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INTRODUCTION: *BARNETTE* AT 75

Howard M. Wasserman*

If one wished to celebrate the First Amendment in a symposium, 2018-19 offered milestone anniversaries of numerous constitutional landmarks. Consider 2019. It is the centennial of Justice Holmes' dissent in *Abrams v. United States*,¹ 2300 words that invented the freedom of speech under the First Amendment.² It is the 50th anniversary of *Brandenburg v. Ohio*,³ the modern and substantially more speech-protective restatement of Holmes' clear-and-present concept, and of *Tinker v. Des Moines Independent Community School District*,⁴ the high-water mark for student speech in a time in which students in school receive the least speech protection.⁵ It is the 30th anniversary of *Texas v. Johnson*,⁶ which recognized First Amendment protection for burning the American flag, and the controversy that followed it.⁷ Meanwhile, 2018 marked the 45th anniversary of the modern and still-controlling definition of unprotected obscenity,⁸ in a time when sexual expression thrives on the internet. It also marked the 220th anniversary of the Alien and Sedition Acts.

But a better option presented itself in 2018—the 75th anniversary of 1943's *West Virginia State Board of Education v. Barnette*, in which the Supreme Court overruled a three-year-old decision to hold that public-school students could not be compelled to salute the flag and recite the Pledge of

*Professor of Law, Florida International University (FIU) College of Law. A version of these remarks was delivered at the Winter Meeting of the First Amendment Lawyer's Association in February 2019. It was my privilege to organize this symposium; I thank the participants and the editors and staff of *FIU Law Review* for creating a marvelous program.

¹ 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

² THOMAS HEALY, THE GREAT DISSIDENT: HOW OLIVER WENDELL HOLMES CHANGED HIS MIND—AND CHANGED THE HISTORY OF FREE SPEECH IN AMERICA 7(2013); Howard M. Wasserman, *Holmes and Brennan*, 67 ALA. L. REV. 797, 798 (2016).

³ 395 U.S. 444 (1969) (per curiam).

⁴ 393 U.S. 503 (1969).

⁵ *Morse v. Frederick*, 551 U.S. 393 (2007); Wasserman, *supra* note 2, at 851.

⁶ 491 U.S. 397 (1989).

⁷ ROBERT JUSTIN GOLDSTEIN, FLAG BURNING AND FREE SPEECH: THE CASE OF *TEXAS V. JOHNSON* (2000).

⁸ *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973); *Miller v. California*, 413 U.S. 15 (1973); Wasserman, *supra* note 2, at 847.

Allegiance.⁹ *Barnette* is one of Justice Robert Jackson's most famous and significant opinions. The case sits at the intersection of the First Amendment's speech and religion clauses, as the plaintiffs were Jehovah's Witnesses with a religious objection to the compelled pledge. The case arose in the midst of the patriotic fervor of World War II, brought by members of an historically oppressed religious minority.¹⁰

The program, held at FIU College of Law in October 2018,¹¹ divided perfectly. Panel I focused on *Barnette*'s historical context and the time period in which the case arose.¹² Panel II focused on *Barnette* as text and the best way to read and interpret Jackson's words.¹³ Panel III focused on *Barnette*'s modern context, its continued relevance, and its prominent role in three decisions from the Supreme Court's October Term 2017.¹⁴ John Q. Barrett, the leading scholar on Robert Jackson, delivered a keynote address exploring Jackson's life and how it led him to *Barnette*.¹⁵

Barnette is known for several things. It established a First Amendment liberty against compelled expression, protecting individuals against being compelled to utter government-mandated, -approved, or -certified messages. It introduced the First Amendment into the mix of patriotic speech, symbols, and rituals—the American flag, other flags, the Pledge, and the national anthem. It is a wonderful piece of prose, one of the Court's great pieces of First Amendment writing (along with Justice Brandeis' concurring opinion in *Whitney v. California*,¹⁶ which one scholar labeled the “most important essay ever written” on the meaning of the First Amendment).¹⁷ And it was

⁹ 319 U.S. 624, 625–26 (1943); Vincent Blasi & Seana V. Shiffirin, *The Story of West Virginia State Bd. of Educ. v. Barnette*, in *FIRST AMENDMENT STORIES* 99, 99–100 (Richard W. Garnett and Andrew Koppelman, eds., 2012).

