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Compulsion, Indoctrination, and Retribution in State Pledge of Allegiance Statutes

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COMPULSION, INDOCTRINATION, AND RETRIBUTION IN STATE PLEDGE OF ALLEGIANCE STATUTES

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ABSTRACT

Under West Virginia State Board of Education v. Barnette*, states lack the authority to compel any student to recite the Pledge of Allegiance. Twenty-one of the forty-six state Pledge statutes comply with* Barnette*. But twenty-two state Pledge statutes can be read to violate* Barnette *by relying on compulsion.*

Consistent with Barnette*, states may foster patriotism among students through the teaching "of all our history and in the structure and organization of government, including the guaranties of civil liberty, which tend to inspire patriotism and love of country." Justice Jackson described this process of education and reflection as the "slow and easily neglected route to aroused loyalties." Instead of engaging in appropriate education and reflection, states rely on rote recitation of the Pledge to indoctrinate their students.*

The Barnette *protection from compulsion necessarily includes protection from the viewpoint discrimination inherent in retribution for the decision to not recite the Pledge. But some states engage in petty tyrannies to punish students for the decision to not recite.*

Courts and state legislatures should remove compulsion, indoctrination, and retribution from the Pledge statutes. Rather than seeking to coerce loyalty, state legislators should get about the infinitely more difficult business of earning the respect and allegiance of each rising generation of citizens.

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I. INTRODUCTION

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 be consistent with the First Amendment, permit the widest toleration of conflicting viewpoints consistent with a society of free men.

Justice Hugo L. Black
West Virginia Board of Education v. Barnette[1]

That it violates the Constitution for public officials to compel a student to recite the Pledge of Allegiance could not be more clear. As Justice Jackson wrote for the Court in *West Virginia State Board of Education v. Barnette*:

> We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.[2]

The holding of *Barnette* is simple: the state does not have the power to compel anyone to recite the Pledge of Allegiance.[3]

Forty-six of the fifty states have statutes governing the recitation of the Pledge of Allegiance in schools.[4] Notwithstanding the clear holding in *Barnette*, almost half of the states with Pledge statutes have provisions that can be read to be based on compulsion. Seven states have statutory provisions the most natural readings of which would compel recitation of the Pledge with no apparent exceptions.[5] Another ten states have what might be described as "catch and release" Pledge statutes. These contain a requirement that the Pledge of Allegiance be recited, coupled with exemptions for some individuals. These statutes violate the Constitution because their catch provisions contain an irremediable violation of *Barnette*.[6] And five states have provisions which are

1. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 644 (1943) (Black & Douglas, JJ., concurring).

2. *Id.* at 642 (majority opinion).

3. *See infra* text accompanying notes 39–55.

4. Hawaii, Nebraska, Vermont, and Wyoming do not have statutes relating to the recitation of the Pledge of Allegiance in schools. Brad Dress, *Here is a Breakdown of Laws in 47 States That Require Reciting the Pledge of Allegiance*, HILL (Apr. 2, 2022), https://thehill.com/homenews/3256719-47-states-require-the-pledge-of-allegiance-be-recited-in-schools-here-is-a-breakdown-of-each-states-laws/ [https://perma.cc/2FZZ-JZJW].

5. *E.g.*, MISS. CODE ANN. § 37-13-7(1) (1972) ("[T]he public schools of this state shall require the teachers under their control to have all pupils repeat the oath of allegiance to the flag of the United States of America at least once during each school month."). *See infra* text accompanying notes 57–89.

6. *Barnette*, 319 U.S. at 642. *E.g.*, MD. CODE ANN., EDUC. § 7-105(c) (West 1978) ("Each county board shall . . . (3) Require all students and teachers in charge to stand and face the flag and

facially inconsistent in that they provide exceptions but do not have language compelling participation.[7]

It is not particularly difficult to write a Pledge statute that complies with *Barnette* and does not compel participation in the recitation of the Pledge.[8] Twenty-one states have Pledge statutes that comply with *Barnette* and do not compel participation.[9]

The compulsion issue was clearly and definitively decided in *Barnette*. But two other issues regarding the Pledge statutes remain. The first contemporary issue is whether the states should indoctrinate students to recite the Pledge of Allegiance. The second is whether the states should engage in retribution against students and teachers who choose to not participate.

The following discussion first considers *Barnette*, to review its compulsion analysis.[10] Then the discussion turns to the state Pledge of Allegiance statutes, evaluating the various classes of provisions in terms of whether they are constitutional under *Barnette*.[11] We then turn to the question of indoctrination, considering whether the rote recitation of the Pledge by young schoolchildren is consistent with *Barnette* and good public policy.[12] We next discuss the matter of retribution, considering whether requiring non-participating students to observe the rote recitation of the Pledge is consistent with *Barnette* and good public policy.[13] We conclude with a discussion of how the nation ought to move forward.[14]

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while giving an approved salute and recite in unison the pledge of allegiance . . . ."); MD. CODE ANN., EDUC. § 7-105(d) (West 1978) ("Any student or teacher who wishes to be excused from the requirements of subjection (c)(3) or this section shall be excused."). *See infra* text accompanying notes 90–164.

7. *E.g.*, IND. CODE § 20-30-5-05(b) (2022) ("The governing body of each school corporation shall provide a daily opportunity for students of the school corporation to voluntarily recite the Pledge of Allegiance in each classroom or on school grounds."); *Id.* ("A student is exempt from participation in the Pledge of Allegiance and may not be required to participate in the Pledge of Allegiance if: (1) the student chooses to not participate; or (2) the student's parent chooses to have the student not participate."). *See infra* text accompanying notes 165–69.

8. *E.g.*, N.D. CENT. CODE § 15.1-19-03.1.5 (2017):

> A school board may authorize the voluntary recitation of the pledge of allegiance by a teacher or one or more students at the beginning of each schoolday. A student may not be required to recite the pledge of allegiance, stand during the recitation of the pledge of allegiance, or salute the American flag.

9. *See infra* text accompanying notes 170–90. The remaining three states—California, New Mexico, and New York—have pledge statutes that are so unclear that a *Barnette* compulsion evaluation cannot be made. *See infra* text accompanying notes 191–96.

10. *See* discussion *infra* Section II.

11. *See* discussion *infra* Section III.

12. *See* discussion *infra* Section IV.

13. *See* discussion *infra* Section V.

14. *See* discussion *infra* Section VI.

II. *BARNETTE*: ". . . COMPELLING THE FLAG SALUTE AND PLEDGE TRANSCENDS CONSTITUTIONAL LIMITATIONS . . ."

On the basis of the unfortunate 1940 Supreme Court decision in *Minersville School District v. Gobitis*,[15] the West Virginia Board of Education ordered, among other things:

> that the salute to the flag become "a regular part of the program of activities in the public schools," that all teachers and pupils "shall be required to participate in the salute honoring the Nation represented by the Flag; provided, however, that refusal to salute the Flag be regarded as an Act of insubordination, and shall be dealt with accordingly."[16]

The flag salute violated the religious beliefs of Jehovah's Witnesses.[17] When the Jehovah Witness children from the Barnette family refused to participate in the compulsory flag salute, the children and their parents were punished: "Children of this faith have been expelled from school and are threatened with exclusion for no other cause. Officials threaten to send them to reformatories maintained for criminally inclined juveniles. Parents of such children have been prosecuted and are threatened with prosecutions for causing delinquency."[18]

The parents brought an action in Federal court, asking that an injunction issue to protect the Jehovah's Witnesses. The trial court cast the issue in *Barnette* somewhat more broadly: "Whether children who for religious reasons have conscientious scruples against saluting the flag of the country can lawfully be required to salute it."[19] That question, the three-judge panel of the district court answered in the negative.[20]

The analysis of the district court was straightforward. The state of West Virginia had "a regulation of the Board [of Education] requiring children in the public schools to salute the American flag."[21] The plaintiffs were Jehovah's Witnesses, for whom the flag salute required by the state was "a violation of the second commandment . . . ."[22] Failure to engage in the compulsory salute would

15. 310 U.S. 586, 586 (1940).

16. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 626 (1943).

17. The district court reported that the Jehovah's Witnesses "believe that a flag salute of the kind required by the Board is a violation of the second commandment of the Decalogue, as contained in the 20th chapter of the Book of Exodus . . . ." Barnette v. W. Va. State Bd. of Educ., 47 F. Supp. 251, 252 (S.D. W.Va. 1942). *Barnette* was decided more than a decade before Congress inserted the words "under God" into the Pledge of Allegiance. 4 U.S.C. § 4 (amended 1954).

18. *Barnette*, 319 U.S. at 630.

19. *Barnette*, 47 F. Supp. at 252.

20. *Id*.

21. *Id.*

22. *Id.* For Jehovah's Witnesses, the Second Commandment is found at Exodus 20:4–6. Jehovah's Witnesses, *What Are the Ten Commandments of God?*, https://www.jw.org/en/bible-

cause the expulsion of the plaintiffs' children from public school.[23] Thereupon, the plaintiffs would either have to pay for private education or be subject to prosecution for failing to enroll their children in school.[24] The district court summarized the plaintiffs' claims: "They contend, therefore, that the regulation amounts to a denial of religious liberty and is violative of rights which the first amendment to the federal Constitution protects against impairment by the federal government and which the 14th Amendment protects against impairment by the states."[25]

The district court started from the proposition that a compulsory flag salute was not improper: "There is, of course, nothing improper in requiring a flag salute in the schools. On the contrary, we regard it as a highly desirable ceremony calculated to inspire in the pupils a proper love of country and reverence for its institutions."[26] The problem with the West Virginia regulation was from its application to some citizens despite their conscientious scruples against the practice:

> [P]laintiffs and their children do have conscientious scruples, whether reasonable or not, against saluting the flag, and these scruples are based on religious grounds. If they are required to salute the flag, or are denied rights and privileges which belong to them as citizens because they fail to salute it, they are unquestionably denied that religious freedom which the Constitution guarantees. The right of religious freedom embraces not only the right to worship God according to the dictates of one's conscience, but also the right "to do, or forbear to do, any act, for conscience sake, the doing or forbearing of which, is not prejudicial to the public weal."[27]

Although the issue of the case was initially framed as one of religious liberty, the district court spoke as well in terms of freedom of speech. To override religious conviction, the court observed, the state would have to prove the same predicate as it would have to prove to override free speech: a clear and present danger to the community.[28] The district court concluded:

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teachings/questions/10-commandments [https://perma.cc/24NR-SCMY] (last visited Oct. 14, 2022):

> You must not make for yourself a carved image or a form like anything that is in the heavens above or the on the earth below or in the waters under the earth. You must not bow down to them nor be enticed to serve them, for I, Jehovah your God, am a God who requires exclusive devotion, bringing punishment for the error of fathers upon sons, upon the third generation and upon the fourth generation of those who hate me, but showing loyal love to the thousandth generation of those who love me and keep my commandments.

Exodus 20:4–6 (New World Translation).

23. *Barnette*, 47 F. Supp. at 252.
24. *Id.*
25. *Id.*
26. *Id.* at 253.
27. *Id.* at 252 (quoting Commonwealth v. Lesher, 17 Serg. & Rawle 155, 160 (1828)).
28. The district court stated:

> Religious freedom is no less sacred or important to the future of the Republic than freedom of speech; and if speech tending to the overthrow of the government but not constituting a clear and present danger may not be forbidden because of the guaranty of free speech, it is difficult to see how it can be held that conscientious scruples against giving a flag salute must give way to an educational policy having only indirect relation, at most, to the public safety. Surely, it cannot be held that the nation is endangered more by the refusal of school children, for religious reason, to salute the flag than by the advocacy on the part of grown men of doctrines which tend towards the overthrow of the government.[29]

The district court was clear as to the high bar faced by legislatures when fundamental liberties are implicated:

> The tyranny of majorities over the rights of individuals or helpless minorities has always been recognized as one of the great dangers of popular government. The fathers sought to guard against this danger by writing into the Constitution a bill of rights guaranteeing to every individual certain fundamental liberties, of which he might not be deprived by any exercise whatever of governmental power. The bill of rights is not a mere guide for the exercise of legislative discretion. It is a part of the fundamental law of the land, and is to be enforced as such by the courts. If legislation or regulations of boards conflict with it, they must give way; for the fundamental law is of superior obligation.[30]

The district court had no difficulty framing the question with respect to the flag salute:

> Can it be said by the Court then, in the exercise of the duty to examine the regulation here in question, that the requirement that school children salute the flag has such direct relation to the safety of the state, that the conscientious objections of plaintiffs must give way to it? Or to phrase the matter differently, must the religious freedom of plaintiffs give way because there is a clear and

> To justify the overriding of religious scruples, however, there must be a clear justification therefor in the necessities of national or community life. Like the right of free speech, it is not to be overborne by the police power unless its exercise presents a clear and present danger to the community.

Id. at 253–54.

29. *Id.* at 254.

30. *Id.* The district court continued:

> It is true of freedom of religion, as was said of freedom of speech . . . "In every case, therefore, where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights."

Id. (quoting Schneider v. State, 308 U.S. 147, 161 (1939)).

> present danger to the state if these school children do not salute the flag, as they are required to do?[31]

As it concluded its analysis, the district court combined the religious liberty and freedom of speech analyses and cast the issue as one of "conscientious objections" and "conscientious scruples."

> It seems to us that to ask these questions is to answer them, and to answer them in the negative. As fine a ceremony as the flag salute is, it can have at most only an indirect influence on the national safety; and no clear and present danger will result to anyone if the children of this sect are allowed to refrain from saluting because of their conscientious scruples . . . .[32]

The district court found no credible argument for forcing the plaintiffs' children to salute the flag: "It certainly cannot strengthen the Republic, or help the state in any way, to require persons to give a salute which they have conscientious scruples against giving, or to deprive them of an education because they refuse to give it."[33] The district court's conclusion was clear:

> The salute to the flag is an expression of the homage of the soul. To force it upon one who has conscientious scruples against giving it, is petty tyranny unworthy of the spirit of the Republic and forbidden, we think, by its fundamental law. This court will not countenance such tyranny but will use the power at its command to see that rights guaranteed by the fundamental law are respected. . . . [W]e are clearly of [the] opinion that the regulation of the Board requiring that school children salute the flag is void in so far as it applies to children having conscientious scruples against giving such salute and that, as to them, its enforcement should be enjoined.[34]

Finding in favor of the plaintiffs, the district court quoted with approval the statement of Justice Lehman of New York, which was cast in terms of the "dictates of conscience" of those refusing to participate in the flag salute:

> The salute to the flag is a gesture of love and respect—fine when there is real love and respect back of the gesture. The flag is dishonored by a salute by a child in reluctant and terrified obedience to a command of secular authority which clashes with the dictates of conscience.[35]

31. *Id.* at 254.

32. *Id.*

33. *Id.*

34. *Id.* at 254–55.

35. *Id.* (quoting People v. Sandstrom, 18 N.E.2d 840, 847 (N.Y. 1939)). In the opinion, Justice Lehman's observation continued: "The flag 'cherished by all our hearts' should not be soiled by the tears of a little child. The Constitution does not permit, and the Legislature never intended, that the flag should be so soiled and dishonored." *Sandstrom*, 18 N.E.2d at 840.

On appeal, the Supreme Court upheld the district court by a vote of 6 to 3, reversing *Gobitis*.[36] Writing for the Court, Justice Jackson framed the issue as one of state compulsion:

> The sole conflict is between authority and rights of the individual. The State asserts power to condition access to public education on making a prescribed sign and profession and at the same time to coerce attendance by punishing both parent and child. The latter stand on a right of self-determination in matters that touch individual opinion and personal attitude. . . . Here, however . . . we are dealing with a compulsion of students to declare a belief.[37]

Justice Jackson was equally clear that the issue before the Court was not limited to religious rights:

> Nor does the issue as we see it turn on one's possession of particular religious views or the sincerity with which they are held. While religion supplies appellees' motive for enduring the discomforts of making the issue in this case, many citizens who do not share these religious views hold such a compulsory rite to infringe constitutional liberty of the individual. It is not necessary to inquire whether non-conformist beliefs will exempt from the duty to salute unless we first find power to make the salute a legal duty.[38]

Justice Jackson noted that the Court in *Gobitis* "assumed . . . that power exists in the State to impose the flag salute discipline upon school children in general."[39] But the *Barnette* Court examined the question of state power to compel such individual speech:

> The question which underlies the flag salute controversy is whether such a ceremony so touching matters of opinion and political attitude may be imposed upon the individual by official authority under powers committed to any political organization under our Constitution. We examine rather than assume existence of this power and, against this broader definition of issues in this case, re-examine specific grounds assigned for the *Gobitis* decision.[40]

36. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 630 (1943). Justice Jackson delivered the opinion of the Court for himself, Chief Justice Stone, and Justices Black, Douglas, Murphy, and Rutledge. *Id.* at 625. Justices Black and Douglas concurred and made an additional statement. *Id.* at 643–44 (Black & Douglas, JJ., concurring). Justice Murphy concurred and made an additional statement. *Id.* at 644–46 (Murphy, J., concurring). Justices Roberts and Reed dissented without a statement. *Id.* at 642–43 (Roberts & Reed, JJ., dissenting)). Justice Frankfurter dissented. *Id.* at 646–47 (Frankfurter, J., dissenting).

