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A CLOSE READING OF *BARNETTE*, IN HONOR OF VINCENT BLASI

Paul Horwitz*

I am aware that we must decide the case before us and not some other case. But that does not mean that a case is dissociated from the past and unrelated to the future.¹

—Justice Felix Frankfurter

I. INTRODUCTION

Because he spent years teaching at both Columbia and the University of Virginia (after stints at Texas and Michigan), Vincent Blasi has been influential, as a colleague or teacher, for many contemporary First Amendment scholars. Although all of us have learned from his first-rate body of writing on the First Amendment, his influence as a teacher has been no less profound. I was fortunate enough to take one of his First Amendment classes as an LL.M. candidate at Columbia in 1996-97, and I have tried to pay back my debt to him, and benefit my own students, by “borrowing”—or, more plainly, stealing—some of his teaching techniques ever since.

Perhaps the central element of his teaching that every student of Blasi’s remembers, and that many of us have adopted in our own classes, is his assignment of what he calls “critiques” or “close readings.”² In the close reading assignment, students are asked to select a case or some other discrete text³ and offer a careful, thorough treatment of the case. It is *not* a research paper. The goal is to get the most out of the opinions in *that* case, not to dig

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¹ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 660 (1943) (Frankfurter, J., dissenting).

² The teacher’s manual to the first edition of Blasi’s *Ideas of the First Amendment* casebook refers to them as “critiques,” but I remember him as having called them close readings, and that is what I call them when assigning them to my students.

³ Blasi also uses the assignment in his *Ideas of the First Amendment* course, in which the readings include classics like Milton’s *Areopagitica* and Madison’s *Memorial and Remonstrance*. In my own Law and Religion class, I give students a list of cases and a number of texts, including the *Memorial and Remonstrance*, one or two classic early American political sermons such as Elisha Williams’s *The Essential Rights and Liberties of Protestants*, and a few timely or essential law review articles. I usually include some of my own work, not in the hope of receiving praise but because, after poking around in my students’ minds, I believe they are entitled to reciprocity. Students are assigned two close readings over the course of the semester and at least one must center on a case rather than some other text.

through the First Amendment caselaw or secondary literature. Nor is it a line-by-line analysis or exercise in doctrinal skill. It is an exercise in selectiveness. The student may choose a single theme, drawing on all the opinions in that case to develop and critique that theme. Or she may focus on a single opinion, or even a section, paragraph, or sentence in that opinion, exploring the meaning of that portion of the opinion: its unspoken premises, its logic, its promise, and its flaws. The goal is to achieve a genuine intellectual experience, a fresh encounter between a text and its reader, one that constitutes an original and genuine expression rather than an imitation or the kind of third-person summary of masses of doctrine that characterizes law school exams.

To this I would add two other features that make the close reading a valuable form of writing for students and scholars alike. The first Blasi himself emphasized in talking to his students, as best as I can remember, and the second he exemplifies in his own work.

First, there is the sad fact that the reading of complete judicial opinions is relatively infrequent in American legal education. The casebook is the primary vehicle for legal education in this country. Far from its Langdellian origins, which focused on “largely unedited, appellate opinions,”⁴ many casebooks feature a vast selection of miniscule case excerpts. Langdell wanted students to have “direct, unlimited, and continuous access” to cases.⁵ Over time, however, casebook editors took to “heavily edit[ing]”⁶ the cases that appear within them, for many reasons: to make room for questions, commentary, and non-case “materials”; to keep up with the proliferation of caselaw; to provide teachers with options for what to teach or omit; to keep the casebook from becoming too long (*not* a successful project, on the whole); and so on. Although I suspect this is less true today, the heavy redaction of judicial opinions has been used as a selling point, according to which cases are “‘heavily enough edited’ that students ‘are not forced to struggle through unnecessary detail and discussion before reaching the point of the case.’”⁷ In “doing more and more editorial work,” “whittl[ing]” cases

⁴ Kate O’Neill, *But Who Will Teach Legal Reasoning and Synthesis?*, 4 J. ASS’N LEGAL WRITING DIRECTORS 21, 29 (2007); see also Stephen M. Johnson, *The Course Source: The Casebook Evolved*, 44 CAP. U. L. REV. 591, 618 (2016) (noting that the first edition of Langdell’s casebook on contract law “was a thousand-page collection of cases, mostly unedited, with a topical index and no commentary other than a three-page preface”).

⁵ Matthew Bodie, *The Future of the Casebook: An Argument for an Open-Source Approach*, 57 J. LEGAL EDUC. 10, 12 (2007).

⁶ Johnson, *supra* note 4, at 620.

⁷ E. Allan Farnsworth, *Casebooks and Scholarship: Confessions of an American Opinion Clipper*, 42 SW. U. L. REV. 903, 906 (1988) (quoting a circular letter sent to law professors by the author of a contract law casebook).

“down into snippets” while expanding “the space devoted to explaining what the cases stand for,” the casebook editor taking this approach produces a product that is “easier and easier for the students to read and digest”; but in doing so, she is “in fact doing less and less for the teaching process.”⁸

Based on my occasional surveys of new casebooks, I think this trend peaked some time ago, and that more casebook editors are attempting to include longer versions of cases. But that is a relative measure. Through most of their educations, with the exception of legal writing classes, a few unusual teachers or courses, and perhaps work on longer papers, law students still spend most of their time with heavily edited cases.

Thus, to speak to the case at hand, a student using a recent edition of the popular Gerald Gunther-descended constitutional law casebook would encounter a page-and-a-half excerpt from *West Virginia Board of Education v. Barnette*.⁹ The student gets a taste of *Barnette*, including the classic “fixed star in our constitutional constellation” passage and, perhaps for color and with some critical intent, a portion of Justice Frankfurter’s dissent identifying himself with “the most vilified and persecuted minority in history.” What the student will not get is the wealth and richness of the *entire* case—the facts and their use, the multiple observations and apothegms of Justice Jackson, the rich doctrinal and jurisprudential dissent of Justice Frankfurter, which involves much more than an impassioned personal statement, and the multiple conflicting ideas offered in the concurrences of Justices Black and Murphy.¹⁰

A second element of legal education that makes the close reading a useful exercise is the nature of student evaluation in legal education. Again, my anecdotal sense is that things are improving. But the issue-spotting

⁸ Anthony D’Amato, *The Decline and Fall of Law Teaching in the Age of Student Consumerism*, 37 J. LEGAL EDUC. 461, 485–86 (1987). The date of the article suggests that complaints about consumerism in legal education began long before so-called Millennials entered the law classroom.

⁹ 319 U.S. 624 (1943). See KATHLEEN M. SULLIVAN & NOAH FELDMAN, CONSTITUTIONAL LAW 1321–23 (18th ed., 2013); *id.* at 1497–98 (repeating, in a chapter on the Religion Clauses, a portion of the same excerpt used previously in a chapter on free speech). In the (wonderful) casebook I use in teaching law and religion, *Barnette* fares somewhat better, getting just under three and a half somewhat denser pages. See MICHAEL W. MCCONNELL, THOMAS C. BERG & CHRISTOPHER C. LUND, RELIGION AND THE CONSTITUTION 458–61 (4th ed. 2016).

¹⁰ I regret that I do not examine those opinions here. They certainly deserve the attention. Among other things, in keeping with the “pre-capitulation” theme that I pursue below, the concurring and dissenting opinions offer a remarkably full advance version of the arguments that have occupied Free Exercise Clause law over the past 75 years. And Justice Frankfurter’s dissent, whether one agrees with it or not, has faced decades of undeserved neglect. That may be changing. See, e.g., Samuel Moyn, *Human Rights and Majority Politics: On Felix Frankfurter’s Democratic Theory* (Jan. 20, 2019) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3319515).

exam—often a single final exam that, absurdly,¹¹ comprises one’s whole grade in a course—is still an American law school mainstay. The goal of such exams is to integrate a large body of doctrine and cases. The exam answer should include some nuance and detail, but is fundamentally synoptic. Students focus on aggregating multiple cases (more accurately, case excerpts) rather than engaging closely with a single case. Student notes sometimes focus on a single case, but more often focus on a single legal *issue* while drawing on multiple cases. In short, there are few opportunities in legal education to engage closely with the full version of a single judicial decision, let alone to engage with it as a more or less self-contained *text*.

This is not Blasi’s way. That is evident not only in his teaching, but in his own, extraordinary scholarship. Much of that work consists not of doctrine-chopping and the manipulation of multiple cases,¹² but of rich examinations of individual thinkers (both judges and others) and, often, single pieces of writing by those thinkers. Over the years, they have included close readings of Milton’s *Areopagitica*,¹³ Justice Brandeis’s concurring opinion in *Whitney v. California*,¹⁴ Justice Holmes’s dissent in *Abrams v. United States*¹⁵ and its classic reference to the marketplace of ideas,¹⁶ and Learned Hand’s opinion in *Masses*.¹⁷ In one lecture, he moved to a micro-level, examining passages by Holmes and John Stuart Mill.¹⁸ Nor has he neglected *Barnette*, having co-written a penetrating chapter on that case with Seana Shiffrin.¹⁹

To pay tribute to Blasi by offering my own “close reading” is, I hope, fitting. To do so by writing on a case to which he (and, of course, his co-

¹¹ See, e.g., Nancy B. Rapoport, *Is “Thinking Like a Lawyer” Really What We Want to Teach?*, 1 J. ASS’N LEGAL WRITING DIRECTORS 91, 97, 102 (2002).

¹² Although he has made important contributions to the First Amendment literature that fall more into this category. See, e.g., Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521; Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449 (1985); Vincent Blasi, *Free Speech and Good Character*, 46 UCLA L. REV. 1567 (1998).

¹³ See Vincent Blasi, *John Milton’s Areopagitica and the Modern First Amendment*, 13 COMM. LAW. 1 (1995).

¹⁴ 274 U.S. 357 (1927). See Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 WM. & MARY L. REV. 653 (1988).

¹⁵ 250 U.S. 616 (1919).

¹⁶ See Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1 (2004).

¹⁷ Vincent Blasi, *Learned Hand and the Self-Government Theory of the First Amendment: Masses Publ’g Co. v. Patten*, 61 U. COLO. L. REV. 1 (1990) (discussing *Masses Publ’g Co. v. Patten*, 244 F. 535 (S.D.N.Y. 1917)).

¹⁸ See Vincent Blasi, *Shouting Fire in a Theater and Vilifying Corn Dealers*, 39 CAP. U. L. REV. 535 (2011).

¹⁹ See Vincent Blasi & Seana V. Shiffrin, *The Story of West Virginia State Board of Education v. Barnette: The Pledge of Allegiance and the Freedom of Thought*, in *FIRST AMENDMENT STORIES* 99 (Richard W. Garnett & Andrew Koppelman eds., 2012).

author, Shiffrin, as well) has already brought a keen eye is, perhaps, foolhardy.²⁰ That's especially true because in some respects what follows departs from the model of a close reading I have described above.

For the most part, and despite the usual array of footnotes that have attached themselves like barnacles to this article, I have avoided the secondary literature on *Barnette*, instead focusing on my own reading of the case. I also avoid slotting *Barnette* into a larger doctrinal framework. I have something to say about what arguably followed from *Barnette*, but the primary focus of this reading is still the text of *Barnette* itself.

Unlike the usual approach of a classic Blasi close reading, however, this article does not follow a single theme or focus on a single passage. Indeed, the most famous passage from *Barnette*—Justice Jackson's "fixed star" statement about the impermissibility of government orthodoxy, which has been called one of the "dozen or so most quoted and revered passages to appear in a Supreme Court opinion"²¹—has already been subjected to this kind of analysis so often that I mostly omit it here.²²

Instead, I offer a gallery of passages from Justice Jackson's opinion in *Barnette*. Each of them has been given far less attention by First Amendment scholars, and each could easily support a close reading of its own. These passages are worth exploring both in themselves and for the light they shed on the whole opinion in *Barnette*. Beyond that, however, these passages also shed light on how First Amendment doctrine itself has developed over the past 75 years. If this is not quite the kind of exercise that Professor Blasi asks his students to undertake, it at least serves as notice that one student—standing in for many, I'm sure—has not forgotten Blasi's emphasis on the importance of delving into the entirety of a judicial opinion.

