

ESSAY: PLEDGING ALLEGIANCE

Michael K. Steenson[†]

I. INTRODUCTION	747
II. MINNESOTA’S LEGISLATURE REQUIRING THE RECITATION OF THE PLEDGE.....	748
III. THE PLEDGE REDUX AND <i>WEST VIRGINIA STATE BOARD OF EDUCATION V. BARNETTE</i>	754
A. Minersville School District v. Gobitis.....	755
B. Gobitis— <i>the Aftermath</i>	761
C. West Virginia State Board of Education v. Barnette...	762
IV. THE PLEDGE OF ALLEGIANCE AND THE MINNESOTA CONSTITUTION.....	771
V. CONCLUSION.....	779

I. INTRODUCTION

Symbols are powerful magnets for emotions.¹ We identify with and communicate through symbols. The flag is a unique symbol and, given our history, it has been and is an emotional patriotic

[†] Margaret H. and James E. Kelley Professor of Law, William Mitchell College of Law. The author thanks Jennifer Doyle, 2L, for her excellent research assistance.

1. The Supreme Court acknowledged the power of symbols in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 632-33 (1943):

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

rallying point for us in times of national stress. Ironically, the flag that becomes the fulcrum for national unity and freedom also becomes a focal point for forced patriotism.

This Essay focuses on the Pledge of Allegiance requirement and its place in public schools. It begins with an analysis of a typical, but certainly not isolated, approach of the Minnesota Legislature, following September 11, in passing a bill that required recitation of the Pledge. This Essay then moves to a discussion of the events surrounding the 1943 United States Supreme Court decision in *West Virginia State Board of Education v. Barnette*² and how *Barnette* has subsequently been interpreted. Finally, this Essay discusses the probable impact of the Minnesota Constitution on the Pledge Bill, should it pass in this legislative session.

II. MINNESOTA'S LEGISLATURE REQUIRING THE RECITATION OF THE PLEDGE

The Minnesota Legislature, in its 2001-2002 session, overwhelmingly passed a bill that would have required recitation of the Pledge of Allegiance to the flag of the United States of America at least once a week in all public and charter schools in Minnesota.³ The bill would have amended section 121A.11 of the Minnesota Statutes by adding the following language:

Subd. 3. [PLEDGE OF ALLEGIANCE] (a) All public and charter school students shall recite the pledge of allegiance to the flag of the United States of America one or more times each week. The recitation shall be conducted:

(1) by each individual classroom teacher or the teacher's

2. 319 U.S. 624 (1943).

3. The action is reminiscent of the congressional response to the United States Supreme Court's flag burning opinion in *Texas v. Johnson*, 491 U.S. 397 (1989), where the United States flag was burned as a political gesture. In a 5-4 decision, the Court held a Texas anti-desecration statute unconstitutional, because the statute presumed to regulate the content of speech and the State's interest in "preserving the flag as a symbol of nationhood and national unity" did not justify the conviction of the protestor. *Id.* The congressional response was in the form of Senate and House resolutions, the Senate reprimanding the Court and the House expressing its "profound concern" over the decision. NAT HENTOFF, *FREE SPEECH FOR ME—BUT NOT FOR THEE* 234-35 (1992); see also Larry Bartlett & Lynda Frost, *The Pledge of Allegiance in the Public Schools on the 200th Anniversary of the Bill of Rights*, 67 WEST EDUC. L. REP. 867 (1991). Congress responded in a similar fashion after the Ninth Circuit's decision holding the Pledge of Allegiance unconstitutional as violative of the establishment clause.

surrogate; or

(2) over a school intercom system by a person designated by the school principal or other person having administrative control over the school.

All public and charter schools must set aside time each year for civics education that includes the history and reasons for reciting the pledge. A school district or charter school that has a student handbook or school policy guide must include a statement about student rights and responsibilities under this subdivision in that document. A local school board or a charter school board of directors annually, by majority vote, may waive these requirements.

(b) Any student or teacher who objects to reciting the pledge must be excused from participating without penalty.

(c) A local school board or a charter school board of directors that waives the requirement to recite the pledge of allegiance under paragraph (a) may adopt a district or school policy regarding the reciting of the pledge of allegiance.

Subd. 4. [INSTRUCTION.] Unless this requirement is waived annually by a majority vote of the school board, a school district must instruct students in the proper etiquette toward, correct display of, and respect for the flag, and in patriotic exercises.

Subdivision 3(a) of the bill initially states that all children “shall” recite the Pledge, but in subdivision 3(b), it states that any student or teacher objecting to recitation of the Pledge “must be excused from participating without penalty.” The bill says nothing about how the information concerning the right to opt out would be conveyed by the school, except that a student handbook or school policy guide “must include a statement about student rights and responsibilities” concerning the Pledge. The ability to opt out may depend on whether the school makes the handbook or policy guide readily available or whether the parents of the students are aware of the requirement to inquire about the surrounding rules.

A Senate provision would have required teachers to tell their students that the students did not have to participate; the provision was rejected by the House negotiators on the bill, who thought that the provision would undermine the importance of the Pledge as

4. H.F. No. 2598, 82d Leg., Reg. Sess. (Minn. 2002). The bill would also have applied to charter schools by amending section 124D.10, subd. 8 by adding a subpart (k), which would have read, “A charter school is subject to the Pledge of allegiance requirement under section 121A.11, subdivision 3.” *Id.*

well as of other classroom directives.⁵ The bill was framed so that teachers and students who object to reciting the Pledge may be excused from doing so without penalty, but it did not state that the school district had any affirmative obligation to tell them that they do not have to participate.

In 2002, Minnesota Governor Jesse Ventura vetoed the bill, saying in his veto message that “I believe patriotism comes from the heart. Patriotism is voluntary. The United States of America exists because people wanted to be free to choose. All of us should have free choice when it comes to patriotic displays.”⁶ Concerns about the Pledge requirement left the chief author of the Minnesota Senate bill, Senator Mady Reiter, somewhat incredulous. In a newspaper report, she said, “I’m a little baffled and disappointed. He says we can’t mandate patriotism. I never looked to this as a mandate, and most people I know don’t either.”⁷ Determining whether a policy is a mandate is the key issue in any analysis of the Pledge requirement.⁸ Senator Reiter said that her “initial reaction is one of just abject disappointment. I just don’t understand why the governor of the State of Minnesota would want to veto a bill that passed so unanimously in both houses of the Legislature.”⁹ Senator Reiter stated that her intent is to re-introduce the bill “almost immediately” in the next legislative session.¹⁰ On January 8, 2003, Senator Reiter did re-introduce the bill in a form identical to the bill that passed through the previous legislative session.¹¹ The same bill was introduced in the House, with twenty-six authors climbing on board.¹²

5. Ashley H. Grant, *Pledge of Allegiance Requirements Nixed Patriotism is Voluntary*, Ventura Says, GRAND FORKS HERALD, May 23, 2002, at 7.

6. John Welsh, *Patriotism is Voluntary*, ST. PAUL PIONEER PRESS, May 23, 2002, at 1A. See also James Lileks, *Heart or Head? Patriotism’s Roots; Taking (or Not) the Pledge, According to the Governor*, MINNEAPOLIS STAR TRIB., May 26, 2002, at E2; James Walsh & Anthony Lonetree, *Pledge of Allegiance to Remain Voluntary*, MINNEAPOLIS STAR TRIB., May 23, 2002, at A17. While the bill failed in Minnesota, the post-September 11 patriotic surge has resulted in the passage of other Pledge bills. Illinois succeeded where Minnesota failed and made the Pledge mandatory, with no opt-out provision. 105 ILL. COMP. STAT. § 5/27-3 (2002). Missouri adopted a Pledge statute, but made it voluntary. MO. REV. STAT. §171.021 (2002).

7. Welsh, *supra* note 6.

8. See, e.g., *Sherman v. Community Consol. Sch. Dist. 21 of Wheeling Township*, 980 F.2d 437, 439 (7th Cir. 1992).

9. Walsh & Lonetree, *supra* note 6.

10. *Id.*

11. S.F. No. 14, 82d Leg., Reg. Sess. (Minn. 2003).

12. H.F. No. 6, 82d Leg., Reg. Sess. (Minn. 2003).

The St. Paul School Board, prompted by board member Tom Conlon, also recently considered the Pledge issue. Mr. Conlon's reason for the requirement emphasized the unifying force of the Pledge, stating that, "[r]eciting the pledge does offer the opportunity for unity. . . . It [does] not require anyone to participate, but it does provide students that opportunity [to participate]. . . . It's the one opportunity where we can put aside our differences and come together as Americans for a common cause; it is diversity at its best."¹³

Many other states considered, and some passed, similar Pledge bills,¹⁴ after September 11, and the Ninth Circuit's decision in *Newdow v. United States Congress*,¹⁵ in which the court held that requiring students to speak the words "under God" in a teacher-led Pledge of Allegiance was unconstitutional.¹⁶ The bills ranged in tenor, from a resolution in Alabama urging that "each board of education in the state develop a program to incorporate patriotic education into its daily curriculum in conjunction with teaching character education and the Pledge of Allegiance,"¹⁷ to statutes requiring the Pledge to be given,¹⁸ some with exceptions for students who did not wish to participate,¹⁹ to resolutions condemning the Ninth Circuit and calling for impeachment of the judges deciding the case.²⁰

Newdow prompted outrage and immediate congressional action in the form of a bill. Signed by President George W. Bush, the bill reaffirms the Pledge of Allegiance and our national motto, along with their respective phrases: "under God" and "In God we trust."²¹ The bill includes a fourteen-paragraph civics lesson, beginning with the pilgrims and the Mayflower Compact and ending with a reference to a Seventh Circuit case sustaining the

13. *St. Paul School Board Minutes* (Oct. 23, 2001) (summary of statement of Tom Conlon, Member, St. Paul School Board).

