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Post-Panel Commentary Symposium: Barnette at 75: The Past, Present, and Future of the "Fixed Star in Our Constitutional Constellation": Commentary

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POST-PANEL COMMENTARY

These passages are generated from the commentary that followed each panel at the symposium. Because these remarks are the product of transcriptions from audio recordings, we ask that you please excuse any errors. Some portions have been omitted where the author’s message was unclear. Any inaudible portions in the commentary that did not detract from the author’s overall message have been identified accordingly.

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PANEL I: *BARNETTE* IN HISTORICAL CONTEXT

Dean Joëlle Moreno, FIU College of Law: Thank you so much, and thank you so much for staying on time. So, we have now five minutes for the panel to ask questions or to have a discussion with each other and then we will open up to questions from the audience.

Prof. Genevieve Lakier, University of Chicago Law School: (Addressing Professor Brad Snyder) Can I ask you about that? I was actually in Geneva writing about Frankfurter’s dissent because it is so interesting. So, I agree with you that the dissent in *Barnette*—remember, this dissent in *Barnette* is part of a long tradition that Frankfurter stole. It is not a departure in any way; I think it is partially criticized for it. But, it is a representative principle and view that is not new at all. And, he was a huge admirer of the *Lochner* dissent in many ways, more than Holmes took part of when it comes to free-speech, and Frankfurter in many ways never is. But, there is an incoherency to Frankfurter’s dissent.

It sounded sort of heroic, right? He is standing tall against the weaponization of the First Amendment. Frankfurter is not willing to say that the area of approach applies in every single case. He recognizes that free-speech has this important value. He says that it is not as if all means of access to the political process he proposed to the Jehovah’s Witnesses minimizes the intrusion of First Amendment rights. He says [Jehovah’s Witnesses] are justified in the flag salute, and they can still go to Congress and protest. He also said that it is not as if this was motivated by discrimination. It would be one thing if the legislature did it because it hates Jehovah’s Witnesses. It is

another thing when it does it to promote national [inaudible]. First of all, my question is, is that consistent with [inaudible] here? It does not seem like it. So, if we are going to have that wedge, then why is the Frankfurter approach any less perceptible to weaponization in some ways?

Second, given the facts of the case, I would respect Frankfurter's commitment, but it just seems that its application is really ridiculous. Obviously, these rules were motivated by animus towards Jehovah's Witnesses. I do not understand how he could be insensible to that fact or denying it. So, it seems like a major problem, in his dissent, that he is refusing to acknowledge it or that he recognizes that it would blow up his conclusion, but he is not willing to go there.

Prof. Brad Snyder, Georgetown University Law Center: Well, there was a lot there. So, let me try to take it apart. Frankfurter, I think, is on the forefront of introducing a balancing approach to the First Amendment. I think we often may not agree with the way that Frankfurter balances First Amendment rights and the rights of religious minorities in this case or in *Dennis*, where I think this balancing approach is on full display.

I think he thinks that the majority has gone too far, and he hated the law. He is not in sympathy with the law. I do not think the point of the law is to hurt Jehovah's Witnesses. The flag salute law is not like, "Let's get the Jehovah's Witnesses and have us flag salute."

I do think there is this sort of jingoism and national unity around World War II. I think the failure to give an exception to the Jehovah's Witnesses is unconscionable, and, of course, there should have been an exception for the Jehovah's Witnesses. But, the law, the idea of a "flag-saluter," or just saying the Pledge of Allegiance—it is hard to ascribe that to intend to a particular religious group. That, to me, is a little bit of a leap. But, let me respond to a brief of the panels, to let them chime in; I know our time is fleeting.

I think there is some danger to Justice Jackson's broad language, and that is part of what Frankfurter is reacting to. Jackson is such a great writer, like Brandeis, Holmes, and Marshall. He is in that category. I think that sometimes the loftiness of Jackson's language was too broad, and I agree with you, that it is a free-speech, appellate speech case.

Frankfurter wrote a Columbia law review essay about Jackson, who is his closest friend on the Court, which said that Jackson, later on in his life, realized that his broad language sometimes masked some problems and complexities with what was going on. But, as to John's paper, one thing I wanted to ask him was whether our doctrinal confusion actually starts with *Barnette*?

Because *Barnette* lists so many rights, it does not articulate in a real theorized way what it is doing. It reads more like an essay, whether our

doctrinal confusion ends there. And, my last comment to Ron—you mentioned at the end of your talk, Ron, about the ABA Civil Rights Committee’s amicus brief. Well, that was written by Louis Lusky, the author of footnote four, right? He wrote that brief, and that committee was chaired by Grenville Clark. Monte Lemann was on that committee, and Zechariah Chafee was on that committee. I wonder whether that amicus brief, years before the course of amicus jurisprudence was really driving a lot of the Court’s decisions, was doing the work in changing from *Gobitis* to *Barnette*, from free exercise to compelled speech, and whether we ought to credit Hayden Covington, or whether we ought to credit Louis Lusky and those lawyers.

Prof. Ronald K.L. Collins, University of Washington School of Law: Well, Covington just echoed their arguments in this point making the paper, just a couple of big comments, Genevieve.