Before exploring the passages I wish to highlight, allow me to offer a couple of general framing remarks. The first takes stock of *Barnette* in its 75th anniversary year. On the one hand, *Barnette*'s stock is high. It had a good year. It was cited by the majority, not trivially but significantly, in two

²⁰ Perhaps doubly foolhardy, for a reason I could have foregone sharing but feel compelled and slightly delighted to reveal. While I did well in Blasi's class, my wife, Kelly Riordan Horwitz, was a student in one of his First Amendment courses and wrote a close reading that he still remembered and handed out as an exemplary close reading years later, long after he had forgotten my own contribution. Unfortunately, she was not invited to contribute to this symposium, and so he will have to make do with this tribute from a lesser author.

²¹ Steven D. Smith, *Barnette's Big Blunder*, 78 CHI.-KENT L. REV. 625, 625 (2003).

²² See, e.g., *id.*; Andrew Koppelman, *No Expressly Religious Orthodoxy: A Response to Steven D. Smith*, 78 CHI.-KENT L. REV. 729 (2003); Abner Greene, *The Pledge of Allegiance Problem*, 64 FORDHAM L. REV. 451 (1995).

major decisions last Term—*Masterpiece Cakeshop*²³ and *Janus*²⁴—and again significantly in a dissent in the crisis pregnancy center case, *Becerra*.²⁵

Other recent evidence, however, suggests that it is in poorer health than these examples indicate, at least in academic circles. One might, for instance, expect discussion of *Barnette*, if only to distinguish it, in scholarly treatments of hot-button cases like *Masterpiece Cakeshop*, *Elane Photography*,²⁶ or *Arlene's Flowers*.²⁷ One can find plenty of articles discussing these cases. Some 61 law review articles cite all three, while 78 cite the latter two, and nearly 165 cite *Masterpiece* and at least one of the other two cases. If one adds “*Barnette*” to the search terms, however, the numbers plummet to 15, 18, and 33 articles, respectively.²⁸

Of course, one can distinguish *Barnette* from the wedding-vendor cases. Lawyers can almost always distinguish precedents. What is interesting is not whether scholars believe that it is distinguishable or not, but that many of them skip the question altogether. It is simply absent from much of the discussion. I doubt this is because the case has been forgotten or treated as irrelevant. It *could* suggest that a larger number of scholars think of *Barnette* as antiquated or passé despite its apparent vitality in the courts. But I think a more likely explanation is that a growing number of scholars are *uncomfortable* with *Barnette*. They are uneasy about how it fits into modern legal doctrine and substantive debates and what it suggests about current fashionable positions. This is speculation on my part, to be clear. As we will see, however, it is relevant to the conclusions I draw from a close reading of *Barnette*.

The second general observation concerns *Barnette*'s relationship to the development of First Amendment law over the 75 years. *Barnette* is important to modern First Amendment law in two ways. The first is so generally accepted that it requires little comment. I doubt any citation is necessary for the proposition that *Barnette* is one of the key opinions in the canon of First Amendment law.²⁹

²³ See *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rts. Com'n*, 138 S. Ct. 1719, 1731 (2018).

²⁴ See *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2463 (2018).

²⁵ See *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2387 (2018) (Breyer, J., dissenting).

²⁶ See *Elane Photography, L.L.C. v. Willock*, 309 P.3d 53 (N.M. 2013).

²⁷ See *State v. Arlene's Flowers*, 187 Wash. 2d 804 (2017).

²⁸ The numbers in this paragraph are based on searches of the Westlaw Law Reviews & Journals database. In keeping with the anniversary year theme and to control for later discussions offering rote citations to *Barnette* because of its appearance in the Supreme Court's decision in *Masterpiece Cakeshop*, I limited the date field to articles published before January 1, 2019.

²⁹ Here are a couple anyway. See, e.g., Timothy Zick, *Managing Dissent*, 95 WASH. U. L. REV. 1423, 1451 (2018) (calling *Barnette* “part of the First Amendment canon” and “an iconic affirmation of a

The second point is less often observed, although it is probably true of many canonical constitutional cases. In both freedom of speech and freedom of religion, *Barnette* not only serves as the fount for what would follow, but offers a fascinating predictive summary—what I call a *pre-capitulation*³⁰—of the development of legal doctrine in these areas over the subsequent 75 years. Some of this will be evident in the discussion of aspects of Justice Jackson’s opinion below. Even more of it can be found in the concurring and dissenting opinions in the case, which unfortunately are omitted from this discussion. Between them, the four opinions in *Barnette* read like a syllabus of the major issues in First Amendment law between 1943 and 2018. I suggest that there are two related reasons for this, both of which should be of interest to students of *Barnette* and other canonical cases and to constitutionalists more generally.

The first reason has to do with the particular mode of greatness of Justice Jackson’s opinion in *Barnette*. Paraphrasing Richard Posner’s description of Justice Holmes’s dissent in *Lochner*,³¹ we can say of Jackson’s opinion in *Barnette* that it is “not . . . a good judicial opinion. It is merely [one of] the greatest judicial opinion[s] of the last hundred years.”³² The *Barnette* opinion is not great because it is tightly organized, exhaustive and careful in its use of existing precedents, carefully aimed at and confined to the facts, or clear and precise in the doctrinal rule it announces. It decides the case, but it does very little by way of practical doctrinal development. Beyond the particular context, it offers very little by way of judicially clear and manageable standards for lower courts in the area of what came to be labeled as “compelled speech.”³³

Rather, the opinion is great because it is rich, fascinating, eloquent, sweeping, and powerful. It lacks the brevity of Holmes’s *Lochner* dissent, which “focuses and commands the reader’s attention” and “gives the opinion

core right to dissent with respect to and resist majoritarian ideas regarding politics, patriotism, and nationalism”); Steven G. Calabresi, *On Liberty, Equality, and the Constitution: A Review of Richard A. Epstein’s The Classical Liberal Constitution*, 8 N.Y.U. J.L. & LIBERTY 839, 925 (2014) (writing, somewhat awkwardly, that with *Barnette* “the New Deal Supreme Court . . . issued one [of] its most important liberty protective opinions of all time”).

³⁰ In keeping with the current and unfortunate vogue in legal scholarship for novelty by neologism or by clever labeling or branding, I am pleased to note that “pre-capitulation” cannot be found anywhere else in the law review databases. As with many other ostensibly novel ideas or labels, that is hardly any guarantee that the concept itself is unknown or unused. Many well-placed articles these days achieve the appearance of novelty by slapping new labels on old ideas.

³¹ *Lochner v. New York*, 198 U.S. 45 (1905).

³² RICHARD A. POSNER, *LAW AND LITERATURE* 346 (3d ed. 2009).

³³ One might contrast *Barnette* with Eugene Volokh’s recent helpful, detailed, and distinctly doctrinalist treatment of that subject. See Eugene Volokh, *The Law of Compelled Speech*, 97 TEX. L. REV. 355 (2018).

a power it would lack if it were longer and more diffuse, burying the aphorisms under qualifications, citations, quotations, legal jargon, numbing factual detail, and the other common padding of judicial opinions.”³⁴ But like that dissent, it is rich with aphoristic eloquence and short on technical jargon and detail. Indeed, despite its relative length, in legal and public memory it has been reduced to a just a few ringing passages—especially the “fixed star” passage. It is not great because these passages are clear or clearly right, but because they *feel* clearly right. Like other great texts in the literature of American civil religion, they are suggestive, inspirational, intuitively persuasive, and fertile. Like those other texts, if read either literally and mechanically or deeply and for all it is worth, the opinion raises countless questions, dilemmas, contradictions, and practical problems. These make it difficult or impossible to adhere completely to it. But it compels our attention and commands our loyalties far more than an opinion that met all the standard desiderata such as clarity or guidance would.

It is not clear whether “such a style remains possible in a mature legal system.”³⁵ That’s not necessarily a bad thing. We may desire other qualities from judicial opinions—things like clear and easily applicable rules, certainty, reliability, clarity, and finality—even if we sacrifice eloquence or suggestiveness.³⁶ And although great opinions like *Barnette* have tremendous staying power, we may be aware that most judges, let alone their law clerks, are not great poets or deathless writers, and that most attempts at judicial poetry will fail miserably. We may thus prefer workmanlike prose from judges who do not aspire to be great writers to the wooden, treacly, vain, pompous, or painful failures that generally result when they do.

Nevertheless, we lose something when our opinions become highly mechanical or technical. And having become accustomed to the modern style, we may miss something when we read the older, grander, but less technically formal opinions in the modern fashion. We may focus on individual words or technical formulae at the expense of the general sense and sensibility of a great opinion. In examining some of the passages in the *Barnette* opinion below, I will suggest that while some of the questions it raises about current doctrine can be addressed by reading its words narrowly, focusing on it only as a case in the ostensible category of compelled speech, or otherwise distinguishing it, doing so risks “captur[ing] some of the lyrics” of the opinion while remaining deaf to its “music.”³⁷ Great opinions demand

³⁴ POSNER, *supra* note 32, at 345.

³⁵ *Id.* at 351 (discussing the “magisterial style” of Chief Justice John Marshall).

³⁶ See generally Frederick Schauer, *Opinions as Rules*, 62 U. CHI. L. REV. 1455 (1995).

³⁷ Paul Horwitz, *Demographics and Distrust: The Eleventh Circuit on Graduation Prayer in Adler v. Duval County*, 63 U. MIAMI L. REV. 835, 855 (2009).

more from their readers than a technical reading of individual words; they require us to recapture a sense of the full music and meaning of those opinions. A lawyer reading the words of the Beatles' *I Want to Hold Your Hand* might suggest that the song is limited to the narrow category of hand-holding.³⁸ A more thoughtful listener might conclude that the singer also wants to kiss the girl.

"Great" opinions like Jackson's in *Barnette* are more common in the early stages of legal doctrine, when the law is "fresh" and the writer lacks "the modern judge's burden of negotiating a minefield of authoritative precedents."³⁹ Given the scarcity of doctrine on the ground, such opinions are almost literally "landmark" opinions: They provide a grand edifice around which everything else—all the functional, mundane, and necessary buildings and infrastructure of ordinary life—is built. They may remain visible and oft-visited monuments, or they may become empty shells, overshadowed and obscured by the city that grows around, and perhaps over, them. But they are essential to all the development that follows.

This leads to the second reason why the opinions in *Barnette* offer a prescient "pre-capitulation" of subsequent First Amendment doctrine. To be "great" in the sense we call Jackson's opinion great is precisely to offer a grand, eloquent, seemingly final statement that ultimately raises more questions than it settles. It is to offer a vital legal, political, and cultural statement that then requires decades of implementation, qualification, exceptions, and other ways of making that statement practically useful, acceptable, and livable.

This can be put in positive or critical ways. Charles Fried has written positively of the ways in which "the great organizing doctrines of constitutional law have come into being." Some of those doctrines "issue from early and sweeping decisions[,] . . . with the whole course of later jurisprudence working out the implications instinct in their large generalizations." Others emerge "through an accumulation of distinctions, accretions, and expansions."⁴⁰ Although he describes the former approach as encompassing doctrines concerning judicial review and the relationship between state and federal courts and the latter as characteristic of free speech doctrine, *Barnette* arguably comports with both descriptions.

More critically, writers on jurisdiction in federal courts have described the ways in which initially clear statements can be "fuzz[y] at the margin," a fuzziness that "often becomes magnified by judicial interpretation" and

³⁸ THE BEATLES, *I WANT TO HOLD YOUR HAND* (EMI Studios 1964).

³⁹ POSNER, *supra* note 32, at 351.

⁴⁰ Charles Fried, *Constitutional Doctrine*, 107 HARV. L. REV. 1140, 1152–53 (1994).

implementation.⁴¹ The result of seemingly clear judicial statements that “misstate [their] own firmness,” Frederic Bloom argues, is the “need for offsetting measures, elaborate escape valves devised to soften jurisdiction’s hard rules.”⁴² Similarly, I have suggested that some of First Amendment doctrine’s seemingly clear rules are fitted over time with “safety valves” that take some of the pressure off those rules and allow for sound and reasonable results in individual cases, thus weakening those doctrines but enabling them to stay in existence longer.⁴³

Sometimes, the kinds of questions that require modifications and changes in doctrine arise only over time and with experience. But despite the strength and assurance of *Barnette*’s majority opinion, many of the questions it raised were surely obvious from the start, were at least implicit in Jackson’s opinion, and were acknowledged more openly in the concurring and dissenting opinions. Some of them will be apparent in the discussion that follows. Between them, one can appreciate the surprising degree to which the opinions in *Barnette* represent a canvassing *avant la lettre* of modern First Amendment doctrine.