37. *Id*. at 630–31 (majority opinion).

38. *Id.* at 634–35. In a footnote to the quoted passage, Justice Jackson cited the words of Cornell professor Robert E. Cushman: "All of the eloquence by which the [*Gobitis*] majority extol the ceremony of flag saluting as a free expression of patriotism turns sour when used to describe the brutal compulsion which requires a sensitive and conscientious child to stultify himself in public." *Id.* at 635 n.15 (quoting Robert E. Cushman, *Constitutional Law in 1939-40*, 35 AM. POL. SCI. REV. 250, 271 (1941)).

39. *Id.* at 635.

40. *Id.* at 635–36.

The *Gobitis* majority framed the issue of compulsory flag salutes within "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?'"[41] Writing as the nation was engaged in a global war against Nazism, fascism, and militarism, the *Barnette* Court's rejection of the argument had special meaning: "To enforce [the Bill of Rights] today is not to choose weak government over strong government. It 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."[42] Justice Jackson's final word on this issue may have special resonance at a time when partisan state legislators are seeking more and more control over what is taught in public schools:

> Free public education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party, or faction. If it is to impose any ideological discipline, however, each party or denomination must seek to control, or failing that, to weaken the influence of the educational system. Observance of the limitations of the Constitution will not weaken government in the field appropriate for its exercise.[43]

The second *Gobitis* argument reviewed by the *Barnette* Court was the suggestion that for the Supreme Court to review the actions of school officials "would in effect make us the school board for the country."[44] The *Barnette* rejection of the argument was direct and forceful:

> The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.[45]

The third *Gobitis* argument reviewed by the *Barnette* Court was the suggestion "that this is a field 'where courts possess no marked and certainly no controlling competence,' that it is committed to the legislatures as well as the courts to guard cherished liberties . . . ."[46] The *Barnette* Court's rejection of the argument was uncompromising:

41. *Id.* at 636 (quoting *Gobitis*, 310 U.S. at 596).
42. *Id.* at 637.
43. *Id.*
44. *Id.* (quoting *Gobitis*, 310 U.S. at 598).
45. *Id.*
46. *Id.* at 638 (quoting *Gobitis*, 310 U.S. at 597–98).

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[47]

The final *Gobitis* argument reviewed by the *Barnette* Court was the argument at "the very heart of the *Gobitis* opinion," that "'National unity is the basis of national security,' that the authorities have 'the right to select appropriate means for its attainment,' [and that therefore] such compulsory measures toward 'national unity' are constitutional."[48] Justice Jackson began his analysis with the assertion that: "Upon the verity of this assumption depends our answer in this case."[49]

The *Barnette* Court framed the issue as one of state compulsion: "National unity as an end which officials may foster by persuasion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement."[50] Citing examples through history, including the regimes against which the nation was then engaged in a titanic struggle, the Court was clear:

> Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard. It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.[51]

Justice Jackson made insightful comments about the value of unanimity of national thought as against the value of intellectual freedom:

> [W]e apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism and the rich cultural diversities that we owe to

47. *Id.*
48. *Id.* at 640 (quoting *Gobitis*, 310 U.S. at 595).
49. *Id.*
50. *Id.*
51. *Id.* at 641.

> exceptional minds only at the price of occasional eccentricity and abnormal attitudes.[52]

But the Court did not limit the protection of the Constitution for intellectual freedom to only those cases, like the compulsory pledge of allegiance, where the price of freedom was minor: "[F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order."[53]

Justice Jackson's analysis ended with perhaps the most famous passage of the *Barnette* 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, religion, or other matters of opinion or force its citizens to confess by word or act their faith therein."[54] The Court concluded with a complete rejection of the West Virginia compulsory pledge of allegiance rule: "We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."[55]

III. COMPULSION IN STATE PLEDGE OF ALLEGIANCE STATUTES

All but four of the states—Hawaii, Nebraska, Vermont, and Wyoming—have statutes addressing the recitation of the Pledge of Allegiance in public schools.[56] There are wide variations in the approaches taken by the states.

Twenty-two states have Pledge statutes which raise substantial compulsion issues. Seven have Pledge statutes which can be read to compel participation and provide no exemptions—a practice flatly in violation of *Barnette*. Ten have Pledge statutes which compel participation but provide exceptions—a practice which begins with an irremediable violation of *Barnette*. Five have Pledge statutes which are facially inconsistent. While they do not on their face compel participation, they contain exemptions which are presumably unnecessary if students and teachers are not compelled to participate.

52. *Id.* at 641–42.

53. *Id.* at 642.

54. *Id.*

55. *Id.*

56. *Supra* note 4. The District of Columbia, Puerto Rico, the Virgin Islands, and the Northern Mariana Islands do not have statutes regarding the recitation of the Pledge of Allegiance in their schools. Guam has a provision which violates *Barnette*. 17 GUAM CODE ANN. § 3206 (2022) ("[R]equiring students, at a suitable time during school sessions, to pledge allegiance to the United States flag and to the nation for which it stands."). Interestingly, Guam affirmatively does not require a pledge to the flag of GUAM. 1 GUAM CODE ANN. § 409 (2022) ("No pledge of allegiance shall be required to be given by anyone to the Guam Flag.").

Twenty-one states have pledge statutes that do not compel participation in a pledge recitation and are not coercive. Three states have pledge statutes that are so unclear that a *Barnette* evaluation cannot be made.

A. Statutes which facially violate Barnette

Barnette clearly holds that the states lack the authority to compel recitation of the Pledge of Allegiance. Notwithstanding the Constitutional prohibition, seven states—Delaware, Illinois, Kansas, Louisiana, Massachusetts, Mississippi, and Nevada—have statutory provisions the most natural readings of which would compel recitation of the Pledge with no apparent exceptions.

Mississippi's Pledge statute requires "teachers . . . to have all pupils repeat the oath of allegiance to the flag of the United States of America . . . ."[57] By requiring "all pupils" to repeat the Pledge, the Mississippi provision clearly violates *Barnette*. The Mississippi Pledge statute also has language relating to a pledge of allegiance to the Magnolia State's flag.[58] Mississippi requires both the federal Pledge and the state pledge of allegiance be taught in Mississippi's public schools.[59] The state pledge requirement was the subject of a court challenge.[60] The Fifth Circuit found that the plaintiff lacked standing to advance claims on behalf of his daughter, in part because there was no facial violation of the Constitution in that students are not required by the Mississippi statute to *recite* the state pledge, only to learn about it.[61] In contrast, Mississippi students are required to recite the Pledge of Allegiance to the national flag, which under the *Bryant* analysis violates the Constitution.[62]

57. MISS. CODE ANN. § 37-13-7(1) (West 2022) ("The boards of trustees of the public schools in this state shall require the teachers under their control to have all pupils repeat the oath of allegiance to the flag of the United States of America at least once during each school month . . . .").

58. *Id.* at § 37-13-7(2) ("I salute the flag of Mississippi and the sovereign state for which it stands with pride in her history and achievements and with confidence in her future under the guidance of Almighty God.").

59. *Id.* ("The pledge of allegiance to the Mississippi flag shall be taught in the public schools of this state, along with the pledge of allegiance to the United States flag.").

60. Moore v. Bryant, 853 F.3d 245, 252 (5th Cir. 2017) (cert. denied 138 S.Ct. 468).

61. *Id.* at 252–53. The court addressed two Mississippi statutes, one that "requires that Mississippi students be 'given a course of study' concerning the Mississippi flag and be taught 'proper respect' for the flag," and the other that "requires that the Mississippi pledge be taught in public schools . . . ." *Id.* As to the pledge, the court noted: "[s]ection 37-13-7 does not require that students pledge allegiance to the Mississippi flag. Instead, the statute only requires that the Mississippi pledge be taught in public schools, without mandating that schools teach a particular viewpoint about the pledge." *Id.* at 253. The court concluded: "Accordingly, neither statute requires anything more than that students be taught about the flag and pledge. The statutes do not facially violate the Constitution." *Id.*

62. *Compare* MISS. CODE ANN. § 37-13-7(1) (West 2022) (requiring students to recite the national pledge of allegiance), *with* MISS. CODE ANN. § 37-13-7(2) (West 2022) (not requiring students to recite the state pledge of allegiance). *Bryant*, 853 F.3d at 253.

Although the Pledge statutes of Delaware,[63] Illinois,[64] Massachusetts,[65] and Nevada[66] lack the absolute clarity of Mississippi's "all pupils" language, they are most naturally read to compel all students to join in the recitation of the Pledge of Allegiance and thus violate *Barnette*. Nevertheless, both the Illinois and Massachusetts Pledge statutes have been saved by judicial analysis which declared both to be voluntary.

The Illinois Pledge provision was subject to challenge in 1992.[67] The plaintiffs contended that the statutory language was unambiguous and compulsory.[68] Writing for the court, Judge Easterbook was clear that if the statute was compulsory, it violated *Barnette*: "If Illinois requires every pupil to recite the Pledge, then *Barnette* scuttles the statute . . . ."[69] Judge Easterbrook then managed to read a "willing" modifier into the Illinois Pledge statute:

> [W]hat [the provision] says is that the Pledge "shall be recited each school day by pupils" in public schools. Some pupils? Willing pupils? All pupils? It does not specify. *If it means "all pupils" then it is blatantly unconstitutional;* if it means "willing pupils" then the most severe constitutional problem dissolves. When resolving statutory ambiguities, the Supreme Court of Illinois adopts readings that save rather than destroy state laws. Given *Barnette*, which long predated enactment of this statute, it makes far more sense to interpolate "by willing pupils" than "by all pupils." School administrators and teachers satisfy the "shall" requirement by leading the Pledge and ensuring that at least some pupils recite. Leading the Pledge is not optional, but participating is. This makes sense of the statute without imputing *a flagrantly unconstitutional act to the State of Illinois*.[70]

Judge Easterbrook dismissed as "juicy tidbits of legislative history" record entries which were inconsistent with the reading of "pupils" as meaning "willing pupils."[71] Whether one believes Judge Easterbrook's maneuvering to save the

63. DEL. CODE ANN. tit. 14 § 4105 (West 2022) ("In the opening exercises of every free public school each morning, the teachers and pupils assembled shall salute and pledge allegiance to the American flag. . . .").

64. 105 ILL. COMP. STAT. ANN. § 5/27-3 (West 2020) ("The Pledge of Allegiance shall be recited each school day by pupils in elementary and secondary educational institutions supported or maintained in whole or in part by public funds.").

65. MASS. GEN. LAWS ANN. ch. 71, § 69 (West 2022) ("Each teacher at the commencement of the first class of each day in all grades in all public schools shall lead the class in a group recitation of the 'Pledge of Allegiance to the Flag'. . . .").

66. NEV. REV. STAT. ANN. § 389.014 (West 2015) ("Each public school shall set aside appropriate time at the beginning of each school day for pupils to pledge their allegiance to the flag of the United States.").

67. Sherman v. Community Consolidated Sch. Dist. 21 of Wheeling Twp., 980 F.2d 437 (7th Cir. 1992).

68. *Id.* at 442.

69. *Id.*

70. *Id.* (case references omitted) (emphasis added).

71. *Id.* at 443.

statute was appropriate, it is clear from his analysis that if the Illinois statute compelled any students to recite the Pledge, it was blatantly and flagrantly unconstitutional.[72]

Massachusetts Pledge statutes have been discussed a number of times. In 1943, just two months after *Barnette*, the Massachusetts Attorney General issued an opinion against compulsion of students with respect to the Pledge: "Pupils in the public schools may not be required to salute the flag nor to recite the 'Pledge of Allegiance to the Flag,' neither can the pupils refusing to participate in such ceremonies be disciplined for their refusal or be required to state the reasons for such refusal."[73]

In 1977 the Supreme Judicial Court rendered an opinion to the Governor regarding a bill to insert the following language in the statute: "Each teacher at the commencement of the first class of each day in all grades in all public schools shall lead the class in a group recitation of the 'Pledge of Allegiance to the Flag.'"[74] The Massachusetts court opined that a statutory provision which sought to compel a teacher to participate in the recitation of the pledge would violate the Constitution under *Barnette*.[75] As to students, the court's evaluation makes it clear that it viewed the language "shall lead the class in a group recitation of the 'Pledge of Allegiance to the Flag'" to compel participation.[76] A few weeks after the Supreme Judicial Court rendered its opinion, the Massachusetts Attorney General issued an opinion on the Pledge language.[77] The Attorney General cited *Barnette* for the proposition "that *students* cannot be compelled to recite the pledge . . . [because] such a requirement invades the individual's right to freedom of speech and belief."[78] As to teachers, the Attorney General opined: "Although the Supreme Court has not directly

72. *Id.* at 445 ("[S]o 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.").

73. Opinions of the Attorney General, 64 (Mass. 1943).

74. Opinions of the Justices to the Governor, 363 N.E.2d 251 (Mass. 1977). Prior to the amendment, the language read: "Each teacher shall cause the pupils under his charge to salute the flag and recite in unison with him at said opening exercises at least once each week the 'Pledge of Allegiance to the Flag.'" *Id.* at 252–53 n.2.

75. *Id.* at 254–55.

76. *Id.* at 255:

> We think it is clear from the opinion of the Supreme Court of the United States in the Barnette case that no punishment of any kind may be imposed on a student who elects, as a matter of principle, to abstain from participation. If the Legislature enacted a statute which permitted a student or teacher to sit quietly without participating in the pledge of allegiance by others in a classroom, different and yet still difficult constitutional questions would be presented, on which our opinion has not and could not be sought by the Governor in the circumstances.

Id.

77. 1976-77 Mass. Op. Atty. Gen. No. 34 (Mass. A.G.), 1976-77 Mass. Op. Atty. Gen. 169, 1977 WL 36224 (1977).

78. 1976-77 Mass. Op. Atty. Gen. 169, 1977 WL 36224, *1 (1977) (emphasis in original).

addressed the question of whether *teachers* can be compelled to recite the pledge, the Court has indirectly extended the *Barnette* rationale from students to teachers . . . . The Court's citation of *Barnette* plainly indicates a congruence between students' and teachers' rights in this context."[79]

It was reported that, as of 2006, the Massachusetts Pledge statute was no longer enforced.[80] In 2014, the Massachusetts Supreme Judicial Court considered the Bay State's Pledge statute.[81] Notwithstanding the language of the Pledge provision—"Each teacher . . . shall lead the class in a group recitation of the 'Pledge of Allegiance to the Flag'. . . ."[82]—the *Doe* court found that the recitation under the statute was "entirely voluntary" in practice.[83] In a rather curious finding, the *Doe* court declared: "It is undisputed, as a matter of Federal constitutional law and as a matter of fact on the summary judgment record before us, that no student is required to recite the pledge."[84] It adopted a strained reading of the statute:

> The statute that calls for the daily recitation of the pledge in Massachusetts schools . . . on its face imposes no affirmative requirement on students to participate. It purports, at most, to require teachers to lead a daily recitation of the pledge, a requirement that is itself of doubtful constitutional legitimacy.[85]

Notwithstanding the questionable analysis of the language of the Massachusetts Pledge statute, the *Doe* court clearly stated the Constitutional

79. *Id.* (emphasis in original) (cases omitted).

80. Chris Gaylord, *Backstory: Is America Pledging Less? The Schoolkid's Mantra is More Legally Mandated than Ever, but Recited Less than Ever*, CHRISTIAN SCI. MONITOR (Dec. 7, 2006), https://www.csmonitor.com/layout/set/print/2006/1207/p20s01-legn.html [https://perma.cc/FV2Y-TCSA]:

> The actual letter of Bay State law demands students say the pledge every morning. It even imposes a $5 fine on teachers who refuse or forget to lead the students for two weeks. But this law hasn't been enforced since 1977, the year the current wording was passed . . . . That's because forcing students, or teachers, to say the pledge violates a different American institution: the First Amendment.

Id.

81. Doe v. Acton-Boxborough Regional Sch. Dist., 8 N.E.3d 737, 738 (Mass. 2014).

82. MASS. GEN. LAWS ANN. ch. 71, § 69 (West 2022).

83. *Doe*, 8 N.E. 3d at 740. The record apparently reflected that the practice of the schools in Massachusetts was to not compel participation in the Pledge recitation:

> Although the statute purports to impose a monetary fine on teachers who fail to lead the pledge, the parties do not dispute that the defendants' school administration does not require participation by teachers or students. The school superintendent, in his affidavit, avers that "[f]or both students and teachers, participation in the Pledge of Allegiance is totally voluntary. Any teacher or student may abstain themselves from participation in the Pledge of Allegiance for any or no reason, without explanation and without any form or recrimination or sanction."

Id. at 741.

84. *Id.* at 745.