We talk about the judges and their role in the regulatory state. Remember that these cases were brought to them by progressive lawyers, so you might want to give some attention to progressive lawyers, like [inaudible] Francis, Zechariah Chafee, and very importantly, Osmond Fraenkel, with the American Civil Liberties Union.

On your note you talked about, and I love this idea, revisiting and rethinking Frankfurter’s opinions in *Gobitis* and *Barnette*. The picture of him was almost demonic, and I am not saying that there is not some truth there. I would not use the word demonic, but about.

But, I think it is important to be judicious and revisit it. I just mentioned probably something you already know. We mentioned the *Atkins* case, and the incredible work that he did as a lawyer, working with Louis Brandeis, Florence Kelley, and Josephine, the women who really wrote the Brandeis brief or most of it. And then he worked with them again in *Atkins*, and their role in developing the law.

Finally, just one last thing, you all know the name Thurgood Marshall. How many of you know the name of Robert L. Carter? You know the doctrine of freedom of association. The Constitution says “freedom of assembly.”

There was a guy who was a graduate of Howard College and then went to Columbia and wrote an L.L.M. on freedom of association and the First Amendment. His name was Robert L. Carter. He was one of the lawyers for the National Association for the Advancement of Colored People.

In the case *NAACP v. Alabama*,¹ that is his case. That is where it began. It began with progressive lawyers arguing on behalf of progressive causes,

¹ 357 U.S. 449 (1958).

and we see what has happen to that. It is one of those cases that is sometimes used as court weaponization of the First Amendment.

Prof. John Inazu, Washington University School of Law: Did the confusion start with *Barnette*? No. I am just kidding. I think that some of the labor cases in the 20s and 30s suggest that there are lots of cases, at the time, that are raising different, multiple claims, and addressing it in the same kind of flowery language. So, you are right, that *Barnette* is probably a symptom, but I would not place the blame on *Barnette*. I think, actually, there is some important transitional work that cases like *Widmar* and *Good News* really bring all together.

Dean Joëlle Moreno, FIU College of Law: Okay, questions from the audience?

Prof. Steven Smith, University of San Diego School of Law: This is a question mostly for Genevieve. I thought your presentation was really interesting, and it seemed to me like you were very persuasive in suggesting that there is a big difference between what is at stake in *Barnette*, and what is at stake in issues involving disclosure.

Saying compelled affirmation of beliefs that a speaker does not share, is just not the same at all. It seems like disclosing information that they might prefer not to disclose, but it does not involve that. Is it the same, though? You seem to be suggesting that that is almost the same distinction as between opinion and fact.

It strikes me that that is not the same distinction at all, and I would be much more worried about inquisition if you did not insist on equating them because that seems to me like a pretty dangerous distinction that could create severe inroads into what is the core of the *Barnette* principle.

Prof. Genevieve Lakier, University of Chicago Law School: I am actually curious why you think it is not a distinction because, of course, some disclosures are really problematic.

I am teaching freedom of speech this quarter, and I just taught *American Communication Association v. Douds*,² which is not a case that is in most casebooks, but I think it is really important for students to see the 1950s cases. This is the case, of course, where the Court upholds the loyal communist oath law that is part of the Taft-Hartley Act that requires unions to disclose that they are part of the communist party and that they have particular beliefs, and this is a really problematic law because it requires them to disclose opinions,

² 339 U.S. 382 (1950).

because it penalizes them by denying them the [inaudible] based on their viewpoint. So, [inaudible] are not all the same either. I guess my intuitions are actually that opinion and fact is a much better basis of distinction than the disclosure versus compelled belief. But, tell me why you think it is so dangerous to say *Barnette* is only a case about opinion, not a case about fact.

Prof. Steven Smith, University of San Diego School of Law: Well, this is probably an almost absurd example; it only comes to mind at the moment because I was having a discussion with John Inazu last night about Kyrie Irving's views about whether the Earth was flat or not. Apparently, at one point, [Kyrie] said that he believed the Earth was flat, or recently, I think John says he has recanted.

So, suppose, though, that you have—I was going to say that is almost a frivolous example—but, you can think of all kinds of examples where people do not believe certain things that other people would regard as matters of fact. And, to force them to affirm those things, it seems to me, would be just as severe as a sort of violation of their integrity in the *Barnette* sense. It is totally a matter of opinion.

Prof. Genevieve Lakier, University of Chicago Law School: But, now you are talking about compelled belief, because the reason it is so severe is because they do not believe that.

Prof. Steven Smith, University of San Diego School of Law: Right, exactly.

Prof. Genevieve Lakier, University of Chicago Law School: So, again, now we are talking about how we all get on the case, and all of a sudden, nice, clear distinctions that we draw for purposes of 50-minute talks get very messy. I completely agree that the distinction between opinion and fact can be a complicated one.

But, your opinion again suggests that that problem is compelled affirmation of belief. The problem with that, and the reason why it feels like such an intrusion on their freedom, is because they are being required to speak something that they do not believe is true. This seems to be very different, just to use a counterexample, in the last term's case, the *National Institute of Family & Life Advocates v. Becerra*,³ the Pregnancy Crisis Center case.

In that case, the Court says these pregnancy clinics cannot be required to disclose that the State of California provides low cost or no cost medical

³ 138 S. Ct. 2361 (2018).

care including abortion, in part, and this violates their right not to speak because it is a fact, but it is a controversial fact.