To see this, however, we must first tour the gallery of passages that are the focus of this close reading. In each case, I begin with the passage, and then offer some remarks on it.

II. READING *BARNETTE*

The resolution [of the Board of Education] originally required the “commonly accepted salute to the Flag” which

41 Scott Dodson, *The Complexity of Jurisdictional Clarity*, 97 VA. L. REV. 1, 5 (2011).

42 Frederic M. Bloom, *Jurisdiction’s Noble Lie*, 61 STAN. L. REV. 971, 973 (2009) (quotation and citation omitted).

43 PAUL HORWITZ, *FIRST AMENDMENT INSTITUTIONS* 34, 37 (2013). For similar observations, with respect to particular doctrines or First Amendment law more generally, see, e.g., *First Amendment—Freedom of Speech—Government Speech—Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 129 HARV. L. REV. 221, 221 (2015) (describing government speech doctrine as a “constitutional escape hatch” that allows government to speak without having to confront all the strictures of ordinary free speech doctrine); Patricia R. Stembridge, *Adjusting Absolutism: First Amendment Protection for the Fringe*, 80 B.U. L. REV. 907, 913 (2000) (arguing that a “qualified absolutist” approach to free speech doctrine “incorporates safety valves that are ‘designed to release the pressures that inevitably destroy absolute [First Amendment] absolutism’”) (quoting RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 24 (1992)); David L. Faigman, *Reconciling Individual Rights and Government Interests: Madisonian Principles Versus Supreme Court Practice*, 78 VA. L. REV. 1521, 1557 (1992) (similar reading, also using the term “safety valve,” of how the “tensions” created by absolutist First Amendment readings are eased through supplemental doctrines). More generally, see Ashutosh Bhagwat, *Hard Cases and the (D)evolution of Constitutional Doctrine*, 30 CONN. L. REV. 961, 961–62, 988–89 (1998) (arguing that “concerns about hard cases have pushed the Supreme Court towards the inclusion of ‘outs,’ or ‘safety valves,’ in all areas of constitutional doctrine”).

it defined. Objections to the salute as “being too much like Hitler’s” were raised by the Parent and Teachers Association, the Boy and Girl Scouts, the Red Cross, and the Federation of Women’s Clubs. Some modification appears to have been made in deference to these objections, but no concession was made to Jehovah’s Witnesses.⁴⁴

We begin with this seemingly unremarkable passage from Justice Jackson’s relatively brief statement of facts.⁴⁵ Little noticed, and surely not *meant* to be noticed beyond its stage-setting purposes, it nonetheless raises two interesting points.

First, this passage indicates what *Barnette* might have been. It suggests that, whether as a free speech matter or as a matter of free exercise of religion, *Barnette* could have been decided on equality rather than liberty grounds.

Consider by way of comparison the Supreme Court’s pivotal decision in *Sherbert v. Verner*.⁴⁶ In that case, which laid the foundation for almost three decades of constitutionally required and judicially administered religious accommodations, the Court gave readers ammunition for either a liberty-oriented or an equality-oriented reading of the opinion. On the one hand, the Court said straightforwardly that a state-imposed burden—even an indirect burden—on Sherbert’s exercise of religion demanded strict scrutiny.⁴⁷ Where an individual was forced to choose between “following the precepts of her religion” and continuing to receive government benefits to which she was otherwise entitled, such a choice would “effectively penalize [] the free exercise of her constitutional liberties,” regardless of the state’s intent or the effect of the benefits law on anyone else.⁴⁸ On the other, the Court called it “significant[]” that the South Carolina unemployment benefit law created an exemption for objectors in instances where a “national emergency” might require textile plants within the state to remain open on Sundays.⁴⁹ Justice Brennan added, “The unconstitutionality of the disqualification of the Sabbatarian is thus compounded by the religious discrimination which South Carolina’s general statutory scheme necessarily effects.”⁵⁰

44 *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 627–28 (1943).

45 *See id.* at 625–30.

46 374 U.S. 398 (1963).

47 *See id.* at 402–03.

48 *Id.* at 404, 406.

49 *See id.* at 406.

50 *Id.*

The cases that followed suggest that the liberty reading of *Sherbert* did have independent force.⁵¹ Nevertheless, the dual arguments in *Sherbert* led to decades of debate about whether that case, or free exercise doctrine more generally, is *best* understood as focused on equality and not liberty.⁵² After the equally pivotal decision in *Employment Division v. Smith*,⁵³ the Supreme Court favored the equality reading of the Free Exercise Clause, treating it less as a positive liberty than as an anti-discrimination provision.⁵⁴ Between statutory and judicial developments, we have swung some of the way back toward a liberty-oriented approach and may swing further yet.⁵⁵

We need not resolve the contest between these competing readings here. I doubt we can “resolve” it anywhere. But that is irrelevant here. What matters is to note the path not taken in *Barnette*. Given the unequal treatment of the Witnesses’ objections, Justice Jackson could have decided the case on equal-treatment grounds, whether as a matter of free speech or of free exercise of religion. He could have given us *Sherbert*, or at least its equality-oriented aspect, twenty years earlier.

He did nothing of the sort. To the contrary, his opinion boldly marks out a *liberty* of speech, silence, and belief, a “sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.”⁵⁶ Doing so made it not an easy or narrow decision, but an immortal one. In taking a broad liberty-oriented approach, Jackson also delivered an opinion that over time turned out to be “surprisingly difficult to

⁵¹ See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) (applying strict scrutiny in a case involving a generally applicable law with no apparent discriminatory exceptions); *Thomas v. Review Bd. of the Ind. Emp’t Sec. Div.*, 450 U.S. 707, 719 (1980) (same); Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 STAN. L. REV. 1919, 1958–59 (2006) (noting the equality reading of *Sherbert* but pointing out that “*Sherbert* itself didn’t limit its reasoning to such situations,” and that the arguments for religious accommodation statutes “have generally treated *Sherbert* as being a general religious liberty case, and not just a religious equality case”).

⁵² See generally CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, *RELIGIOUS FREEDOM AND THE CONSTITUTION* (2007); Stephen Pepper, *Conflicting Paradigms of Religious Freedom: Liberty Versus Equality*, 1993 BYU L. REV. 7 (1993).

⁵³ *Emp’t Div. v. Smith*, 494 U.S. 872, 872 (1990).

⁵⁴ See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–32 (1993) (strict scrutiny applies where a law is not neutral and generally applicable, but instead “discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons”).

⁵⁵ See, e.g., Volokh, *supra* note 51, at 1958–59 (noting the liberty focus of post-*Smith* religious freedom “restoration” statutes); *Kennedy v. Bremerton Sch. Dist.*, 139 S. Ct. 634, 637 (2019) (Alito, J., statement respecting denial of certiorari) (hinting at a willingness to re-examine *Smith*); *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rts. Com’n*, 138 S. Ct. 1719, 1734 (2019) (Gorsuch, J., concurring) (noting that “*Smith* remains controversial in many quarters,” but emphasizing neutrality rather than liberty as a key principle of free exercise).

⁵⁶ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). I say more about this passage below.

defend.”⁵⁷ With his bold statement about the “fixed star in our constitutional constellation,”⁵⁸ Justice Jackson gave birth to both a fundamental constitutional principle and 75 years of unresolved questions.

The second point about this passage is less doctrinal; it is more of a sociological or historical observation about the making of constitutional law. The school board’s “modifications” to the flag salute indicate that it was willing to *compromise* with at least some of the objecting groups.⁵⁹ Nothing prevented the board from similarly compromising with or showing “deference” to the Jehovah’s Witnesses,⁶⁰ not just at the time the policy was promulgated but at any point during the litigation.

It is this meeting of immovable forces and irresistible objects that makes great law in First Amendment jurisprudence. This is simultaneously an obvious point and one that deserves more attention than it generally receives. The story of peaceful coexistence under conditions of pluralism is the story of great First Amendment cases that *do not* happen. It is the story of local or national governments treating dissenters and minority groups as a fundamental part of the community and finding ways to compromise with them. It is arguably a more important story than any that can be told about the keystone cases and controversies in our First Amendment tradition.

Of course, there are always ultimate limits to compromise and coexistence. Under present conditions of polarization, and of sincere and unyielding conviction, it may be a story that is harder to tell today, because compromise and coexistence are harder to achieve. Or perhaps not. Perhaps, now as then, these stories happen all the time and are simply not noticed or given public prominence. In any event, the story of many great First Amendment cases is just the opposite. It involves a local body, a state, or even the national government *refusing* to compromise—sometimes more in sorrow than in anger, and sometimes for reasons of politics, stubbornness, or spite. It is often literally a footnote to the story told by the Court.⁶¹ Beyond religious accommodation cases, it no doubt covers many great student speech cases. In what may be a more complex way, it includes many modern public

⁵⁷ Blasi & Shiffrin, *supra* note 19, at 121.

⁵⁸ *Barnette*, 319 U.S. at 642.

⁵⁹ In fairness, however, we might view the “modification[s]” less as a matter of willingness to compromise, and more as a matter of a change in the general consensus over what physical form the flag salute should take in light of the tainting and embarrassing effect of the likeness between the “stiff-arm” flag salute and the Nazi salute.

⁶⁰ *Barnette*, 319 U.S. at 628.

⁶¹ In *Wisconsin v. Yoder*, for instance, the Court noted in a footnote that the plaintiffs’ attorney “wrote the State Superintendent of Public Instruction in an effort to explore the possibilities for a compromise settlement” and was rebuffed. 406 U.S. 205, 208 n.3 (1972).

accommodation cases and similar controversies.⁶² It certainly includes *Barnette*.

The freedom asserted by these appellants does not bring them into collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin. But the refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so. Nor is there any question in this case that their behavior is peaceable and orderly. The sole conflict is between authority and rights of the individual.⁶³

The facts in the majority opinion in *Barnette* are presented briefly and without emphasis. By contrast, the “framing” of the legal issues in the opinion constitutes much, even most, of the opinion. One key element of the framing of the case appears in this passage. Like other passages in this close reading, it is important both for what it says and for the questions it necessarily raises about later cases, including recent controversies involving religion and speech.

In contemporary terms, we might think of this statement as an assertion that the conflict in *Barnette* does not raise any issues of second- or third-party harm. Arguments of this sort have been raised most frequently in recent years in the context of religious accommodations, under the label of “third-party harms.” In brief, this argument asserts that “religious accommodations that impose substantial or significant harms on identifiable third parties violate the Establishment Clause.”⁶⁴ Despite the serious questions raised by the third-party harm argument in the religious accommodation context,⁶⁵ there are reasons to think this argument has traction in the Establishment Clause context. There, the problem is not necessarily the harm as such. Any constitutional right is likely to affect, and make worse off, some other party

⁶² See, e.g., Paul Horwitz, *The Hobby Lobby Moment*, 128 HARV. L. REV. 154, 160–61 (2014) (describing the history of the contraceptive mandate and of government willingness to compromise on the initial scope of the mandate—up to a point); Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839, 877–80 (2014) (arguing that the contemporary culture wars have been exacerbated by a mutual unwillingness to compromise).

⁶³ *Barnette*, 319 U.S. at 630.

⁶⁴ Marc O. DeGirolami, *Virtue, Freedom, and the First Amendment*, 91 NOTRE DAME L. REV. 1465, 1514 (2016). See *id.* at 1514–15 (summarizing and critiquing the argument and citing relevant sources).