14. See Associated Press, *Lawmakers Want Pledge of Allegiance in More Schools*, at <http://www.cnn.com/2002/fyi/teachers.ednews/02/28/school.pledge.ap/> (last visited Feb. 6, 2002).

15. 292 F.3d 597 (9th Cir. 2002).

16. *Id.* at 612.

17. H.J.R. 152, 189 Leg., 3d Spec. Sess. (Al. 2001).

18. See 105 ILL. COMP. STAT. § 5/27-3 (2002).

19. See MO. REV. STAT. § 171.021 (2002).

20. See Patrick J. Buchanan, *Time for a Little Rebellion*, at <http://www.theamericancause.org/pattimeforalittle.htm> (July 1, 2002).

21. Act of Nov. 13, 2002, Pub. L. No. 107-293, 116 Stat. 2057.

constitutionality of the Pledge.²²

22. *Id.* Section 1, the findings section, reads in its entirety as follows: Congress finds the following:

(1) On November 11, 1620, prior to embarking for the shores of America, the Pilgrims signed the Mayflower Compact that declared: "Having undertaken, for the Glory of God and the advancement of the Christian Faith and honor of our King and country, a voyage to plant the first colony in the northern parts of Virginia." (2) On July 4, 1776, America's Founding Fathers, after appealing to the "Laws of Nature, and of Nature's God" to justify their separation from Great Britain, then declared: "We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness." (3) In 1781, Thomas Jefferson, the author of the Declaration of Independence and later the Nation's third President, in his work titled "Notes on the State of Virginia" wrote: "God who gave us life gave us liberty. And can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are of the Gift of God. That they are not to be violated but with His wrath? Indeed, I tremble for my country when I reflect that God is just; that his justice cannot sleep forever." (4) On May 14, 1787, George Washington, as President of the Constitutional Convention, rose to admonish and exhort the delegates and declared: "If to please the people we offer what we ourselves disapprove, how can we afterward defend our work? Let us raise a standard to which the wise and the honest can repair; the event is in the hand of God!" (5) On July 21, 1789, on the same day that it approved the Establishment Clause concerning religion, the First Congress of the United States also passed the Northwest Ordinance, providing for a territorial government for lands northwest of the Ohio River, which declared: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." (6) On September 25, 1789, the First Congress unanimously approved a resolution calling on President George Washington to proclaim a National Day of Thanksgiving for the people of the United States by declaring, "a day of public thanksgiving and prayer, to be observed by acknowledging, with grateful hearts, the many signal favors of Almighty God, especially by affording them an opportunity peaceably to establish a constitution of government for their safety and happiness." (7) On November 19, 1863, President Abraham Lincoln delivered his Gettysburg Address on the site of the battle and declared: "It is rather for us to be here dedicated to the great task remaining before us—that from these honored dead we take increased devotion to that cause for which they gave the last full measure of devotion—that we here highly resolve that these dead shall not have died in vain—that this Nation, under God, shall have a new birth of freedom—and that Government of the people, by the people, for the people, shall not perish from the earth." (8) On April 28, 1952, in the decision of the Supreme Court of the United States in *Zorach v. Clauson*, 343 U.S. 306 (1952), in which school children were allowed to be excused from public schools for religious observances and education, Justice William O. Douglas, in writing for the Court stated: "The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concern or union or dependency one on the other. That is the common sense of

the matter. Otherwise the State and religion would be aliens to each other—hostile, suspicious, and even unfriendly. Churches could not be required to pay even property taxes. Municipalities would not be permitted to render police or fire protection to religious groups. Policemen who helped parishioners into their places of worship would violate the Constitution. Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; ‘so help me God’ in our courtroom oaths—these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: ‘God save the United States and this Honorable Court.’ “. (9) On June 15, 1954, Congress passed and President Eisenhower signed into law a statute that was clearly consistent with the text and intent of the Constitution of the United States, that amended the Pledge of Allegiance to read: “I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.”. (10) On July 20, 1956, Congress proclaimed that the national motto of the United States is “In God We Trust”, and that motto is inscribed above the main door of the Senate, behind the Chair of the Speaker of the House of Representatives, and on the currency of the United States.. (11) On June 17, 1963, in the decision of the Supreme Court of the United States in *Abington School District v. Schempp*, 374 U.S. 203 (1963), in which compulsory school prayer was held unconstitutional, Justices Goldberg and Harlan, concurring in the decision, stated: “But untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it. Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political, and personal values derive historically from religious teachings. Government must inevitably take cognizance of the existence of religion and, indeed, under certain circumstances the First Amendment may require that it do so.”. (12) On March 5, 1984, in the decision of the Supreme Court of the United States in *Lynch v. Donnelly*, 465 U.S. 668 (1984), in which a city government’s display of a nativity scene was held to be constitutional, Chief Justice Burger, writing for the Court, stated: “There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789... [E]xamples of reference to our religious heritage are found in the statutorily prescribed national motto ‘In God We Trust’ (36 U.S.C. 186), which Congress and the President mandated for our currency, (see 31 U.S.C. 5112(d)(1) (1982 ed.)), and in the language ‘One Nation under God’, as part of the Pledge of Allegiance to the American flag. That pledge is recited by many thousands of public school children—and adults—every year... Art galleries supported by public revenues display religious paintings of the 15th and 16th centuries, predominantly inspired by one religious faith. The National Gallery in Washington, maintained with Government support, for example, has long exhibited masterpieces with religious messages, notably the Last Supper, and paintings depicting the Birth of Christ, the Crucifixion, and the

III. THE PLEDGE REDUX AND *WEST VIRGINIA STATE BOARD OF EDUCATION V. BARNETTE*

History repeats itself because we let it. The recent spate of Pledge-related bills and resolutions is nothing new. The Pledge requirement and the controversies surrounding it are recurring. The current controversy warrants yet another brief look at the issue as it arose sixty years ago in *West Virginia State Board of Education v. Barnette*.²³ The case has continuing vitality and familiarity, in part because of the significance and boldness of the decision in wartime when patriotism was high, and in part because it has slipped into our culture as a commonly understood potential barrier to patriotic exercises injected into the classroom by state legislatures, school boards, administrators and teachers.

Moreover, *Barnette* has a rich history. While the current question concerns the boundaries it sets on patriotic exercises in

Resurrection, among many others with explicit Christian themes and messages. The very chamber in which oral arguments on this case were heard is decorated with a notable and permanent—not seasonal—symbol of religion: Moses with the Ten Commandments. Congress has long provided chapels in the Capitol for religious worship and meditation.”.(13) On June 4, 1985, in the decision of the Supreme Court of the United States in *Wallace v. Jaffree*, 472 U.S. 38 (1985), in which a mandatory moment of silence to be used for meditation or voluntary prayer was held unconstitutional, Justice O’Connor, concurring in the judgment and addressing the contention that the Court’s holding would render the Pledge of Allegiance unconstitutional because Congress amended it in 1954 to add the words “under God,” stated “In my view, the words ‘under God’ in the Pledge, as codified at (36 U.S.C. 172), serve as an acknowledgment of religion with ‘the legitimate secular purposes of solemnizing public occasions, [and] expressing confidence in the future.’ “. (14) On November 20, 1992, the United States Court of Appeals for the 7th Circuit, in *Sherman v. Community Consolidated School District 21*, 980 F.2d 437 (7th Cir. 1992), held that a school district’s policy for voluntary recitation of the Pledge of Allegiance including the words “under God” was constitutional..(15) The 9th Circuit Court of Appeals erroneously held, in *Newdow v. United States Congress* (9th Cir. June 26, 2002), that the Pledge of Allegiance’s use of the express religious reference “under God” violates the First Amendment to the Constitution, and that, therefore, a school district’s policy and practice of teacher-led voluntary recitations of the Pledge of Allegiance is unconstitutional..(16) The erroneous rationale of the 9th Circuit Court of Appeals in *Newdow* would lead to the absurd result that the Constitution’s use of the express religious reference “Year of our Lord” in Article VII violates the First Amendment to the Constitution, and that, therefore, a school district’s policy and practice of teacher-led voluntary recitations of the Constitution itself would be unconstitutional.