And, the Court does not mean controversial to say that we are not sure it is actually a fact, which is how the Court previously used it on this opinion, this fact line. But, it is about controversial things and you should not be required to say things. So that just seems wrong. It seems like a very different kind of problem than the person being compelled to say something they do not believe.

Prof. Ronald K.L. Collins, University of Washington School of Law: If I can weigh in. There is a case that is being argued by Paul Smith and faculty right now challenging the constitutionality of a Maryland statute that has disclosure requirements for political advertisements, and it is being imposed on newspapers online. And the issue in the case is the distinction between compelled exposure and compelled expression. That case is being litigated right now in a district court in Maryland.

So again, just another example of not only leaning toward the Supreme Court cases, but it has actually happened. In about three or four years, this will work its way through the legal academy. I mean not from here to you but just generally as they would have to go to appellate court. It is a phenomenal case—different standards of review, and depending on how you pigeonhole it, it is actually a state law directed against political expression. And it is being challenged right now in federal district court in Maryland.

Roberto Lopez, 3L FIU College of Law: This question is for any of the panelists. Considering how *Barnette* has been expanded beyond just compulsion of opinion—you decide to demand Internet companies to disclose algorithms or whatever programs are being used to disseminate opinions that are not popular, but become popular because people see comments that are made by bots rather than by people.

Prof. Genevieve Lakier, University of Chicago Law School: Great, so can the government compel Internet companies to disclose their algorithms?

Roberto Lopez, 3L FIU College of Law: Yeah. Operators, owners, bots, or fake comments that are being used to disseminate ideas that are not actually popular.

Prof. Genevieve Lakier, University of Chicago Law School: So, I think there are probably a lot of other reasons why you might have problems with the government compelling a company to disclose their algorithms.

My relatively narrow view of *Barnette* does make me think—there is this case in the Southern District of New York they do in which it is a Internet search engine that systematically excludes democracy-promoting sites from its search results. It is complicated procedural posture because it is in China but the litigants basically say, if you have a First Amendment right to, or that our equal protection rights are being violated by being systematically censored by this private search engine. But that is on and on with the Chinese government that is [inaudible].

And the search engine company says they a right from *Barnette* to completely control what they do or do not include. They cannot be forced to include search results that they do not like in their search engine. So, I think that that is wrong. I think that that is an over-reading of *Barnette*. It does seem like trade secrets who would want to require search engines to disclose their algorithms. But yes, in general, I think that there is a space for a lot more regulation of that.

Prof. Ronald K.L. Collins, University of Washington School of Law: There is a new book called *Robotica: Speech Rights and Artificial Intelligence*⁴ that speaks to some of these issues.

Roberto Lopez, 3L FIU College of Law: Thank you.

Prof. Aaron Saiger, Fordham University School of Law: This is also a question for Genevieve. You said you were talking about a disclosure case about how much money actually goes to charity versus not, that one of the problems was that maybe we should look at whether compelling speech actually threatens free-speech values. And so that led me to ask, I think maybe this is a question of level of generality as is so often the case in the constitutional law.

The question is how we pitch the claim, right? So, if we are saying, well, if there is a law out there that is requiring someone to say or disclose something, I might think that the threshold, is that there is a free-speech value at least presumptively there. The law is requiring you to say or disclose something.

Or, if you said that the level of generality was requiring to disclose a fact, that is a little narrower, the law is requiring you to disclose a percentage of money that you raise that you turn over to charity. Or, to now build on [inaudible] analysis, requiring you to disclose what percentage of money

⁴ RONALD K.L. COLLINS & DAVID M. SKOVER, *ROBOTICA: SPEECH RIGHTS AND ARTIFICIAL INTELLIGENCE* (2018).

turned over to a charity in a setting in which some unpopular charities might be harmed.

Now, that clearly mattered to them, I think, going back to *NAACP*. Part of the concern here was that unpopular charities would be harmed by this. That is the harm that I think we have to take into account when thinking about the regulation of speech. So, the question is where do we think about the free-speech value? If we think about it at the most general level, the most specific level does not matter in how the jurisprudence gets developed.

Prof. Genevieve Lakier, University of Chicago Law School: I agree with you that there are free-speech interests implicated, because I think it is just at the end.

I do not necessarily think that laws that require people to disclose information or to speak things that affect, pose no First Amendment harms. But they do not necessarily pose the kind of comment that requires strict scrutiny. I guess in general, I think, some kind of intermediate scrutiny. And I would say that the analogy, the useful analogy, is to incidental regulation of speech. But I do not want to say that, because I do not like *O'Brien* because it is too low. So, you know that criticism. But in general, just as a theory, the useful, and the New Deal regulations [inaudible] in *Associated Press*, the case that I cited, it really treats the Sherman Act as an incidental regulation of speech.

So, what is so useful about that whole line of cases is that that in general, the Court provides relatively deferential scrutiny because it recognizes that the government had a lot of good reasons to do what it was doing even if it has an effect on speech. When the burden is very severe as in *NAACP v. Alabama*, which the Court recognizes was not intended to suppress expression, is an incidental regulation of speech, but in this particular context, has profound and severe burdens on the groups that are regulated by it because of a historical circumstance.