¹⁰ *Barnette*, 319 U.S. at 652; Blasi & Shiffirin, *supra* note 9, at 109–12.

¹¹ The program is available for viewing at: *Barnette at 75: The Past, Present, and Future of the “Fixed Star in Our Constitutional Constellation”*, FIU L. REV. SYMPOSIA [hereinafter *Barnette at 75*], <https://ecollections.law.fiu.edu/lawreviewsymposia/Barnette/> (last visited Mar. 25, 2019).

¹² Ronald K.L. Collins, *Thoughts on Hayden C. Covington and the Paucity of Litigation Scholarship*, 13 FIU L. REV. 599 (2019); Genevieve Lakier, *Not Such a Fixed Star After All: West Virginia State Board of Education v. Barnette, and the Changing Meaning of the First Amendment Right Not to Speak*, 13 FIU L. REV. 741 (2019); *Post-Panel Commentary*, 13 FIU L. REV. 827, 827–35 (2019).

¹³ Paul Horwitz, *A Close Reading of Barnette, in Honor of Vincent Blasi*, 13 FIU L. REV. 689 (2019); Aaron Saiger, *Deconstitutionalizing Dewey*, 13 FIU L. REV. 765 (2019); Steven D. Smith, “*Fixed Star*” or *Twin Star*? the Ambiguity of *Barnette*, 13 FIU L. REV. 801 (2019); *Post-Panel Commentary*, *supra* note 12, at 835–40.

¹⁴ Leslie Kendrick, *A Fixed Star in Shifting Skies: Barnette and Civil Rights Law*, 13 FIU L. REV. 729 (2019); Erica Goldberg, “*Good Orthodoxy*” and the Legacy of *Barnette*, 13 FIU L. REV. 639 (2019); Abner S. Greene, *Barnette and Masterpiece Cakeshop: Some Unanswered Questions*, 13 FIU L. REV. 667 (2019); *Post-Panel Commentary*, *supra* note 12, at 840–47.

¹⁵ John Q. Barrett, *Justice Jackson in the Jehovah's Witnesses' Cases*, 13 FIU L. REV. 827 (2019).

¹⁶ 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).

¹⁷ Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in*

one of the first cases in which the Court upheld the First Amendment claim of right, moving lyrical defenses of the freedom of speech into the majority and out of dissents and concurrences.

The timing of this anniversary celebration of *Barnette* was fortuitous because *Barnette* is back. Its principles are again in the courts and in the fore of political, public, and judicial debates. Its principles are increasingly contested, disputed, and litigated. And its principles are wielded towards different political, ideological, and historical valances.

This symposium captured each of these, as do the articles that follow in this issue of *FIU Law Review*.

I. THE ROAD TO *BARNETTE*

In 1940, the Supreme Court in *Minersville School District Board of Education v. Gobitis*¹⁸ rejected a First Amendment claim by Jehovah's Witness students expelled from a Pennsylvania public school for refusing to salute the flag. Justice Frankfurter wrote for an eight-Justice majority that included Justices Black, Douglas, and Murphy, all widely known as civil libertarians. Only Justice Stone dissented.

As Vincent Blasi and Seanna Shiffrin describe, *Gobitis* triggered a wave of violence against Jehovah's Witnesses. The American Civil Liberties Union reported to DOJ of attacks on more than 1500 Jehovah's Witnesses in 335 incidents in 44 states in 1940. Many attacks were abetted, if not ignored, by law enforcement. Some attackers pointed to *Gobitis* as a statement from the Court that the Witnesses were traitors who could and should be compelled by these mobs to salute the flag. More than 2000 Jehovah's Witness students were expelled across 48 states.¹⁹ And the Court did not limit its role to *Gobitis* and children. In *Chaplinsky v. New Hampshire* in 1941, it affirmed the conviction of a Jehovah's Witness for calling a police officer a fascist and racketeer, establishing the "fighting words" exception to the First Amendment.²⁰

Three years after *Gobitis*, however, the issue of compulsory flag salutes and Jehovah's Witnesses returned to the Court, in a case involving three Witness families from West Virginia (which had amended its law to compel the Pledge following *Gobitis*).²¹ Several things had changed in the

Whitney v. California, 29 WM. & MARY L. REV. 653, 668 (1988).