Act of Nov. 13, 2002, Pub. L. No. 107-293, 116 Stat. 2057.

23. 319 U.S. 624 (1943).

the public schools, the historical context of the case establishes its heart. Just three years earlier, the Court upheld the flag salute and Pledge of Allegiance requirement in *Minersville School District v. Gobitis*.²⁴ The case had a significant impact on Jehovah's Witnesses, who suffered greatly because of the decision. It was the subject of significant adverse press. Much of the negative media was channeled toward Justice Felix Frankfurter, who wrote the opinion.

A. *Minersville School District v. Gobitis*

In *Gobitis*, twelve-year-old Lillian Gobitis, and her ten-year-old brother William, were expelled from the Minersville public schools because they refused to salute the flag in the course of a daily school exercise.²⁵ The ceremony required students and teachers to recite the Pledge while extending their right hands in salute to the flag.²⁶ The children refused to salute the flag because their religious beliefs taught them that gestures of respect for the flag were forbidden by scripture.²⁷ They were affiliated with the Jehovah's Witnesses, for whom the supreme authority is the Bible as the Word of God.²⁸

The issue, as framed by the Court, was "whether the requirement of participation in such a ceremony, exacted from a child who refuses upon sincere religious grounds, infringes without due process of law the liberty guaranteed by the Fourteenth Amendment."²⁹ Justice Frankfurter, writing for the Court, emphasized not only the importance of the right to religious freedom guaranteed by the First Amendment, but also the potential for limitation of that right: "So pervasive is the acceptance of this precious right that its scope is brought into question, as here, only when the conscience of individuals collides with the felt necessities of society."³⁰

The right to free exercise is not doubted. Justice Frankfurter noted that there are many infringements on the free exercise of religion, but not all infringements amount to constitutional violations. Instead, many infringements are a manifestation of the

24. 310 U.S. 586 (1940).

25. *Id.*

26. *Id.* at 591.

27. *Id.* at 591-92.

28. *Id.* at 591.

29. *Id.* at 592-93.

30. *Id.* at 593.

government's power to secure an orderly, tranquil and free society.³¹

Similarly, Justice Frankfurter observed that freedom of speech assured by Due Process is not absolute;³² even if the Court were to concede that freedom of speech goes beyond its historical meaning of the "full opportunity to disseminate views"³³ to the freedom from conveying "what may be an implied but rejected affirmation." Justice Frankfurter narrowed the question to "whether school children, like the Gobitis children, must be excused from conduct required of all the other children in the promotion of national cohesion."³⁴

The majority opinion examined the Pledge issue as one that is central to national unity. As Justice Frankfurter stated, "[n]ational unity is the basis of national security."³⁵ The Court felt that it could not deny the legislature the right to select appropriate means for the attainment of national security. This 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 distribution of handbills.

Situations like the present are phases of the profoundest problem confronting a democracy—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?" No mere textual reading or logical talisman can solve the dilemma. And when the issue demands judicial determination, it is not the personal notion of judges of what wise adjustment requires which must prevail.³⁶

The issue, then, as framed by Justice Frankfurter, is what interests have to be balanced against the interests in religious freedom:

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 constitutes a

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 595-96 (citations omitted).

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. This Court has had occasion to say that “. . . the flag is the symbol of the nation’s power, – the emblem of freedom in its truest, best sense . . . it signifies government resting on the consent of the governed; liberty regulated by law; the protection of the weak against the strong; security against the exercise of arbitrary power; and absolute safety for free institutions against foreign aggression.”³⁷

Justice Frankfurter deferred to the right of state legislatures to require flag salutes.

The wisdom of training children in patriotic impulses by those compulsions which necessarily pervade so much of the educational process is not for our independent judgment. Even were we convinced of the folly of such a measure, such belief would be no proof of its unconstitutionality. For ourselves, we might be tempted to say that the deepest patriotism is best engendered by giving unfettered scope to the most crochety beliefs. Perhaps it is best, even from the standpoint of those interests which ordinances like the one under review seek to promote, to give to the least popular sect leave from conformities like those here in issue. But the 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 idiosyncracies 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.

We are dealing here with the formative period in the development of citizenship. Great diversity of psychological and ethical opinion exists among us concerning the best way to train children for their place in society. Because of these differences and because of reluctance to permit a single, iron-cast system of education to be imposed upon a nation compounded of so many strains, we have held that, even though public education is one of our most cherished democratic institutions, the Bill of Rights bars a state from compelling all children to attend the public schools But it is a

37. *Id.* (citations omitted).

very different thing for this Court to exercise censorship over the conviction of legislatures that a particular program or exercise will best promote in the minds of children who attend the common schools an attachment to the institutions of their country.³⁸

The focus is, in substantial part, on the right of the schools to determine their own curricula, but also on the value of encouraging patriotism through appropriate means, including flag salutes. Permitting dissidence, in Justice Frankfurter's opinion, would be "to maintain that there is no basis for a legislative judgment that such an exemption might introduce elements of difficulty into the school discipline, might cast doubts in the minds of the other children which would themselves weaken the effect of the exercise."³⁹

In his conclusion, Justice Frankfurter saw no conflict in permitting "[a] society which is dedicated to the preservation of these ultimate values of civilization" to "utilize the educational process for inculcating those almost unconscious feelings which bind men together in a comprehending loyalty, whatever may be their lesser differences and difficulties."⁴⁰ That process may be used if "men's right to believe as they please, to win others to their way of belief, and their right to assemble in their chosen places of worship for the devotional ceremonies of their faith, are all fully respected."⁴¹

Justice Stone dissented. He viewed the law in question as "unique in the history of Anglo-American legislation" because it not only suppresses freedom of speech, but it also prohibits the free exercise of religion:

For by this law the state seeks to coerce these children to express a sentiment which, as they interpret it, they do not entertain, and which violates their deepest religious convictions. It is not denied that such compulsion is a prohibited infringement of personal liberty, freedom of speech and religion, guaranteed by the Bill of Rights, except in so far as it may be justified and supported as a proper exercise of the state's power over public education. Since the state, in competition with parents, may through teaching in the public schools indoctrinate the minds of the young, it is said that in aid of its

38. *Id.* at 598-99.

39. *Id.* at 600.

40. *Id.*

41. *Id.* at 600-01.

undertaking to inspire loyalty and devotion to constituted authority and the flag which symbolizes it, it may coerce the pupil to make affirmation contrary to his belief and in violation of his religious faith. And, finally, it is said that since the Minersville School Board and others are of the opinion that the country will be better served by conformity than by the observance of religious liberty which the Constitution prescribes, the courts are not free to pass judgment on the Board's choices.⁴²

Justice Stone recognized that the personal liberties guaranteed by the Constitution are not always absolute, and that the right of the government to survive and operate is not necessarily negated by the Bill of Rights:

It may make war and raise armies. To that end it may compel citizens to give military service It may suppress religious practices dangerous to morals, and presumably those also which are inimical to public safety, health and good order But it is a long step, and one which I am unable to take, to the position that government may, as a supposed educational measure and as a means of disciplining the young, compel public affirmations which violate their religious conscience.⁴³

There are other limitations. The state has the power to require education and it has the power to control it, but the state cannot require attendance only at public schools. Nor does the state's power to control the streets mean that the state has the authority to suppress expression. Other cases involving conflicts between the state's authority and individual rights have required a reasonable accommodation of rights and powers. In this case, Justice Stone stated that there are alternative ways to achieve the state goal of teaching loyalty and patriotism. The state has the authority to compel attendance at school and to require study and instruction in the history of the country and its governmental organization, including the guaranties of our civil liberties. Limiting the authority of the government to compel a Pledge of Allegiance in no way limits the government's ability to achieve its goals by other avenues.

Justice Stone defined civil liberties:

The guaranties of civil liberty are but guaranties of freedom of the human mind and spirit and of reasonable freedom and opportunity to express them. They

42. *Id.* at 601-02.