85. *Id.*

rule: "The Barnette decision sounded the death knell for any statute, government regulation, or policy that purports to impose a requirement on students to recite the pledge."[86] The court was quite clear in its statement of the rule on compelled student participation in the recitation of the Pledge:

> Although this court has not been called on previously to so state, we take this opportunity to confirm what has been obvious and understood to be the case for the decades since the *Barnette* case was decided: no Massachusetts school student is required by law to recite the pledge or to participate in the ceremony of which the pledge is a part. Recitation of the pledge is entirely optional. Students are free, for any reason or for no reason at all, to recite it in its entirely, not to recite it at all, or recite or decline to recite any part of it they choose, without fear of punishment.[87]

Another step away from clarity is seen in the Pledge statutes of Kansas[88] and Louisiana,[89] which speak in terms of a recitation of the Pledge of Allegiance

86. *Id.*

87. *Id.*

88. KAN. STAT. ANN. § 72-9928(a) (West 2022) (directing the state board of education to prepare "a program providing for patriotic exercises" and mandating that "The program of patriotic observation of every school district shall include: (1) A daily recitation of the pledge of allegiance to the flag of the United States of America.").

The Kansas "program of patriotic observation" also includes "instructions relating to flag etiquette, use and display . . ." and "provisions relating to the observance in public schools of Lincoln's birthday, Washington's birthday, Memorial day, and Flag day and such other legal holidays designated by law." *Id.* at (a)(2) and (3). Presumably the legislature intended flag etiquette instruction and holiday celebrations to include all students, and there is no indication in the statutory language that the recitation of the Pledge was to be treated any differently in terms of who was intended to participate.

The Kansas Pledge provision was the subject of a Jehovah's Witnesses challenge in the Kansas Supreme Court which was decided after *Gobitis* but before *Barnette*. State v. Smith, 127 P.2d 518, 519 (Kan. 1942). Based on *Gobitis*, at the start of the 1941 school year, "the members of the school board went to the school and told the teacher to exclude any children from . . . school who failed to salute the flag." *Id.* at 520. The Kansas Supreme Court held *Gobitis* "not in point." *Id.* at 521. The court observed that when enacted, the Kansas Pledge statute did not provide a penalty for students who declined to recite the Pledge based on religious belief. *Id*. To provide such a penalty violated Section 7 of the Kansas bill of rights. *Id.* at 523. Within a year *Smith* came *Barnette*. The *Smith* holding does not render moot every appeal based on *Barnette* because the children shielded by *Smith* are those with religious beliefs protected by the Kansas Bill of Rights and *Barnette* shields *all* students from compulsory recitation, regardless of their motivation. The *Smith* court necessarily interpreted the Kansas Pledge provision as requiring recitation by all students; if it hadn't, it would not have had to find a shield for the Jehovah's Witness students under the Kansas Bill of Rights. If the Kansas Pledge provision requires participation in the recitation, it violates the Constitution under *Barnette*.

89. LA. STAT. ANN. § 2115 (2022):

> Each parish and city school board in the state shall also permit the proper authorities of each school to allow the opportunity for a group recitation of the "Pledge of Allegiance to the Flag". Such recitation shall occur at the commencement of the first class of each day in all grades and in all public schools.

without indicating by whom it is to be recited. The natural reading would be that these statutes, too, compel participation and violate *Barnette*.

B. Statutes which are based on an irremediable violation of Barnette

Next comes a group of ten states—Arkansas, Florida, Maryland, Minnesota, New Jersey, Oklahoma, South Carolina, Tennessee, Texas, and Virginia—which have what might be described as "catch and release" Pledge statutes. These contain a requirement that the Pledge of Allegiance be recited, coupled with exemptions for specified classes of individuals. The catch and release statutes do not comply with *Barnette* since the state lacks the authority to compel anyone to recite the pledge.

The catch and release Pledge provisions divide into two groups. The first is the statutes in which the catch provisions explicitly provide that the Pledge is to be recited by all students. The second is the statutes in which the catch provisions implicitly provide that the Pledge is to be recited by all students by using the terms "students" or "pupils" without any modifier.

1. Explicit Inclusion Statutes

Three states—Maryland, Minnesota, and South Carolina—have catch provisions which explicitly specify that the Pledge is to be recited by all students.

Maryland's statute has a broad catch provision: "Each county board shall . . . (3) Require all students and teachers in charge to stand and face the flag and while standing give an approved salute and recite in unison the pledge of allegiance . . . ."[90] The release provision is equally broad: "Any student or teacher who wishes to be excused from the requirements of subjection (c)(3) or this section shall be excused."[91]

The current Maryland Pledge provision dates to 1978. It replaced a Pledge provision which required every board of education in the state:

> . . . to require all students and teachers in charge to stand and face the flag and while so standing render an approved salute, and recite in unison the pledge of allegiance . . . Any pupil or teacher, for religious reasons, may be excused from actually repeating the words of the pledge of allegiance and from giving any form of hand salute. Any person, however, who may commit an act of disrespect, either by word or action, shall be considered to be in violation of the intent of this act.[92]

While at first glance, the use of "opportunity" may not sound like compulsion, it should be noted that the wording isn't that individual students are given the opportunity to participate in the pledge; it is that the school is given the opportunity for "a group recitation."

90. MD. CODE ANN, EDUC. § 7-105(c) (West 2022).

91. *Id.* at (d).

92. MD. CODE ANN, art. 77, § 77 (1970), as reproduced in State v. Lundquist, 278 A.2d 263, 264 (Md. 1971).

The older Pledge statute was the subject of a challenge decided by the Maryland Court of Appeals in 1971.[93] The matter before the *Lundquist* court was an appeal from a lower court declaratory decree invalidating the older Pledge provision.[94] The trial judge relied upon *Barnette* in invalidating the Pledge provision, and the Court of Appeals affirmed.[95]

The plaintiffs were August Luther Lundquist, a high school social studies teacher, and his high school student son, Eric.[96] The plaintiffs' objections to the Pledge were not religious in nature:

> [August Lundquist] claimed that he would refuse to engage in a mandatory flag salute ceremony, not for religious reasons but because he could not "in good conscience" force patriotism upon his classes. He voluntarily if not eagerly instructed his world history classes in patriotic and democratic ideals and he had no objection to teaching courses, such as civics, which made instruction in democracy a required part of the curriculum. Mr. Lundquist also objected strongly to being forced to salute the flag because he believed such a requirement eliminated his right to freely express his own loyalty to the United States.[97]

In its opinion affirming the trial court in striking down the Maryland Pledge statute, the *Lundquist* court reviewed *Barnette* in depth, and extended the analysis to the 1969 case of *Tinker v. Des Moines Independent Community School District*.[98] The court found that *Barnette* was decided on the basis of free speech, not religious freedom,[99] and found the Maryland Pledge statute unconstitutional and void:

> We recognize, as did Justice Frankfurter in the Gobitis opinion, that one student's failure to join in this group expression "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." As if in direct response to this assertion, the Court in Tinker has answered: "our Constitution says we must take this risk. . . ." Quite aside from the fact that Barnette and Tinker are binding constitutional precedents, we also are convinced the First and Fourteenth Amendments of the Constitution require this gamble. The salute requirement and punishment provision of [the Maryland Pledge statute] are unconstitutional and void.[100]

93. *Lundquist*, 278 A.2d, at 264.

94. *Id.*

95. *Id.* at 264–65.

96. *Id*. at 266.

97. *Id.* The court noted that Mr. Lundquist "indicated, without objection, that his son shared these views and would similarly refuse to engage in the flag salute." *Id.*

98. *See generally* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

99. *Lundquist*, 278 A.2d at 273 ("Contrary to the Attorney General's intimations we think that none of these members of the Court rejected the free speech resolution of the flag salute controversy . . . .").

100. *Id.* at 274 (emphasis supplied) (citations omitted).

It should be noted that the *Lundquist* court did not find the older Maryland catch and release Pledge statute was unconstitutional and void because it limited the release to those with religious justifications and the plaintiffs had non-religious reasons to not participate in the recitation. Had it done so, it might be argued that the newer Maryland catch and release statute passes constitutional muster because it has a broad release formulation.[101] Rather, the *Lundquist* court found the older Maryland catch and release Pledge statute was unconstitutional and void because of the requirement of participation in the recitation. And that did not change between the older and newer catch and release provisions. Thus, under *Lundquist*, the current Maryland catch and release Pledge statute is unconstitutional.

The second explicit inclusion statute is Minnesota. The catch provision is straightforward.[102] The release provision is unexceptional.[103] The provision also includes a notice requirement and an interesting protection for those who decline to participate.[104]

The third explicit inclusion statute is South Carolina. The catch provision is clear.[105] The release provision includes protection against retaliation for non-participation, and limited permission for expressing non-participation.[106]

101. *Compare* MD. CODE ANN, art. 77, § 77 (1970) ("Any pupil or teacher, *for religious reasons*, may be excused from actually repeating the words of the pledge of allegiance and from giving any form of hand salute.") (emphasis added) *with* MD. CODE ANN, EDUC. §7-105(d) (West 2022) ("Any student or teacher who wishes to be excused from the requirements of subjection (c)(3) or this section shall be excused.").

102. MINN. STAT. ANN. § 121A.11.subd. 3(a) (West 2022):

> 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 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.

The catch provision may be waived: "A local school board or a charter school board of directors may annually, by majority vote, waive this requirement." *Id.*

103. *Id.* § 3(b) ("Any student or teacher may decline to participate in recitation of the pledge.").

104. *Id.* § 3(c):

> A school district or charter school that has a student handbook or school policy guide must include a statement that anyone who does not wish to participate in reciting the Pledge of Allegiance for any personal reasons may elect not to do so and that students must respect another person's right to make that choice.

105. S.C. CODE ANN. § 59-1-455 (West 2002) ("[A]ll public school students, commencing with grades kindergarten through and including high school, shall during the course of each school day's activities at a specific time which must be designated by the local school say the Pledge of Allegiance . . . .").

106. *Id.*:

> Any person not wishing to say the "Pledge of Allegiance" or otherwise participate in saying the "Pledge of Allegiance" is exempt from participation and may not be penalized for failing to participate. A person who does not wish to participate may leave the classroom, may

2. Implicit Inclusion Statutes

Seven states—Arkansas, Florida, New Jersey, Oklahoma, Tennessee, Texas, and Virginia—have catch provisions which only implicitly provide that the Pledge is to be recited by all students.

The Arkansas catch and release Pledge statute is interesting because it has two implicit inclusion catch provisions. The first requires "students . . . participate in a daily recitation of the Pledge of Allegiance. . . ."[107] The second provides "students shall stand and recite the Pledge of Allegiance. . . ."[108] The release provision is straightforward,[109] and a separate release is provided for teachers.[110] Interestingly, Arkansas also requires schools recite the Pledge at assemblies and sporting events.[111]

Florida's statute has an implicit inclusion catch provision,[112] and a somewhat restrictive release provision:

> Each student shall be informed by a written notice published in the student handbook or similar publication . . . that the student has the right not to participate in reciting the pledge. Upon written request by his or her parent, the

remain in his seat, or may express his nonparticipation in any form which does not materially infringe upon the rights of other persons or disrupt school activities.

107. The State Board of Education is instructed to adopt a policy requiring "[p]ublic school students in grades kindergarten through twelve . . . participate in a daily recitation of the Pledge of Allegiance followed by one (1) minute of silence during the first class of each school day. . . ." ARK. CODE ANN. § 6-16-108(a)(1) (West 2021).

108. *Id.* § (b)(1) ("[A]t the time designated for the recitation of the Pledge of Allegiance students shall stand and recite the Pledge of Allegiance while facing the flag with their right hands over their hearts or in an appropriate salute if in uniform.").

109. *Id.* § (b)(2)(A) ("[T]hat no student shall be compelled to recite the Pledge of Allegiance if the student or the student's parent or legal guardian objects to the student's participating in the exercise on religious, philosophical, or other grounds."). The statute has conduct standards for non-participating students. *Id.* at (b)(2)(B) ("Students who are exempt from reciting the Pledge of Allegiance . . . shall be required to remain quietly standing or sitting at their desks while others recite the Pledge of Allegiance").

110. *Id.* § (b)(3)(A). The statute provides that "teachers or other school staff who have religious, philosophical, or other grounds for objecting are exempt from leading or participating in the exercise." *Id.* Teachers who are released are replaced by another: "If a teacher chooses not to lead the Pledge of Allegiance, the policy shall require that another suitable person shall be designated either by the teacher or principal to lead the class." *Id.* § (b)(3)(B).

111. *Id.* § (a)(2) (requiring "public schools lead or broadcast a recitation of the Pledge of Allegiance followed by one minute of silence at the commencement of each school-sanctioned after school assembly and each school-sanctioned sporting event").

112. FLA. STAT. ANN. § 1003.44(1) (West 2021) ("The pledge of allegiance to the flag . . . shall be rendered by students standing with the right hand over the heart. The pledge of allegiance to the flag shall be recited at the beginning of the day in each public elementary, middle, and high school in the state.").

> student must be excused from reciting the pledge, including standing and placing the right hand over his or her heart.[113]

The Florida Pledge provision was challenged in two specific respects.[114] The first was to the requirement at the time that "civilians" stand while the Pledge was being recited. The plaintiff asserted that, as a civilian, he was required to stand even though he was exempt from participation. Stating "[t]hat students have a constitutional right to remain seated during the Pledge is well established," the *Frazier* court invalidated that part of the statute.[115]

The second challenge was to the release provision which requires that to be excused a student must present a "written request by his or her parent." The *Frazier* court upheld the parental request requirement:

> We see the statute before us as largely a parental-rights statute. . . . Although we accept that the government ordinarily may not compel students to participate in the Pledge [citing *Barnette*], we also recognize that a parent's right to interfere with the wishes of his child is stronger than a public school official's right to interfere on behalf of the school's own interest. . . . And this Court and others have routinely acknowledged parents as having the principal role in guiding how their children will be educated on civic values.[116]

The *Frazier* court did allow that in some instances the rights of students might justify a different outcome, but didn't find the frequency of such situations sufficient under the overbreadth doctrine:

> Even if the balance of parental, student, and school rights might favor the rights of a mature high school student in a specific instance, Plaintiff has not persuaded us that the balance favors students in a *substantial* number of instances—

113. *Id.* By requiring a written request by a parent, and not allowing the student to request exemption, the Florida is more restrictive than some other states. *E.g.*, c*ompare id.* (requiring written request by a parent), *with* ARK. CODE ANN. §6-16-108(b)(2)(A) (West 2021) (allowing exemption "if the student or the student's parent or legal guardian objects to the student's participating in the exercise on religious, philosophical, or other grounds.").

The statute further provides: "When the pledge is given, unexcused students must show full respect to the flag by standing at attention, men removing the headdress, except when such headdress is worn for religious purposes . . . ." FLA. STAT. ANN. § 1003.44(1) (West 2021).

114. Frazier v. Winn, 535 F.3d 1279, 1281 (11th Cir. 2008), *cert. denied* 558 U.S. 818 (2009).

115. *Id.* at 1282. The Florida Pledge statute was subsequently amended to make it clear that students who are excused from participation need not stand during the recitation.

> The pledge of allegiance to the flag . . . shall be rendered by students standing with the right hand over the heart. . . . Upon written request by his or her parent, the student must be excused from reciting the pledge, including standing and placing the right hand over his or her heart. When the pledge is given, unexcused students must show full respect to the flag by standing at attention. . . .

FLA. STAT. ANN. § 1003.44(1) (West 2021). It might be noted that the Florida Pledge statute also provides that "[w]hen the national anthem is played, students and all civilians shall stand at attention" but does not provide for students to be excused from standing. *Id.*

116. *Frazier*, 535 F.3d at 1284–85 (citations omitted).

> particularly those instances involving elementary and middle school students—relative to the total number of students covered by the statute.[117]

Another interesting justification was used by the *Frazier* court. The argument started with the state's assertion that "the statute is neutral on the Pledge in the statute's deference to a parent's expressed wishes."[118] The court then addressed two circumstances where the wishes of a parent and student differed:

> Should a parent request that his child not recite the Pledge—even where the child wishes to recite—the statute provides that the school *must* excuse the student. . . . Likewise, the school will protect the interests of a parent who refuses to send in a written request that his child be excused.[119]

The reader might be forgiven a healthy skepticism that a Florida public school would *prevent* a student from participating in the recitation of the Pledge where the parent submitted a written request for exemption, but the student wished to participate.[120]

New Jersey's catch provision requires each board of education to:

> Require the pupils in each school in the district on every school day to salute the United States flag and repeat the . . . pledge of allegiance to the flag . . . which salute and pledge of allegiance shall be rendered with the right hand over the heart . . . .[121]

The release language is unusual in that it limits exemptions to students with "conscientious scruples against the pledge or salute," potentially limiting the

117. *Id.* at 1283–84, 1285 (emphasis in original).

118. *Id.* at 1285.

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

120. The court concluded its opinion by stating: "We stress that we decide and hint at nothing about the Pledge Statute's constitutionality as applied to a specific student or a specific division of students." *Id.* at 1286.

