheld the school expulsions. The justices in *Minersville School District v. Gobitis* said the states could require all students, no matter their religious beliefs, to salute

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<sup>7</sup> *Gobitis v. Minersville School District*, 21 F.Supp. 581 (E.D.Pa. 1937) and 24 F.Supp. 271 (E.D.Pa. 1938).

<sup>8</sup> *Minersville School District v. Gobitis*, 108 F.2d 683, n.3 at 683 (3rd Cir. 1939). The court's opinion was issued on November 10, 1939, two months after World War II began in Europe.

<sup>9</sup> Quoted in Leonard Stevens, "Salute! *The Case of The Bible v. The Flag*," page 72, (Coward, McCann and Geoghegan, 1973).

the flag and recite the pledge.<sup>10</sup> The flag, they said, was an essential symbol of national unity and transcended all internal differences. In the Supreme Court's view, the need of school officials to inculcate patriotism in its students trumped the religious beliefs of the Gobitis family.

Private religious beliefs, according to the Supreme Court, had to give way to obedience to general law – particularly if that law was not targeted at a religious minority but applied to everyone. “The ultimate foundation of a free society is the binding tie of cohesive sentiment,” Justice Frankfurter wrote for the majority.<sup>11</sup> Only one justice -- Harlan Fiske Stone -- dissented.

The consequences of the Supreme Court's decision were soon recorded on the streets and in schools around the country, where the mood was often ugly and the Witnesses found themselves victims of harassment and attack. In numerous small towns across the nation, Witness members were beaten if they did not publicly salute the flag. The most bizarre incident occurred in West Virginia, where a group of door-to-door Jehovah's Witness preachers were forced to drink castor oil and then sent on their way, all under the watchful eyes of the local sheriff.

And yet at the Supreme Court there were signs of change. In June 1942, three members of the Court said they erred in the *Gobitis* ruling. Justices rarely admit mistakes – at least in public – but Justices Hugo Black, William O. Douglas

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<sup>10</sup> *Minersville School District v. Gobitis*, 310 U.S. 586 (1940).

<sup>11</sup> *Ibid.*, 596.

and Frank Murphy did just that in the case of *Jones v. City of Opelika*. “[W]e now believe [*Gobitis*]...was wrongly decided,” they wrote. “Certainly our democratic form of government ...has a high responsibility to accommodate itself to the religious view of minorities however unpopular and unorthodox those views may be.”<sup>12</sup>

Hayden Covington at the Witness headquarters in Brooklyn watched those developments with interest. He now had four votes to reverse *Gobitis*: the original dissenter (Justice Stone, since elevated to Chief Justice by President Roosevelt); and three justices who signaled their change of heart in *Opelika*.

But Covington doubted how Robert H. Jackson, the newest justice, would vote.<sup>13</sup> Appointed to the Supreme Court in July 1941, only a year earlier, Jackson had sided with the majority in *Opelika*, a case that upheld the constitutionality of a municipal ordinance taxing the proceeds from the sale of literature by door-to-door preachers, like the Jehovah’s Witnesses.

Covington began looking for another case and a new set of facts that would allow the Witnesses to bring the flag salute issue back before the Supreme Court. He found that case in West Virginia, where the Barnette sisters and their cousins,

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<sup>12</sup> *Jones v. City of Opelika*, 316 U.S. 584, 623-624 (1942).

<sup>13</sup> Shortly before his Court appointment, Jackson published a book, *The Struggle for Judicial Supremacy: A Study of a Crisis in American Power Politics*, (New York: Alfred A. Knopf, 1941). It addressed a range of topics, from civil liberties to Roosevelt’s ill-fated plan to expand the number of justices on the Supreme Court. The Supreme Court, Jackson wrote on page 284, has been “particularly vigilant in stamping out attempts by local authorities to suppress the free dissemination of ideas, upon which the system of responsible government rests.” In a brief footnote, Jackson listed with apparent approval several opinions where the Court had acted vigilantly, but he noted without comment the contrary 1940 decision in *Minersville School District v. Gobitis*, where a majority of the justices upheld school expulsions for refusing to salute the flag.

including Dave McClure, had been expelled. The lawsuit, *Barnette v. West Virginia Board of Education*, was filed in federal district court there.

On October 6, 1942, a three-judge district court panel ruled in favor of the Witnesses. The district court declared West Virginia's mandatory flag salute to be unconstitutional and ordered the school board to allow the Barnette children and the other plaintiffs to return to school without saluting the flag or saying the pledge, notwithstanding the Supreme Court's ruling in *Gobitis*.<sup>14</sup>

The judges noted that three members of the Supreme Court had expressed reservations about *Gobitis*, and they used the opportunity to revisit the issue, to frame the matter as they saw it. "There is not a religious persecution in history that was not justified in the eyes of those engaging in it on the ground that it was reasonable and right and that the persons whose practices were suppressed were guilty of stubborn folly hurtful to the general welfare," the court said.<sup>15</sup> The framers of the Constitution were familiar with persecution of this character, and the religious freedoms guaranteed by the First Amendment and Fourteenth Amendment were adopted precisely to prevent those types of abuses.