43. *Id.* at 602.

presuppose the right of the individual to hold such opinions as he will and to give them reasonably free expression, and his freedom, and that of the state as well, to teach and persuade others by the communication of ideas. The very essence of the liberty which they guaranty is the freedom of the individual from compulsion as to what he shall think and what he shall say, at least where the compulsion is to bear false witness to his religion. If these guaranties are to have nay meaning they must, I think, be deemed to withhold from the state any authority to compel belief or the expression of it where that expression violates religious convictions, whatever may be the legislative view of the desirability of such compulsion.⁴⁴

Justice Stone acknowledged that while there may have been few cases in which infringements of personal liberty have not been “justified in the name of righteousness and the public good, and few which have not been directed, as they are now, at politically helpless minorities,” the framers of the Constitution were aware that most curtailments of liberties by the government would have the support of a legislative judgment, and therefore, the limitations are justified.⁴⁵ Justice Stone said that “The very terms of the Bill of Rights preclude . . . any reconciliation of such compulsions with the constitutional guaranties by a legislative declaration that they are more important to the public welfare than the Bill of Rights.”⁴⁶ He went on to say that even if his view was rejected, and the government had some authority to compel a public expression of loyalty, the Court should not be precluded from reviewing the governmental action by recognition of the ability to obtain redress through the democratic process.⁴⁷

And until now we have not hesitated to scrutinize similar legislation restricting the civil liberty of racial and religious minorities although no political process was affected Here 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. In such circumstances careful scrutiny of legislative efforts to secure conformity of belief and opinion by a compulsory affirmation of the desired

44. *Id.* at 604.

45. *Id.*

46. *Id.* at 605.

47. *Id.* at 605-06.

belief, is especially needful if civil rights are to receive any protection. Tested by this standard, I am not prepared to say that the right of this small and helpless minority, including children having a strong religious conviction, whether they understand its nature or not, to refrain from an expression obnoxious to their religion, is to be overborne by the interest of the state in maintaining discipline in the schools.⁴⁸

B. *Gobitis*—the Aftermath

Gobitis aroused antithetical public sympathies. Justice Frankfurter was heavily criticized for his decision in the case.⁴⁹ It was also a factor in the intensification of the persecution of the Jehovah's Witnesses, although that persecution had earlier roots dating to 1928, when the Jehovah's Witnesses started practicing their proselytizing methods.⁵⁰

After *Gobitis*, the West Virginia legislature revised its statutes to require certain courses of instruction intended to teach, foster and perpetuate "the ideals, principles and spirit of Americanism, and increase[e] the knowledge and organization and machinery of the government."⁵¹ The West Virginia Board of Education, taking its

48. *Id.* at 606.

49. LEONARD BAKER, *BRANDEIS & FRANKFURTER: A DUAL BIOGRAPHY* 401 (1984); PETER IRONS, *A PEOPLE'S HISTORY OF THE SUPREME COURT* 346 (1999).

50. DAVID R. MANWARING, *RENDER UNTO CAESAR, THE FLAG-SALUTE CONTROVERSY* 163 (1962). Another report notes that within two weeks of the decision, hundreds of attacks on Jehovah's Witnesses were reported to the Department of Justice. PETER IRONS, *A PEOPLE'S HISTORY OF THE SUPREME COURT* 341 (1999). See also BAKER, *supra* note 49 at 402; HENTOFF, *supra* note 3 at 243.

51. W. VA. CODE § 1734 (1941), as cited in *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 625. The statute reads as follows:

In all public, private, parochial and denominational schools located within this state there shall be given regular courses of instruction in history of the United States, in civics, and in the constitutions of the United States and of the state of West Virginia, for the purpose of teaching, fostering and perpetuating the ideals, principles and spirit of Americanism, and increasing the knowledge of the organization and machinery of the government of the United States and of the state of West Virginia. The state board of education shall, with the advice of the state superintendent of schools, prescribe the courses of study covering these subjects for the public elementary and grammar schools, public high schools and state normal schools. It shall be the duty of the officials or boards having authority over the respective private, parochial and denominational schools to prescribe courses of study for the schools under their control and supervision similar to those required for the public schools.

The salute to the flag as settled on by the Board is a stiff-arm salute, which required the saluter "to keep the right hand raised with palm turned up" while

cue from *Gobitis*, adopted a resolution ordering the flag salute to be a regular and required part of the public school programs. Refusal to salute the flag was to be regarded as an act of insubordination.⁵²

In *Jones v. City of Opelika*,⁵³ a licensing tax case involving Jehovah's Witnesses, Justices Black, Douglas, and Murphy frankly stated in dissent that they were wrong in *Gobitis*:

The opinion of the Court sanctions a device which in our opinion suppresses or tends to suppress the free exercise of a religion practiced by a minority group. This is but another step in the direction which *Minersville School District v. Gobitis* . . . took against the same religious minority and is a logical extension of the principles upon which that decision rested. Since we joined in the opinion in the *Gobitis* case, we think this is an appropriate occasion to state that we now believe that it was also wrongly decided. Certainly our democratic form of government functioning under the historic Bill of Rights has a high responsibility to accommodate itself to the religious views of minorities however unpopular and unorthodox those views may be. The First Amendment does not put the right freely to exercise religion in a subordinate position. We fear, however, that the opinions in these and in the *Gobitis* case do exactly that.⁵⁴

C. West Virginia State Board of Education v. Barnette

The West Virginia law was quickly challenged by the Jehovah's Witnesses. The impact of the substantial criticism of *Gobitis* and the turnabout of Justices Murphy, Black, and Douglas, prompted the

repeating the Pledge. *Barnette*, 319 U.S. at 628. It was modified in deference to objections raised by the Parent and Teachers Association, the Boy and Girl Scouts, the Red Cross and the Federation of Women's Clubs because it seemed too much like Hitler's salute. *Id.*

52. *Barnette*, 319 U.S. at 629. In lieu of the Pledge of Allegiance, the Jehovah's Witnesses offered an alternative Pledge, which they would give "periodically and publicly":

I have pledge my unqualified allegiance and devotion to Jehovah, the Almighty God, and to His Kingdom, for which Jesus commands all Christians to pray.

I respect the flag of the United States and acknowledge it as a symbol of freedom and justice to all.

I pledge allegiance and obedience to all the laws of the United States that are consistent with God's law, as set forth in the Bible.

Id. at 629 n.4.

53. 316 U.S. 584, 623-24 (1942), *judgment vacated*, 319 U.S. 103 (1943).

54. *Id.*

three-judge district court hearing the case to shun *Gobitis* in holding the flag salute requirement unconstitutional:

Ordinarily we would feel constrained to follow an unreversed decision of the Supreme Court of the United States, whether we agree with it or not. It is true that decisions are but evidences of the law and not the law itself; but the decisions of the Supreme Court must be accepted by the lower courts as binding upon them if any orderly administration of justice is to be attained. The developments with respect to the *Gobitis* case, however, are such that we do not feel that it is incumbent upon us to accept it as binding authority. Of the seven justices now members of the Supreme Court who participated in that decision, four have given public expression to the view that it is unsound, the present Chief Justice in his dissenting opinion rendered therein and three other justices in a special dissenting opinion in *Jones v. City of Opelika* The majority of the court in *Jones v. Opelika*, moreover, thought it worth while to distinguish the decision in the *Gobitis* case, instead of relying upon it as supporting authority. Under such circumstances and believing, as we do, that the flag salute here required is violative of religious liberty when required of persons holding the religious views of plaintiffs, 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.⁵⁵

The outcome in *Barnette* seemed inevitable. The reasons for the switch are varied and are the subject of disagreement. Justice Stone was appointed Chief Justice by President Roosevelt, and two new members of the Court replaced two retiring justices. Justice Jackson replaced Chief Justice Hughes in 1941 and Justice Rutledge replaced Justice McReynolds in 1943. The Supreme Court's opinion, handed down on June 14, 1943, (Flag Day) was written by Justice Jackson.⁵⁶ He was joined by Justices Black, Douglas, and Murphy, who changed their position from *Gobitis*, Justice Rutledge, and Chief Justice Stone (who dissented in *Gobitis*). Justices Frankfurter, Roberts, and Reed, in the majority of *Gobitis*, dissented.

Justice Jackson's opinion was a reaffirmation of Justice Stone's

55. *Barnette v. W. Va. State Bd. of Educ.*, 47 F. Supp. 251, 252-53 (S.D.W. Va. 1942).

56. *Barnette v. W. Va. State Bd. of Educ.*, 319 U.S. 624 (1943).

(who was now the Chief Justice) dissenting opinion in *Gobitis*. He first began his opinion by noting the nature of the religious beliefs of the Jehovah's Witnesses and the impact of the flag salute requirement. The failure of children of that faith to salute the flag and comply with the rule resulted in expulsion and threats of expulsion from school. Officials had threatened to send them to reformatories, and their parents had been prosecuted and threatened with prosecution for causing their children's delinquency.⁵⁷

The Court emphasized that the right to be free from the salute requirement was not in conflict with any rights asserted by any other individual, nor was there any question concerning the children's behavior, which was peaceable and orderly. Noting Justice Stone's opinion in *Gobitis*, the Court emphasized the state's right to "require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guaranties of civil liberty which tend to inspire patriotism and love of country."⁵⁸

The Court viewed the flag salute requirement differently, however, because it required students not to study but to declare a belief:

They are not merely made acquainted with the flag salute so that they may be informed as to what it is or even what it means. The issue here is whether this slow and easily neglected route to aroused loyalties constitutionally may be short-cut by substituting a compulsory salute and slogan.⁵⁹

The Court noted the significance of the salute and Pledge requirement:

There is no doubt that, in connection with the pledges, the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind.