121. N.J. STAT. ANN. § 18A:36-3(c) (West, 1968).

ability of students to decline to recite.[122] It also specifically excludes the children of diplomats.[123]

The history of Pledge litigation in New Jersey is illuminating. In 1937, the New Jersey Supreme Court considered a challenge to the state's mandatory Pledge recitation statute.[124] At issue were the expulsions of two children, ages five and seven, because of their refusal to join in the recitation of the Pledge. The *Hering* court approved the compulsory Pledge requirement and the expulsion of the two children:

> Those who resort to educational institutions maintained with the state's money are subject to the commands of the state. . . . It is little enough to expect of those who seek the benefits of the education offered in the public schools of this state that they pledge their allegiance to the nation and the nation's flag. . . . It is a patriotic ceremony which the Legislature has the power to require of those attending schools established at public expense.[125]

New Jersey's Pledge statute was at issue five years later in 1942, after *Gobitis* but before *Barnette*, in a case where Jehovah's Witness parents were convicted of "being disorderly persons in that they had not kept in regular attendance at school their two children aged 13 and 14."[126] As the *Latrecchia* court noted, "[t]hey were powerless so to do, because the children were expelled from school, and excluded each day when they reported for attendance. The children were trained in the beliefs of Jehovah's Witnesses and would not salute the American flag pursuant to [the Pledge statute]."[127]

122. *Id.*:

> [E]xcept that pupils who have conscientious scruples against such pledge or salute, or are children of accredited representatives of foreign governments to whom the United States government extends diplomatic immunity, shall not be required to render such salute and pledge but shall be required to show full respect to the flag while the pledge is being given merely by standing at attention, the boys removing the headdress.

The New Jersey and Florida catch and release provision are similar. It might also be noted that the New Jersey catch and release language, which also refers to the removal of headdresses, differs from the Florida provision in three ways. First, New Jersey refers to male students as "boys" not "men." Second, New Jersey does not have an exception to the removal requirement for religious headdresses. Third, and most significantly, while the Florida requirement applies only to those students who are required to recite the pledge; the New Jersey requirement applies to those students who are exempted and are not required to recite the pledge. FLA. STAT. ANN. § 1003.44(1) (West, 2021) ("When the pledge is given, *unexcused* students must show full respect to the flag by standing at attention, men removing the headdress, except when such headdress is worn for religious purposes . . . .") (emphasis added).

123. *Id.*

124. Hering v. State Bd. of Educ., 189 A. 629, 629 (N.J. 1937), *aff'd* 194 A. 177; *app. dis.* 303 U.S. 624 ("[T]he pupils are required to salute the flag and repeat the oath of allegiance every school day.").

125. *Id.*

126. *In re* Latrecchia, 26 A.2d 881, 881 (N.J. 1942).

127. *Id.*

The court adopted Judge Lehman's pronouncement:

> "The salute of the flag is a gesture of love and respect—fine when there is real love and respect back of the gesture. The flag is dishonored by a salute by a child in reluctant and terrified obedience to a command of secular authority which clashes with the dictates of conscience. The flag 'cherished by all our hearts' should not be soiled by the tears of a little child. The Constitution does not permit, and the Legislature never intended, that the flag should be so soiled and dishonored."[128]

Declaring "Liberty of conscience is not subject to uncontrolled administrative action," the *Latrecchia* court set aside the convictions of the parents.[129]

In 1966 the New Jersey Supreme Court relied on *Barnette* to vindicate the right of Muslim children to not participate in the recitation of the Pledge.[130]

In 1978, the Third Circuit heard a challenge to the New Jersey Pledge statute.[131] At issue was the statutory requirement under which non-reciting students are "required to show full respect to the flag while the pledge is being given merely by standing at attention. . . ."[132] The plaintiff, a sixteen year old high school student "emphasized that in her belief, the words of the pledge were not true and she stood only because she had been threatened if she did not do so."[133] The appellate court affirmed the holding of the trial court that the statutory requirement that students show respect by standing at attention during the Pledge violated the Constitution.[134]

Finally, in 2015, a challenge was heard to the New Jersey Pledge statute.[135] *Matawan* raised equal protection claims about the Pledge recitation statute based on the New Jersey constitution; the plaintiff was not asserting claims under the Federal Constitution.[136] The *Matawan* court rejected the state equal protection claim, in part based on a finding that "there is no classification under the pledge statute because, on its face, the recitation of the pledge is entirely voluntary."[137] Speaking of the New Jersey Pledge statute, the court observed: "Under the pledge statute . . . any child is free to abstain from the pledge for any reason, whether it be religious, political, moral, or any other principle. Nor does the

128. *Id.* at 882 (quoting People v. Sandstrom, 18 N.E.2d 840, 847 (N.Y. 1939)).

129. *Id.* (quoting Jones v. City of Opelika, 62 S. Ct. 1231 (1942)).

130. Holden v. Bd. of Educ., 216 A.2d 387 (N.J. 1966).

131. Lipp v. Morris, 579 F.2d 834, 835 (3rd Cir. 1978).

132. *Id.* The current statute, which contains the same language, is N.J. STAT. ANN. § 18A:36-3(c) (West, 1968).

133. *Lipp*, 579 F.2d at 835.

134. *Id.* at 836 (citing Goetz v. Ansell, 477 F.2d 636 (2nd Cir. 1973), Banks v. Bd. of Pub. Instruction, 314 F. Supp. 285 (S.D. Fla. 1970), and Wooley v. Maynard, 430 U.S. 705 (1977)).

135. Am. Humanist Ass'n v. Matawan-Aberdeen Reg'l Sch. Dist., 115 A.3d 292 (N.J. 2015).

136. *Id.* at 294, 297.

137. *Id.* at 299.

pledge statute require a conscientious objector to state his or her reasons for refusing to participate."[138]

The court's insistence that the recitation of the Pledge is "entirely voluntary" because "any child is free to abstain from the pledge for any reason" was something of a reach. First, the release clause in the New Jersey Pledge statute limits exemptions to "pupils who have conscientious scruples against such pledge or salute. . . ."[139] One can imagine a high school administrator requiring non-reciting students to give their reasons so that the administrator could decide who had "conscientious scruples" and who did not. Of course, the New Jersey Pledge statute does not require non-reciting students to submit a writing explaining their conscientious scruples against participation. But, it turned out, the defendant school district *did* require such a writing:

> Parent(s) or legal guardian(s) of pupils refusing to salute the flag shall be informed of the refusal by the school administration. The parent(s) or legal guardian(s) of a minor pupil shall be required to furnish the school administration with a written statement of their child's conscientious objection. Pupils eighteen or older shall provide his/her own written statement.[140]

The school board's attorney "represented that he did not know to whom the written statement was to be submitted, what, if anything was to be done with it, and what would happen if a parent or student of majority age refused to provide a written statement."[141] At what one imagines was the urging of the court, "defendants informed the court that the Matawan-Aberdeen Regional School Board was revising policy 8820 to delete the aforementioned paragraphs from that policy, thus implicitly acknowledging that the paragraphs were potentially problematic."[142] Thus, the court determined, "any issue raised by plaintiffs with respect to board policy 8820 is now moot."[143]

Oklahoma's catch provision is: "Students . . . shall recite the pledge of allegiance to the flag of the United States of America once every school week."[144] To the extent one adopts the natural reading of "students" as all

138. *Id.* at 299–300.

139. N.J. STAT. ANN. § 18A:36-3(c) (West 1968).

140. *Matawan*, 115 A.3d at 300 n.7 (quoting the Matawan-Aberdeen School District's policy 8820 Ceremonies and Observances subsection on Flag Salute).

141. *Id.* (noting "Indeed, it appeared that counsel was unaware of the existence of this school board policy.").

142. *Id.* at 301.

143. *Id.*

144. OKLA. STAT. ANN. tit. 70 § 24-106.C (West 2014). The inattentive reader may be confused by the intervening language of authorization:

> Students in all public schools are authorized to recite, at the beginning of each school day, the pledge of allegiance to the flag of the United States of America as enumerated at 36 U.S.C., Section 172; however, they shall recite the pledge of allegiance to the flag of the United States of America once every school week. (emphasis added). *Id.*

students, the provision, standing alone, would violate *Barnette*. Oklahoma's release language is somewhat indirect: "Each student shall be informed by posting a notice in a conspicuous place that students not wishing to participate in the pledge shall not be required to do so."[145] On its face, the language speaks to the posting of a notice, not to the creation of an exemption for students not wishing to participate.

Tennessee's catch provision is a bit oblique. Each board of education is directed to "require the daily recitation of the Pledge of Allegiance in each classroom."[146] The statute compels participation: "At the time designated for the recitation of the Pledge of Allegiance, students shall stand and recite the Pledge of Allegiance while facing the flag with their right hands over their hearts or in an appropriate salute if in uniform. . . ."[147] To the extent one adopts the natural reading of "students" as all students, the provision, standing alone, would violate *Barnette*. The Tennessee release provision allows students to not participate in the recitation of the Pledge: "provided, however, that no student shall be compelled to recite the Pledge of Allegiance if the student or the student's parent or legal guardian objects on religious, philosophical or other grounds to the student participating in such exercise."[148] The Tennessee attorney general has interpreted this provision as allowing a student to not participate "if they, or a student's parent or guardian, object for any reason."[149] The statute also includes behavior standards for released students,[150] exemption language for teachers,[151] and a direction for the preparation of guidelines.[152]

145. *Id.*

146. TENN. CODE ANN. § 49-6-1001(c)(1) (West 2016). The board of education "shall determine the appropriate time during the day for recitation of the Pledge of Allegiance." *Id.*

147. *Id.*

148. *Id.*

149. OP. ATT'Y. GEN. No. 03-129 (Tenn. 2003). The opinion cited *Barnette* for the proposition that: "Because the Tennessee statute allows students and teachers to refuse to participate, for any reason, the law is constitutional." *Id.*

150. TENN. CODE ANN. § 49-6-1001(c)(1) (West 2016) ("Students who are thus exempt from reciting the pledge of allegiance shall remain quietly standing or sitting at their desks while others recite the Pledge of Allegiance and shall make no display that disrupts or distracts others who are reciting the Pledge of Allegiance."); *Id.* at (c)(2) ("The board of education's code of conduct shall apply to disruptive behavior during the recitation of the Pledge of Allegiance in the same manner as provided for other circumstances of such behavior.").

151. *Id.* at (c)(1) ("Teachers or other school staff who have religious, philosophical or other grounds for objecting are likewise exempt from leading or participating in the exercise. If a teacher chooses not to lead the Pledge, another suitable person shall be designated either by the teacher or principal to lead the class."). The provision is somewhat odd since the Tennessee catch provision covers only students, not teachers and certainly not "other school staff."

152. *Id.* at (d)(1). The statute requires the state board of education and the attorney general to prepare "guidelines on constitutional rights and restrictions relating to the recitation of the Pledge of Allegiance to the American flag in public schools." The guidelines were to include "[t]he

The Texas pledge statute contains a catch provision that is unusual because it requires the recitation of both the pledge of allegiance to the Federal flag and the pledge of allegiance to the Texas flag.[153] The release portion of the Texas statute provides: "On written request from a student's parent or guardian, a school district or open-enrollment charter school shall excuse the student from reciting a pledge of allegiance under Subsection (b)."[154] Neither the Texas catch provision, nor the release provision has been the subject of a direct challenge.[155]

The Virginia pledge statute is similar to that of Tennessee. The catch portion begins with a requirement for daily recitation of the Pledge.[156] Like Tennessee, the board determines a time for the pledge.[157] Like Tennessee, the statute requires the students to recite the pledge and compels the way in which they are to carry themselves.[158] The Virginia release provision is virtually identical to the

propriety and constitutionality of any recitation or participation requirements," and "[r]elevant state and federal constitutional concerns, such as freedom of speech and religion." *Id.* at (d)(2)(B), (D).

153. TEX. EDUC. CODE ANN. § 25.082(b) (West, 2017):

> The board of trustees of each school district and the governing board of each open-enrollment charter school shall require students, once during each school day at each campus, to recite: (1) the pledge of allegiance to the United States flag in accordance with 4 U.S.C. Section 4; and (2) the pledge of allegiance to the state flag in accordance with Subchapter C, Chapter 3100, Government Code. . . .

For readers unfamiliar with Texas lore, the pledge of allegiance to the Texas flag is: "Honor the Texas flag; I pledge allegiance to thee, Texas, one state under God, one and indivisible." TEX. GOV'T CODE ANN. tit. 11, subtit. A, ch. 3100, subch. C, § 3100.101 (West 2007).

154. TEX. EDUC. CODE ANN. § 25.082(c) (West 2017).

155. The compelled moment of silence in which students are to "reflect, pray, meditate, or engage in any other silent activity that is not likely to interfere with or distract another student." *Id.* at § (d), which is part of the Texas Pledge statute survived an Establishment Clause challenge in 2009. Croft v. Gov. of Tex., 562 F.3d 735 (5th Cir. 2009). The Texas pledge of allegiance (TEX. EDUC. CODE ANN. § 25.082(b)(2) (West, 2017)) survived an Establishment Clause challenge in 2010. Croft v. Perry, 624 F.3d 157 (5th Cir. 2010).

Implementation of the release provision of the Texas Pledge statute was challenged in a 2020 §1983 case, although the Constitutionality of the Pledge statute was not at issue. Oliver v. Klein Indep. Sch. Dist., 472 F. Supp. 3d 367 (S.D. Tex. 2020). The high school student involved claimed that her school retaliated against her after receiving a sufficient written request to excuse her. The defendants disputed the effectiveness of the written request. The *Oliver* court granted summary judgment for the defendants.

156. *Compare* VA. CODE ANN. § 22.1-202(C) (Lexis 2001) ("Each school board shall require the daily recitation of the Pledge of Allegiance in each classroom of the school division . . . ."), *with* TENN. CODE ANN. § 49-6-1001(c)(1) (West 2016) ("Each board of education shall require the daily recitation of the Pledge of Allegiance in each classroom in the school system . . . .").

157. VA. CODE ANN. § 22.1-202(C) (Lexis 2001).

158. *Compare* VA. CODE ANN. § 22.1-202(C) (Lexis 2001) ("During such Pledge of Allegiance, students shall stand and recite the Pledge while facing the flag with their right hands over their hearts or in an appropriate salute if in uniform . . . ."), *with* TENN. CODE ANN. § 49-6-1001(c)(1) (West 2016) ("At the time designated for the recitation of the Pledge of Allegiance, students shall stand and recite the Pledge of Allegiance while facing the flag with their right hands over their hearts or in an appropriate salute if in uniform. . . .").

Tennessee release provision, with only stylistic and gendered language differences:

> [H]owever, no student shall be compelled to recite the Pledge if he, his parent or legal guardian objects on religious, philosophical or other grounds to his participating in this exercise. Students who are thus exempt from reciting the Pledge shall remain quietly standing or sitting at their desks while others recite the Pledge and shall make no display that disrupts or distracts others who are reciting the Pledge.[159]

Finally, like Tennessee, Virginia does not include teachers in its catch provision; unlike Tennessee, the Virginia state does not address teacher exemptions.

The Virginia Pledge statute has been unsuccessfully challenged on Establishment Clause and Free Exercise Clause grounds in *pro se* litigation by an Anabaptist Mennonite father of two elementary school children.[160] The § 1983 assertions were unusual, claiming that the Pledge and the posting of the motto "In God we Trust" constituted the creation of a "civil religion of God and Country" which was idolatrous under his faith.[161] The district court cited *Barnette* in stating that the Virginia Pledge statute is voluntary:

> Not only is recitation of the pledge free enough from sectarian color, so as to conclusively qualify as secular, the statute makes clear that it is not forcing acceptance of the beliefs contained in the pledge on any student. Specifically, the statute reads: "no student shall be compelled to recite the Pledge if he, his parent or legal guardian objects on religious, philosophical or other grounds to his participating in this exercise." Therefore, *the statute is in line with the Supreme Court's holding that compelling a student to recite the pledge under threat of expulsion from school "transcends constitutional limitations on [the state's] power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment of our Constitution to reserve from all official control*."[162]

But the *Myers* trial court misstated the *Barnette* holding. The *Barnette* Court did not say "that compelling a student to recite the pledge under threat of expulsion from school 'transcends constitutional limitations. . . .'"[163] The Barnette analysis does not turn on the "threat of expulsion," as the unedited quotation makes clear:

159. VA. CODE ANN. § 22.1-202(C) (2001). Like Tennessee, the Virginia formulation adds language about student behavior: "The school board's code of conduct shall apply to disruptive behavior during the recitation of the Pledge in the same manner as provided for other circumstances of such behavior." *Id.*

160. Myers v. Loudoun Cnty. Sch. Bd., 251 F. Supp. 2d 1262 (E.D. Va. 2003); Myers v. Loudoun Cnty. Sch. Bd., 418 F.3d 395 (4th Cir. 2005).

161. *Myers*, 251 F. Supp. 2d at 1264.

162. *Id.* at 1268–69 (statutory citation omitted) (citing W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)) (emphasis added).

163. *Id.*

> *We think the action of the local authorities in compelling the flag statute and pledge transcends constitutional limitations* on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.[164]

Thus, it is the catch provision that makes these Pledge statutes unconstitutional, not the presence, absence, or form of any release provision.

C. Statutes which are facially inconsistent and may violate Barnette

Next are five states—Colorado, Idaho, Indiana, Iowa, and Wisconsin—whose statutes are not cast in terms of requiring recitation of the Pledge of Allegiance, but which nevertheless contain an exemption for those who don't wish to recite. If the first clause doesn't require anyone to recite the pledge, the exemption in the second clause is unnecessary and confusing. If the first clause requires anyone to recite the pledge, the second clause is necessary and the provision violates *Barnette*.