West Virginia's Board of Education promptly appealed to the Supreme Court, asking it to decide once again whether the state could expel children for refusing to salute the flag.

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<sup>14</sup> *Barnette v. West Virginia State Board of Education*, 47 F.Supp.251 (S.D.W.Va. 1942).

<sup>15</sup> *Ibid.*, 253.

If there was ever a time when the Supreme Court could wrap itself in the cloak of patriotism and demand loyalty, this was it: American soldiers were dying on battlefields in Europe and in the Pacific.

The Supreme Court issued its opinion on June 14, 1943 – Flag Day – and this time, there was no doubt about what Justice Robert H. Jackson thought. To this day, the decision, *West Virginia v. Barnette*, remains one of his most-quoted opinions, a compelling defense of the right to exercise religious beliefs that do not conform to the vagaries of local public opinion. By a 6-3 vote, the Court reversed its decision only three years earlier in *Gobitis* and held that mandatory flag salute was unconstitutional.<sup>16</sup>

Justice Jackson wrote the majority opinion:

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.<sup>17</sup>

The purpose of the Bill of Rights, Jackson wrote, was to withdraw certain subjects, like religion, and “place them beyond the reach of majorities and officials.”<sup>18</sup>

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<sup>16</sup> *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). The newest justice, Wiley Rutledge, joined the majority, leaving Justice Frankfurter, who had written the *Gobitis* opinion, to dissent with only other justices.

<sup>17</sup> *Ibid.*, 642.

<sup>18</sup> *Ibid.*, 638.

Nor did Jackson find convincing the argument, promoted in *Gobitis*, that mandatory flag salute would instill school discipline and promote civic virtues. Those efforts, Jackson wrote, were self-defeating, doomed, like the attempts by the Romans who sought to stamp out Christianity as a “disturber of pagan unity” or the contemporary efforts of “our present totalitarian enemies.”<sup>19</sup>

Jackson warned:

Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.<sup>20</sup>

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To the Barnette sisters and their parents, the Supreme Court’s decision was a welcome conclusion but did not change their daily lives. Marie and Gathie were already back in school, thanks to the lower court’s ruling in October 1942.

Sometimes, to be sure, it was not easy. A few kids taunted them and called them “Japs.” Their school had a drive to sell war stamps, and might have had a “perfect record” – each kid bought some – but Marie and Gathie did not because their religion required them to stay neutral, to avoid endorsing war or taking sides. Their exasperated teacher told them: “I would be stuck with the two of you.” And when it came time to help Gathie tackle a difficult math problem, an area covered when Gathie missed several months of class, the teacher refused. “It wasn’t my fault you were out of school,” she told Gathie.

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<sup>19</sup> *Ibid.*, 641.

<sup>20</sup> *Ibid.*

But those were relatively minor repercussions, which in the long run left lingering unpleasant memories, but no physical scars.

For more than four decades after the Supreme Court's opinion in *West Virginia v. Barnette*, the two sisters rarely read in the press of the case that bore their name. But in 1988, the flag salute issue was raised in the presidential campaign by George Bush, who criticized Michael Dukakis, the Democratic Party nominee and the governor of Massachusetts, for having vetoed a bill some years before that would impose fines on teachers if they did not lead their classes in daily recitations of the pledge of allegiance.

And then the press found Marie Barnette Snodgrass and Gathie Barnette Edmonds and the other Witnesses who had made history 45 years earlier. "It's hard to comprehend why they're raising this again," complained William Gobitis, a 62-year-old piano tuner in a small Wisconsin town. "They're ignoring our constitutional development and history," he told *The New York Times*.<sup>21</sup>

After the election, the issue died away – again.

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Lillian Gobitis Klose now lives near Atlanta. Her family suffered during the flag salute controversy, she recalled. An anonymous phone call in the middle of the night warned her father that a mob would show up at the family grocery store the next morning. Her father went to the police chief, who parked his car in front of the store to discourage troublemakers. Nothing happened, but some residents

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<sup>21</sup> *The New York Times*, September 11, 1988, page 1.

then urged a boycott to punish the family for its religious views. Business dropped off for months.

Years later, Lillian married a Jehovah's Witness from Germany who had been put in a concentration camp for handing out literature on street corners. He had seen and experienced Nazi Germany's treatment of the Witnesses, persecutions that the appeals court in *Gobitis* could only imagine. When asked if the ordeal was worth the pain and inconvenience, Lillian answers emphatically that she would do it again, even knowing that the Supreme Court would rule against her and her brother in 1940, and that it would take three more years for it to render the *Barnette* opinion.

Dave McClure, the cousin of the Barnettes who was a plaintiff with them in their lawsuit, agreed. "I feel the same now as I did then. The case helped put some meat on the Bill of Rights," said McClure, now retired in Seattle. "The legal system is stronger."

The Barnette sisters still live in the Charleston area, and they, too, said they would fight for the principle again. "Absolutely," was the short, unequivocal response. Gathie Barnette Edmonds put it this way: "We took a stand, and it set a precedent for other children for years to come."

-Dan Seligman is an attorney in Seattle, Washington.