⁶⁵ See, e.g., Marc O. DeGirolami, *Free Exercise by Moonlight*, 53 SAN DIEGO L. REV. 105, 130–45 (2016).

in a zero-sum pluralistic world.⁶⁶ Rather, it is that the state's imposition of those costs on others arguably constitutes an official action preferring the religion or religious needs of the person or group being accommodated over the views and interests (religious or otherwise) of some other individual or group.⁶⁷

In free speech law, at least within expressive realms treated as falling within the standard "boundaries" of the First Amendment,⁶⁸ the Supreme Court has been unreceptive to harm arguments of this sort. Indeed, in the realm of speech it has been largely unreceptive to harm arguments altogether, at least where the harm is dignitary or results from the subsequent actions of a listener rather than resulting directly, immediately, tangibly, and irremediably from the speech itself. There have certainly been cases in which the Court has permitted speech restrictions on the basis of harm arguments.⁶⁹ For the most part, however, the Court's position has been that "any robust free speech principle must protect at least some harmful speech despite the harm it may cause."⁷⁰

That may change. It certainly seems to be changing in American legal scholarship, which appears to be making the same shift toward advocacy of harm-based limitations on free speech that it has made recently in the religious accommodation context.⁷¹ This line of scholarship is much more willing to consider balancing free speech claims against competing values such as "equality, dignity, creativity, and public peace."⁷² In a form of third-party harm argument, scholars operating in a "genre of egalitarian [First Amendment] argument" are willing to contemplate judicial restriction of speech where it may affect the "expressive interests of third parties," particularly where those third parties are more susceptible to the risk of being

⁶⁶ See DeGirolami, *supra* note 64, at 1486.

⁶⁷ For a recent symposium exploring arguments in favor of and against the third-party harm argument in the Establishment Clause context, see Symposium, *Religious Exemptions and Harms to Others*, 106 KY. L.J. 603 (2017-2018).

⁶⁸ See generally Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765 (2004).

⁶⁹ See, e.g., Frederick Schauer, *Harm(s) and the First Amendment*, 2011 S. CT. REV. 81, 83 & n.12 (2012) (offering examples).

⁷⁰ *Id.* at 81. To be clear, Schauer's article argues more centrally that both public and judicial rhetoric often downplay any potential harm resulting from speech or deny that speech causes harm at all.

⁷¹ That, at least, is the claim of Marc O. DeGirolami, who argues that there is a "vast and growing" legal academic literature "advocating new free speech limits in the service of ostensibly common ends," including the protection of the dignitary interests of others and other protections against second- or third-party harm. See generally Marc O. DeGirolami, *The Sickness Unto Death of the First Amendment*, HARV. J.L. & PUB. POL'Y (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3283041.

⁷² Alexander Tsesis, *Balancing Free Speech*, 96 B.U. L. REV. 1, 16 (2016).

chilled or subordinated.⁷³ While they concede that exporting a third-party harm argument from the Establishment Clause to the Speech Clause would conflict with current law, they are candid in questioning the current regime. On this view, “we *should* be disturbed by the claim that individual rights,” including speech rights, “can be exercised in ways that harm others.”⁷⁴ One might conclude as a result that where the exercise of speech “impose[s] serious costs on others, including on those who are not well-positioned to bear those costs or to resist their imposition,” we should “restrict the [speech] and avoid imposing costs on third parties.”⁷⁵

By framing the case as involving no “collision with rights asserted by any other individual,” *Barnette* avoids all these questions. Doing so was not inevitable or necessary. The Court regularly balanced First Amendment claims against competing governmental interests, albeit in a way that weighted the speech side of the scales heavily.⁷⁶ Justice Jackson was no stranger to this approach—including in cases involving the Jehovah’s Witnesses.⁷⁷

Of course, one might argue that balancing was irrelevant or unnecessary in *Barnette*.⁷⁸ Certainly the language here tilts things in that direction by focusing only on the absence of any competing *individual* rights, rather than contrasting the Witnesses’ rights with any competing *interests*, whether of individuals or of the state. There are reasonable grounds for this. Allowing the Witnesses to refrain from the flag salute did not, in the Court’s reading, prevent others from engaging in it.

But cases both before *Barnette*, such as *Gobitis*, and after it suggest that it was possible to take a different view of the interests involved in the case. As in *Gobitis*, the majority could have given greater weight to the proposition that the case presented “the conflicting claims of liberty and authority,”

⁷³ Jeremy K. Kessler & David E. Pozen, *The Search for an Egalitarian First Amendment*, 118 COLUM. L. REV. 1953, 1994 (2018).

⁷⁴ Micah Schwartzman, Nelson Tebbe, & Richard Schragger, *The Costs of Conscience*, 106 KY. L.J. 781, 810 (2017-2018) (emphasis added).

⁷⁵ *Id.* at 810.

⁷⁶ See, e.g., Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1288–89 (2007).

⁷⁷ See, e.g., *Douglas v. City of Jeannette*, 319 U.S. 157, 167, 178–80 (1943) (Jackson, J., concurring and dissenting) (discussing, in a case involving an aggressive proselytizing campaign by Witnesses, the need to balance the speech and religious rights of the Witnesses with the rights of those who objected to being subjected to the campaign).

⁷⁸ In an interesting article, Iddo Porat notes the different approaches taken in different Jehovah’s Witnesses cases during this period, including the deployment of balancing in some cases but not in *Barnette*, and offers an analysis of why the Court adopted different approaches in these cases, including its rejection of balancing in *Barnette*. See Iddo Porat, *On the Jehovah’s Witnesses Cases, Balancing Tests, and Three Kinds of Multicultural Claims*, 1 L. & ETHICS HUM. RTS. 429 (2007).

including a state interest in “safeguard[ing] the nation’s fellowship.”⁷⁹ Although the case did not involve the invalidation of the flag salute altogether, the Court could also have focused not on competing *state* interests, but on the “personal interests on the other side” of the case—the desire of the other students for a unified communal expression of allegiance to purportedly common values.⁸⁰

Justice Jackson is able to dismiss such concerns in part because of the view that he takes of such exercises and their relation to national values and unity. On this view, the keystone of public education is “secular instruction and political neutrality.”⁸¹ Efforts to secure patriotism through exercises like the flag salute “make an unflattering estimate of the appeal of our institutions to free minds.”⁸² But that is not the only vision of liberal democracy available to us. One might take a thicker view, believing that “government in a liberal democracy not only *may* promote contested views of the good, but *should* do so.”⁸³

One might, of course, take this view while insisting that government cannot do so through compelled speech. On that view, no matter how important it may be for government to endorse thicker values than “political neutrality,” the state still cannot take the additional step of conscripting an individual to voice those values.⁸⁴ Nevertheless, the stronger one’s vision of the competing interests at play is, the more reason there may be to give real weight to those interests, and thus to turn to something like balancing.

Jackson does none of this. Instead, he simply characterizes the case as an uncomplicated question of individual rights, one that involves no competing rights claims by other individuals and no competing government interest worth taking seriously. He thus smooths the path toward his ultimate conclusion. As with other elements of the opinion, in doing so he puts off difficult questions that would return to bedevil the Court later, and to raise doubts about just how seriously we can take his “fixed star” passage.⁸⁵

Because he puts off those questions, it is certainly possible to read *Barnette* as leaving open questions about third-party harm. But a more

79 *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 591 (1940).

80 *Lee v. Weisman*, 505 U.S. 577, 645 (1992) (Scalia, J., dissenting).

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

82 *Id.* at 641.

83 Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1, 2 (2000).

84 See, e.g., Abner S. Greene, “*Not in My Name*” *Claims of Constitutional Right*, 98 B.U. L. REV. 1475, 1526 (2018).

85 See, e.g., Smith, *supra* note 21; Richard W. Garnett, *Can There Really Be “Free Speech” in Public Schools?*, 12 LEWIS & CLARK L. REV. 45, 55 (2008) (noting that public schools are “charged with forming and shaping students’ values, loyalties, commitments, and manners”).

“musical” reading of *Barnette*, one that captures its sensibility and grand sense and reads the language for all it is worth in light of that sensibility, might suggest a different conclusion. A more “musical” reading of *Barnette* suggests that, at least at the outset of its free speech jurisprudence, the Court offered a vision of the centrality of free speech and speaker autonomy that was more willing to protect speech despite the possibility of harm to others, and perhaps especially intangible harms.⁸⁶ That would suggest that more expansive or aggressive contemporary arguments for third-party-harm-based limitations—those involving free speech at a minimum, if not religious exercise as well—are in tension with *Barnette*.

A second point worth noting about this passage is its emphasis on the “peaceable and orderly” behavior of the objecting Witnesses. Of course, those who know the history of violent behavior that followed the Court’s decision in *Gobitis* are well aware that the actual violence came from the Witnesses’ fellow students and neighbors, as well as public officials.⁸⁷ Jackson makes clear that this behavior must not be laid at the objectors’ feet. As Judge Tjoflat would put it years later, if the other students’ potential reaction could be held against the Witnesses, this would “sacrifice freedom upon the [altar] of order, and allow the scope of our liberty to be dictated by the inclinations of the unlawful mob.”⁸⁸

We might contrast this with some later treatments of student speech. Just as I have suggested that *Barnette* is a great case that inspired 75 years of doctrine that pays homage to *Barnette* while seeking to cabin and constrain it, we could say much the same thing about the classic student speech case, *Tinker v. Des Moines Independent Community School District*.⁸⁹ There, the Court held that student expressions of opinion must be protected unless the school can show that the continuation of the speech “would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.”⁹⁰

Justin Driver, in his recent book on the history of the First Amendment and public education, is surely right to warn that “[r]eports of *Tinker*’s demise

⁸⁶ Cf. Erica Goldberg, *Free Speech Consequentialism*, 116 COLUM. L. REV. 687, 695, 721–25 (2016) (arguing for a consequentialist approach to free speech that allows for some balancing, while protecting the core values of the First Amendment, by limiting the kinds of harm subject to judicial balancing to conduct-like rather than “more intangible and emotional” harms).

⁸⁷ See Blasi & Shiffrin, *supra* note 19, at 109–12 (noting the “widespread and severe” treatment of Jehovah’s Witness schoolchildren and placing it in the wider context of violent attacks against adult Witnesses).

⁸⁸ Holloman ex rel. Holloman v. Harland, 370 F.3d 1252, 1275 (11th Cir. 2004).

⁸⁹ 393 U.S. 503 (1969).

⁹⁰ *Id.* at 509 (quotation and citation omitted).

have . . . been greatly exaggerated.”⁹¹ Just as stories of compromise and coexistence are less likely to achieve headlines than stories of conflict and litigation, so stories about school administrators restraining the impulse to suppress student speech are less likely to draw attention than stories of censorship.⁹² That said, there is little doubt that subsequent cases have given schools greater cover to suppress student speech without making a serious showing of material or substantial interference with appropriate school discipline.⁹³

For purposes of the passage above, one important question that has arisen in contemporary cases is the extent to which student speech can be suppressed on the basis of whether the student *audience*, rather than the student *speaker*, is reacting or likely to react in a “peaceable and orderly” manner. By focusing on the Witnesses’ orderly behavior and protecting their right to refuse to salute the flag, not just regardless of but doubtless *because* of the violent reaction toward other Witnesses that the nation had witnessed in the three years since *Gobitis*, Justice Jackson effectively refused to allow those responses to constitute a heckler’s veto.

Some scholars have suggested that *Tinker* may be more ambiguous on this question.⁹⁴ But if applied vigorously and with due regard for its statement that the Constitution requires us to risk the possibility that minority speech may “start an argument or cause a disturbance,”⁹⁵ *Tinker* is better read as placing a heavy weight on the side of the scales of the student speaker, not the objector. As with the Witnesses in *Barnette* and elsewhere, the presumption should be that where students “threaten their classmates or an outbreak of violence occurs, the students who are responsible for actually causing those disruptions should be disciplined, not the speaker.”⁹⁶

That is not what the courts have always done. To take a recent example, in *Dariano v. Morgan Hill Unified School District*,⁹⁷ the Ninth Circuit upheld the action of a school principal directing students to turn shirts that prominently featured the American flag inside out or to go home, because the administration feared the students would face retaliatory violence. What

⁹¹ JUSTIN DRIVER, *THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND* 125 (2018).

⁹² *See id.* at 126.

⁹³ *See, e.g.*, Alexander Tsesis, *Categorizing Student Speech*, 102 MINN. L. REV. 1147, 1170–73 (2018); Mark Strasser, *Tinker Remorse: On Threats, Boobies, Bullying, and Parodies*, 15 FIRST AMEND. L. REV. 1, 25–26 (2016) (arguing that the Supreme Court’s lack of clarity in post-*Tinker* cases about when student speech can be punished “has resulted in differing and incompatible doctrines” in the lower courts).

⁹⁴ *See id.* at 8 n.49 (collecting commentary to this effect).

⁹⁵ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969).

⁹⁶ Driver, *supra* note 91, at 128.