¹⁸ 310 U.S. 586 (1940).

¹⁹ Blasi & Shiffrin, *supra* note 9, at 109–12.

²⁰ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 569, 573 (1941); Blasi & Shiffrin, *supra* note 9, at 110.

²¹ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 625 (1943).

intervening years. Jackson and Wiley Rutledge had replaced Chief Justice Hughes and Justice McReynolds on the Court. Stone, the lone and forceful dissenter in *Gobitis*, had been elevated to Chief Justice. Black, Douglas, and Murphy had announced in a separate dissent that they had been wrong in *Gobitis*. The historical context also had changed. In 1940, Europe was at war but the United States was not; it skirted the edges of the conflict in the face of a strong “America First” movement, reluctance to join another foreign war, and fear of Nazi spies drawing the U.S. into the conflict. By 1943, the United States was in the war, the tide was turning in the Allies’ favor, and fears of a Nazi Third Column had subsided.²²

Gobitis’ 8-1 majority rejecting the First Amendment claim became a 6-3 majority accepting the claim and protecting the right of the plaintiffs to opt-out of the pledge. Jackson wrote for the Court; Black concurred, joined by Douglas, to explain the change of heart;²³ Murphy did the same.²⁴ Roberts and Reed announced simply that they adhered to the views expressed in *Gobitis*.²⁵ Only Frankfurter wrote a full dissent.²⁶

Jackson emphasized two points. The salute and participation in the flag ritual represent a form of utterance, one requiring affirmation of belief and state of mind.²⁷ And the freedom to opt-out that the students asserted did not collide with the rights of others; the opting-out Witnesses did not prevent anyone who wanted to salute the flag or recite the pledge from doing so. The only collision was between the right of the individual and the authority of government to compel compliance for its own sake.²⁸

Jackson’s opinion is known for several rhetorical flourishes in defense of the First Amendment and its freedoms. Five are worth noting:

National unity as an end which officials may foster by persuasion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement.²⁹

That is, government can take steps to create a nation and to build unity through its rhetoric; it may not do so by compelling adherence to those views.

²² Blasi & Shiffrin, *supra* note 9, at 112.

²³ *Barnette*, 319 U.S. at 643 (Black, J., joined by Douglas, J., concurring).

²⁴ *Id.* at 644 (Murphy, J., concurring).

²⁵ *Id.* at 642–43 (Robert and Reed, JJ., stating the opinion that the judgment below should be reversed).

²⁶ *Id.* at 646 (Frankfurter, J., dissenting).

²⁷ *Id.* at 632.

²⁸ *Id.* at 630–31.

²⁹ *Id.* at 640.

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.³⁰

This responded to Frankfurter's dissent here and his majority opinion in *Gobitis*, both of which urged judicial deference to the decisions and policies of majoritarian branches of government.³¹

To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds.³²

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.³³

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.³⁴

The final statement is the opinion's most famous (and gives the symposium its title). It also is only partially true. Government and government officials can prescribe orthodoxy in politics, nationalism, and other matters. But government may not do so by compelling citizens to utter or represent agreement with that orthodoxy.

II. *BARNETTE* AND THE FLAG

Barnette has been a key precedent in other constitutional disputes over the flag. The Court cited and quoted it in cases arising from convictions for burning or otherwise defacing an American flag. In establishing First Amendment protection for flag desecration in *Texas v. Johnson*, Justice Brennan emphasized the expressive nature of the flag and the act of

³⁰ *Id.* at 638.

³¹ *Id.* at 646, 648 (Frankfurter, J., dissenting); *see also* *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 598 (1940).

³² *Barnette*, 319 U.S. at 641.

³³ *Id.* at 632–33.