. . . Here it is the State that employs a flag as a symbol of adherence to government as presently organized. It requires the individual to communicate by word and sign his acceptance of the political ideas it thus bespeaks.

57. *Id.* at 630.

58. *Id.* at 631 (citing *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 604 (1943)).

59. *Id.* at 631.

Objection to this form of communication when coerced is an old one, well known to the framers of the Bill of Rights.⁶⁰

Justice Jackson emphasized the role of the Bill of Rights as a protection of the right of individuals to speak their minds. Sanctioning the compulsory flag salute would require an interpretation of the Bill of Rights that would permit the state to compel them to make a statement with which they disagree. Jackson then rebutted the primary points that were the foundation for the *Gobitis* opinion. First, he addressed the issue as framed in *Gobitis* of the dilemma Lincoln posed: “[m]ust a government of necessity be too strong for the liberties of its people, or too weak to maintain its own existence?”⁶¹ The *Gobitis* Court resolved the issue in favor of government strength.

Justice Jackson noted that the argument proves too much due to its potential for resolving all power disputes in favor of those who are in authority by the override of liberties thought to weaken or delay execution of their policies.⁶² He stressed that enforcement of the Jehovah’s Witnesses’ rights is not a choice of a weak over a strong government. Rather, “[i]t is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end.”⁶³

Second, Justice Jackson addressed Justice Frankfurter’s assumption that interfering with the authority of educational officers in the states would make the Supreme Court the school board for the country. He noted the importance of the functions of the boards, but expressed concern that “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. . . . There are village tyrants as well as village Hampdens, but none who acts under color of law is beyond reach of the Constitution.”⁶⁴

The third point of *Gobitis* held that where courts have no special competence in an area, the legislatures, as well as the courts, have the obligation to guard cherished liberties and that the

60. *Id.* at 632-33.

61. *Id.* at 636 (citing *Gobitis*, 310 U.S. at 596).

62. *Barnette*, 319 U.S. at 636.

63. *Id.* at 637.

64. *Id.* at 637-38.

determine the use of legislative authority through public opinion, rather than transferring the issue to the courts, is appropriate. This point was rebutted by the *Barnette* Court's view of the Bill of Rights as placing certain matters beyond the reach of "the vicissitudes of public controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."⁶⁵

The fourth point, and the heart of the *Gobitis* opinion (as characterized by Justice Jackson), was its conclusion that the authorities have the right to select the appropriate means of attaining national security through national unity. Justice Jackson did not disagree with that view. However, he viewed the problem instead as whether the type of compulsion utilized by the Board is a constitutionally permissible method of achieving that unity. He noted the inherent problems in requiring conformity:

Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity. As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. 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. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the last failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.⁶⁶

Justice Jackson concluded with perhaps the best-known and most frequently cited part of *Barnette*:

65. *Id.* at 638.

66. *Id.* at 640-41.

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 public 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.⁶⁷

The Court concluded that the school board exceeded their authority by requiring the flag salute and Pledge and violated the First Amendment.⁶⁸ The Court overruled *Gobitis*.⁶⁹

Justices Black and Douglas concurred, but wrote separately to explain the reasons for the reversal of their positions in *Gobitis*.⁷⁰ They joined the majority in *Gobitis* because they were reluctant to impose the Constitution as “a rigid bar against state regulation of conduct thought inimical to the public welfare.”⁷¹ They remained convinced that the principle is sound but that it was inappropriately applied:

Words uttered under coercion are proof of loyalty to nothing but self-interest. Love of country must spring from willing hearts and free minds, inspired by a fair administration of wise laws enacted by the people’s elected representatives within the bounds of express constitutional prohibitions. These laws must, to be consistent with the First Amendment, permit the widest toleration of conflicting viewpoints consistent with a society of free men.⁷²

They concluded that neither domestic tranquility during times of peace, nor the war effort depended “on compelling little children to participate in a ceremony which ends in nothing for them but a fear of spiritual condemnation.”⁷³ They viewed the ceremony, as enforced against conscientious objectors, as “a handy implement for disguised religious persecution,” and therefore inconsistent with the Constitution.⁷⁴

Justice Frankfurter dissented in a bitter opinion beginning with the following paragraph:

67. *Id.* at 642.

68. *Id.*

69. *Id.*

70. *See id.* at 643.

71. *Id.*

72. *Id.* at 644.

73. *Id.*

74. *Id.* Justice Murphy, also changing his view from *Gobitis*, concurred for substantially the same reasons. *Id.* at 644-46.

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. Were my purely personal attitude relevant I should whole-heartedly associate myself with the general libertarian views in the Court's opinion, representing as they do the thought and action of a lifetime. But as judges we are neither Jew nor Gentile, neither Catholic nor agnostic. We owe equal attachment to the Constitution and are equally bound by our judicial obligations whether we derive our citizenship from the earliest or the latest immigrants to these shores. As a member of this Court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard. The duty of a judge who must decide which of two claims before the Court shall prevail, that of a State to enact and enforce laws within its general competence or that of an individual to refuse obedience because of the demands of his conscience, is not that of the ordinary person. It can never be emphasized too much that one's own opinion about the wisdom or evil of a law should be excluded altogether when one is doing one's duty on the bench. The only opinion of our own even looking in that direction that is material is our opinion whether legislators could in reason have enacted such a law. In the light of all the circumstances, including the history of this question in this Court, it would require more caring than I possess to deny that reasonable legislators could have taken the action which is before us for review.⁷⁵

Having established what *Barnette* did, it is equally important to emphasize what it did not do. It does not take away the broad discretion of school boards to establish the curricula for their schools.⁷⁶ It does not work to blur distinctions between religious and patriotic exercises, even if it were to be linked to subsequent Supreme Court decisions on the coercive aspects of non-compulsory religious exercises in public schools.⁷⁷ The Seventh Circuit Court of Appeals considered the issue in *Sherman v.*

75. *Id.* at 646-47. Justice Frankfurter was discouraged from writing the first paragraphs of his dissent. BAKER, *supra* note 49, at 405-06.

76. See *Bd. of Educ. v. Pico*, 457 U.S. 853, 864 (1982); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968); *Fleischfresser v. Dir. of Sch. Dist. 200*, 15 F.3d 680, 686 (7th Cir. 1994).

77. See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 312 (2000); *Lee v. Weisman*, 505 U.S. 577, 587 (1992).

Community Consolidated School District 21,⁷⁸ illustrates the limitations. *Sherman* involved the constitutionality of a 1979 Illinois statute stating that the Pledge of Allegiance “shall be recited each day by pupils in elementary educational institutions supported or maintained in whole or in part by public funds.”⁷⁹ Judge Easterbrook, writing for the court, initially noted that if the statute required every student to recite the Pledge, *Barnette* would require the court to hold the statute unconstitutional.⁸⁰ He avoided that problem by construing the statute to mean that only “willing pupils” rather than “all pupils” were required to recite the Pledge.⁸¹

He went on to address the issue of coercion. Even where participation is not overtly required, “notwithstanding the lack of penalties or efforts by teachers to induce pupils to recite, there remains social pressure to do so and a sense of exclusion when one’s beliefs enforce silence during a ceremony others welcome.”⁸² He noted the opinion of four of the Supreme Court Justices in *Allegheny County v. Pittsburgh American Civil Liberties Union*, that “[i]t borders on sophistry to suggest that the ‘reasonable’ atheist would not feel less than a ‘full member of the political community’ every time his fellow Americans recited, as part of their expression of patriotism and love for country, a phrase he believed to be false.”⁸³

The issue is whether social pressure, sufficient to justify a finding that the Establishment Clause is violated in the school prayer cases, may be equated with legal pressure. The court in *Sherman* noted the analogy and then rejected it:

If as *Barnette* holds no state may require anyone to recite the Pledge, and if as the prayer cases hold the recitation by a teacher or rabbi of unwelcome words *is* coercion, then the Pledge of Allegiance becomes unconstitutional under all circumstances, just as no school may read from a holy scripture at the start of class.

As an analogy this is sound. As an understanding of the first amendment it is defective—which was Justice Kennedy’s point in *Allegheny*. The religion clauses of the first amendment do not establish general rules about speech or schools; they call for religion to be treated

78. 980 F.2d 437 (7th Cir. 1992).

79. 27 ILL. COMP. STAT. ANN. § 5/27-3 (West 2002).

80. *Sherman*, 980 F.2d at 442.

81. *Id.*

82. *Id.* at 443.