These statutes differ in terms of how the recitation of the Pledge is cast. Colorado[165] and Indiana[166] are framed in terms of an opportunity to recite. Idaho[167] and Wisconsin[168] are offer formulations. Iowa is the closest to a compulsion provision, with the Pledge to be "administered."[169*]

164. *Barnette*, 319 U.S. at 642 (emphasis added).

165. COLO. REV. STAT. § 22-1-106(3) (2004) ("Each school district shall provide an opportunity each school day for willing students to recite the pledge of allegiance in public elementary and secondary educational institutions."). The provision also contains an exemption: "Any person not wishing to participate in the recitation of the pledge of allegiance shall be exempt from reciting the pledge of allegiance and need not participate." *Id.* Colorado has caselaw applying the state constitution to parallel *Barnette*. Zavilla v. Masse, 147 P.2d 823, 823 (Colo. 1944).

166. IND. CODE ANN. § 20-30-5-0.5(b) (West 2022) ("The governing body of each school corporation shall provide a daily opportunity for students of the school corporation to voluntarily recite the Pledge of Allegiance in each classroom or on school grounds."). The provision also contains an exemption: "A student is exempt from participation in the Pledge of Allegiance and may not be required to participate in the Pledge of Allegiance if: (1) the student chooses to not participate; or (2) the student's parent chooses to have the student not participate."). *Id.*

167. IDAHO CODE ANN. § 33-1602(4) (West 2020) ("Every public school shall offer the pledge of allegiance or the national anthem in grades 1 through 12 at the beginning of each school day."). The provision also contains an exemption. *Id.* at (5) ("No pupil shall be compelled, against the pupil's objections or those of the pupil's parent or guardian, to recite the pledge of allegiance or to sing the national anthem.").

168. WIS. STAT. ANN. § 118.06(2) (West 2022) ("Every public school shall offer the pledge of allegiance or the national anthem in grades one to 12 each school day."). Private schools are included unless they opt out. *Id.* ("Every private school shall offer the pledge of allegiance or the national anthem in grades one to 12 each school day unless the governing body of the private school determines that the requirement conflicts with the school's religious doctrines."). The provision also contains an exemption. *Id.* ("No pupil may be compelled, against the pupil's objections or those of the pupil's parents or guardian, to recite the pledge or to sing the anthem.").

169. IOWA CODE ANN. § 280.5 (West 2021) ("The board of directors of each public school district shall administer the pledge of allegiance in grades one through twelve each school day.").

D. Statutes which comply with Barnette

Twenty-one states—Alabama, Alaska, Arizona, Connecticut, Georgia, Kentucky, Maine, Michigan, Missouri, Montana, New Hampshire, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Utah, Washington, and West Virginia—have statutory provisions on the Pledge of Allegiance which comply with *Barnette* because they do not require any student to recite the Pledge. These statutory provisions cluster into two groups. The first is those that are cast in terms of students being afforded an opportunity to recite the Pledge, or words of similar meaning. The second is those that are cast in terms of the Pledge being recited.

1. Opportunity Statutes

The opportunity statutes are framed in terms of students being extended the opportunity to recite the Pledge. Some provide simply the opportunity. For example, the Georgia Pledge statute provides: "Each student in the public schools of this state shall be afforded the opportunity to recite the Pledge of Allegiance to the flag of the United States of America during each school day."[170] The Pledge provisions of Arizona,[171] Kentucky,[172] and Oregon[173] are similar.

Other opportunity statutes provide the opportunity and add clarifications of the voluntary nature of participation or explicit protections for non-participating students. For example, the Maine Pledge statute provides: "A school

The provision also contains an exemption. *Id.* ("A student shall not be compelled against the student's objections or those of the student's parent or guardian to recite the pledge."). It might be argued that the act of "administering" the Pledge suggests compelled student recitation. The original wording of the Iowa proposal was "offer," and it was amended to "administer." H.F. 415, Comm. State Gov. (Iowa 2021), https://www.legis.iowa.gov/legislation/BillBook?ga=89&ba=HF%20415&v=i [https://perma.cc/3C4Z-5VRD]. The author of the bill, a Republican, reports that the Democrats on the committee thought "offer" sounded too much like a mandate and requested the change to "administer." He did not see any difference between the two terms and supported the amendment. Interview by research assistant Martha Baker with Carter F. Nordman, Member of the Iowa House of Representatives, in Des Moines, Iowa (July 16, 2022) (*on file with author).

170. GA. CODE ANN. § 20-2-310(c)(1) (West 2001).

171. ARIZ. REV. STAT. ANN. § 15-506(A) (2022) ("School districts and charter schools shall: . . . Set aside a specific time each day for those students who wish to recite the pledge of allegiance to the United States flag.").

172. KY. REV. STAT. ANN. § 158.175(2) (West 2000) ("The board of education of each school district shall establish a policy and develop procedures whereby the pupils in each elementary and secondary school may participate in the pledge of allegiance to the flag of the United States at the commencement of each school day.").

173. OR. REV. STAT. ANN. § 339.875(1)(c) (West 2013) ("Provide students with the opportunity to salute the United States flag at least once each week of the school year."). The Oregon Pledge statute also includes a provision on the behavior of non-participating students. *Id.* at (3) ("Students who do not participate in the salute provided for by this section must maintain a respectful silence during the salute.").

administrative unit shall allow every student enrolled in the school administrative unit the opportunity to recite the Pledge of Allegiance at some point during a school day in which students are required to attend. A school administrative unit may not require a student to recite the Pledge of Allegiance."[174] The Pledge provisions of Alabama,[175] Connecticut,[176]

174. ME. REV. STAT. ANN. tit. 20-A, § 4010 (West 2011).

175. ALA. CODE § 16-43-5 (2019) ("The pledge of allegiance to the United States flag shall be conducted at the beginning of each school day and all students attending public kindergarten, primary, and secondary schools shall be given the opportunity each school day to voluntarily recite the pledge of allegiance to the United States flag.") The Alabama provision also includes a protection for non-participating students. *Id.* ("A student who refuses to recite the pledge of allegiance may not be punished or penalized for that refusal.").

A prior, functionally equivalent version of the Alabama Pledge statute was the subject of litigation which helps evaluate the current Alabama Pledge statute. *See generally* Holloman v. Walker Cnty. Bd. Of Educ., 334 F. Supp. 2d 1286 (2001); Holloman ex rel. Holloman v. Harland, 370 F.3d 1252,1252 (11th Cir. 2004), *reh'g* and *reh'g en banc denied*, 116 Fed. Appx. 254, 2004 WL 1737002. The previous formulation, as quoted by the *Holloman* appellate court, was: "The State Board of Education shall afford all students attending public kindergarten, primary and secondary schools the *opportunity* each school day to *voluntarily* recited the pledge of allegiance to the United States flag." *Holloman ex rel. Holloman*, 370 F.3d at 1262 (emphasis original to the cited opinion). Both the majority and the dissent in that appellate decision started from the proposition that the plaintiff had an absolute and unquestioned right to not participate in the Pledge recitation. "*Barnette* clearly and specifically established that schoolchildren have the right to refuse to say the Pledge of Allegiance." *Id.* at 1269. The dissent also acknowledges that *Barnette* controls: "*Barnette* prohibits a school from *compelling* a student to say the Pledge." *Id.* at 1303 (emphasis in original). The dissent also acknowledges that *Barnette* controls on the question of compelling a student to stand during the recitation of the Pledge: "A student may decide not to participate in the recitation of the Pledge by remaining silent and seated. In such circumstances, the holding of *Barnette* applies." *Id.* at 1301. In this case, of course, the plaintiff did stand. The trial court also appears to have conceded the point that Holloman had a right to refuse to say the Pledge. *Holloman*, 334 F. Supp. 2d at 1289 (speaking of Holloman "maintaining the silence that he had a right to maintain."). The opinion quotes with apparent approval the formulation of the Pledge statute as emphasizing "that students should not be forced to recite the pledge." *Holloman ex rel. Holloman*, 370 F.3d at 1262.

176. CONN. GEN. STAT. § 10-230 (2002):

> Each local and regional board of education shall develop a policy to ensure that time is available each school day for students in the schools under its jurisdiction to recite the 'Pledge of Allegiance'. The provisions of this subsection shall not be construed to require any person to recite the "Pledge of Allegiance."

The protection of *Barnette* has been extended to Connecticut teachers. Hanover v. Northrup, 325 F. Supp. 170, 173 (D. Conn., 1970).

Michigan,[177] New Hampshire,[178] North Dakota,[179] Ohio,[180] and South Dakota[181] are similar.

2. Recitation Statutes

The recitation statutes are framed in terms of the Pledge of Allegiance being recited, with student participation being voluntary, or words to that effect. For example, the West Virginia Pledge statute provides: "Every instructional day in the public schools of this state shall be commenced with a pledge of allegiance to the flag of the United States. Pupils who do not wish to participate in this

177. MICH. COMP. LAWS ANN. § 380.1347a.(1) (West 2012) ("[T]he board . . . shall ensure that an opportunity to recite the pledge of allegiance to the flag of the United States is offered each school day to all public school pupils in each public school it operates."). The next section provides a clarification. *Id.* § (2) ("A pupil shall not be compelled, against the pupil's objections or those of the pupil's parent or legal guardian, to recite the pledge of allegiance."). The following section provides an uncommon protection for non-participating students. *Id.* § (3):

> The board of a school district or intermediate school district or board of directors of a public school academy, and the school administrator in charge of a school building, shall ensure that a pupil is not subject to any penalty or bullying at school as a result of not reciting the pledge of allegiance.

178. N.H. REV. STAT. ANN. § 194:15-c.II. (2002) ("A school district shall authorize a period of time during the school day for the recitation of the pledge of allegiance. Pupil participation in the recitation of the pledge of allegiance shall be voluntary."). The New Hampshire provision includes language as to the conduct of students not participating in the pledge. *Id.* ("Pupils not participating in the recitation of the pledge of allegiance may silently stand or remain seated but shall be required to respect the rights of those pupils electing to participate.").

179. N.D. CENT. CODE ANN. § 15.1-19-03.1.5 (West 2017):

> A school board may authorize the voluntary recitation of the pledge of allegiance by a teacher or one or more students at the beginning of each schoolday. A student may not be required to recite the pledge of allegiance, stand during the recitation of the pledge of allegiance, or salute the American flag.

180. OHIO REV. CODE ANN. § 3313.602(A) (West 2009):

> The board of education of each city, local, exempted village, and joint vocational school district shall adopt a policy specifying whether or not oral recitation of the pledge of allegiance to the flag shall be a part of the school's program and, if so, establishing a time and manner for the recitation.

The local policy may not prohibit teachers from providing time for recitation of the pledge. *Id.* The governing policy, whether from the board or a teacher, "shall not require any student to participate in the recitation and shall prohibit the intimidation of any student by other students or staff aimed at coercing participation." *Id.* The Ohio statute also prohibits alteration of the wording of the pledge. *Id.*

181. S.D. CODIFIED LAWS § 13-24-17.2 (2014) ("Each school district shall provide students the opportunity to salute the United States and the flag each day by reciting the pledge of allegiance to the flag of the United States."). It includes a clarification on voluntary participation. *Id.* ("A student may choose not to participate in the salute to the United States and the flag."). It concludes with a requirement as to the conduct of non-participating students. *Id.* ("However, a student who does not participate in the salute shall maintain a respectful silence during the salute.").

exercise shall be excused from making such pledge."[182] The Pledge statutes of Alaska,[183] Missouri,[184] Montana,[185] North Carolina,[186] Pennsylvania,[187] Rhode Island,[188] Utah,[189] and Washington[190] are similar.

182. W. VA. CODE ANN. § 18-5-15B (West 1986).

183. ALASKA STAT. ANN. § 14.03.130(a) (West 2000) ("The governing body shall require that the pledge of allegiance be recited regularly, as determined by the governing body. A person may recite the . . . salute to the flag of the United States or maintain a respectful silence."). The Alaska statute also includes a notice requirement and protections for non-participants. *Id*. § (b) ("A school district shall inform all affected persons at the school of their right not to participate in the pledge of allegiance. The exercise of the right not to participate in the pledge of allegiance may not be used to evaluate a student or employee or for any other purpose.").

184. MO. REV. STAT. § 171.021.2. (2016):

> Every school in this state which is supported in whole or in part by public moneys shall ensure that the Pledge of Allegiance to the flag of the United States of America is recited in at least one scheduled class of every pupil enrolled in that school no less often than once per school day. . . .

The Missouri statute clarifies that compulsion is not allowed. *Id.* ("No student shall be required to recite the Pledge of Allegiance.").

185. MONT. CODE ANN. § 20-7-133(1) (2021) ("[T]he pledge of allegiance to the flag of the United States of America must be recited in all public schools of the state and may be followed by a moment of silence."). The Montana statute has a clarification that neither students nor teachers are required to participate in the recitation. *Id.* § (4):

> A school district shall inform all students and teachers of their right to not participate in recitation of the pledge. Any student or teacher who, for any reason, objects to participating in the pledge exercise must be excused from participation. A student or teacher who declines to participate in the pledge may engage in any alternative form of conduct so long as that conduct does not materially or substantially disrupt the work or discipline of the school.

Montana also includes a protection for non-participating students and teachers. *Id.* at (5) ("If a student or teacher declines to participate in the recitation of the pledge pursuant to this section, a school district may not for evaluation purposes include any reference to the student's or teacher's not participating.").

186. North Carolina has three pledge statutes, one for school boards, one for public schools, and one for charter schools. Each of the three requires daily recitation of the pledge and contains a clarification that no person shall be compelled to join in the recitation. N.C. GEN. STAT. ANN. § 116-69.1 (West 2006) ("The school shall . . . (2) require the recitation of the Pledge of Allegiance on a daily basis . . . ."); *Id.* ("The school shall not compel any person to stand, salute the flag, or recite the Pledge of Allegiance."). N.C. GEN. STAT. ANN. §115C-47(29a) (West 2022) ("Local boards of education shall adopt policies to . . . (ii) require that recitation of the Pledge of Allegiance be scheduled on a daily basis . . . ."); *Id.* ("These policies shall not compel any person to stand, salute the flag, or recite the Pledge of Allegiance."). N.C. GEN. STAT. ANN. § 115C-218.80 (West 2014) ("A charter school shall . . . (ii) require the recitation of the Pledge of Allegiance on a daily basis . . . ."); *Id.* ("A charter school shall not compel any person to stand, salute the flag, or recite the Pledge of Allegiance.").

187. The Pennsylvania Pledge statute provides for the daily recitation of the Pledge in public, private, and parochial schools. 24 PA. CONS. STAT. (EDUC.) §7-771(c)(1) (West 2003) ("All supervising officers and teachers in charge of public, private or parochial schools . . . shall provide for the recitation of the Pledge of Allegiance or the national anthem at the beginning of each school day."). There is an exemption for students based on religious conviction and personal belief. *Id.*

E. Statutes Which are so Unclear that a Barnette *Evaluation is Impossible*

Finally are three states—California, New Mexico, and New York—the statutes of which are so unclear that it is impossible to determine whether *Barnette* is implicated or not. California's Pledge statute is remarkably imprecise:

> In every public elementary school each day during the school year at the beginning of the first regularly scheduled class or activity period at which the majority of the pupils of the school normally begin the schoolday, there shall be conducted appropriate patriotic exercises. The giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy the requirements of this section . . . .[191]

("Students may decline to recite the Pledge of Allegiance and may refrain from saluting the flag on the basis of religious conviction or personal belief."). There is also an interesting notice provision for the parents of non-participating students. *Id.* ("The supervising officer of a school subject to the requirements of this subsection shall provide written notification to the parents or guardian of any student who declines to recite the Pledge of Allegiance or who refrains from saluting the flag."). The notice provision was struck down on First Amendment Grounds. Circle School v. Pappert, 381 F.3d 172, 183 (3d Cir. 2004).

188. R.I. GEN. LAWS ANN. § 16-22-11(a) (West 2022) ("All public schools, commencing with preprimary school through and including high school, shall commence each day with the . . . pledge. . . ."). The statute contains an exemption clarification. *Id.* § (b) ("Any person not wishing to participate in the 'pledge of allegiance' is exempt from participation and need not participate in the pledge.").

189. UTAH CODE ANN. § 53G-10-304(3)(a) (West 2020) ("The pledge of allegiance to the flag shall be recited once at the beginning of each day in each public school classroom in the state, led by a student in the classroom, as assigned by the classroom teacher on a rotating basis."). Curiously, since there is no generalized participation requirement in the Utah Pledge provision, the statute provides for written excuses. *Id.* § (c) ("A student shall be excused from reciting the pledge upon written request from the student's parent.").