³⁴ *Id.* at 642.

utterances associated with it; he quoted in full Jackson's language about national unity as an end fostered by persuasion rather than compulsion and the homage to the "fixed star in our constitutional constellation."³⁵ The Court did the same in *Spence v. Washington* in reversing a conviction under a state state statute prohibiting the placement of figures or images on an American flag.³⁶

Controversies over the flag, pledge, anthem, and related patriotic symbolism arise periodically. Even with *Barnette*, a story often surfaces in which a public-school student is sanctioned or singled out for exercising his rights under *Barnette* to opt-out of the pledge.

In 2009, a lawsuit was filed against the New York Yankees by two fans who were evicted from Yankee Stadium when they attempted to leave their seats during the playing of "God Bless America" during the Seventh-Inning Stretch, in violation of a team policy established after 9/11. The lawsuit settled, with the Yankees agreeing not to prohibit fans from moving during the song.³⁷

In 2010, Mississippi Judge Talmadge Littlejohn held in contempt of court an attorney who failed to recite the pledge at the beginning of court proceedings, as was the judge's courtroom practice; Littlejohn jailed the attorney for five hours until rescinding the contempt citation. The Mississippi Commission on Judicial Performance recommended that Littlejohn be reprimanded and assessed \$ 100 in costs, a sanction the Supreme Court of Mississippi affirmed.³⁸

The most recent controversy, ongoing since 2015, involves Colin Kaepernick and several NFL players kneeling during the pre-game playing of the national anthem. The issue took on national consequence in fall 2017, when President Trump turned it into a political football, repeatedly calling on the NFL to cut or suspend players who did not stand at attention for the anthem on the field.³⁹ Vice President Pence flew to a game in Indiana

³⁵ *Texas v. Johnson*, 491 U.S. 397, 401, 415 (1989).

³⁶ *Spence v. Washington*, 418 U.S. 405, 415 (1974) (per curiam).

³⁷ Complaint, *Campeau-Laurion v. Kelly*, (S.D.N.Y. Apr. 15, 2009) (No. 09-CV-3790); *Yankees Settle 'God Bless America' Case, Won't Restrict Spectators' Movements During Song*, NYCLU (July 7, 2009), <https://www.nyclu.org/en/press-releases/yankees-settle-god-bless-america-case-wont-restrict-spectators-movements-during-song>.

³⁸ *Miss. Comm'n on Judicial Performance v. Littlejohn*, 62 So. 3d 968, 973 (Miss. 2011); MISS. COMM'N ON JUDICIAL PERFORMANCE, INQUIRY CONCERNING A JUDGE NO. 2010-216: COMMISSION FINDINGS OF FACT AND RECOMMENDATION (2010), <https://prawfsblawg.blogs.com/files/lampley-jud-perf-order.pdf>.

³⁹ See Ryan Wilson, *Donald Trump: NFL Should Have Suspended Colin Kaepernick for Kneeling*, CBS SPORTS (Oct. 12, 2017, 9:04 AM), <https://www.cbssports.com/nfl/news/donald-trump-nfl-should-have-suspended-colin-kaepernick-for-kneeling/>; USA Today Sports, *Trump: NFL Should 'Fire or Suspend' Players Who Kneel During Anthem*, USA TODAY (Sept. 24, 2017, 8:30 AM),

specifically to watch some players kneel and then to immediately leave the stadium to protest their doing so.⁴⁰ Justice Ginsburg got involved; asked about the protests during a book event, she described the actions as “dumb” and “disrespectful,” while conceding their right to protest “if they want to be stupid.”⁴¹ One fan unsuccessfully sued the New Orleans Saints, claiming intentional infliction of emotional distress from kneeling players injecting politics into his football.⁴² A bill in Indiana would have required the Indianapolis Colts to refund ticket costs for any fan who complained about protesting players prior to the end of the first quarter of the game.⁴³