83. *Id.* (citing *Allegheny County v. Pittsburgh A.C.L.U.*, 492 U.S. 573, 573 (1989) (Kennedy, J., joined by Rehnquist, C.J., and White, J. & Scalia, J.)).

differently. Recall that for now we are treating the Pledge as a patriotic expression, even though the objections to public patriotism may be religious (as they were in *Barnette*). Patriotism is an effort by the state to promote its own survival, and along the way to teach those virtues that *justify* its survival. Public schools help to transmit those virtues and values. Separation of church from state does not imply separation of state from state. Schools are entitled to hold their causes and values out as worthy subjects of approval and adoption, to persuade even though they cannot compel, and even though those who resist persuasion may feel at odds with those who embrace the values they are taught.⁸⁴

Judge Easterbrook warned of the problems in “a general assimilation of religion to patriotism and other values.”⁸⁵ In his opinion, it would severely limit the right of public schools to determine their curricula.⁸⁶ However, government has the right to establish its curriculum in the public schools.⁸⁷ There is a safety valve through private choice for those students or parents who disagree with that curriculum. He viewed the right of school boards to establish their curricula as limited only by the Establishment Clause.⁸⁸ Government neutrality on religious issues complies with the Free Exercise clause.⁸⁹ He then briefly returned to *Barnette*:

All that remains is *Barnette* itself, and so long as the school does not compel pupils to espouse the content of the Pledge as their own belief, it may carry on with patriotic exercises. Objection by the few does not reduce to silence the many who want to Pledge allegiance to the flag “and to the Republic for which it stands.”⁹⁰

Social pressure does not equal legal compulsion, at least in the context of non-religious observances. Judge Easterbrook noted the equation changes if the Pledge is deemed to be a religious observance, but he concluded that it was not religious, as a matter of tradition.⁹¹

84. *Id.* (emphasis in original).

85. *Id.*

86. *Id.*

87. *Id.* at 445.

88. *Id.*

89. *Id.*

90. *Id.* (emphasis omitted).

91. *Id.* at 445-48. The Ninth Circuit disagreed with *Sherman* in *Newdow v. United States Congress*, 292 F.3d 597, 611 n.12 (9th Cir. 2002).

IV. THE PLEDGE OF ALLEGIANCE AND THE MINNESOTA CONSTITUTION

Judge Easterbrook's assumptions concerning *Barnette* are the same assumptions that support most recent state statutory ventures in the area, including, apparently, Minnesota's. The issue in Minnesota will likely be whether the Pledge statute constitutes a requirement. If it does not, then nothing in *Barnette* prevents schools from shaving the Pledge ceremony just short of that. Justice Jackson's concluding statement in *Barnette* bears repeating, if for no other reason than to compare it to the reality of patriotic prescription that is the current norm:

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 public opinion or force citizens to confess by word or act their faith therein. If there are any circumstances⁹² which permit an exception, they do not now occur to us.

Absent any argument that a Pledge requirement with an opt-out provision is unconstitutional under *Barnette*'s compelled speech proscription, the only other potential impediment to the Pledge requirement is the state constitution. Minnesota's contains two potential limitations. The first is in Article I, section 3, of the Minnesota Constitution, the free speech clause.⁹³ The second is the freedom of conscience provision in Article I, section 16.⁹⁴

The Minnesota Supreme Court has considered axiomatic its power to interpret the state constitution to provide more comprehensive protection of individual rights than under the United States Constitution.⁹⁵ The Minnesota Constitution's application to the Pledge statute, should it pass, does not seem likely to result in a holding that would differ from the Seventh Circuit in the *Sherman* case.

In general, the history of the Minnesota Supreme Court's decisions dealing with religious liberty and free speech illustrate a broader protection of religious liberty under the Minnesota Constitution than the United States Constitution. The Minnesota Supreme Court's decision also illustrate a free speech interpretation that parallels the First Amendment interpretations

92. *Barnette*, 319 U.S. at 642.

93. MINN. CONST. art. I, § 3.

94. MINN. CONST. art. I, § 16.

95. *State v. Fuller*, 374 N.W.2d 722, 726 (Minn. 1985).

of the United States Supreme Court. However, there are always skeletons in the closet.

In *Kaplan v. Independent School District*,⁹⁶ a decision never again cited in this state, the Minnesota Supreme Court sanctioned a Virginia, Minnesota, School Board resolution that each schoolroom in the district be provided with a copy of the King James version of the Bible, and that the school superintendent choose suitable selections from the Old Testament to be read daily by teachers.⁹⁷ The child of any objecting parent or any objecting student could retire from the room during the reading.⁹⁸ Parents of the children who attended the schools included Protestants, Roman Catholics, Christian Scientists, and Jews.⁹⁹ The plaintiffs argued that the Board's action violated Minnesota Constitution Article I, section 16's freedom of conscience provision and Article VIII, section 3's prohibition against the use of public money for support of schools where religious doctrines are taught.¹⁰⁰

The trial court found that the purpose of the reading "was to implant in the minds of the pupil higher moral and ethical standards and a knowledge of the Bible and was not for the purpose of teaching the doctrines of any religious sect," and concluded that the plaintiffs' constitutional rights were not violated.¹⁰¹ The supreme court acknowledged the religious nature of the Bible reading exercise, but recognized it also as the basis for the moral training of students. The court rejected the plaintiffs' argument that the practice violated Article I, section 16, of the Minnesota Constitution, which states, "[n]or shall any man be compelled to attend, erect or support any place of worship."¹⁰² The court thought it a "strained construction" to conclude that a teacher's reading from the Bible converts the school into a place of worship.¹⁰³ The court relied on the history of prayer in other institutions such as Congress and the armed forces to sustain its view:

We are not concerned with nice distinctions between sects, nor as to how among them the different authorized

96. 171 Minn. 142, 214 N.W. 18 (1927).

97. *Id.* at 142, 214 N.W. at 18.

98. *Id.* at 143, 214 N.W. at 18.

99. *Id.*

100. *Id.* at 144, 214 N.W. at 19.

101. *Id.* at 143, 214 N.W. at 18.

102. *Id.* at 148, 214 N.W. at 20.

103. *Id.*

versions of the Bible are regarded. We take notice that they are at variance. But we do feel that the intolerance which drove so many to seek an asylum in America has gradually abated and is not now so intense. This intolerance touching religion, the Bible, or certain scientific lines of study is not confined to the Christian or to the orthodox Jew, but it seems to grip the atheist and the disbeliever as intensely. Speaking for myself only, I think that instead of fostering this spirit of intolerance by a strained construction of the Constitution so as to exclude from use by public schools of any book proclaiming great moral precepts, it is more desirable that a liberal construction be adopted to the end that even in the public school the pupils perceive that there is that in our principles of government which recognizes the religious element of man and guarantees protection to its free exercise and culture, and that divergent views of others concerning religion and worship should be tolerated and respected so long as there is no effort made to teach or induce any pupil to adopt them.¹⁰⁴

Justice Stone, concurring, acknowledged that the Bible could be used in public schools in a way that would interfere with the rights of consciences or give a preference to one particular faith or religious sect, but he also thought that it could be used legitimately.¹⁰⁵ He also thought it “simply considerate and tactful, rather than legally necessary, to permit certain children to absent themselves during the Scripture reading,” and that “[i]t does not follow from the fact that such reading is legitimate that the attendance of all should be compelled.”¹⁰⁶ Ultimately, however, he thought that there was a legal or constitutional objection to compulsion if the school board attempted it.¹⁰⁷

Justice Stone noted the problems of using the Bible without giving it a sectarian twist that makes its use questionable, but he thought it a question of policy that is within the province of the school board and not the courts. He also thought that if Article I, section 16, were given “a four corners construction,” the liberty of conscience secured by the Constitution could not be inconsistent with the peace or safety of the state. In his opinion, the absence of ethics and morals training would be inimical to those interests.¹⁰⁸

104. *Id.* at 147-48, 214 N.W. at 18.

105. *Id.* at 153, 214 N.W. at 22.

106. *Id.* at 152-53, 214 N.W. at 22.

107. *Id.* at 153, 214 N.W. at 22.

108. *Id.*

Chief Justice Wilson, in dissent, agreed that the Bible reading did not require a taxpayer to support a place of public worship, but he did conclude that the constitutional protection for every person to “worship God according to the dictates of his own conscience,” and the prohibition against “any control of or interference with the rights of conscience” were violated.¹⁰⁹ His view of the “rights of conscience” is as follows:

By conscience we mean that internal conviction or self-knowledge that tells us that a thing is right or wrong. It is that faculty or power within us which decides on the right or wrong of an act and approves or condemns. It is our moral sense which dictates to us right or wrong. Each person is governed by his own views. The “rights of conscience,” in religious matters, means the privilege of resting in peace or contentment according to one’s own judgment. It is a recognition of a right to religious complacency.

He may not only worship as his conscience dictates, but, surely he also has a right not to be annoyed by those things which directly interfere with what he genuinely believes is wrong, even though they act only upon an incidental, but, to his mind, an important, angle of his way of worship. Of course, the thing of which complaint is here made will not directly prevent him from worshipping God according to the dictates of his own conscience when he is in his own sanctuary or home, but how soon will it pervert the child from the parental belief? No one knows. But that is not the important point. It is this. He, at least, sincerely believes that there is danger of this result and he worries. He is dissatisfied and discontented. Why? Because something is being done which to him is a real “interference with the rights of conscience,” which the Constitution expressly says shall not be permitted. . . .