⁹⁷ 767 F.3d 764 (9th Cir. 2014).

counted was the prospect of substantial disruption, not the source of that disruption.⁹⁸ Dissenting from the denial of *en banc* review, Judge O’Scannlain rightly worried that such an approach would “condon[e] the suppression of free speech by some students because *other students* might have reacted violently.”⁹⁹

As with the third-party harm question, we need not settle here the ultimate question what ought to happen to the law of student speech, or the circumstances under which it may be restricted in order to achieve some measure of security and allow public schools to do their job of educating students. We could, again, read *Barnette* narrowly and technically, distinguishing it from the school speech cases because the former involved compelled speech and the latter involve punishment of individual speech.

But the tension between *Barnette* and modern student speech cases like *Dariano* is greater than that. Compared to the arguable tension between *Barnette* and later arguments for third-party-harm limitations or balancing in the First Amendment, this tension is harder to avoid through narrow doctrinal readings. Read for all it is worth, *Barnette* suggests that the value of speech, and the individual autonomy that underlies it, is such that it should not be swept aside because *listeners* might react negatively to it. That is especially true so where the speaker, however provocative, is acting in a peaceable fashion. In such a case, the negative or violent reaction of the listener turns on social meaning and its impact on how objectionable the audience finds the behavior or message of the dissenting students. Indeed, the record of behavior after *Gobitis* involved a level of violence on and off school grounds that extended far beyond the sort of violence that raised concerns on the part of school officials in cases like *Dariano*. On this view, we are faced with a genuine and ineluctable tension between *Barnette* and some modern student speech decisions. We must thus either rethink those decisions, or rethink *Barnette* itself.

A person gets from a symbol the meaning he puts into it, and what is one man’s comfort and inspiration is another’s jest and scorn.¹⁰⁰

The passage here comes from the segment of Justice Jackson’s *Barnette* opinion emphasizing that “[t]here is no doubt that, in connection with the pledges, the flag salute is a form of utterance.”¹⁰¹ That is true even where the expression in question is not linguistic but symbolic, using a physical object

⁹⁸ See *id.* at 778.

⁹⁹ *Id.* at 766 (O’Scannlain, J., dissenting from the denial of rehearing en banc).

¹⁰⁰ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632–33 (1943).

¹⁰¹ *Id.* at 632.

or ritual as “a short cut from mind to mind” that represents “some system, idea, institution, or personality.”¹⁰²

On a basic level, the passage quoted here is interesting as another instance of pre-capitulation. Some 28 years later, in the “Fuck the Draft” case, *Cohen v. California*,¹⁰³ Justice Harlan wrote that the First Amendment must care “not only [about] ideas capable of relatively precise, detached explication, but [about] otherwise inexpressible emotions as well.”¹⁰⁴ Even where the expression involves “tumult, discord, and even offensive utterance,” these are “matters of taste and style” that the Constitution leaves “largely to the individual.”¹⁰⁵ Harlan capped his point with his famous observation that “one man’s vulgarity is another’s lyric.”¹⁰⁶ Thus, this passage in *Barnette* can be seen as *Cohen avant la lettre*.

More speculatively, we can also read this passage as making a larger statement about how courts should treat symbolic speech and expressive conduct. It does not seem to take the view that some message or symbolic action, in order to be capable of First Amendment recognition as “speech,” must be reducible to a clear formula, such as the ostensibly methodical requirement that an action involve (1) “[a]n intent to convey a particularized message” and (2) a “great” “likelihood” in the “surrounding circumstances” that “the message [will] be understood by those who viewed it.”¹⁰⁷ In particular, it does not demand that the “meaning” of a symbol be the same for the “speaker”—or, as in *Barnette*, the person compelled to articulate government speech—and for the audience.¹⁰⁸

Barnette does not settle the question of *whose* understanding of a symbol counts. We might say that it concludes that the *speaker’s* understanding counts, or at least that the fact that the compelled speaker understands him or herself to be voicing a particular “meaning”—one that he or she “puts into it”—is enough to raise compelled speech concerns. Or we might read the passage as suggesting that, at least where there is “no doubt” that “a form of utterance” is involved, *everyone’s* understanding counts, even if different individuals and state actors may disagree about the “particularized” meaning of that expression. What counts as expression, let

¹⁰² *Id.*

¹⁰³ 403 U.S. 15 (1971).

¹⁰⁴ *Id.* at 26.

¹⁰⁵ *Id.* at 24–25.

¹⁰⁶ *Id.* at 25.

¹⁰⁷ *Spence v. Washington*, 418 U.S. 405, 410–11 (1974).

¹⁰⁸ Cf. Harold Anthony Lloyd, *Crushing Animals and Crashing Funerals: The Semiotics of Free Expression*, 12 FIRST AMEND. L. REV. 237, 256–57, 259 (2013) (discussing the distinction between “intended expression” and “perceived expression” and the potential for the two to diverge in “subtle and complex” ways, and arguing that “First Amendment protection should . . . apply to both.”).

alone protected expression, is a difficult question that may cash out in different ways in different contexts. It is unsurprising that *Barnette* does not settle it, particularly given that no one doubted that the flag salute was expressive and that it was precisely its expressive nature that led the state to compel students to give it each morning.¹⁰⁹

Still, we might draw two general—and, again, speculative—conclusions from this passage. First, if we take the passage seriously, we should not turn the notion of a “particularized” message that is likely to be understood by its audience into a mechanical test.¹¹⁰ Where it is clear that a symbol *is* a symbol, and that the state understands it as such, we should acknowledge that it may give rise to a multitude of meanings, and protect that speech even if its meaning is not understood identically by the speaker and the audience.

Second and more speculatively, this passage may again counsel against the exportation of “third-party harm” arguments from religion to speech, especially if those harms take a more dignitary and mediated form rather than a tangible and immediate one. Justice Jackson’s language here, like the later language in *Cohen*, suggests that speech that has symbolic meaning to the speaker—or to the person resisting compelled speech—should be protected even if an audience member may “put” a different “meaning” into the same symbol, including an offensive and demeaning one. The music of Jackson’s writing here seems disinclined to treat the prospect that others will be offended by *their* understanding of a symbol as a reason not to protect the speaker (or non-speaker) who finds a different message in the symbolic communication or action.

Any credo of nationalism is likely to include what some disapprove or to omit what others deem essential, and to give off different overtones as it takes on different accents or interpretations.¹¹¹

¹⁰⁹ For useful discussions about the general issue of what constitutes “speech” or expressive conduct for First Amendment purposes, see, e.g., John Greenman, *On Communication*, 106 MICH. L. REV. 1337 (2008); James M. McGoldrick, Jr., *Symbolic Speech: A Message From Mind to Mind*, 61 OKLA. L. REV. 1 (2008); Charles W. “Rocky” Rhodes, *The First Amendment Structure for Speakers and Speech*, 44 SETON HALL L. REV. 395 (2014); MARK V. TUSHNET, ALAN K. CHEN & JOSEPH BLOCHER, *FREE SPEECH BEYOND WORDS: THE SURPRISING REACH OF THE FIRST AMENDMENT* (2017).

¹¹⁰ This is something the courts have recognized, of course. In *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), Justice Souter cautioned that “a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a particularized message, would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schönberg, or Jabberwocky verse of Lewis Carroll.” *Id.* at 569 (quotation and citations omitted). But Justice Souter’s warning against mechanical applications of the *Spence* test has not always been honored by lower courts.

¹¹¹ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 634 (1943).

This passage once again shows how much of *Barnette* is devoted to framing efforts. In particular, much of the opinion consists of efforts to eliminate potential obstacles to Justice Jackson's famed anti-orthodoxy conclusion, by describing what the case is *not* or the questions on which it does *not* turn. Thus, this passage follows Jackson's observation that the conclusion that the government cannot "order observance of ritual of this nature does not depend on whether as a voluntary exercise we would think it to be good, bad or merely innocuous."¹¹² The reason none of this matters is that "[i]f official power exists to coerce acceptance of any patriotic creed, what it shall contain cannot be decided by courts, but must be largely discretionary with the ordaining authority, whose power to prescribe would no doubt include power to amend."¹¹³ Because there is no clearly fixed and identifiable formula for the American creed, the question presented must be whether the government has the power to compel the voicing by private individuals of *any* creed, "independently of any idea we may have as to the utility of the ceremony in question."¹¹⁴

In that sense, the passage quoted above is unnecessary. Even if one could imagine crafting a "credo of nationalism" that somehow managed to omit nothing that is universally deemed essential and include nothing that anyone would disapprove of, this Platonic form of a creed could just as easily be superseded by one that would fulfill neither of these conditions.

In a footnote, Jackson goes further. *Any* statement of the American creed, no matter how bland, banal, and widely shared, can take on different meanings for members of the vast American audience, not least members of our civic community who nevertheless dissent from that creed. The word "Republic," if meant to distinguish our system from a democracy, or the words "one Nation" if meant to distinguish it from a "federation," can "open up old and bitter controversies in our political history."¹¹⁵ The same is true of a phrase—trite for some, powerful for others—like "liberty and justice for all," which "might to some seem an overstatement" given the injustice or imperfection of the "present order."¹¹⁶

Jackson's footnote calls to mind a more momentous disagreement over the meaning of the Constitution. The iconic abolitionist Frederick Douglass came to treat the antebellum Constitution as worthy of loyalty and reverence by reading it, in a spirit of ostensible textual rigidity and underlying "visionary and redemptive constitutionalism," as an anti-slavery

¹¹² *Id.* We may pause briefly to mark and lament the absence of the Oxford comma.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 634 n.14.

¹¹⁶ *Id.*

document.¹¹⁷ In contrast, the abolitionist William Lloyd Garrison adopted a perfectionist reading of the Constitution¹¹⁸ that led him to read the same constitutional text as countenancing slavery and thus as a document worthy only of rejection: a “covenant with death and an agreement with hell.”¹¹⁹

Their dispute illustrates and makes more powerful the point made more mildly by Jackson. Every creedal statement or invocation of value can be the subject of important, legitimate, and violent disagreement. To treat the language in the Pledge of Allegiance—or, for that matter, in the Constitution itself—as settled, clear, and unmistakable in meaning is an error, for multiple reasons. At best, doing so treats this language as commanding consensus by rendering it banal and meaningless, a matter of rote invocation and repetition. It is likely that any such consensus would ultimately be either a lowest-common-denominator form of consensus or the imperial “consensus” of an elite establishment. At worst, attempts to treat our common creedal language as uncontroversial become “jurispathic,” responding to different interpretations and understandings of law, and of the legal and political order, by asserting that “*this* [understanding] is law and destroy[ing] or try[ing] to destroy the rest.”¹²⁰ These jurispathic efforts are likely to fall hardest on minority and dissenting communities.

Because Jackson’s observation that no creedal statement can avoid multiple interpretations and reactions is so seemingly basic and uncontested, it is unsurprising that this passage has received little attention. But it may be worth revisiting in light of contemporary developments in constitutional scholarship. As with so much in this close reading of *Barnette*, the arguments I focus on here can be distinguished on various bases. But I suggest that this passage raises serious questions about these developments.

Those developments take place next door to *Barnette*, as it were, in the field of government speech. In the courts, the general rule is relatively clear and firm. Apart from any limitations imposed by the Establishment Clause, “[t]he Free Speech Clause restricts government regulation of private speech;

¹¹⁷ Ronald R. Garet, “Proclaim Liberty”, 74 S. CAL. L. REV. 145, 154 (2000). See also J.M. Balkin & Sanford Levinson, *Interpreting Law and Music: Performance Notes on the “Banjo Serenader” and “The Lying Crowd of Jews”*, 20 CARDOZO L. REV. 1513, 1558-60 (1999) (describing Douglass’s justice-seeking reading of the Constitution and comparing it to Dworkin’s argument for reading legal texts to make them “the best they can be”) (quoting RONALD DWORKIN, *LAW’S EMPIRE* 313-14 (1986)).

¹¹⁸ See Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 36 (1983).

¹¹⁹ J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 1015 (1998) (citing WALTER M. MERRILL, *AGAINST WIND AND TIDE: A BIOGRAPHY OF WM. LLOYD GARRISON* 205 (1963)). For an illuminating discussion, see J.M. Balkin, *Agreements With Hell and Other Objects of Our Faith*, 65 FORDHAM L. REV. 1703, 1708 (1997).