In spring 2018, the NFL unilaterally imposed a new policy requiring players to stand on the field or remain in the locker room during the anthem, before withdrawing that policy several days later in the face of public complaints and the threat of a union grievance.⁴⁴ Meanwhile, unable to find a team to sign him, Kaepernick filed a collusion grievance, alleging that owners had agreed not to sign him in retaliation for his protest. Evidence emerged in that proceeding that owners were scared of crossing the President, who had contacted several of them, urged them to stop the players from protesting, and insisted that criticizing the “disrespectful” protesting players was a “winning issue” for him. Kaepernick and the NFL settled for an undisclosed amount in early 2019.⁴⁵

The NFL and other controversies expose two things. One is the flag’s shifting messages. The flag, pledge, and anthem are not about the United States or its government or society. They have become about the military, veterans, soldiers, and those fighting foreign wars, such that those who do not stand and salute disrespect those veterans and soldiers. The other is an

<https://www.usatoday.com/story/sports/nfl/2017/09/24/trump-nfl-should-fire-suspend-players-who-kneel-during-anthem/697680001/>.

⁴⁰ See Steve Gardner, *Report: VP Mike Pence’s Walkout at Indianapolis Colts NFL Game Costly to Taxpayers*, USA TODAY (Oct. 7, 2018, 3:56 PM),

<https://www.usatoday.com/story/sports/nfl/2018/10/07/mike-pence-walkout-indianapolis-colts-game-cost-taxpayers/1559583002/>.

⁴¹ Ariane de Vogue, *Ruth Bader Ginsburg on Kaepernick Protests: ‘I Think It’s Dumb and Disrespectful’*, CNN POLITICS (Oct. 12, 2016, 4:21 PM), <https://www.cnn.com/2016/10/10/politics/ruth-bader-ginsburg-colin-kaepernick/index.html>.

⁴² See *Dragna v. New Orleans Saints, L.L.C.*, No. 18-C-514, 2018 WL 4997670 (La. App. 5 Cir. 10/15/18).

⁴³ Khadrice Rollins, *Indiana Bill Would Make Colts Give Refunds to Fans Bothered By Players Kneeling During Anthem*, SPORTS ILLUSTRATED (Dec. 29, 2017), <https://www.si.com/nfl/2017/12/29/colts-fans-bothered-players-kneeling-during-national-anthem-may-receive-refunds>.

⁴⁴ Austin Knoblauch, *NFL Anthem Policy on Hold Under Standstill Agreement*, NFL (July 19, 2018, 10:50 PM), <http://www.nfl.com/news/story/0ap3000000941064/article/nfl-anthem-policy-on-hold-under-standstill-agreement>.

⁴⁵ Jamele Hill, *Kaepernick Won. The NFL Lost.*, ATLANTIC (Feb. 17, 2019), <https://www.theatlantic.com/ideas/archive/2019/02/colin-kaepernick-won-his-settlement-nfl/582994/>.

abandonment of *Barnette*'s insistence that patriotism will thrive if voluntary. Trump and other critics assume what Jackson rejected—they accept the “unflattering estimate of the appeal of our institutions to free minds” and act as if national symbols are not so appealing that patriotic ceremonies can remain voluntary and not compelled upon free minds.

Beyond Kaepernick's grievance, the NFL protests and the league's efforts to stop them has not triggered litigation because neither the NFL nor its teams are state actors. The assumption in conversations around Kaepernick, however, is that players have a First Amendment liberty to opt-out and that the NFL violates the First Amendment but for the lack of state action. I want to test that assumption with a hypothetical in which state action is clearly present.⁴⁶

Imagine that the head of a government agency (a county Recorder of Deeds or the supervisor of a DMV office) announces that each workday would begin ten minutes before doors open with employees standing together at attention, reciting the pledge, and singing “America, the Beautiful.” The supervisor explains that the ceremony, song, and recitation remind public employees of their obligations to enforce and defend the Constitution and of their obligations as public servants to provide for the needs of the people who enter the office. Can an employee who wishes to opt-out be fired or otherwise disciplined?