In that case, then all of a sudden we get much more scrutiny. I like that framework. I think it is supple and then responsive to the particular context and circumstance. Of course, we do not want the government to effectively prevent you from speaking. But that is very different than making, what the Court tends to do in its cases these days, making a sort of a metaphysical claim, that any time the government compels speech, we have to apply strict scrutiny.

Prof. Ronald K.L. Collins, University of Washington School of Law: These questions, I think, raise another question: how do progressive values evolve into conservative norms, and does the counter ever hold true?

Prof. Genevieve Lakier, University of Chicago Law School: In a way, isn't that what we have been saying, no?

Prof. Ronald K.L. Collins, University of Washington School of Law: Still, what happens typically in these sorts of situations, is conservatives will go back to a case and say, well, that is really not the case. And sometimes they breathe new life into it, and what have you. And that may or may not be the case, but I just worry and wondering stood back and [inaudible] he just thought, well, how does this happen?

I mean, how do cases like *NAACP* or etc. How is it that one value, if you will, evolves into a, if you will, a counter to that, and I hadn't thought about it until today. Does the converse hold true? Are there conservative norms that evolve into progressive values?

PANEL II: READING *BARNETTE*

Prof. Ronald K.L. Collins, University of Washington School of Law: (Addressing Prof. Paul Horwitz) I wanted to thank you for your emphasis on that incredible article, and I strongly recommend it. It's a collection of essays that evoke on First Amendment cases, the law review might give some thought to ask them to write a forward or to adapt portions of that for the law review Symposium.

The idea of careful writing, which now in an era of corporate writing (collective writing done largely by [inaudible]) got me to thinking that Brandeis certainly attended to detail, and to say that he overlooked this, and he overlooked that, and what have you, he was also, like Holmes, very attempted to be courts of the aesthetic, of the power of phrases, uninhibited, robust, wide-open marketplaces like his, that others use.

And so, it just occurred to me that he may well have thought that a pound, if you will, of important rhetoric could very much overshadow, even for decades, any analytical problems that might, and I don't know that he might have been insensitive to the concerns of progressives and, if you will, all of the authorization of the First Amendment. But he may not have wanted to deal with them. Instead, he placed it with some pretty powerful rhetoric, which, like [inaudible], carried the day.

Prof. Paul Horwitz, University of Alabama School of Law: A classic example of this is the opinion for the Court of Chief Justice Warren in *Brown v. Board of Education*,⁵ which Warren wrote for the public. He designedly wanted it to be the kind of thing that could and would be reprinted in

⁵ 347 U.S. 483 (1954).

newspapers across the country and read by the American people. And of course, it left the remedial phase until later, and it left many problems until later. It is possible, and one wants to talk carefully to one's students about this, it's possible both to praise Brown, and then to spend time questioning, picking apart the opinion, right?

It is great. It is not necessarily great law or a kind of formal legal doctrine. Now, one can say this, I think, about *Barnette*. I guess what I'd say is, and I appreciate this from our Canadian perspective, but early in the development of individual rights and individual rights jurisprudence, there is a greater need for setting the stage, and for saying in an important way that we're going to value individual rights or treat you in a particular way.

And then it is necessary because people have to plan, rely on decisions and so on, to come up, and because lower courts have to apply them. It's necessary to doctrinalize these things, right? So yeah, we get uglier, more corporate doctrine. It serves a real value. We could simply reject it. We should then, though, recognize that we are taken back from time to time to the first questions.

Brian Heckmann, 2L FIU College of Law: My question is for Professors Saiger and Smith, and Professor Horwitz, I welcome your insight as well.

It's just that the question is posed through the papers that the other colleagues on the panel addressed. Professor Xavier, you mentioned that *Barnette* is more about schools, or that's the primary focus, and Professor Smith, you talk about how there's a fundamental pluralism aspect of it, and I'm in my mind sort of combining the two and looking at how that's an increasingly rare occurrence as we become a more polarized society.

Pluralism in whatever microcosms, be them the schools, be them social organizations, is becoming rarer and rarer. You're seeing individuals who are concerned that, to use one of the quotes that Professor Saiger said, "rather than having public schools create Americans out of kids, they're creating partisans out of kids, creating Democrats, or creating Republicans, based on whatever administration is currently in power, or whatever cause célèbre is currently in vogue.

So my question deals with Professor Saiger's idea that the line has to be drawn somewhere. That *Barnette* does not stand for the proposition that public schools cannot ever compel speech, and Professor Smith's concept of the neutrality interpretation of *Barnette*. Is the appropriate way to draw the line, and would drawing the line in this way, make the neutrality interpretation a viable option that could actually be implemented?

Should we cognitively disassociate our schools from the state, from whatever politics that is going on, and really make control of the academic pursuit localized, so that you still have students who can be compelled to stop

saying two plus two equals five, but will not have students who are disciplined for either insisting that there are only two genders, or insisting that climate change is a man-made problem?

Prof. Aaron Saiger, Fordham University School of Law: I think that Professor Smith and I would agree that one of the genius moves of *Barnette* is to begin with a general principle about citizens and compelled speech and then to treat schools as a special case. It has to treat schools as a special case for the reasons that I articulate. But I am not sure that one ought to treat what public school teachers and officials can do as anything except for the fact that they are a very unusual kind of public official.