¹²⁰ Cover, *supra* note 118, at 53.

it does not regulate government speech.”¹²¹ Government is “entitled to say what it wishes” and “to select the views that it wants to express.”¹²² If a government body or official wishes to select a set of creedal values or propositions and proclaim them far and wide, it may do so, subject to the same political risks that any government or governmental official incurs by saying, or not saying, anything at all.

One may raise many questions about the nature and contours of government speech doctrine. Many of them have to do with how clear it must be that it is indeed *government* that is speaking, and with the line between government speech and compelled individual speech. Recently, some progressive constitutional scholars have gone a step further, asking whether we can discern in the Constitution additional limits on what government can say other than whatever limitations are required by the Establishment Clause. They argue that the Constitution “imposes a broad principle of government nonendorsement,” under which a number of constitutional provisions positively “prohibit any [government] endorsement that abridges full and equal citizenship in a free society.”¹²³ Although this approach concededly involves drawing difficult distinctions,¹²⁴ it is not limitless: it specifically limits government speech that undermines the Constitution’s “[c]ommitments to full citizenship, equal citizenship, and the maintenance of a free society,” all of which are “basic to American constitutionalism.”¹²⁵ Various permutations of this claim are growing in visibility and popularity in American constitutional scholarship.¹²⁶

Jackson’s passage about the debatability of any given “credo of nationalism” certainly does not dispose of this proposed doctrinal turn. Among other things, one can distinguish the question what speech government may (or must) engage in or avoid from the question whether government can compel that speech from private individuals. One might share Corey Brettschneider’s view that government “should not be neutral in

121 *City of Pleasant Grove v. Sumnum*, 555 U.S. 460, 467 (2009).

122 *Id.* at 467–68 (quotations and citations omitted).

123 Nelson Tebbe, *Government Nonendorsement*, 98 MINN. L. REV. 648, 650 (2013).

124 *See id.* at 695–96.

125 *Id.* at 702.

126 *See, e.g.*, Michael C. Dorf, *Same-Sex Marriage, Second-Class-Citizenship, and Law’s Social Meaning*, 97 VA. L. REV. 1267, 1283 (2011); COREY BRETTSCHEIDER, *WHEN THE STATE SPEAKS, WHAT SHOULD IT SAY?: HOW DEMOCRACIES CAN PROTECT EXPRESSION AND PROMOTE EQUALITY* (2012); Christopher L. Eisgruber & Lawrence G. Sager, *Chips Off Our Block?: A Reply to Berg, Greenawalt, Lupu and Tuttle*, 85 TEX. L. REV. 1273, 1281–83 (2007); Helen Norton, *The Equal Protection Implications of Government’s Hateful Speech*, 54 WM. & MARY L. REV. 159 (2012); Micah Schwartzman & Nelson Tebbe, *Charlottesville’s Monuments Are Unconstitutional*, SLATE (Aug. 25, 2017, 9:07 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/08/charlottesville_s_monuments_a_re_unconstitutional.html.

the values that it supports and expresses,” but must be neutral “in protecting the right to express all viewpoints,” which may easily be extended to the right *not* to express a viewpoint.¹²⁷

But one may, I think, read this passage as raising *doubts* about a government nonendorsement approach. Such an approach depends in large measure on some level of agreement and certainty about two things: the nature and meaning of the underlying “basic values that shape the principle of government nonendorsement,” and the “social meaning” of a particular government statement.¹²⁸ Advocates of the government nonendorsement approach readily, and wisely, concede that the latter category raises difficult questions about how to determine social meaning.¹²⁹

Their response, if I understand it correctly, is that 1) the question is no more intractable here than it is with respect to the Establishment Clause, in which the courts have muddled through with the endorsement test, which asks exactly the same kinds of questions about social meaning;¹³⁰ 2) despite any such difficulties, “there must be *some* constitutional limit to government pronouncements” that disparage full and equal citizenship,¹³¹ and 3) the government nonendorsement approach does not risk being applied to any and every instance of government speech. There will be easy cases, and only some government “messages will carry the kind of ‘charge or valence’ that triggers constitutional concerns.”¹³²

Although Jackson’s passage here is arguably distinguishable from the case of government nonendorsement, it nevertheless eloquently raises doubts about the viability of that approach. As Jackson observes, even the most banal statement about what is “basic to American constitutionalism” is subject to potential disagreement. And every claim that a government statement carries a particular, and unconstitutional, social meaning likewise gives rise to potential disagreement depending on “different accents or interpretations”—on the fact that “[a] person gets from a symbol the meaning he puts into it,”¹³³ and that good-faith disagreement about social meaning is inevitable in a large population filled with people of diverse views and backgrounds. Easy cases, if there are any, will likely take care of themselves. A congressional

¹²⁷ Corey Brettschneider, *Democratic Persuasion and Freedom of Speech: A Response to Four Critics and Two Allies*, 79 BROOK. L. REV. 1059, 1060 (2014).

¹²⁸ See, e.g., Tebbe, *supra* note 123, at 659–60, 668, 677–81, 684, 687, 690, 695, 707–08, 710.

¹²⁹ See, e.g., *id.* at 660, 679–80; *id.* at 680 (“Ultimately, there is no methodology for identifying social meaning that is not itself controversial.”).

¹³⁰ See *id.* at 660, 681. Of course, the difficulty of determining social meaning is a major contributor to widespread criticism of the endorsement test by judges and scholars discussing the Establishment Clause.

¹³¹ *Id.* at 680 (emphasis added).

¹³² *Id.* at 708 (quoting EISGRUBER & SAGER, *supra* note 52, at 126).

¹³³ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632–34 (1943).

resolution declaring that “America is a white nation” will likely not occur, or will be addressed swiftly and decisively by the political process if it does. If neither of these predictions are true, it is unlikely that any “government nonendorsement” rule will come close to addressing the deeper ailment.

That leaves the harder cases—the vast majority, arguably. And there, live disagreement about what a creedal or political statement by government means, both in itself and in its social meaning for particular individuals or groups, is certain. If what ends up deciding such questions is some sort of elite consensus, it is hard to see how either the Constitution or the democratic health and legitimacy of the nation will be better off. Indeed, it is precisely this kind of prospect that drove Robert Cover to worry about the “jurispathic” role of judges and its effect on independent and dissentient communities within our polity. Given the social position of the Jehovah’s Witnesses, it is likely that some of the same concern was behind Jackson’s reminder that no “credo of nationalism” will mean the same thing to every person.

In short, the lesson of this passage is that no value is so clear, and no government *expression* of that value is so clear or widely shared, that it does not leave room for good-faith disagreement about its meaning by loyal citizens—including minority groups and including citizens, minority or majority, who may have a different view about the meaning of words like “equality” or “dignity” but nevertheless respect the rights of others in practice. All this at least raises doubts about the wisdom and viability of any approach that seeks to expand the set of words or statements that are “unspeakable” by government.

It may be doubted that Mr. Lincoln would have thought that the strength of government to maintain itself would be impressively vindicated by our confirming power of the state to expel a handful of children from school. Such oversimplification, so handy in political debate, often lacks the precision necessary to postulates of judicial reasoning. If validly applied to this problem, the utterance would resolve every issue of power in favor of those in authority and would require us to override every liberty thought to weaken or delay execution of their policies.¹³⁴

This passage has received very little discussion. But it is arguably as important as—and intimately connected to—the “fixed star” passage. One of the key moves by Justice Jackson in *Barnette*, one that has been commented on often enough not to require attention here, is his “re-conception of the central constitutional issues at stake” in the flag salute issue from the

¹³⁴ *Barnette*, 319 U.S. at 636.

religious-freedom-oriented focus of *Gobitis* to “one that implicated the freedom of speech of all students,” including those with “moral or political rather than religious” objections to compelled speech.¹³⁵ Here and in an earlier passage, Jackson accomplishes this in large measure by shifting the subject from the objector to the state itself. Whether the objection turns on religion or something else is less important than the question whether the state has the power “to make the salute a legal duty” in the first place.¹³⁶

In framing the issue this way, Jackson does more than mock the idea that government’s survival depends on its ability to “expel a handful of children from school,” although that is surely a rhetorical element here. And he does more than make a strong statement about the importance of freedom of speech, of religious exercise, or of individual autonomy and the importance of being able to form one’s ideas independently. In this passage at least, that is not his real focus. Rather, Jackson focuses on both the *limits of state power* and, at least implicitly, the importance of other realms of human activity. I have already noted that *Barnette* rejects the balancing approach that the Court had taken in other cases. This passage helps us understand *why* Jackson takes a more categorical approach. It suggests that any claim of government exigency must have strong limits, lest the “power . . . of those in authority” become an overwhelming reason in any case involving individual freedom.

Nothing in this passage sneers at the flag salute as such. Nor is Jackson’s concern limited to the flag salute. There is no shortage of important government policies. They can take many forms: liberal, progressive, conservative, libertarian, socialist, and so on; addressing military, economic, social, and other concerns. And government officials can often reasonably argue in such cases that some individual objector would “weaken or delay” the execution of these important policies. Despite making sport at the idea that such policies could turn on the expulsion of schoolchildren, Jackson certainly does not deny the importance of government policy.

That is important. Something deeper is happening here than a mere rejection of the sufficiency of the government’s asserted regulatory need in the case at hand. Jackson rejects the very proposition that the fact that a policy is legitimate and important necessarily means the courts should adopt a rule that privileges, and exalts, the state, its power, and even its legitimate interests. At least where some sphere of individual freedom is concerned, he rejects the notion that this sphere must take a back seat to the exercise of state power simply because the state can argue for the importance of a given policy. In short, *Barnette* is not simply a statement about the value of

¹³⁵ Blasi & Shiffrin, *supra* note 19, at 115.

¹³⁶ *Barnette*, 319 U.S. at 635.

individual autonomy or freedom from compelled speech, although it is surely that as well. In an important sense, it is also, and centrally, about the limits of the state itself, and the danger of allowing the state to justify its actions on the basis of arguments from necessity, the legitimacy of state policy, or the value of government as such.

This reading naturally raises many questions. Just as the “fixed star” passage has been questioned for years, on the basis that government necessarily and routinely *does* state various orthodoxies,¹³⁷ so the notion that there are spheres of activity with which the state cannot interfere at all, no matter how logical and pressing the argument that non-interference would “weaken or delay [the] execution” of important government policies, has been questioned, implicitly and explicitly, by both courts and scholars.

This criticism was apparent from the very day that *Barnette* was decided. In their concurring opinion, Justices Black and Douglas, veterans of the long war against *Lochner*, argued that the question in *Barnette* was not one of government disability to interfere but of the state’s failure to meet even the most minimal balancing test. The two Justices maintained that “[n]o well-ordered society can leave to the individuals an absolute right to make final decisions, unassailable by the state, as to everything they will or will not do.”¹³⁸ Nikolas Bowie observes that almost as soon as *Barnette* was decided, it was clear that Justice Jackson’s absolutist position was “unworkable in practice.”¹³⁹ Thus began a long effort to “rein in” the ruling.¹⁴⁰ As a later Court would say, the First Amendment must not be interpreted “so as . . . to cripple the regular work of the government.”¹⁴¹ Justice Jackson himself was responsible for another famous apothegm on the subject, warning that the Bill of Rights should not be “convert[ed] . . . into a suicide pact.”¹⁴² That language is not necessarily inconsistent with his language in this passage. A clever lawyer could reconcile the two statements on any number of grounds. But it is unquestionably in tension with it. The music of each of these passages comes from two very different scores.

Again, we can see that in setting out such a bold statement about the limits of state power, *Barnette* naturally gives rise to questions that would require decades of doctrinal fixes. In that sense, it does not so much “pre-

137 See, e.g., Smith, *supra* note 21.

138 *Barnette*, 319 U.S. at 643 (Black, J., and Douglas, J., concurring).

139 Nikolas Bowie, *The Government Could Not Work Doctrine*, 105 VA. L. REV. 1, 20 (2019).

140 See *id.* at 20–22, 24–28.

141 *CBS, Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 103 (1973) (quoting *ZECHARIAH CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS* 640–41 (1947)).

142 *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

capitulate” as make necessary the doctrinal journey of the 75 years that have followed it.