The Utah Pledge provision is praiseworthy for the panoply of addition protections it provides. The Utah statute requires the posting of "a notice in a conspicuous place that the student has the right not to participate in reciting the pledge." *Id.* § (b). It requires that at least annually students be instructed the "participation in the pledge of allegiance is voluntary and not compulsory . . . ." *Id.* § (d)(i)(A). It requires that at least annually students be instructed that "not only is it acceptable for someone to choose not to participate in the pledge of allegiance for religious or other reasons, but students should show respect for any student who chooses not to participate." *Id.* § (d)(i)(B). Finally, the Utah statute is praiseworthy for the admonition to teachers: "A public school teacher shall strive to maintain an atmosphere among students in the classroom that is consistent with the principles described in Subsection (3)(d)(i)." *Id.* § (d)(ii).

190. WASH. REV. CODE ANN. § 28A.230.140 (West 1981) (schools shall "cause appropriate flag exercises to be held in each classroom at the beginning of the school day, and in every school at the opening of all school assemblies, at which exercises those pupils so desiring shall recite the . . . salute to the flag . . . ." The provision contains language concerning the behavior of students who do not desire to join in the recitation. *Id.* ("Students not reciting the pledge shall maintain a respectful silence.").

191. CAL. EDUC. CODE § 52720 (West 1976).

The California language is as precise as to *when* the thing is going to happen as it is imprecise as to *what* the thing is. Does it compel recitation by teachers or students? While "shall be conducted" and "appropriate patriotic exercises" may tend to indicate required student participation, and thus a *Barnette* violation, the reader has no clue as to what is to be made of "[t]he *giving* of the Pledge of Allegiance . . . ."[192]

Similarly, the New Mexico Pledge statute is framed in terms of requiring local school boards to provide for daily recital of the Pledge, but doesn't speak to whether it is voluntary or not: "Local school boards shall provide that the pledge of allegiance shall be recited daily in each public school in the school district according to regulations adopted by the state board [department]."[193]

New York's Pledge statute merely requires the commissioner prepare a plan for daily recitation, frustrating a *Barnette* evaluation: "It shall be the duty of the commissioner to prepare, for the use of the public schools of the state, a program providing for . . . a daily pledge of allegiance to the flag . . . ."[194]

* * *

Given that we are dealing with the First Amendment rights of school children, the Pledge statutes ought to be held to a high standard. As Justice Jackson observed: "That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."[195] The seven Pledge statutes which violate *Barnette* ought to be given their natural readings and found unconstitutional. The ten catch and release Pledge statutes should also be found unconstitutional because of their compulsory catch provisions.

IV. INDOCTRINATION IN STATE PLEDGE OF ALLEGIANCE STATUTES.

It has been said that the recitation of the Pledge of Allegiance "may be the core civic ritual in the United States and the most common—core because it extracts a personal promise of some sort, and most common because it is widely required in schools. . . ."[196] It is worth considering how rote recitation of the Pledge by school children comports with *Barnette*, and whether the practice is good public policy.

192. *Id.* (emphasis added).

193. N.M. STAT. ANN. § 22-5-4.5 (West 1986).

194. N.Y. EDUC. LAW § 802 (McKinney 2019). New York was the location of a case holding the rights of teachers under *Barnette* were not less than the rights of their students. Russo v. Central Sch. Dist. No. 1, 469 F.2d 623, 634 (2d Cir. 1992).

195. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

196. Walter C. Parker, *Pledging Allegiance*, 87 PHI DELTA KAPPAN 613 (Apr. 2006), http://depts.washington.edu/rchild/PledgingAllegiance.pdf [https://perma.cc/9KAJ-WTHM].

Of course, *Barnette* did not directly address the question of whether the rote recitation of the Pledge by non-objecting students and teachers was permissible. And it is conceded that some of the courts leading up to the Supreme Court consideration of *Barnette* referred to the recitation of the Pledge by schoolchildren in approving tones. For example, the *Barnette* district court started from the proposition that a compulsory flag salute was not improper: "There is, of course, nothing improper in requiring a flag salute in the schools. On the contrary, we regard it as a highly desirable ceremony calculated to inspire in the pupils a proper love of country and reverence for its institutions."[197] And in *Sandstrom*, Judge Lehman suggested "[t]he legitimate purpose of the salute to the flag . . . is to inculcate love of country and reverence for the things which the flag represents. . . ."[198]

In contrast, the Supreme Court in *Barnette* referred to the recitation of the Pledge by schoolchildren in rather different terms. The Court distinguished between "patriotic ceremonies [that] are voluntary and spontaneous" and "patriotic ceremonies [that are] . . . a compulsory routine."[199]

Barnette was based on the proposition that, to be meaningful, the decision to participate in recitation of the Pledge of Allegiance should be the product of individual judgment. Thus, we are told that recitation of the Pledge "requires affirmation of a belief and an attitude of mind."[200] In its analysis, the Court speaks of "free minds," "intellectual individualism," and "exceptional minds:"

> [W]e apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes.[201]

The *Barnette* Court also recognized that the students at issue are not fully formed intellects. For that reason, Justice Jackson quotes Chief Justice Stone's dissent in *Gobitis*, that the state may educate students in ways that lead to an appreciation of the nation: "[T]he State may 'require teaching by instruction and study of all in our history and in the structure and organization of our

197. Barnette v. W. Virginia State Bd. of Educ., 47 F. Supp. 251, 253 (S.D.W. Va. 1942), *aff'd*, 319 U.S. 624 (1943).

198. People v. Sandstrom, 18 NE.2d 840, 846 (N.Y. Ct. App., 1939) (Lehman, J. concurring). *But see Barnette*, 47 F. Supp. at 254–55 ("The salute of the flag is a gesture of love and respect—fine when there is real love and respect back of the gesture.") (quoting People v. Sandstrom, 18 N.E.2d 840, 847 (N.Y. Ct. App., 1939) (Lehman, J., concurring)).

199. *Barnette*, 319 U.S. at 641.

200. *Id*. at 633.

201. *Id.* at 642–43.

government, including the guarantees of civil liberty which tend to inspire patriotism and love of country.'"[202] In public schools, the state may require that history, philosophy, law, and other topics that inspire patriotism be taught. Justice Jackson described such educational process as "this slow and easily neglected route to aroused loyalties. . . ."[203] Indeed, the fact that those involved are students whose intellects are developing was a reason for particular caution:

> That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.[204]

It is unreasonable to expect elementary school students to have the intellectual capacity to make a truly voluntary decision to participate in the recitation of the Pledge. As it turns out, it is also unreasonable to expect the recitation of the Pledge by young children to have much of a patriotic effect on them. For one thing, the students apparently don't learn much by rote repetition. In one interesting historical study, researchers asked the question:

> Do teachers and pupils salute the flag because it is customary to do so, or do they perform this ceremony because they are compelled to do so by law and wish to be law-abiding citizens, or do they perform the ceremony because the flag is, to them, the symbol of liberty and justice for all?[205]

To gain insight into how the students viewed the Pledge, the authors asked 8,000 students who were in fourth through twelfth grade to write down the Pledge. Not one was able to write it correctly.[206] The authors reproduced a selection of the responses (note that the study predated the 1954 addition of "under God"):

> I pledge a legion to the flag and to the republic for which it stands one nation in the individual with liberty and justice for all.
>
> I pledge a legion to the flag of the United of a America. One nation inversial and with a stand.
>
> I Plage the legen to the flag and to the United States of America and to the puplic for witches stands one nason in afesable off liberty just for all.
>
> I plague the legion to the flag of the United States of America and to the republic for Richlan stand's one nation in indivisible with librty and jesta straw.[207]

The authors commented: "These illustrations may seem humorous to the reader but it becomes a serious problem when pupils have repeated the pledge every

202. *Id.* at 631 (quoting *Gobitis*, 310 U.S. at 604 (Stone, J. dissenting)).
203. *Id.*
204. *Id.* at 637.
205. A.C. Moser & B.B. David, *I Pledge a Legion*, 9 J. ED. SOC. 436, 437 (1936).
206. *Id.*
207. *Id.* at 438.

school day for a period of twelve years and understand so little about it."[208] They suggested that the lack of understanding of the Pledge came from the way in which it was introduced in the beginning grades:

> In teaching as well as in other professions we take too many things for granted. Pupils are promoted from grade to grade in this mechanical educational system of ours and are expected to receive a certain dose of knowledge in each grade . . . .
>
> So it is with the pledge of allegiance to the flag. Pupils in the first grade are taught the pledge by repetition. As they are promoted from grade to grade the repetition continues and we take it for granted that they know and understand the pledge. We have them rise each morning and give the pledge in a group. They make a striking appearance and it sounds fine, but when they are called upon individually to give the pledge it is a sad, sad story.[209]

An Education Director at a Head Start program reported on three to five-year old children learning the Pledge.[210] She reported a series of "varied and imaginative" word choices, and some interesting explanations:

> ("One nation under Bob") – "I don't know who Bob is, I got an Uncle Bob."
>
> ("[I put] Pledge [on the flag of the USA]") – "Cause you're waxing the flag to make it shine like my mom does to our table."
>
> ("One nation . . . invisible") – "You know . . . you can't see it."
>
> ("I pledge legions") – "I think that means you line all the soldiers up for miles and miles where the flag is and then it's a parade!"
>
> ("With liberty and juice for all") – "Everybody can get juice, and they don't have to pay for it."[211]

The author suggested that the rote recitation of the Pledge is a "developmentally inappropriate experience" for young children. Citing the work of a University of Illinois professor, she observed:

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208. *Id.*

209. *Id.* at 439–40.

210. Jill Eiseman Witherell, *To Pledge or Not To Pledge—Is That the Question?*, YOUNG CHILD. 64 (Jan. 1992).

211. *Id.* "Indivisible" is apparently a common problem. In 2006, a reporter visited a first-grade classroom in Massachusetts:

> While [the teacher's] first-graders have been saying the Pledge of Allegiance for two months, she says this fall day is perfect for a visitor because, "just yesterday I went over the meaning of the pledge with the class. Now they know what all the words mean." Well, maybe not all the words. "Indivisible" takes a few tries. One boy in an oversized rugby shirt confidently reminds the group it means "freedom." A ponytailed classmate eagerly raises her hand to correct him: "It means you can't be seen."

Chris Gaylord, *Backstory: Is America Pledging less? The Schoolkid's Mantra is More Legally Mandated than Ever, but Recited Less than Ever*, CHRISTIAN SCI. MONITOR, (Dec. 7, 2006), https://www.csmonitor.com/layout/set/print/2006/1207/p20s01-legn.html [https://perma.cc/T3W9-NGPS].

> She described young children as trusting and seeking approval from adults, therefore agreeing to do what the teacher asks even if it has no significant meaning or makes no sense to them. [She] makes the point that when we put children in a position to behave as though they understand something, when in fact they don't, we ultimately undermine their confidence in their own intellects.[212]

The author concluded that "[r]ote group recitation of the Pledge of Allegiance does not seem to be a desirable early method to use in helping young children grasp these abstract concepts."[213] She suggested a more constructive goal than mere rote recitation of the Pledge: "Ultimately, we hope that children could find their own words to express the ideas and values generated through these experiences . . . ."[214] And she gave a cautionary note about simply repeating the familiar routine: "No matter how comfortable and familiar they are to us, we must push ourselves to reassess routines in the classroom that do not support the way in which young children learn."[215]

Another observer confirmed the hollow nature of the Pledge recitation. He led "nearly 50 interpretive discussions or seminars on the pledge" with elementary and high school students, teachers, and parents.[216] He reported: "While many people have recited and memorized the pledge, few have interpreted it with others . . . . Participants typically say they've not done this before; they have been putting their hands to their hearts and promising something they have not thought much about."[217]

It is suggested that the goal of the Pledge recitation was never the type of thoughtful judgment identified by the *Barnette* court. It is reported that Francis Bellamy, the author of the Pledge, saw its recitation as a means of indoctrination, not as a reflection of fully-formed convictions:

> Bellamy saw the Pledge as a socialization technique similar to churches having youth recite the Lord's Prayer from childhood to adulthood. Bellamy felt that by inculcating youth over the course of their childhood, the premise of loyalty to

212. Witherell, *supra* note 210, at 64 (citing L. Katz, *The Importance of Developmentally Appropriate Curriculum* (July, 1988)).

213. *Id.* The author suggests an alternative:

> Perhaps we should first help children define feelings for what they personally like and don't like. We could explore freedom in terms of real-life choices they make at home and at school. We could relate the idea of a flag as a symbol to something a child is already familiar with . . .

Id.

214. *Id.* at 65.

215. *Id.*

216. Walter C. Parker, *Pledging Allegiance*, 87 PHI DELTA KAPPAN 613 (Apr. 2006), http://depts.washington.edu/rchild/PledgingAllegiance.pdf [https://perma.cc/C6XK-DNXK]. Professor Parker wrote: ". . . I've concluded that recitation without interpretation is like fishing in a dry lake." *Id.*

217. *Id.*

> the nation would be inescapable and so deeply imbedded in them that it would simply become a natural part of what they were.[218]

It is appropriate for the state to require the teaching of topics in school that tend toward students making informed decisions to be loyal to the government, what Justice Jackson described as "this slow and easily neglected route to aroused loyalties. . . ."[219] The state may foster national unity "by persuasion and example;" it may not do so by compulsion and indoctrination.[220] It is inappropriate, and arguably a violation of *Barnette*, for politicians to provide for the rote recitation of the Pledge, even by students who do not object.[221]

V. RETRIBUTION IN STATE PLEDGE OF ALLEGIANCE STATUTES

The *Barnette* protection against being compelled to recite the Pledge of Allegiance necessarily includes protection from retribution for making the decision not to recite. As Justice Murphy noted in his *Barnette* concurrence: "The trenchant words in the preamble to the Virginia Statute for Religious Freedom remain unanswerable: '. . . all attempts to influence [the mind] by temporal punishment, or burdens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness . . . .'"[222]

Such habits of hypocrisy and meanness are evident in how non-participating students are treated. One problem is that state legislators, not content with simply passing a Pledge statute, are tempted to enact other provisions to punish those who think differently about the Pledge than they do.

Two examples of such measures are the Tennessee and Virginia provisions which compel their students "[i]n recognition of the civic heritage of the United States of America . . . to learn the Pledge of Allegiance. . . ."[223] Having compelled "all students," including those who under the Tennessee and Virginia

218. Leisa A. Martin, Glenn P. Lauzon, Matthew J. Benus & Pete Livas Jr., *The United States Pledge of Allegiance Ceremony: Do Youth Recite the Pledge?*, SAGE OPEN 2 (January-March 2017), https://journals.sagepub.com/doi/pdf/10.1177/2158244017701528 [https://perma.cc/LHZ9-375W] (citing R.J. ELLIS, TO THE FLAG: THE UNLIKELY HISTORY OF THE PLEDGE OF ALLEGIANCE (Lawrence, University Press of Kansas, 2005)).

219. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 631 (1943) (Jackson, J., for the Court).

220. *Id.* at 640 ("National unity as an end which officials may foster *by persuasion and example* is not in question.") (emphasis added).

221. Admittedly, this question becomes exponentially more complex when one factors in the decision-making authority of parents. Presumably, the parents have the intellectual capacity to make the decision that their child should participate in the rote recitation of the Pledge of Allegiance. This would answer the *Barnette* compulsion analysis. The question then becomes whether schools should be complicit in the indoctrination of their students. Or should schools only participate in Justice Jackson's "slow and easily neglected route to aroused loyalties."

222. *Barnette*, 319 U.S. at 646 (Murphy, J., concurring) (quoting Code Va. 1919, § 344).

223. TENN. CODE ANN. § 49-6-1001(b) (2016), and VA. CODE ANN. § 22.1-202.A. (West 2001).

Pledge statutes are not required to recite, to learn the Pledge, the two statutes further compel the students "to demonstrate such knowledge."[224]

The statutes are silent as to how non-reciting students are compelled to demonstrate their mastery of the Pledge, but the obvious way would be to require them to recite it. Forcing a student who is otherwise exempt from reciting the Pledge "on religious, philosophical or other grounds" to recite it to demonstrate the student's knowledge of the pledge as part of civics education is petty and mean spirited.[225] To illustrate the point, imagine public school students who, as part of a required comparative religion class, were compelled to learn the Shahada, the oath from the Five Pillars of Islam—"I bear witness that there is no deity but God, and I bear witness that Muhammad is the messenger of God"—and were then compelled to recite it to demonstrate such knowledge. Do you not imagine some Christian parents would object?

Another petty and mean-spirited provision designed to supplement the basic Pledge statute is a recent proposal in Iowa. The Hawkeye state passed a Pledge statute recently.[226] Shortly thereafter, a junior state senator introduced a bill to punish "unpatriotic commentary on the United States" in connection with the Pledge of Allegiance recitation.[227] The Dickey bill had two provisions which sought to regulate the actions of teachers with respect to the Pledge of Allegiance. Section 2 provided:

> A teacher shall not, while in a classroom with any student in kindergarten through grade twelve, and with the intent to politically influence the student or students in the classroom, fail to do any of the following during the recitation of the pledge of allegiance:
>
> a. Recite the pledge of allegiance, unless a documented disability prevents the teacher from reciting the pledge of allegiance.
>
> b. Stand during the pledge of allegiance, unless a documented disability prevents the teacher from standing during the pledge of allegiance.[228]

Limiting exemptions for teacher recitation of the Pledge to those with "documented disabilities" of course violates *Barnette*. Section 3 provided additional unconstitutional provisions:

> A teacher shall not, while in a classroom with any student in kindergarten through grade twelve, speak about the pledge of allegiance in any manner in

224. TENN. CODE ANN. § 49-6-1001(b) (2016), and VA. CODE ANN. § 22.1-202.A (West 2001).

225. TENN. CODE ANN. § 49-6-1001(c)(1) (2016), and VA. CODE ANN. § 22.1-202.C (West 2001).

226. IOWA CODE ANN. § 280.5 (West 2021).

227. Iowa 89th General Assembly, S.F. 2043. The bill was introduced on January 13, 2022, by Senator Adrian Dickey and sent to the Senate Education Committee. Iowa 89th General Assembly, S.J. 96. Senator Dickey is a first-term senator from Jefferson County. It should be noted that Senator Dickey was not the author of Iowa's pledge of allegiance statute.