The other groups in those categories, or the other places of compelled attendance, have speech. The Armed Forces and courtrooms are the two that come immediately to mind. I do not think I said that students are being sorted by political party, and I guess I would respond to what you said about schools in two ways.

One is that the state cannot dissociate itself from an educational enterprise, just as imaginary Senator Smith cannot dissociate himself from the hearings, but whatever you decide is a political decision. And the other is that localism is no longer the only kind of associational structure available to us that is not big government control because now they are capable of sorting people by virtually any criterion that we want. So, the attractions of globalism should be balanced against those possibilities as well.

Prof. Steven Smith, University of San Diego School of Law: Well, I do not know if I would have much to add of substance. It seems to me, the gist of your question was, could we avoid some of these problems that arise, trying to figure out how our next principles might apply to schools if we just got the government out of the business of schooling.

Now, if we made them more privatized and so forth. I think you can. You can reduce or avoid some pressures in that way. You can give people more choices, but even though that is a choice, you could make that choice partly so that there would be more latitude for students to be able to test schools where you would not be required to affirm things they did not believe, and so forth.

I cannot imagine that will be any sort of overall cure. There is always going to be hard problems like that, I think. I do not think that public school tradition is going to go away. Frankly, I mean, I can't imagine another. You could have an array of schools so that every student would be able to find this. So, I think these are going to be hard issues, though you can maybe address to some degree some of these problems.

Prof. Genevieve Lakier, University of Chicago Law School: I think this is a question for all three of you, but I am going to tie in with Aaron. I want to get your provocation I think at the end of your talk, when you said maybe *Barnette* is wrong because we shouldn't constitutionalize progressive education, or maybe *Barnette* is right because we should constitutionalize progressive education?

That was a clever trick; you're giving us one or the other. I want to say Door C. So maybe *Barnette* is right, but not because it requires us to constitutionalize progressive education, but because the lower issue of *Barnette* poses a substantial burden to the ability of a minority group to participate in public life, and support in the domain of public life.

Maybe *Barnette* can be a win, as my colleague's decision, that it doesn't require us to constitutionalize a particular vision of education but prohibits the government from imposing a particularly severe burden on any particular group. And I was tracking all three, I thought all three papers were really interesting and incisive analyses of *Barnette*, but in none of them, other than Professor Horowitz's, which talked a little bit about equality but quickly moved away, was a view that maybe what the vision of *Barnette* is a vision of equality.

So not all three sort-of presumed a kind of neutral principle that applies to all groups different at the same. Either all groups have a right of integrity, or all groups have a right against non-neutral state action, or all groups have a right to progressive education or not progressive education. Maybe this is a principle about the different ways in which the Constitution applies to different groups depending upon their different positions and their burdens that facially neutral laws that perhaps can impose.

Prof. Steven Smith, University of San Diego School of Law: Well I would resist that interpretation of *Barnette*. I think, as Paul pointed out, that that would possibly be a way to write *Barnette*, and I think it seems the Court chose not to write it that way.

I am very thankful they did not choose to write it that way, because I think that the principles that it is written from are very important ones, as opposed to because Jehovah Witnesses were a minority, that is why the case went that way. But it seems to me that almost, by definition, any student who came into conflict with something, the school would be requiring them to affirm would be that sense of minority.

I become worried about efforts to decide who is a minority, and who is not a minority, and so just given one instance of it, in the kind of work I do, at conferences I go to I hear quite often it said that someone, like say Jack Phillips, the baker in the *Masterpiece Cakeshop* case, we do not need to worry about him, because he is a Christian, and Christians are not a minority,

Christians are the majority in this country. And to me, that seems sociologically so, almost naive. Christianity is not like a block of people, you know? To someone like Jack Phillips I think he is just really clearly part of a minority, but I do not think anything is really gained by trying to sort things out in that way.

Prof. Paul Horwitz, University of Alabama School of Law: I guess first of all, yes, doctrinally, I think the thing that people often point to about *Barnette* that it is important for turning to speech and kind of advancing this vision, rather than creating it as a freedom of religion case, is the same thing that makes me think it is not an equality argument, and that it could have gone that way. As I say, in the facts, there was a willingness to accommodate some others—a majority group for what it's worth—and not the Jehovah's Witnesses, and they could have decided it, in theory. on those grounds, and they didn't. I guess I would say this, it's true certainly that my general position on these matters tends to not be in entirely on board with modern progressive readings of the First Amendment or particular kinds of reading the First Amendment.

But I take them seriously. I think that there is, as I said, a lot of traction behind some of these ideas and that they have a lot of value. Or I could disagree with them and yet find they are worth exploring, as opposed to kind of being the subject of partisan dismissal, but I think that then they have to grapple with this. You would have to grapple with *Barnette* as it is.

I mean, I think one could come up with an equality reading and say *Barnette* would have been better done that way, but I do not think that is the *Barnette* we have. I read a paper this summer, a very good paper, on compelled speech and religion, that talked about *Barnette*, and the ambivalence was palpable.

The paper kind of struggled to deny what I think the rest of the argument of the paper suggested, which was that the author was not really happy with *Barnette*, and would, on the whole, like to see it go because the author wanted more room for compelled speech, or for government action in this area, especially in the public accommodations field.