Nevertheless, despite all that followed, and as a yardstick to measure whether what ensued was faithful to *Barnette* or a rejection of it, it is worth turning our attention away from the “fixed star” question and toward this passage and its significance. Using Wesley Hohfeld’s taxonomy of rights, it is now commonly observed that “an individual right to do or not do X” carries a corresponding “government duty not to interfere with that right.”¹⁴³ Most discussions of *Barnette* focus less on the government side of the equation and more on the individual right in question. That is understandable, since identifying exactly what that right comprises, let alone attempting to find “guidance as to its own limit,” is difficult enough.¹⁴⁴ It is still more understandable if the reader has been captivated by the “fixed star” passage and paid less attention to other passages, like the one I have placed under the close-reading microscope here.

But *Barnette* is not about the nature of the right at issue alone. For that matter, on this reading it is not concerned primarily, if at all, with the contours of any “government duty not to interfere” with whatever right is involved here. Rather, as much of the language surrounding this passage suggests,¹⁴⁵ a central message of the case concerns the absence of any state *power* in this area *at all*. For Jackson, whether the case involves religion or speech, and how compelling the government’s asserted interests are, are less important questions than whether the government has *any* power to impose certain kinds of duties on unwilling individuals. The opinion is less about “the securing of an individual right” and more about the absence or “negat[ion]” of governmental *power* to act in particular spheres of human activity.¹⁴⁶ No balancing of rights against government interests is necessary. Nor is there any need to treat this case as involving an exemption from the usual broad reach of government power, and thus to decide the contours of an exemption

¹⁴³ Linda C. McClain, *Rights and Irresponsibility*, 43 DUKE L.J. 989, 1040 (1994) (citing Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Legal Reasoning*, 23 YALE L.J. 16, 28–30, 30–32 (1913)).

¹⁴⁴ Blasi & Shiffrin, *supra* note 19, at 121.

¹⁴⁵ *See, e.g.*, *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 635 (1943) (“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.”); *id.* at 635–36 (“The question which underlies the flag salute controversy is whether” any “powers committed to any political organization under our Constitution” give it the ability to “impos[e] upon the individual” any “such a ceremony”); *id.* at 636 (“We examine rather than assume existence of this power”); *id.* at 636–37 (discussing the nature of “[g]overnment of limited power” and why the enforcement of the Witnesses’ rights here does not require one to “choose weak government over strong government”).

¹⁴⁶ Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 40–42 (1998).

qua exemption, and whether such exemptions should apply only to religious individuals or to any conscientious objector. The state is “powerless to impose [a flag salute] requirement on *anyone*, whether that person object[s] to the flag salute or not.”¹⁴⁷ It is not a limit on government power in particular cases, subject to the usual formulae of balancing competing interests, but “a ‘no-power,’ a disability.”¹⁴⁸ I return to this point below in connection with the final passage discussed in this close reading.

As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be.¹⁴⁹

Another famous phrase in Jackson’s long string of apothegms, in *Barnette* and elsewhere, is this one: “Compulsory unification of opinion achieves only the unanimity of the graveyard.”¹⁵⁰ But it is worth focusing on the language that leads up to this conclusion. Jackson acknowledges that “many good as well as ... evil men” have sought to “coerce uniformity of sentiment in support of some end thought essential to their time and country.”¹⁵¹ But he argues that such efforts were doomed to “[u]ltimate futility.”¹⁵² The more severe the effort to secure that unity, and the greater the “governmental pressure” toward it, the “more bitter” the strife will become as to “whose unity it shall be.”¹⁵³

The arresting quality of language like “unanimity of the graveyard” is such that one can easily subscribe to a statement like this without asking whether it is necessarily true. That question has been asked repeatedly in recent years, in a way that may not deal directly with compelled speech but

¹⁴⁷ Jay S. Bybee, *Common Ground: Justice Jackson, Antonin Scalia, and a Power Theory of the First Amendment*, 75 TUL. L. REV. 251, 280–81 (2000) (emphasis added). Bybee’s article is the only one I have found that concentrates substantially on *Barnette* as a case about government power as such, not the nature of the individual right at issue. He observes that this approach leaves open the very sorts of questions that have preoccupied readers since *Barnette* was issued: questions about “the core meaning of the freedoms of religion, speech and press,” and hence about what, precisely, government is forbidden to do. *Id.* at 330–31. But he suggests that this is a natural consequence of a “power theory” reading of *Barnette* and similar cases, which is “more of a theory about who is forbidden to interfere with religion, speech, and press than a theory of what is forbidden.” *Id.* at 331.

¹⁴⁸ *Id.* at 326 (quoting William T. Mayton, “Buying-Up Speech:” *Active Government and the Terms of the First and Fourteenth Amendments*, 3 WM. & MARY BILL RTS. J. 373, 376 & n.17, 377, 390 n.71 (1994)).

¹⁴⁹ *Barnette*, 319 U.S. at 641.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 640. It is commonplace to note that the opinion was issued in the midst of World War II, which was easily seen as a global life-and-death struggle over competing fundamental values, a struggle that demanded the kind of loyalty and assent to those values for which people would be willing to risk, and sacrifice, their lives.

¹⁵² *Id.* at 641.

¹⁵³ *Id.*

is certainly intimately tied to it and may include it. Against those who argue that the contemporary culture wars, in both their political manifestation and their legal application to such questions as the possibility of exemptions for religious objectors to public accommodations laws in the context of LGBTQ rights, require us to find ways of coexisting despite “our deep differences,”¹⁵⁴ others argue that there is no need to do so. To the contrary, they assert that “they have already won the culture wars, and that it is time to consolidate their victory.”¹⁵⁵

Perhaps the most notorious example of this is Mark Tushnet’s call—issued before the 2016 election of President Donald Trump, with seeming confidence that the election would usher in a Democratic victory—to “abandon[]” a compromise-friendly “defensive crouch liberal constitutionalism.”¹⁵⁶ Tushnet asserted that the only question, following the alleged liberal or progressive victory in the culture wars, is “how to deal with the losers.” His own “tactical” judgment was that “taking a hard line . . . is better than trying to accommodate the losers.” Such an approach might have made sense when the war was ongoing, because “a hard line might have stiffened the opposition in those fights. But the war’s over, and we won.”¹⁵⁷

I raise this example here neither to praise nor to condemn it, nor to point out the dangers of premature predictions. (Tushnet himself, in fairness, wrote at the time that if Trump won the election, “all bets are off” and “constitutional doctrine is going to be the least of our worries.”¹⁵⁸) I doubt that Tushnet is right about the state of the culture wars, or that the hard-line strategy is indeed preferable, tactically or otherwise.¹⁵⁹ It is certainly arguable that time has not been kind to his assumptions about the state of the culture wars. But the question whether it is better to press hard for a particular creedal or normative vision or proposition—unity, equality, liberalism or conservatism, or any other sort—or to stop short and compromise is just that: a question, one that is subject to both empirical and normative inquiry. At least on non-normative grounds, Tushnet’s answer should not be rejected

¹⁵⁴ JOHN D. INAZU, CONFIDENT PLURALISM: SURVIVING AND THRIVING THROUGH DEEP DIFFERENCE 6 (2016).

¹⁵⁵ Paul Horwitz, *Positive Pluralism Now*, 84 U. CHI. L. REV. 999, 1019 (2017) (reviewing Inazu, *supra* note 154).

¹⁵⁶ Mark Tushnet, *Abandoning Defensive Crouch Liberal Constitutionalism*, BALKINIZATION (May 6, 2016, 1:15 PM), <https://balkin.blogspot.com/2016/05/abandoning-defensive-crouch-liberal.html>.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ See Horwitz, *supra* note 155, at 1021–23.

reflexively, any more than Jackson's prediction of "the unanimity of the graveyard" should be accepted uncritically.¹⁶⁰

Rather, I bring it up because Tushnet's confident assertion provides a useful contrast to the passage quoted above. Jackson here is essentially making an argument about the political economy of struggles over "unity" or orthodoxy, and thus about the dynamics of culture wars.¹⁶¹ Where one creedal view or value commands widespread consensus, *and* where those holding that view include elites with access to governmental and cultural power, holdouts or dissenters from that view—like the Jehovah's Witnesses—are likely to be seen as all the more disturbing. Where the creed or value is liberal in nature, the holdouts will be seen as all the more illiberal. Their unwillingness to accept the consensus will be seen as all the more impossible to comprehend, and unworthy of any effort to understand empathetically.

Under these conditions, the majority's (or elite's) desire to close off the remaining gap, no matter how small, and secure *total* agreement and obedience may be even more urgently felt, and forcefully executed, than the preceding, much longer and larger effort to achieve *substantial* consensus. And that fierce last effort, one now backed by the force of legal sanction, may result not in a final victory, but in the entrenchment and increasing vehemence of the dissenting group. The effort to secure the final inch of ground can "solidify, unify, and galvanize" the dissenting group in "opposition to the state" which represents the prevailing view.¹⁶² Social movements, combined with legal efforts, without doubt can do a tremendous amount to change social and legal views and behavior and effect widespread changes in and sharing of values—often, as Jackson suggests, values shared by "good men" and women. But efforts to close the values gap completely—to arrive at unanimity, and to compel conduct that reflects some widespread and commendable value—can achieve the opposite result. They can push

¹⁶⁰ W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 641 (1943). Indeed, such an answer is consistent with Justice Holmes's acknowledgment of the logic of "[p]ersecution for the expression of opinions": that if "you have no doubt of your premises or your power," it is natural to "express your wishes in law and to sweep away all opposition." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). There is little, if any, intrinsic difference between doing so by criminalizing particular statements and doing so by insisting that the individual positively endorse those premises, although there may be tactical or instrumental reasons to do one and not the other. Holmes's argument that we should not do either, because "time has upset many fighting faiths" and "the ultimate good desired is better reached by free trade in ideas," is just a bet—"an experiment"—not a certainty. *Id.*

¹⁶¹ Cf. Horwitz, *supra* note 155, at 1023 (arguing that one reading of Trump's victory, in light of the liberal or progressive establishment victory in the culture wars that Tushnet assumes, is that "the urging of a liberal 'hard line' and the rise of an anti-elite conservative populist movement [] are closely connected," forming part of a dynamic that encourages polarization and further conflict precisely because each side views itself either as victorious or as embattled—or both at the same time).

¹⁶² Christopher C. Lund, *Martyrdom and Religious Freedom*, 50 CONN. L. REV. 959, 972 (2018).

some of the dissenters to become more intensely attached to their views, more insistent in refusing to comply, and more convinced that any state and society that insists on their final surrender is not worthy of their loyalty and demands forceful opposition.¹⁶³ Differences of view will translate not just into additional strife, but “bitter” strife.

It is this dynamic that Justice Jackson describes here far more pithily than I have. One may conclude that the last inch of ground is worth gaining at that price. The more unreasonable and illiberal the holdout group seems to the majority, the more likely it is that this will be its conclusion. But one may also surely question whether the last inch of ground is really worth the cost.

Changes in American values, at least among academics and other elites, in the past 75 years may render this message less powerful than it once was. The values that Jackson selects as examples may be less salient to a contemporary audience. At least for the kind of reader who is likely to encounter a judicial opinion or law review article, it is doubtful that values like “nationalism,” patriotism, or anything instantiated in a ritual like saluting the flag or mouthing the Pledge of Allegiance will seem worthy of “moderate efforts” to persuade others to adopt them, let alone “ever-increasing severity.”¹⁶⁴

But other regnant values today may seem well worth precisely this kind of escalating effort, including the use of legal coercion. It may not take the form of the sort of compelled participation in a ritualized statement of values that was directly at issue in *Barnette*.¹⁶⁵ But it may well involve insisting that individuals who choose to engage in public behavior, or to participate within

¹⁶³ See Paul Horwitz, *Against Martyrdom: A Liberal Argument for Accommodation of Religion*, 91 NOTRE DAME L. REV. 1301, 1306, 1320–26 (2016).

¹⁶⁴ *Barnette*, 319 U.S. at 640. Of course, one should not assume that this elite audience represents anything like the majority view concerning American values or rituals.