To require Jewish children to read the New Testament which extols Christ as the Messiah is to tell them that their religious teachings at home are untrue. There they are taught a denial of Christ’s divinity and resurrection. Is it possible that this does not interfere with the “rights of conscience” of the parent, and perhaps, of the child?

. . .

To excuse some children is a distinct preference in favor of those who remain and is a discrimination against those who retire. The exclusion puts a child in a class by

109. *Id.* at 154, 214 N.W. at 22.

himself. It makes him religiously conspicuous. It subjects him to religious stigma. It may¹¹⁰ provoke odious epithets. His situation calls for courage.

In commenting on the impact of the majority's position, the Chief Justice said:

The conclusion reached will necessarily be the source of much religious strife. It was the intention of the men who framed our Constitution to avoid all of the evils of religious controversies. There is no fight like a religious fight. The conclusion now reached offers a new qualification for members of local school boards and injects in school elections an element which will be detrimental to the general welfare. It is, indeed, the beginning of religions in our civil affairs. This decision will not settle anything. It merely adds fuel to the flames.¹¹¹

The practice of the Virginia School Board obviously would not withstand the opinion of the Supreme Court in *Engel v. Vitale*,¹¹² prohibiting school prayer. However, it remains one of a relatively limited number of cases construing Article I, section 16, of the Minnesota Constitution. It seems to be the only Minnesota case that deals with the issue of whether recitation in a public school classroom of Bible passages constitutes coercion of students, even if they are permitted to withdraw from the room during that period. Rather than a standard for current cases, however, it is simply of historical interest that the court intended to grant the same sort of broad deference to school authorities, even if it meant infringement of liberty of conscience under Article I, section 16.

Other decisions construing that provision cement its understanding as a provision intended to ensure religious freedom. Even though decisions such as *State v. Hershberger*,¹¹³ and *State v. French*,¹¹⁴ make it clear that Article I, section 16, may be construed more broadly than the United States Constitution's freedom of religion provisions, that construction will not be of use in any case involving challenges to any Pledge of Allegiance requirement, unless the assumption is made that the Pledge is a religious recitation. If so, then as the Seventh Circuit Court of Appeals pointed out in *Sherman*, the coercion inherent in the recitation of

110. *Id.* at 154-56, 214 N.W. at 22-23.

111. *Id.* at 157, 214 N.W. at 24.

112. 370 U.S. 421 (1962).

113. 462 N.W.2d 393, 397 (Minn. 1990).

114. 460 N.W.2d 2, 2 (Minn. 1990).

the Pledge, even if students are excused, would perhaps violate the First Amendment, and therefore the Minnesota Constitution as well.

A broader construction of the Minnesota Constitution might be possible in two ways. It could be argued that the freedom of conscience provision protects a broader category of personal beliefs. (Note that *Hershberger* does not support this because it deals only with the State's authority to regulate for safety, but *French* might). The second way is that it could arguably lead to a broader definition of what is a religious communication. There seems to be no support for the latter proposition in Minnesota law.

In *State v. French*,¹¹⁵ the supreme court construed Article I, section 16's freedom of conscience provision broadly to bar a marital status discrimination claim under the Minnesota Human Rights Act¹¹⁶ which, if enforced, would have violated French's freedom of conscience in requiring him to rent to an unmarried couple.¹¹⁷ The case exhibits some slack in its interpretation and application of the Constitution. The breadth of the court's reasoning and the lack of standards that support its conclusions concerning Article I, section 16,¹¹⁸ makes it uneasy authority for limiting the application of the Pledge based on the argument that it may violate a student's rights based on religious grounds because freedom of conscience under the Minnesota Constitution is somehow broader than the protection that would be provided by the Establishment Clause. There seems to be no reason for that argument to click.

State v. Hershberger,¹¹⁹ which involved the authority of the state

115. *Id.*

116. MINN. STAT. § 363.03, subd. 2 (1988).

117. *French*, 460 N.W.2d at 8-11.

118. The reasoning in the decision begins with the settled proposition that the Minnesota Constitution may be construed more liberally than the United States Constitution, and that the language of Article I, section 16, provides "broad protection of religious liberty." *French*, 460 N.W.2d at 9. The court concludes that this is not surprising, given the special history that anchors the Minnesota Constitution. *Id.* That history is borrowed from an equally conclusory Wisconsin Supreme Court case, *State ex rel. Weiss v. District Board of School District No. Eight*, 44 N.W. 967, 974-75 (Wis. 1890), describing early immigration to Wisconsin and its consequences for the settlers' views of religious liberty. The Minnesota Supreme Court went on to state that given these considerations and the history Minnesota shares with Wisconsin, French had to be granted an exemption from the Minnesota Human Rights Act, absent an overriding state interest in enforcement of the Act. *French*, 460 N.W.2d at 9.

119. 462 N.W.2d 393 (Minn. 1990).

to impose a penalty on certain Amish for failure to use the specified safety sign to mark slow-moving vehicles, also takes the position that the freedom of conscience provision should be construed more broadly than the United States Constitution.¹²⁰ The court's reasoning is based in part on the specific wording of Article I, section 16, and its proscription of "even an infringement on or an interference with religious freedom," which the court interpreted to mean limitations short of prohibitions. The reasoning is also based on the fact that the section expressly grants affirmative rights of worship, as compared to the First Amendment's form as a limitation on governmental action, but also on a history of the Constitution, which indicates the importance of individual rights and liberties to the framers.¹²¹

The freedom of conscience provision would have to be construed to label the Pledge as a religious exercise, which is inconsistent with Article I, section 16's grant of affirmative rights in the area of religious worship, in which case the court would be free to apply a liberal coercion standard that could limit the authority of school districts to use the Pledge, even if it contains an opt-out provision. The problem is that there is nothing in Minnesota law that appears to support the claim that courts should strain to find that teaching any particular doctrine constitutes an infringement of religious liberty.

However, assuming a finding that a sincerely held religious belief is violated by the Pledge requirement, the remaining questions would be whether the Pledge requirement burdens the exercise of religious beliefs, whether the State has an overriding or compelling interest in doing so, and whether the State has utilized

120. The United States Supreme Court vacated and remanded the Minnesota Supreme Court's original decision in *Hershberger*, 444 N.W.2d 282 (Minn. 1989) for reconsideration in light of its decision in *Employment Division v. Smith*, 494 U.S. 872 (1990). *Smith* held that a neutral criminal law did not unduly burden free exercise of religion. *Id.* The Minnesota Supreme Court in *Hershberger II* avoided the issue of *Smith's* application by deciding the case under the Minnesota Constitution. *Hershberger II*, 462 N.W.2d 393 (Minn. 1990).

121. *Hershberger II*, 462 N.W.2d at 397-98. The court relied in part on Terry Fleming & Jack Nordby, *The Minnesota Bill of Rights: "Wrapt in the Old Miasmatic Mist,"* 7 HAMLINE L. REV. 51, 67, 70-71 (1984). If the analysis went so far as to justify the conclusion that the Pledge is a religious exercise, the State's right to require the Pledge would be raised under the latter part of section 16, which states that the liberty of conscience in the section "shall not be construed as to . . . justify practices inconsistent with the peace or safety of the state."

the least restrictive means to achieve that interest.¹²² Although more recent supreme court cases have carefully applied those factors,¹²³ it would be sheer speculation as to how they might be applied should the court deem the Pledge to be a religious requirement within the meaning of the Minnesota Constitution.

The more likely impediment would be Article I, section 3, of the Constitution, the Free Speech provision, as a possible basis for attacking a Pledge requirement. However, the Minnesota Supreme Court's decisions make it clear that a free speech argument would be no more likely to succeed than the same argument under the United States Constitution given the court's prevailing and historical reluctance to deviate from the First Amendment standard established by the United States Supreme Court.

In *State v. Wicklund*,¹²⁴ the Minnesota Supreme Court considered the issue of whether misdemeanor trespass charges against animal rights protestors at the Mall of America violated their free speech rights under the Minnesota Constitution.¹²⁵ No equivalent argument could be made under the United States Constitution because the United States Supreme Court had already determined that malls could be deemed state actors because they served a public function in *Lloyd Corp. v. Tanner*.¹²⁶ The Court held that since there is no state action, there is no violation of the United States Constitution.¹²⁷

While acknowledging its authority to interpret the Minnesota Constitution more broadly than the United States Constitution,¹²⁸ the Minnesota Supreme Court held first that Minnesota's free speech clause did not apply to speech in a private area. Second, it held that the Mall of America could not be considered a state actor under the Minnesota Constitution, a decision bolstered by its view that Minnesota's free speech provision should be interpreted consistently with the First Amendment.¹²⁹

122. *E.g.*, *Odenthal v. Minn. Conference of Seventh-Day Adventists*, 649 N.W.2d 426, 442 (Minn. 2002).