The author again, to kind of keep it neutral, the author knew that *Barnette* was an issue at the background, raised it with integrity, but was uncomfortable finally grappling with it. And I guess what I would say is that just as I have a more or less traditional or civil [inaudible], really need to take on board the important new arguments that are being made in the field.

So, I think it is fair to say that some of those arguments have to grapple with *Barnette*, again, as it exists. So, they might decide that they are actually more sympathetic to Frankfurter's dissent than the majority, and that is fine. But, I think it would be interesting to join that debate.

Prof. Aaron Saiger, Fordham University School of Law: I do not know if this is fully responsive, but the music that I hear in *Barnette* is, we shall not strangle the free mind at its source. And that way of thinking about the problem of the students is the opposite, I think, of thinking about them as a discrete minority. They are each a free mind as all students shall be, and particularly because I suspect, although I do not know, that it's counterfactual.

In general, the children black out that they were witnesses and are not always independent believers. They've been pushed by their families, but for the Court to say these are free minds says to me that they really were not thinking about minorities. That is the way I read the case, and its pedagogy, and that is also the way I read the historical dispute at the time, in educational circles, which was essentially why I am trying to create patriots out of everyone.

PANEL III: *BARNETTE* IN MODERN CONTEXT

Prof. Howard M. Wasserman, FIU College of Law: Thank you, Professor Kendrick and to all of our panelists. The panelists agreed to do something a little different because there are two free speech pieces to *Barnette*. One is the question of compelled expression, and the other is the role and use of the American flag and American-flag-related ceremonies as a part of the First Amendment.

If we are thinking about other current controversies that potentially implicate *Barnette*, one of them is NFL players kneeling during the National Anthem. It also happens, in addition to being the 75th anniversary of *Barnette*, it is the 50th anniversary of Tommie Smith and John Carlos raising their fists during the medal ceremony at the Summer Olympics.

We have not talked about the NFL problem in *Barnette* in First Amendment terms because the NFL is a private actor. There are some state action arguments, but I do not think they actually would work. Therefore, it is being litigated in other terms. But, if we assume that we could get state action, then we get into another issue, which is that the NFL players are employees of their teams and of the NFL, and the First Amendment rights of employees are significantly less than the First Amendment rights of ordinary citizens.

What would happen if a government office, say the DMV office, decided that it was going to start each day by having all the employees stand at attention, recite the Pledge of Allegiance, and sing God Bless America. The employer proffers that they are doing this to remind the employees of their obligation as public servants to serve the people and work for the people

who come to the office. Could an employee take a knee or opt out of that ceremony, and could the employee be sanctioned for that?

Prof. Leslie Kendrick, University of Virginia School of Law: If you were to ask people, is there no problem in saying it is part of your duty to sign a test oath or it is part of your job duty to aver that you are not a member of the communist party.

I think the question is just a lot easier, and it points out a kind of loophole in our society. It is not just about compelled speech, it is about the restriction of speech as well. How much does *Garcetti* allow employers to engage in gaming to say, whatever it is that I want you to do or I do not want you to do, or I am just going to define your job duties to include either that you must do that thing or you cannot do that thing.

If you are concerned about whistleblowers, you could say, well, okay so whistleblowing is part of your job duties, and we are going to tell you when you can do that, and the answer is never. Now we will no longer engage in whistleblowing, right? Because now that has been subsumed in part of your job duties. I think the Court is somewhat concerned about this in *Garcetti*, but they do not get too far in figuring out how to deal with it. And I think of this hypothetical as just a version of that.

Prof. Abner S. Greene, Fordham University School of Law: I had a similar reaction to the hypothetical. Yesterday I was thinking about the loyalty oath cases, and I mean to some extent a lot of this can be recapitulated in the very difficult category of constitutional conditions, or unconstitutional conditions.

As you may know, there is no overarching doctrine of unconstitutional conditions. Sometimes conditions are constitutional, and sometimes they are not, and it varies; it is very hard. But I think that the test of loyalty-oath-type cases are a very good example of where the government, you know you do not have to get me hired as a public school teacher, you do not have a right to be a public school teacher, but the government can condition you to be a public school teacher on taking a loyalty oath.

So, I would take this as the thing; you do not have a right to work at the DMV, but the government may not condition your work with the DMV on saying the Pledge. On the football player situation, I am very troubled by what the NFL owners have done. Not of the exact state of play, they have backed down a little bit. ESPN has backed down, and it has changed a lot.

I am a sort of left of center person generally, but I have very moderate tendencies and try to see if everyone can just get along, which is increasingly hard. I wonder whether all of the players who really want to push the taking a knee to express support for Black Lives Matter, more generally for

protesting violent, illegal police conduct, could use their very public national platform in just a different way.

That is, I think the taking has obscured the message, and maybe it should not be obscured, maybe people should understand that, that people get confused. And so, I just feel, this is just a political point, but I wonder whether this very powerful group of impressive, well-paid players, who are on TV a lot, could use that to make the same argument without making people distracted about it being about the flag in America.