228. *Id.* § 2.

> which the student or students in the classroom may reasonably understand the teacher's speech to be any of the following:
>
> a. An unpatriotic commentary on the United States.
>
> b. An attempt to politically influence the student or students.[229]

The Dickey bill provided penalties for teachers who were found to violate its provisions. The first violation would have triggered written notices to the teacher, the parents of all students enrolled in the school, and the department of education and the board of educational examiners.[230] The second violation would have triggered notices and a one-week suspension without pay.[231] The third violation would have triggered notices and termination of employment.[232] Senator Dickey explained the reasoning behind his bill:

> I firmly believe reciting the Pledge of Allegiance is an opportunity to unify us as Americans, remind all of us of the rights we have, the freedoms that we enjoy, and just how darn fortunate we are to be living in this great country thanks to the sacrifices of so many before us. The bill that I introduced will help to do that.[233]

The Dickey bill was not passed into law.[234]

Such habits of hypocrisy and meanness are also evident in the way in which non-reciting students are typically treated. The Pledge statutes, even those which comply with *Barnette*, typically contemplate the Pledge being recited by those who wish to do so, with those who do not nevertheless being present.[235] Justice Kennedy speculated on one possible reaction of non-reciting students:

> [B]y statute, the Pledge of Allegiance to the Flag describes the United States a "one Nation under God." To be sure, no one is obligated to recite this phrase,

229. *Id.* § 3.

230. *Id.* § 4.a.

231. *Id.* § 4.b.

232. *Id.* § 4.c.

233. Sen. Adrian Dickey, *The Dickey Dispatch – January 21st, 2022*, OSKALOOSA NEWS (Aug. 6, 2022), oskynews.org/the-dickey-dispatch-january-21st-2022/ [https://perma.cc/EWY2-X4DW].

234. S.F. 2043 was referred to the Education Committee, from which it did not emerge. https://www.legis.iowa.gov/legislation/BillBook?ga=89&ba=SF2043 [https://perma.cc/Y8E2-GNAH]. The bill was opposed by the Iowa State Education Association, the Urban Education Network of Iowa, the Rural School Advocates of Iowa, the School Administrators of Iowa, the Iowa Association of Christian Schools, the Iowa Federation of Labor, AFL-CIO; AFSCME Iowa Council 61; the Interfaith Alliance of Iowa Action Fund; the United Professionals/UE; and the Iowa Mental Health Planning Council, https://www.legis.iowa.gov/lobbyist/reports/declarations?ga=89&ba=SF2043 [https://perma.cc/8BAS-L5DB].

235. *E.g.*, TENN. CODE ANN. § 49-6-1001(c)(1) (West 2016) ("Students who are thus exempt from reciting the pledge of allegiance shall remain quietly standing or sitting at their desks while others recite the Pledge of Allegiance and shall make no display that disrupts or distracts others who are reciting the Pledge of Allegiance."); OR. REV. STAT. ANN. § 339.875(3) (West 2013) ("Students who do not participate in the salute provided for by this section must maintain a respectful silence during the salute.").

> but it borders on sophistry to suggest that the "reasonable" atheist would not feel less than a "full membe[r] of the political community" every time his fellow Americans recited, as part of their expression of patriotism and lover for country, a phrase he believed to be false.[236]

Justice Kennedy may have been right about some non-reciting students, but it is reasonable to imagine that the situation is more complicated that he suggested.[237] The language of the Pledge suggests a variety of reasons for non-participation. One can imagine that some atheists, agnostics, and members of non-Christian religions take issue with "under God." People of color, women, the economically disadvantaged, and many others might take issue with "liberty and justice for all." Revanchists of the Southern rebellion might take issue with "one nation" and "indivisible." Jehovah's Witnesses and others might take issue with the act of pledging on religious grounds. Native Americans might reject the exercise on historical grounds. Students who are not citizens might decline to participate for that reason. And students who are citizens and who don't find themselves in any of these groups might take issue with the entire enterprise because of its often divisive nature.

Regardless of their personal reasons, non-participating students and teachers are placed at a remove by having to be present for recitations of the Pledge of Allegiance. Requiring them to be present is retributive, because it will not change the minds of any substantial number, but rather is simply a continuing reminder that they have made a choice disfavored by the state.[238] Like the petty

236. Allegheny County v. Pittsburgh ACLU, 492 U.S. 573, 673 (1989) (Kennedy, J., joined by Rehnquist, C.J., White, J., and Scalia, J., concurring in part and dissenting in part) (citations omitted). Justice Kennedy continued: "Likewise, our national motto, 'In God we trust,' which is prominently engraved in the wall above the Speaker's dias [sic] in the Chamber of the House of Representatives and is reproduced on every coin minted and every dollar printed by the Federal Government, must have the same effect." *Id. See also*, Allan W. Vestal, *Cents and Sensibilities*, 20 U. PENN. J. CON. L. 245, 307 (2017) ("Surely the time has come to remove the motto and recognize on our currency that the religious liberty interests of all our citizens have a claim prior to that of any religion.").

237. I should report that my reaction is not that suggested by Justice Kennedy. I am an atheist and I think a reasonable one. I do not feel less than a full member of the political community when the Pledge of Allegiance is recited. The presence of "under God" simply reminds me that when the phrase was inserted in 1954, a great many of my fellow Americans were bigots on matters of religion, a national disgrace that has improved but not gone away in the intervening years. In short, the problem is theirs, not mine.

238. *But see* Frain v. Baron, 307 F. Supp. 27, 29, 33 (E.D.N.Y., 1969). The cased involved three students who refused to recite the Pledge "because of a belief that the words 'with liberty and justice for all' are not true in America today. One is an atheist, who also objected to the words 'under God.'" *Id.* at 29. The students "refused to leave the room, and stand in the hall outside their homerooms until the conclusion of the ceremony, because they considered exclusion from the room to be a punishment for their exercise of constitutional rights." *Id.* The court granted a preliminary injunction enjoining the schools "from excluding plaintiffs from their classrooms during the Pledge

and mean-spirited statutes which would require non-participating students to nevertheless learn the Pledge, the requirement that they listen to the daily recitations of the Pledge by others seems calculated merely to punish those who have exercised their rights under *Barnette*.

Such habits of hypocrisy and meanness are also evident in the way in which non-reciting students are sometimes treated. The situations invariably suggest viewpoint discrimination, typically include egregious misconduct by individuals in positions of authority, and all too often involve students and faculty members from historically disfavored populations based on religion, politics, economics, and race. To illustrate the point, we briefly note four recent cases in which student's rights with respect to the Pledge of Allegiance were violated and ultimately vindicated. The cases are from a small town near Birmingham, Alabama in 2000; a suburb of Houston, Texas in 2017; a central Florida city in 2019; and the ninth largest city in New England also in 2019.

* * *

On Tuesday, May 16, 2000, John Michael Hutto and Michael Holloman were seniors at the Parrish High School in Walker County, Alabama.[239] They were just three days from graduating.[240] Under the then-applicable version of the Alabama Pledge statute, the school was charged with giving every student the opportunity to voluntarily recite the Pledge every school day.[241] Hutto and Holloman's opportunity was in Fawn Allred's first-period economics and government class.[242]

That day, during the recitation of the Pledge, John Hutto "remained silent with his hands in his pockets, without causing a disturbance."[243] When confronted by Fawn Allred, John Hutto responded that he "did not want to say it, he didn't have to say it, and he hadn't said it for a month."[244] Allred responded to Hutto, who she knew had received a Congressional appointment to the Air Force Academy upon graduation: "You don't want to say the pledge and the United States Air Force Academy has given you a scholarship?"[245] Allred reported the incident to the principal, George Harland, who "became very angry"

of Allegiance, or from treating any student who refuses for reasons of conscience to participate in the Pledge in any different way from those who participate." *Id.* at 33–34.

239. Holloman v. Walker Cnty. Bd. of Educ., 334 F .Supp. 2d 1286, 1288 (N. D. Ala. 2001); Holloman *ex rel.* Holloman v. Harland, 370 F.3d 1252, 1258–1260 (11th Cir. 2004), *reh'g* and *reh'g en banc denied*, 116 Fed. Appx. 254 (11th Cir. 2004).

240. *Holloman ex rel. Holloman*, 370 F.3d at 1261.

241. ALA. CODE § 16-43-5 (2019) ("The State Board of Education shall afford all students attending public kindergarten, primary and secondary schools the opportunity each school day to voluntarily recite the pledge of allegiance to the United States flag.").

242. *Holloman ex rel. Holloman*, 370 F.3d at 1260.

243. *Id.*

244. *Id.*

245. *Id.*

and met in his office with Fawn Allred, John Hutto, and the vice principal, Jason Adkins. Principal Harland:

> told Hutto that he was disappointed in Hutto's refusal to salute the flag, and threatened to report the incident to both Hutto's recruiter at the Air Force Academy as well as the Congressman who had recommended Hutto to the Academy. Harland also ordered Hutto to apologize to Allred and her class for refusing to salute the flag.[246]

The same day, principal Harland went to a physics class in which Michael Holloman was enrolled "and declared that 'anyone who joined in [Hutto's] protest and refused to say the pledge or committed similar action would be punished.'"[247] In subsequent days, John Hutto gave in to the principal's threats by reciting the Pledge and apologizing to Fawn Allred and her class.[248]

The next day, Wednesday, May 17, 2000, Hutto's classmate Michael Holloman:

> stood with the other students in Allred's class, but did not recite the Pledge of Allegiance. Instead, he silently raised his fist in the air while the rest of the class recited the pledge; once the pledge was over, he sat down like everybody else. He did not say anything, touch any other student, disrupt the class, or obstruct anyone's view of the flag.[249]

Teacher Fawn Allred "immediately chastised him in front of the class, saying that he had acted inappropriately and 'disrespectful[ly],' and that she was 'disappointed.'"[250] Allred reported Holloman's actions to principal Harland, who summoned the teacher and the student to his office.[251] There, Michael Holloman "explained that he had raised his fist 'in protest of what happened to [Hutto].'"[252] Principal Harland expressed his disappointment in Holloman, and informed him "that he would have to serve three days' detention and," it being just two days before the Holloman's high school graduation, he "could not receive his diploma until after he completed his punishment."[253] In addition, the principal required the plaintiff to apologize to Fawn Allred's class.[254]

Principal Harland's anger toward the student was evidenced by his own words: "When Holloman left Harland's office, Harland called Holloman's mother, explaining 'that he was too mad and upset to punish Michael at the time

246. *Id.*

247. *Id.*

248. *Id.* John Michael Hutto graduated from the United States Air Force Academy in 2004 with a degree in Military History. XLVI U.S. A.F. Acad., POLARIS 206 (2004), https://s3.amazonaws.com/usafayearbooks/2004.pdf [https://perma.cc/GP4E-MDRJ].

249. Holloman *ex rel.* Holloman, 370 F.3d at 1261.

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

because he may hurt Michael.'"[255] Principal Harland apparently overcame his fears, however:

> Since graduation was that Friday, there was not enough time left in the school year for Holloman to serve his detentions while still being able to receive his diploma on graduation day. Harland consequently offered Holloman the opportunity to receive a paddling instead. Holloman agreed and, Allred watching, was paddled by Harland.[256]

While corporal punishment was apparently allowed under the applicable rules,[257] the record was devoid of any indication as to how the plaintiff, a high school senior within hours of graduation, was spanked with "care, tact, and caution," or how the spanking helped establish or maintain "an educational climate conducive to learning" as required by the rules.[258] The Eleventh Circuit majority merely observed: "A student's pain and humiliation from this act of physical violence cannot be undone . . . ."[259]

The subsequent litigation included claims[260] that Michel Holloman was forced by the school, teacher Fawn Allred, and principal George Harland, "to recite the pledge of allegiance and/or to salute the flag of the United States of America" and that he "was subjected to punishment for refusing to comply with the compulsory pledge and salute . . . ."[261]

255. *Id.*

256. *Id.*

257. The majority opinion noted the school rule allowing corporal punishment:

> In order to establish and maintain an educational climate conducive to learning, the Board permits reasonable corporal punishment of students in the schools of the School District. If such punishment is required, it shall be administered with care, tact, and caution by the principal or his/her designee in accordance with Board policies.

Id. at 1293. The court noted that: "in the state of Alabama, spanking students is a legitimate part of a principal's 'arsenal' for enforcing . . . discipline." *Id.* at 1267. The Eleventh Circuit judge who concurred in part and dissented in part observed merely: "We are not called upon to decide the propriety of the type of punishment inflicted here." *Holloman ex rel. Holloman*, 370 F.3d at 1295 n.1 (Wilson, J. concurring in part and dissenting in part).

258. *Id.* at 1293 (Tjoflat, J. for the court).

259. *Id.*

260. The action was originally brought as a class action, but class action status was denied. *Holloman*, 334 F. Supp. 2d at 1288. As originally filed, the complaint included John Michael Hutto as a plaintiff, but an amended complaint did not include Hutto. *Holloman ex rel. Holloman*, 370 F.3d at 1262.

261. *Holloman*, 334 F. Supp. 2d at 1288.

Michael Holloman also made a third claim, which is not directly related to the Pledge issues, but which does give insight into both the classroom environment and the trial judge's evident bias. The claim was "that plaintiff was forced by defendant Allred, his teacher, to sit in class . . . for a school-sanctioned 'prayer request' and a moment of silence." *Id.* The trial judge characterized the facts as: "Allred, who admittedly sometimes 'slipped up' by using the word 'pray' instead of the words 'moment of silence,' would sometimes 'slip up' doubly by indicating the end of the

The trial court heard summary judgment motions of Fawn Allred and George Harland based on their claims of qualified immunity.[262] The way in which the trial court presented the facts of the case was telling. The trial court made no mention of the Tuesday, May 16, 2000, episode involving John Michael Hutto. Instead, the trial court started with Fawn Allred's statement "that the day before the incident in question," (the episode involving Michael Holloman, not John Hutto), "[Holloman] asked her if there was any way other than placing his hand over the heart, to salute the flag."[263] The trial court continued:

> Allred replied that plaintiff could salute the flag "military style". In Allred's opinion, perhaps not shared by everybody, when reciting the pledge of allegiance, either placing the hand over the heart or executing a military salute are "appropriate forms of expression", whereas raising one's clenched fist in the air is "not allowed . . . [and is] not acceptable behavior in this country."[264]

The trial court described Holloman's conduct:

> Instead of performing either of the socially accepted ways of saluting the flag, Holloman chose to raise his clenched fist while maintaining the silence that he had a right to maintain. This appeared to Allred and subsequently to Harland, to constitute an open act of defiance to school authority, as well as a protest against what the pledge of allegiance stands for.[265]

The trial court judge was clearly not sympathetic to the gesture that Holloman made during the Pledge recitation. He opined that Holloman's gesture "was

moment of silence by voicing the word 'amen', a poor substitute, perhaps, for the words 'let's get to work.'" *Id.* at 1290. The Eleventh Circuit reported the facts rather differently:

> Allred began her Economics and Government class almost every day by asking, "Does anyone have any prayer requests?" After her students offered various dedications, Allred would hold a moment of silence. Allred frequently opened this moment of silence by saying "Let us pray," and often ended it by saying "Amen." Allred explicitly states that over the 1999-2000 school year, this practice became a daily "ritual."

Holloman ex rel. Holloman, 370 F.3d at 1261.

262. *Holloman*, 334 F. Supp. 2d at 1287–88.

263. *Id.* at 1289. By failing to even mention the John Hutto incident, the trial court denies the reader necessary context for the question attributed to Michael Holloman.

264. *Id.* For the record, teacher Fawn Allred was wrong about the appropriate ways to salute the flag during the Pledge of Allegiance. Federal law provides:

> The Pledge of Allegiance to the Flag . . . should be rendered by standing at attention facing the flag with the right hand over the heart . . . . Persons in uniform should remain silent, face the flag, and render the military salute. Members of the Armed Forces not in uniform and veterans may render the military salute in the manner provided for persons in uniform.

4 U.S.C. § 4. On May 17, 2000, student Michael Holloman was not in uniform, was not a member of the armed forces, and was not a veteran. Contrary to Fawn Allred's statement, it would have been inappropriate for him to render a military salute during the Pledge recitation in her class.