123. *E.g.*, *id.* at 426; *Hill-Murray Fed'n of Teachers v. Hill-Murray High Sch.*, 487 N.W.2d 857 (Minn. 1992).

124. 589 N.W.2d 793 (Minn. 1999).

125. Art. I, section 3, reads as follows, "[t]he liberty of the press shall forever remain inviolate, and all persons may freely speak, write and publish their sentiments on all subjects, being responsible for the abuse of such right."

126. 407 U.S. 551, 568-69 (1972).

127. *Id.*

128. *Wicklund*, 589 N.W.2d at 799-800.

129. *Id.* The court noted that it had not interpreted the free speech clause

The argument under the free speech clause of the Minnesota Constitution would have to be that the right to free speech is infringed because of the inherently coercive aspects of state-mandated patriotic rituals, but short of the compelled speech baseline in *Barnette*. Given the fact that Minnesota's free speech baseline parallels the United States Supreme Court's First Amendment interpretations, and given the need for broad deference to school authorities in designing and implementing their curricula, the most plausible response would be similar to Judge Easterbrook's in the *Sherman* case.

V. CONCLUSION

If Minnesota passes the Pledge Bill introduced by Senator Reiter and others, it will be measured against *Barnette's* standards, assuming that the Pledge is "a secular rather than sectarian vow."¹³⁰ The Minnesota Supreme Court's adoption of First Amendment doctrine as the standard for the free speech provision of the Minnesota Constitution does not appear to provide a basis for a more searching evaluation of a Pledge requirement. The freedom of conscience provision of the Constitution does not seem to provide a principled basis for limiting the Pledge.

The most critical question the Bill raises is whether the requirement that students "shall" recite the Pledge is sufficiently diluted by the opt-out provision, which provides that students or teachers who object "must be excused from reciting the pledge," although they are not directly informed of their right to be excused. It seems deceptive to cache a student's right to opt out in a manual or policy that students may not see. Given the significance of the question, the symbolism of the Pledge requirement, and the difficulty students will have in choosing not to participate, even if they are aware of the option to be excused, the reasons for not being forthright in informing the students that they have the option seem inexcusable. To argue that it may

more liberally than the First Amendment interpretations of the Supreme Court of the United States in cases involving commercial speech, obscenity, and freedom of the press. *Id.* See also *State v. Casino Mktg. Group, Inc.*, 491 N.W.2d 882 (Minn. 1992) (addressing commercial speech in automated phone calls); *State v. Davidson*, 481 N.W.2d 51 (Minn. 1992) (addressing obscenity); *Cohen v. Cowles Media Co.*, 479 N.W.2d 387 (Minn. 1992) (addressing freedom of the press).

130. *Sherman v. Community Consolidated Sch. Dist. 21 of Wheeling Township*, 980 F.2d 437, 445 (7th Cir. 1992).

weaken classroom discipline seems absurd, given the unique nature of the compelled speech doctrine under *Barnette*.

Patriotism, or perhaps ritual displays of patriotism, can be forced, or perhaps coerced if the coercion falls short of actual compulsion, but it does not mean that it will be understood or accepted by the students who are affected. Rushes of patriotism recur, legislatures respond predictably, and history repeats itself, because we let it.¹³¹

131. The following is an article by Barbara Kingsolver, that was published in the San Francisco Chronicle on Sept. 25, 2001:

MY DAUGHTER came home from kindergarten and announced, "Tomorrow we all have to wear red, white and blue."

"Why?" I asked, trying not to sound wary.

"For all the people that died when the airplanes hit the buildings."

I fear the sound of saber-rattling, dread that not just my taxes but even my children are being dragged to the cause of death in the wake of death. I asked quietly, "Why not wear black, then? Why the colors of the flag, what does that mean?"

"It means we're a country. Just all people together."

So we sent her to school in red, white and blue, because it felt to her like something she could do to help people who are hurting. And because my wise husband put a hand on my arm and said, "You can't let hateful people steal the flag from us."

He didn't mean terrorists, he meant Americans. Like the man in a city near us who went on a rampage crying "I'm an American" as he shot at foreign-born neighbors, killing a gentle Sikh man in a turban and terrifying every brown-skinned person I know. Or the talk-radio hosts, who are viciously bullying a handful of members of Congress for airing sensible skepticism at a time when the White House was announcing preposterous things in apparent self-interest, such as the "revelation" that terrorists had aimed to hunt down Air Force One with a hijacked commercial plane. Rep. Barbara Lee cast the House's only vote against handing over virtually unlimited war powers to one man that a whole lot of us didn't vote for. As a consequence, so many red-blooded Americans have now threatened to kill her, she has to have additional bodyguards.

Patriotism seems to be falling to whoever claims it loudest, and we're left struggling to find a definition in a clamor of reaction. This is what I'm hearing: Patriotism opposes the lone representative of democracy who was brave enough to vote her conscience instead of following an angry mob. (Several others have confessed they wanted to vote the same way, but chickened out.) Patriotism

threatens free speech with death. It is infuriated by thoughtful hesitation, constructive criticism of our leaders and pleas for peace. It despises people of foreign birth who've spent years learning our culture and contributing their talents to our economy. It has specifically blamed homosexuals, feminists and the American Civil Liberties Union. In other words, the American flag stands for intimidation, censorship, violence, bigotry, sexism, homophobia, and shoving the Constitution through a paper shredder? Who are we calling terrorists here? Outsiders can destroy airplanes and buildings, but it is only we, the people, who have the power to demolish our own ideals.

It's a fact of our culture that the loudest mouths get the most airplay, and the loudmouths are saying now that in times of crisis it is treasonous to question our leaders. Nonsense. That kind of thinking let fascism grow out of the international depression of the 1930s. In critical times, our leaders need most to be influenced by the moderating force of dissent. That is the basis of democracy, in sickness and in health, and especially when national choices are difficult, and bear grave consequences.

It occurs to me that my patriotic duty is to recapture my flag from the men now waving it in the name of jingoism and censorship. This isn't easy for me.

The last time I looked at a flag with unambiguous pride, I was 13. Right after that, Vietnam began teaching me lessons in ambiguity, and the lessons have kept coming. I've learned of things my government has done to the world that made me direly ashamed. I've been further alienated from my flag by people who waved it at me declaring I should love it or leave it. I search my soul and find I cannot love killing for any reason. When I look at the flag, I see it illuminated by the rocket's red glare.

This is why the warmongers so easily gain the upper hand in the patriot game: Our nation was established with a fight for independence, so our iconography grew out of war. Our national anthem celebrates it; our language of patriotism is inseparable from a battle cry. Our every military campaign is still launched with phrases about men dying for the freedoms we hold dear, even when this is impossible to square with reality. In the Persian Gulf War we rushed to the aid of Kuwait, a monarchy in which women enjoyed approximately the same rights as a 19th century American slave. The values we fought for and won there are best understood, I think, by oil companies. Meanwhile, a country of civilians was devastated, and remains destroyed.

Stating these realities does not violate the principles of liberty, equality, and freedom of speech; it exercises them, and by exercise we grow stronger. I would like to stand up for my flag and wave it over a few things I believe in, including but not limited to the protection of dissenting points of view. After 225 years, I vote to retire the rocket's red glare and the bullet wound as obsolete symbols of Old Glory. We desperately need a new iconography of patriotism. I propose we rip stripes of cloth from the uniforms of public servants who rescued the injured and panic-stricken, remaining at their post until it fell down on them. The red glare of candles held in

vigils everywhere as peace-loving people pray for the bereaved, and plead for compassion and restraint. The blood donated to the Red Cross. The stars of film and theater and music who are using their influence to raise money for recovery. The small hands of schoolchildren collecting pennies, toothpaste, teddy bears, anything they think might help the kids who've lost their moms and dads.

My town, Tucson, Ariz., has become famous for a simple gesture in which some 8,000 people wearing red, white or blue T-shirts assembled themselves in the shape of a flag on a baseball field and had their photograph taken from above. That picture has begun to turn up everywhere, but we saw it first on our newspaper's front page. Our family stood in silence for a minute looking at that photo of a human flag, trying to know what to make of it. Then my teenage daughter, who has a quick mind for numbers and a sensitive heart, did an interesting thing. She laid her hand over a quarter of the picture, leaving visible more or less 6,000 people, and said, "That many are dead." We stared at what that looked like – all those innocent souls, multi-colored and packed into a conjoined destiny – and shuddered at the one simple truth behind all the noise, which is that so many beloved people have suddenly gone from us. That is my flag, and that's what it means: We're all just people together.

Barbara Kingsolver, *And Our Flag Was Still There*, S.F. CHRON., Sept. 25, 2001.