Prof. Erica Goldberg, University of Dayton School of Law: My general tendency in approaching legal questions is turn easy questions into hard questions. So, I actually think there is something to this as a difficult question. If any speech pursuant to your official duties is employee speech entitled to no protection, I think there has to be some way of defining what speech is pursuant to your official duties.

We might just end up falling back on something like *Pickering*. Are the people refusing to stand, you know, as sort of ordinary citizens, or does this actually implicate the functions of their job? I can see some government offices where they could say they could make at least a passable argument that it implicates the functions of their job. I think there are certain government offices where you just have to say no, this is sort of within our purview as a normal citizen, and then you are going to need some compelling reason to force us to say the Pledge. In terms of the NFL, no, I certainly as a expansive First Amendment person, even though it's not state action, I am very heartened by the protests; I think they are wonderful.

But I do think it is a good illustration of the difference between state actors and non-state actors, because we have a variety of teams pursuing a variety of approaches, whether or not they let their players protest. There is some sort of competition among teams to appeal to players, to appeal to the audience, and that sort of competition is what separates the state actors from private actors. That is why we do not force private actors to comply with the First Amendment.

Prof. Howard M. Wasserman, FIU College of Law: The microphone is circulating in order for panelists to receive questions.

Roberto Lopez, 3L FIU College of Law: This is a question for everyone. With the *Masterpiece Cakeshop* case, I wonder how much guidance we can get from Scalia's opinion in the *Smith* case with their peyote scenario and adopting that from a criminal context to a civil, which would just then make us ask the question, how much artistic expression is regulated by the government? As a group concept, it seemed like the *Barnette* opinion gives

very narrow and visual products or an extremely expansive product at this point.

Prof. Abner S. Greene, Fordham University School of Law: I hope this is purely doctrinal. If Jack Phillips had just raised his claim as a free exercise exemptions claim under the First Amendment, we know that under *Smith* he would lose. That is why almost the entire case was litigated as a compelled expression case, although Kennedy found a way to make it ends with religious.

I think the best way of seeing the nature of Jack Phillip's expression plan, is as a request for an exemption from the state public accommodations law. I actually think that is the best way of understanding O'Brien's claim in *O'Brien* as a claim for an exemption from the draft, putting aside the prior argument that Congress was acting with discriminatory intent.

I think if we see the *O'Brien* type case and the *Phillips* type case as claims for exemptions from generally applicable laws affecting speech, and if we were to apply true intermediate scrutiny, we would be at the right spot. That leaves the puzzle of why we would have true intermediate scrutiny for exemptions claim in the speech setting and only rational basis scrutiny for the religious setting, which is a question that people should keep pondering because it is hard to know the answer to.

Prof. Leslie Kendrick, University of Virginia School of Law: I look at *O'Brien*, and I look at the way that the Supreme Court in particular has done *O'Brien*. I do not think it is actually intermediate scrutiny. I think it is essentially rational basis, which helps to resolve any type of tension between it and *Smith*, but I think, certainly lower courts have used it to be more protective, and the Supreme Court has at times too.

This question raises the fact that there is a lot of disagreement about what to do about neutral and general applicable laws, and you have *Smith* in the religion context, but *Smith* is highly contested, and of course in *Phillips* one of his arguments was overrule *Smith*. On the speech side, when it comes to restrictions, you have something that looks more like *Smith*.

This is why it matters that I think *O'Brien* is fairly rational basis, that you are going to have heightened scrutiny for content-based laws, and you are going to have much more permissive scrutiny for content-neutral laws. When it comes to speech compulsions, we do not have that framework. We have the mess that *Barnette* and its progeny has generated, which seems to be less about purpose and more about effects.

That works quite different. That is why Phillips would like to overrule *Smith* and replace it with something that looks more effect space, more like the *Barnette* progeny compelled speech cases. It is a strange thing that we

have the asymmetry that we do with regard to speech on one hand, and religion on the other, and whether we get more that looks *Barnette* or more that looks like *Smith*, it looks like we are headed more this direction right now.

Prof. Howard M. Wasserman, FIU College of Law: One other consideration is that RFRA statute kind of really fouled things up, because then it goes from religion goes from rational basis to strict scrutiny. Phillips has just picked the wrong state to live in because Colorado does not have a RFRA statute.

Prof. Paul Horwitz, University of Alabama School of Law: A question for Professor Kendrick. I agree with you that if dignitary harm is kind of treated as mere offensiveness, that is a problem.

I guess I am wondering two things. Are those the only two choices: dignitary harm or mere offensiveness, and how many cases will involve only that as opposed to some panoply of harms, among them dignitary harm? Second, if it is a pure dignitary harm instance, then what is your sense about how we should treat that doctrinally? Should that be a Trump and no third-party harm sense, or are we better off if it is a pure dignitary harms, subjecting it to balancing? How would you address that?

Prof. Leslie Kendrick, University of Virginia School of Law: I do not know. I hesitated to raise the issue of dignitary harms because I am not a theorist of dignitary harms. I am not someone who spent a lot of time doctrinally working through that, and I did it partly because I know there are people here who have thought about that.

I'm interested in learning some more about dignitary harms. My general response, my intuition regarding these arguments is to separate the economic harm and the dignitary harm and try to disaggregate the various types of harms that go along when someone is denying service on the basis of a protected characteristic. My own impulse is to think it is very hard to disaggregate those harms.