265. *Holloman*, 334 F. Supp. 2d at 1289. *But see Holloman ex rel. Holloman*, 370 F.3d at 1261 ("Holloman explained that he had raised his fist 'in protest of what happened to [Hutto].'").

certainly designed to disrupt or to interfere with the patriotic routine in which other students were participating."[266]

The trial court judge presented a historical exegesis of the raised fist gesture:

> [Plaintiff's] gesture reminds this court of the sprinters, Tommie Smith and John Carlos, when they raised gloved clenched fists during the playing of the "The Star Spangled Banner" at the Mexico City Olympics in 1968 as a protest against whatever they were protesting against. The raised clenched fist, both then and now, is known as a signal of defiance and hostility toward societal norms.[267]

The judge's recitation was, at best, incomplete and misleading. The raised fist salute has been used by anti-Fascists, labor organizers, people acting against racism, and feminists.[268] Nelson Mandela used the raised fist salute upon his liberation from South African prison.[269] The raised fist salute has been used by Republicans,[270] including on January 6, 2020, by the junior United States Senator from Missouri.[271] More recently, the raised fist gesture has been appropriated by white nationalists.[272]

The trial judge proceeded from his historically inaccurate history of the raised fist gesture to announcing the context for his deliberations in a way that clearly suggests viewpoint-based discrimination against the student:

> Whether [plaintiff's] gesture was an echo of that event in Mexico City, this court cannot know. This court need not speculate about [plaintiff's] real intent. It could have been no more than a childish expression of resistance to authority, or it could have been a deliberate act of insubordination, or it could have been a little bit of both. This court is only concerned with whether the teacher and the principal, who legitimately perceived that what [plaintiff] did was objectionable,

266. *Holloman*, 334 F. Supp. 2d at 1289. *But see Holloman ex rel. Holloman*, 370 F.3d at 1261 ("[Holloman] did not say anything, touch any other students, disrupt the class, or obstruct anyone's view of the flag.").

267. *Holloman*, 334 F. Supp. 2d at 1289.

268. James Stout, *The History of the Raised Fist, a Global Symbol of Fighting Oppression,* NAT'L GEOGRAPHIC (July 31, 2020), https://www.nationalgeographic.com/history/article/history-of-raised-fist-global-symbol-fighting-oppression [https://perma.cc/ZN5C-84AU]. The author, a historian, identifies a common message from the different historical examples he discusses: "that we can defeat tyranny when we stand together." *Id.* Matthew A. McIntosh, curator, *A 20th-Century History of the Raised Fist as a Changing and Cross-Applicable Symbol*, BREWMINATE (Mar. 19, 2019), https://brewminate.com/a-20th-century-history-of-the-raised-fist-as-a-changing-and-cross-applicable-symbol/ [https://perma.cc/C87Z-5GCV] (as to feminists).

269. McIntosh, *supra* note 268 ("Nelson Mandela . . . used the clenched fist salute upon his release from Victor Verster prison in 1990.").

270. Albeit *Spanish* Republicans. "A raised fist . . . was popularized during the Spanish Civil War of 1936-1939, when it was used by the Republican faction as a greeting, and was known as the 'Popular Front salute' or the 'anti-fascist salute.'" *Id.*

271. *Josh Hawley Raised Fist Photo*, THE JOPLIN [MISSOURI] GLOBE (Apr. 28, 2022), https://www.joplinglobe.com/josh-hawley-raised-fist-photo/image_868b51aa-c70f-11ec-aed2-dfa1fe5db85a.html [https://perma.cc/7YYT-U8LD].

272. McIntosh, *supra* note 268.

> were lawfully exercising their discretion as employees of the Walker County Board of Education when they punished him for it.[273]

The *Holloman* trial court concluded: "[T]he court finds that the mild punishment administered to this student after he raised a clenched fist during the pledge of allegiance was not a violation of the First or Fourteenth Amendments."[274]

Both the majority and the dissent in the *Holloman* appeal started from the proposition that the plaintiff had an absolute and unquestioned right to not participate in the Pledge recitation.[275] The opinion quotes with apparent approval the formulation of the Pledge statute as emphasizing "that students should not be forced to recite the pledge."[276] That formulation is functionally the same as the current Alabama formulation.[277]

The Eleventh Circuit reversed the summary judgments granted by the trial court.[278] It ruled that "the district court erred in granting Allred and Harland summary judgment on qualified immunity grounds against Holloman's Speech Clause claims," and that he had "successfully articulated several theories under which the School Board may be held liable for the Speech . . . Clause violations . . . ."[279]

273. *Holloman*, 334 F. Supp. 2d at 1289. *But see Holloman ex rel. Holloman*, 370 F.3d at 1261 ("Holloman explained that he had raised his fist 'in protest of what happened to [Hutto].'").

274. *Holloman*, 334 F. Supp. 2d at 1290. *But see Holloman ex rel. Holloman*, 370 F.3d at 1261 (The "mild punishment" to which the trial court referred was corporal punishment by principal George Harland in presence of teacher Fawn Allred).

275. "*Barnette* clearly and specifically established that schoolchildren have the right to refuse to say the Pledge of Allegiance." *Holloman ex rel. Holloman*, 370 F.3d at 1269. The dissent also acknowledges that *Barnette* controls: "*Barnette* prohibits a school from *compelling* a student to say the Pledge." *Id.* at 1303 (emphasis in original). The dissent also acknowledges that *Barnette* controls on the question of compelling a student to stand during the recitation of the Pledge: "A student may decide not to participate in the recitation of the Pledge by remaining silent and seated. In such circumstances, the holding of *Barnette* applies." *Id.* at 1301. In this case, of course, the plaintiff did stand. The trial court also appears to have conceded the point that Holloman had a right to refuse to say the Pledge. *Holloman*, 334 F. Supp. 2d at 1289 (speaking of Holloman "maintaining the silence that he had a right to maintain.").

276. *Holloman ex rel. Holloman*, 370 F.3d at 1262.

277. The previous formulation, as quoted by the *Holloman* appellate court, was: "The State Board of Education shall afford all students attending public kindergarten, primary and secondary schools the *opportunity* each school day to *voluntarily* recited the pledge of allegiance to the United States flag." *Id.* (emphasis original to the cited opinion). The current Alabama formulation is: "The pledge of allegiance to the United States flag shall be conducted at the beginning of each school day and all students attending public kindergarten, primary, and secondary schools shall be given the *opportunity* each school day to *voluntarily* recite the pledge of allegiance to the United States flag." ALA. CODE § 16-43-5 (2019).

278. *Holloman ex rel. Holloman*, 370 F.3d at 1260. On appeal, the court viewed the evidence in the light most favorable to the plaintiff. *Id.*

279. *Id.* at 1263 (referring to Part II of the opinion as to the Speech Clause claims against Fawn Allred and George Harland, and Part V of the opinion as to the Speech Clause claims against the School Board). The appellate court also ruled that "Allred is not even potentially entitled to

* * *

Starting in 2014, Ms. Mari Oliver, then a freshman at Klein Oak High School in Spring, Texas, refused to participate in the classroom recitation of the Pledge of Allegiance.[280] She "objected to the pledge because she did not believe that the United States guarantees 'liberty and justice for all,' especially for people of color . . . She also did not agree with the words 'under God.'"[281] It was claimed that "there were myriad consequences for Ms. Oliver's opting out of the pledge.[282] Teachers singled her out during the pledge, sent her to the principal's office, admonished her after class, and confiscated her phone . . . ."[283] In September of 2017, as she was in her senior year, a sociology teacher: "played Bruce Springsteen's 'Born in the U.S.A.,' and asked the class to write about the feelings the song summoned up in them. He then instructed the students, including Ms. Oliver, to transcribe the words of the Pledge of Allegiance. . . ."[284] It is reported that:

> [a]fter the pledge assignment, [the teacher] told the class that students who failed to complete it would receive a zero grade, and then said that people who sat during the pledge were comparable to "Soviet communists, members of the Islamic faith seeking to impose Shariah law, and those who condone pedophilia . . . ."[285]

Another source reported that "He would tell the students if they weren't happy in the United States, he would pay them to move to Europe."[286] It was claimed that:

summary judgment on qualified immunity grounds against Holloman's Establishment Clause claims because she has not established as a matter of law that, in holding her daily moment of silent prayer, she was engaged in a discretionary function of her job." *Id.* (referring to Part III of the opinion). The appellate court also found that "Holloman has successfully articulated several theories under which the School Board may be held liable for the . . . Establishment Clause violations. . . ." *Id.* (referring to Part V of the opinion).

280. Christine Chung, *Texas Student Who Protested Pledge of Allegiance Gets $90,000 in Settlement*, N.Y. TIMES (Mar. 31, 2022), https://www.nytimes.com/2022/03/31/us/texas-pledge-of-allegiance-lawsuit.html [https://perma.cc/WW9J-9NGU].

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.* The sociology teacher, Mr. Benjie Arnold, "has taught at Klein Oak for more than five decades . . . ." *Id.* He "contended that the pledge assignment had a 'legitimate instructional purpose' and wasn't meant to instill patriotism . . . ." *Id.* "He also said that he had not harassed Ms. Oliver or treated her differently from her peers because of her refusal." *Id.*

285. *Id.*

286. Marcelino Benito, *Former Klein Oak ISD Student Gets $90,000 Settlement Following Federal Lawsuit*, KHOU 11 (Mar. 30, 2022), https://www.khou.com/article/news/local/klein-isd-student-bullied-refusing-stand-for-pledge-of-alliegance/285-d0a4b729-252f-4940-9da5-2386abbea9be [https://perma.cc/NTL4-MFL3] (quoting Geoffrey Blackwell of American Atheists).

> Despite knowing that the student was exempt from the pledge, the teacher . . . singled out the student and threatened to fail her for not observing the pledge. According to [the plaintiff], [the teacher] Arnold told the student that what she did left him "no option but to give you a zero, and you can have all the beliefs and resentment and animosity that you want."[287]

After four years in litigation, Ms. Oliver, who is Black, received a $90,000 settlement from the school district's insurer on behalf of the teacher.[288]

* * *

In 2019, a Lakeland, Florida sixth grader refused to recite the Pledge of Allegiance "because he felt the American flag represented unfair and discriminatory treatment of black people."[289] A substitute teacher "had what appeared to be a contentious exchange with the boy," including the statement "[i]f living in the United States is 'so bad,' why not go to another place to live?"[290] The sixth grader, who is Black, said: "They brought me here," and the substitute teacher responded: "Well you can always go back . . . ."[291] There ensued a disturbance.[292] The student was arrested by a school resource police officer, and charged with "disruption of a school facility and resisting an officer without violence."[293] The school terminated the substitute teacher, clarified that the school did not make the decision to arrest the student, and confirmed that its

287. Ariana Garcia, *Houston Area Student Wins $90,000 Settlement after being Bullied by Teacher for not Standing for Pledge of Allegiance, Chron*, HOUS. CHRON. (Mar. 30, 2022), https://www.chron.com/politics/article/Houston-area-student-wins-90K-settlement-after-17037351.php [https://perma.cc/22QQ-CJNJ] ("as evidenced by an audio recording of the incident").

288. Chung, *supra* note 280.

289. CNN Wire, *Florida Sixth-Grader Arrested in Pledge of Allegiance Dispute Will Not be Prosecuted*, FOX61 (Mar. 7, 2019), https://www.fox61.com/article/news/local/outreach/awareness-months/florida-sixth-grader-arrested-in-pledge-of-allegiance-dispute-will-not-be-prosecuted/520-d07c6ae6-edf4-47ae-aec1-9dad68c4fa1a [https://perma.cc/Y9Q9-2EQE].

290. Kristine Phillips, *Florida Sixth-Grader Arrested after Dispute with Teacher over Pledge of Allegiance*, WASH. POST (Feb. 18, 2019, 12:00 PM), https://www.washingtonpost.com/education/2019/02/17/florida-sixth-grader-charged-with-misdemeanor-after-refusing-recite-pledge-allegiance/ [https://perma.cc/3L5S-869P].

291. *Id.*

292. The police version of events was:

> The student yelled at the administrative dean and a school resource officer with the Lakeland Police Department after they came to the classroom, accusing them of being racist and repeatedly refusing to leave the room.
>
> "Suspend me! I don't care. This school is racist," the student, who is black, told the dean as he walked out of the classroom with his backpack . . .
>
> . . .the boy then "created another disturbance and made threats while he was escorted from the office."

Id.; "The family disputed the version of events in the police report, describing it as 'largely fabricated in order to justify the wrongful arrest' . . . ." FOX61, *supra* note 289.

293. Phillips, *supra* note 290.

students are not required to recite the Pledge.[294] Three weeks later it was announced the student would not be prosecuted.[295]

* * *

Also in 2019, a Waterbury, Connecticut student refused to recite the Pledge.[296] The "African-American student refused to stand, citing her First Amendment rights . . . ."[297] It was reported "that a teacher publicly shamed the teenage girl and several of her classmates for opting out of the daily rite."[298] The school board settled "following officials' promises that students don't have to take part in the pledge if they don't want to," and with an agreement to pay the student's legal fees.[299]

* * *

At the time of these incidents, Alabama and Connecticut had Pledge statutes which complied with *Barnette*. Texas and Florida had catch and release provisions which violated *Barnette*. Michael Holloman, Mari Oliver, and the unnamed students in Florida and Connecticut ultimately prevailed. But given the fundamental Constitutional rights involved, it is reasonable to ask if it is enough that the rights of these students were ultimately vindicated. One has to wonder how many other students there are whose First Amendment speech rights are being violated without any recourse.

VI. CONCLUSION

Justice Black was correct in *Barnette*, true loyalty to the nation must come from willing hearts and free minds. Love of country cannot arise from compulsion, indoctrination, and retribution. Why is it, then, that many of our state legislators seem insensible to the axiom that in a democracy genuine loyalty to the government must be earned, not coerced?

Barnette held that the state may not compel students to recite the Pledge. It also spoke to the proper role of government: "the State may '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

294. *Id.*

295. FOX61, *supra* note 289.

296. Ryan J. Farrick, *Connecticut Settlement Shows Schools Can't Get Pledge of Allegiance Rights Right*, LEGAL READER (Feb. 21, 2019), https://www.legalreader.com/connecticut-settlement-schools-pledge/ [https://perma.cc/8Q2X-CCUB].

297. *Id.*

298. *Id.*

299. *Id.*

patriotism and love of country.'"[300] This is the "slow and easily neglected route to aroused loyalties" of which Justice Jackson spoke.[301]

Barnette confronted a situation where the slow route to aroused loyalties through education was subverted by compelling students who had religious or philosophical objections to recite the Pledge. That heinous method is gone, at least in theory. But states continue to indoctrinate students to recite the Pledge and to engage in retribution against students when they choose to not participate. In a setting that demands the "scrupulous protection of Constitutional freedoms of the individual," states continue to subvert the slow route to aroused loyalties through education.[302]

And toward what end? The notion that the government has the right to connive for its survival through the indoctrination of children is curious. As *Barnette* declared, "Free public education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, party, or faction."[303] Certainly, the founders believed that the government had to earn its continuation.[304]

Forcing students of tender age and non-participating students to sit through daily repetitions of a pledge serves no conceivable purpose relating to education. Those actions, too, are, as Justice Murphy put it "overshadowed by the desirability of preserving freedom of conscience to the full. It is in that freedom and the example of persuasion, not in force and compulsion, that the real unity of America lies."[305]

State legislators ought to act to preserve freedom of conscience to the full. They should, as a prudential matter, revise state Pledge statutes to eliminate compulsion, stop having students of tender age recite the Pledge, and cease acts of retribution against non-participating students. I am under no illusion that state legislators will rise to the occasion, especially in this era of heightened political division and strife. But the certainty that they won't act doesn't mean they shouldn't.

300. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 631 (1943) (Jackson, J., for the Court) (quoting *Gobitis*, 310 U.S. at 604).

301. *Id.*

302. *Id.* at 637.

303. *Id.*

304. Perhaps such legislators should reflect upon the founders' words when they first asserted our right to independence:

> [G]overnments are instituted among Men, deriving their just powers from the consent of the governed; that whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its power in such form, as to them shall seem most likely to effect their Safety and Happiness.

THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

305. *Barnette*, 319 U.S. at 646 (Murphy, J., concurring).

Justice Black returned to the central truth that loyalty must be earned, not coerced, in his concurring opinion in a late McCarthy-era loyalty oath case: "I am certain that loyalty to the United State can never be secured by the endless proliferation of "loyalty" oaths; loyalty must arise spontaneously from the hearts of people who love their country and respect their government."[306]

The petty tyrannies involving school children and the recitation of the Pledge of Allegiance should end.[307] Instead, state legislators should get about the infinitely more difficult business of earning the respect and allegiance of each rising generation of citizens.

306. First Unitarian Church of L.A. v. County of L.A., 357 U.S. 545, 547 (1958) (Black, J., with Douglas, J., concurring) (referencing Speiser v. Randall, 357 U.S. 513, 532 (1958) (Black, J., with Douglas, J., concurring)).

307. *Barnette*, 47 F. Supp. at 255 ("The salute to the flag is an expression of the homage of the soul. To force it upon one who has conscientious scruples against giving it, is petty tyranny unworthy of the spirit of the Republic and forbidden, we think, by its fundamental law.").