¹⁶⁵ In her contribution to this symposium, Erica Goldberg identifies a close analogy to this ritual: the trend at public universities toward requiring the filing of “diversity statements” as part of the hiring or promotion process. As she notes, there are many ways to incorporate such a policy that “may not be constitutionally problematic” and that are substantially distinct from something like a “loyalty oath” or compelled statement of values. A university may reasonably want to know what an applicant for promotion has done to ensure that students from various backgrounds are benefiting from the classroom experience, regardless of that teacher’s views on diversity or anything else, just as it may require that a teacher applying for promotion show some other forms of teaching skill. I thus decline to make any blanket statement about such policies as a constitutional matter. But neither is it hard to imagine versions of such a requirement that are poorly designed, badly implemented, or employed in a way that insists not just on practical plans and results but on the applicant’s formal assent to some particularized statement about the meaning and importance of a contestable value or creed: a statement that “equality” or “diversity” have a specific meaning and, as defined, are values to which the applicant subscribes unreservedly. At that point, the fact that some might find that value preferable to something like patriotism is irrelevant, and the requirement does indeed become highly similar to the flag salute requirement in *Barnette*. See Erica Goldberg, “*Good Orthodoxy*” and the Legacy of *Barnette*, 13 FIU L. REV. 639, 651–57 (2019).

the marketplace, engage in conduct, expressive or otherwise, that is consistent with those values.¹⁶⁶ Even commendable public values can furnish the spark for the dynamic that Jackson insists leads to the “unanimity of the graveyard.” This is the kind of dynamic that turns our so-called culture wars into contests over the control of government, and the use of government in turn to advance or entrench apparent victories in those culture wars. Both in electoral politics and in the courts, our culture wars become a fiercer, more bitter, increasingly polarized form of politics.

In sum, although Jackson’s ringing language about the “unanimity of the graveyard” has about it the air of an article of faith, it is also a descriptive account: a story about the ways in which contests over creeds and values can become scorched-earth battles with significant costs. *Barnette* suggests one limit: one cannot insist that the victory of one side, of one creed or value, be memorialized by compelling the defeated side to literally give voice to its submission. But this passage is suggestive of a deeper and broader meaning than that. It has something to say about the dynamics and dangers of *any* effort to move from widespread consensus to an entrenched and enforced final victory.

* * *

I close with a final passage, which is important both in itself and for the light it sheds on the “fixed star” paragraph that precedes it. Immediately after his celebrated ode to the proposition that no official can prescribe or compel orthodoxy “in politics, nationalism, religion, or other matters of opinion,”¹⁶⁷ Jackson offers the following conclusion:

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.¹⁶⁸

Recall the discussion earlier of *Barnette* as a statement about the limits of state power. There, I noted Jay Bybee’s observation that *Barnette* says more about those limitations than about the precise contours of the right at

¹⁶⁶ See *id* at 5–7 (examining modern public accommodations cases and arguing that, at least in some instances, those cases may compel speech or expressive conduct that is “constitutionally suspect” and raises the same concerns that drove Justice Jackson’s opinion in *Barnette*: “an aversion to mandated uniformity of opinion, or even simply a show of uniformity of opinion, and the political strife that may ensue”).

¹⁶⁷ *Barnette*, 319 U.S. at 642.

¹⁶⁸ *Id.*

issue in *Barnette*.¹⁶⁹ Jackson's peroration—his *real* peroration, after the “fixed star” passage that usually marks the end of most readers' encounter with *Barnette*—sheds some possible light on the question what sort of limitation on state power *Barnette* ultimately involves. I cannot do even partial justice here to the multitude of readings of the right in *Barnette* that various scholars have offered. Rather, I focus on one opposed pair of readings, both offered in Steven D. Smith's contribution to this symposium.¹⁷⁰

Smith usefully frames *Barnette* as a response to a “fundamental question” of modern governance: “How, or on what sort of principles, can a political community—or a common life together—be maintained under conditions of deep and persistent pluralism?”¹⁷¹ Justice Jackson's opinion in *Barnette* constitutes “the American contribution to the challenge of pluralism.”¹⁷² Smith suggests that *Barnette*'s “fixed star” passage provides two possible answers, each in tension with the other.

One answer focuses on “neutrality.” The Constitution requires our government to remain “agnostic” or “neutral” on questions about which other governments would have positively asserted an official orthodoxy; instead, it must maintain a “stance of steadfast neutrality.”¹⁷³ The other answer focuses on “integrity.” On this reading, government is free—or generally free; many of us would read the Establishment Clause as imposing some limitations on this freedom—to offer various pronouncements that constitute an orthodoxy or “officially preferred ‘right position.’”¹⁷⁴ What it *cannot* do is “compel citizens to affirm such opinions.”¹⁷⁵ Our Constitution establishes a “committedly *non-confessional* state,” in which government must “respect and protect the integrity and freedom of its citizens,” not least by being barred from “forc[ing] [citizens] to suffer the most direct and severe impairment of their integrity—namely, being compelled to affirm things they do not believe.”¹⁷⁶

Smith prefers the second reading. But he asserts that the question “can hardly be settled just by reading *Barnette*—among other reasons because

¹⁶⁹ See Bybee, *supra* note 147, at 331 (Jackson's *Barnette* opinion is “more of a theory about who is forbidden to interfere with religion, speech, and press than a theory of what is forbidden.”).

¹⁷⁰ See Steven D. Smith, “Fixed Star” or Twin Star?: *The Ambiguity of Barnette*, 13 FIU L. REV. 801 (2019).

¹⁷¹ *Id.* at 803–04.

¹⁷² *Id.* at 804.

¹⁷³ *Id.* at 807.

¹⁷⁴ *Id.* at 809.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 810.

both interpretations can find support there.”¹⁷⁷ And that is especially true if, as he does, one focuses “only [on] the revered sentence from *Barnette*,” the “fixed star” passage, with its complex mix of prepositions and its combination of “no orthodoxy” and “no compulsion” language.¹⁷⁸

“Neutrality” and “integrity” are capacious categories, which can no doubt be treated as covering a number of different readings of *Barnette* under each rubric. I do not attempt to narrow down what is meant in each case. But I *would* suggest that, even if one limits oneself to reading *Barnette* alone, the passage quoted above tilts the scales in favor of an integrity-based reading of that opinion rather than a neutrality-based reading.

The passage’s concern is not with what the state can or cannot say. To be sure, it refers to “constitutional limitations” on state power, which could be read in isolation as a reference to limitations on state pronouncements of orthodoxy. But the sounder reading, I think, is that the limitations in question refer to the protected “sphere of intellect and spirit” which must remain outside “all official control.” Read together, the “fixed star” passage and the reference to a protected sphere of intellect and spirit are far more suggestive of an integrity-based reading than one focused on the absence of state orthodoxy.

The combination of an integrity reading with the Court’s emphasis on the limitations on state power may in turn shed additional light on the integrity reading of the right recognized in *Barnette*. It suggests that the respect for individual integrity recognized in *Barnette* is more than instrumental and goes beyond a highly specific conception of human personhood. It could be true that forced recitation of the Pledge of Allegiance “may have an influence on what and how one thinks,”¹⁷⁹ although it also seems possible that such performances will be so rote in nature as to have little influence at all. Similarly, it may be true that compelled speech shows little “recognition of and respect for the value of sincerity,”¹⁸⁰ although a good deal of useful democratic discourse may involve valuable qualities other than sincerity, such as irony, “humor, pretense, sarcasm, and exaggeration.”¹⁸¹ But *Barnette* does not rest on a particular conception of what the individual ought to do with his or her integrity. It simply removes

¹⁷⁷ *Id.* at 812.

¹⁷⁸ *Id.*

¹⁷⁹ Seana Valentine Shiffirin, *What is Really Wrong with Compelled Association?*, 99 NW. U. L. REV. 839, 855 (2005).

¹⁸⁰ *Id.* at 860.

¹⁸¹ *Id.* at 863. Shiffirin, to be clear, recognizes this, noting that even if “a general virtue of sincerity is integral to a successful First Amendment culture,” public discourse need not be conducted at a constant level of high-minded earnestness. *Id.* I confess that I emphasize this point because, as an immigrant to the United States from a Commonwealth country, I tend to think that there is plenty of sincerity, passion, and earnestness in American public discourse and far too little genuine irony and wit.

the question from the scope of state power altogether, at least where the state would purport to direct the individual to speak.

Perhaps what matters about the *Barnette* opinion is not the precise theory of human dignity, integrity, autonomy, or what have you that Justice Jackson has in mind, although this is the question that has occupied most readers of the opinion. Nor is it the opinion's emphasis on the limits of state power. It is how the two work together. Poetic judicial language cannot be read literally, to be sure. But the conclusion that governmental authority ceases—not that it exists but fails a balancing test in a particular case, but that it runs out altogether—when it confronts the “sphere of intellect and spirit” is worth more attention. It offers a vision of both individual freedom and the public sphere that recognizes that other areas of human life exist, that they matter as much as government's ability to “maintain itself” or execute even commendable policies,¹⁸² and that their existence and independence do not depend on the state's sufferance.

In that sense, *Barnette* recognizes for the individual mind what others have argued is true for larger institutions: that, as Richard Garnett has written, “constitutionalism relies . . . not only on the separation and limitation of the powers of the political authority, but also on the existence and the health of authorities and associations outside, and meaningfully independent of, that political authority.”¹⁸³ It reminds us, in a time when it is easy to think of the state as the locus of all power and the source of every right, of what Mark DeWolfe Howe took for granted about individuals when he made the same argument for groups:

[G]overnment must recognize that it is not the sole possessor of sovereignty, and that private groups within the community are entitled to lead their own lives and exercise within their area of competence an authority so effective as to justify labeling it a sovereign authority. To make this assertion is to suggest that private groups have liberties similar to those of individuals and that those liberties, as such, are to be secured by law from government infringement.¹⁸⁴

182 W. Va. State Bd. of Educ. v. *Barnette*, 319 U.S. 624, 636 (1943).

183 Richard W. Garnett, “*The Freedom of the Church*”: (Towards) An Exposition, Translation, and Defense, 21 J. CONTEMP. LEGAL ISSUES 33, 39 (2013).

184 Mark DeWolfe Howe, *Foreword: Political Theory and the Nature of Liberty*, 67 HARV. L. REV. 91, 91 (1953).

III. CONCLUSION

I have closed with a grand, if not grandiose, suggestion. Among the significant aspects that one can draw from a close reading of Justice Jackson's opinion in *Barnette* are its recognition of the limits on state power and rejection of balancing, its emphasis on the integrity and independence of the individual, and its particular application of these two positions to protect the right to reject a compelled orthodoxy, "good" or "bad." Taken together, they suggest that *Barnette* is a kind of paean to the sovereignty of the mind—in a legal sense, a political sense, and perhaps a larger sense altogether.

That is a rather sweeping vision. It raises difficult practical and jurisprudential questions that the opinion itself certainly does not answer. However eloquent Jackson's opinion is, and however fitting the outcome, it is hardly surprising, given the reading I have suggested here, that much of the history of post-*Barnette* First Amendment law has consisted of conscious or unconscious efforts to rein it in. In the 75 years since *Barnette*, an ever more labyrinthine set of doctrines has provided more instruction—and more constraints—than the decision itself did. The reach of the First Amendment itself has expanded considerably since 1943. But so has the Supreme Court's reluctance to speak in terms of the absence of state power and the absolute sovereignty of the individual mind. Instead, it speaks in terms of competing governmental interests. They may receive a form of scrutiny that is so strict in some areas as to be "fatal in fact,"¹⁸⁵ but they are entitled to scrutiny just the same. In other words, just as the First Amendment has become a more powerful restraint on government, so the presumption that government has the jurisdiction to regulate in the first place, subject only to whatever test the Supreme Court imposes, has become more powerful as well.

That *Barnette* rejects this kind of language, and speaks in such absolute terms about the lack of *any* state power to compel individual obeisance to orthodoxy, makes it understandable that so much doctrine since then—in the areas of compelled speech, government speech, and much else in the First Amendment—has both followed from and reined in *Barnette*. And it *may* suggest something about why, as I noted at the outset of this article, there has been relatively little direct discussion of *Barnette* in recent scholarship on what Erica Goldberg calls the modern "good orthodoxy" cases, even as the Court has begun invoking *Barnette* in precisely those cases.¹⁸⁶ *Barnette* can surely be distinguished from these cases. But it does certainly not sit comfortably with them.

¹⁸⁵ Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 4 (1972).

¹⁸⁶ See Goldberg, *supra* note 165.

That there is a tension does not make *Barnette* right or the new wave of arguments wrong. But this tension ought to be addressed squarely and openly. *Barnette* deserves and demands more readers.