The economic part of it is part, and the dignitary part is part. However, I do not know that you can just pull them apart, such that when you send someone away, as people did in the South prior to the Civil Rights Act, that action is conveying the idea that you are being sent away because of your race.

Even if you could find a place down the street that will serve you, on the margins, an economic debt has been imposed on you. Certainly a dignitary harm has been imposed on you. I have a hard time pulling those things apart

in quite as clinical a way as some folks do. But I need to think about it a lot more, and I appreciate your question.

Prof. Genevieve Lakier, University of Chicago Law School: I was interested in the idea that we should recognize a lot of things as expressive conduct or speech. Relatedly, we should recognize that it depends on the harms and claims, and that there should still be some kind of limit.

Prof. Genevieve Lakier, University of Chicago Law School: I'm curious about how broad or narrow you define this category of the conduct to which the business engages in, because I am interested in this as well. It seems to me that the complicated thing about the anti-discrimination laws often in the conversation is that, I feel we are misidentifying where the expression occurs.

So much debate surrounding *Masterpiece Cakeshop* is whether the cake itself is expressive conduct. The debate centered around whether it was blank cake, not a blank cake, a made-to-order cake, or a cake on the shelf. This seems like a crazy way to define doctrine. It seems like the expression that is really being targeted is the act of providing service to a member of a targeted class, because in the act of providing service, you're saying, "I recognize you as a member of the public, and I'm going to treat you like every other member of the public."

It doesn't seem to me so much about the cake, just like in the 60s the act of refusing service at lunch counters was a profoundly expressive act. However, no one was saying a hamburger had debates about whether or not it was a hamburger or not. I don't think that the point was the hamburger was expressive, it's the act of saying, "I will treat you as a member of the general public who I will patronize," and that, in our commercial society, has a certain kind of status if you're willing to be of service. Think about the status harms that were done to the African-Americans that had to go to the back door of these special establishments rather than the front door, and it was all about the division of service.

So, we think of the expression surrounding the action is not the cake but is the act of giving service, then you have an extremely expansive conception, which I think is correct, that the anti-discrimination laws are laws about expression. And they are justified, because the harms that they are seeking to prevent are very, very serious which I'm okay with. I think Jackson would also be okay, because he recognized the clear and present danger. They also might be able to justify this.

Prof. Abner S. Greene, Fordham University School of Law: Here are my initial thoughts, which would have to be worked out. First, I don't have a fully worked out view about this, but I do think that, for Jack Phillips, if I

have it right, for him, custom made wedding cakes are a type of a craft; a type of an art, and the act of creating the cake is the expression. It's really the act of using his hands to make the cake.

Then I have an argument about expression associations. My second point is the larger claim about how we might have a too expansive conception about what sort of conduct is expressive conduct. I want to be a little bit of a formalist here and stick with the sort of two-part test that I know from *Texas v. Johnson*⁶ that goes back to *Spence* and other cases: does the person subjectively believe that she's expressing a message, and would the reasonable viewers see it as expressing a message.

In some settings that works, but I think in other settings it doesn't. I had a student who came to me to write a paper recently about a case from Florida about sharing food in a public park. The decision says that this act of food sharing qualifies at the threshold as expressive conduct. That doesn't seem right to me as a general matter. I don't know the specific facts of this case, but as a general matter, it seems to me that if you are in the business of providing a soup kitchen or something similar, there may be a, what I would call, an internal and external point of view.

The external point of view may interpret this as part of the discussion about hunger and poverty and sharing and religious good deeds. But I don't think we should see this act as itself intending to express some things, intending to feed someone. It may be viewed as expressing something.

Therefore, I think there are all sorts of situations where we could limit this. So, for example, the person who is providing the folding chairs for the wedding, even if they're claiming that they are expressing or not expressing something, I'm going to rule them out.

Prof. Erica Goldberg, University of Dayton School of Law: Yes, I would just add to that, that Jack Phillips himself said he was, and his actions are conclusive that, he's happy to serve all sorts of baked goods, and that might not be satisfying to you. But in terms of the actual service, he just doesn't want to serve particular cakes that he bakes with a particular expressive meaning.

I also think there are decent limiting principles here, and if I could just say to Leslie, you had said that if we take out the dignitary harm there's no real compelling interest, but when there is no expression of issues, the state does not need a compelling interest anymore, right? The state only needs a rational basis.

Therefore, I feel like most of the civil rights laws will be totally intact unless we have somebody who can make an actual plausible claim of

⁶ 491 U.S. 397 (1989).

expression at issue, like the folding chairs guy has no claim unless they are custom-made folding chairs, but that would be upsetting.

Prof. Leslie Kendrick, University of Virginia School of Law: I agree with you that I think that this cannot turn on whether people write on the cake, or do not write on the cake, or make it special, or do not make it special. However, I think on the offensiveness argument, I think the way the argument is framed is to isolate the way in which you conduct the denial of service, generates offense in the person who is denied service, right?

That's the offensiveness, and the expression there does not have anything to do with the cake. It is the denial of service that is expressing a certain view that creates offense in the person who is denied service. That seems to me to be a form of "expression" that is present in every single application of civil rights law and in all the other types of laws that I was talking about.