Two doctrinal points are clear. The Supreme Court has declared invalid the use of loyalty oaths as a condition of public employment.⁴⁷ And several lower courts, in cases from the 1970s, held that public-school teachers cannot be compelled to recite or lead the pledge, extending *Barnette* to employees.⁴⁸ The latter became an issue during the 1988 presidential election, wielded by Republican candidate George H.W. Bush against Democratic candidate Michael Dukakis, who as Massachusetts governor had vetoed such a law, on constitutional grounds.⁴⁹

Two more-recent doctrinal shifts affect this answer in competing directions. In *Garcetti v. Ceballos*, the Court held that public employees have no First Amendment rights when speaking is part of their job and their job responsibilities. An employee does not speak as a citizen when he speaks as

⁴⁶ I posed the hypothetical during the Panel III Q&A. See *Post-Panel Commentary*, *supra* note 12, at 840.

⁴⁷ *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967); *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961).

⁴⁸ See, e.g., *Russo v. Cent. Sch. Dist.*, 469 F.2d 623 (2d Cir. 1972); *Hanover v. Northrup*, 325 F. Supp. 170 (D. Conn. 1970); *State v. Lundquist*, 262 Md. 534 (Ct. App. 1971).

⁴⁹ GOLDSTEIN, *supra* note 7, at 88-89; Blasi & Shiffrin, *supra* note 9, at 137.

an employee performing his job functions and can be fired if the government does not like what he says in performing those official functions.⁵⁰

The open question is how *Garcetti* translates when the government employer compels an employee to speak as part of her job as opposed to prohibiting her from speaking as part of the job. The key is the existence of a civilian or private analogue to the employee speech. If the compelled speech is the same or analogous to speech the government might compel from a member of the public, then the employee is not compelled to speak as part of the job. If the compelled speech is unique and only could be engaged in by a public employee in the course of performing her public duties, she is compelled as part of the job and *Garcetti* defeats the First Amendment claim. Two cases illustrate the issue.

In *Jackler v. Byrne*,⁵¹ a probationary police officer was fired for refusing to file a false report and refusing to testify falsely as part of a departmental investigation of officer misconduct. The Second Circuit held that *Garcetti* did not control because giving testimony and evidence is something that members of the public can and often do, not something unique to a public employee. Government officials could attempt to compel a member of the public to testify falsely in some proceeding, action that would violate the First Amendment.⁵² In attempting to compel the police-officer plaintiff to do the same, officials compelled him to speak as a citizen.

In contrast stands *Miller v. Davis*,⁵³ an action arising from the refusal of the clerk of Rowan County, Kentucky to issue marriage licenses to same-sex couples following the Supreme Court's decision in *Obergefell*. Several couples sued Davis for violating the Fourteenth Amendment; Davis defended in part that issuing the license was expressive and that compelling her to do so violated her freedom of speech.⁵⁴ The district court rejected the defense; there was no civilian or private analogue to issuing a marriage license, thus in issuing the license she was compelled to speak only as a government employee and enjoyed no First Amendment protections under *Garcetti*.⁵⁵

The second doctrinal shift occurred in 2018 with *Janus v. AFSCME*,⁵⁶ where the Court held that the First Amendment was violated where non-union-member public employees were compelled by state law to pay agency fees to the Union to cover collective bargaining and other activities

⁵⁰ *Garcetti v. Ceballos*, 547 U.S. 410, 421–22 (2006).

⁵¹ 658 F.3d 225, 229 (2d Cir. 2011).

⁵² *Id.* at 241–42.

⁵³ 123 F. Supp. 3d 924 (E.D. Ky. 2015).

⁵⁴ *Id.* at 930–31.

⁵⁵ *Id.* at 942.

⁵⁶ 138 S. Ct. 2448 (2018).

benefitting non-members.⁵⁷ *Janus* rests on that distinction between restrictions on speech of employees-as-employees and compulsions of speech of employees-as-employees, suggesting that employees enjoy greater protections against speech compulsions than against enforced silence. Justice Alito's majority opinion quoted *Barnette* for the proposition that "'involuntary affirmation' of objected-to beliefs would require 'even more immediate and urgent grounds' than a law demanding silence."⁵⁸ Justice Kagan's dissent emphasized this anomaly—government can stop employees from speaking but cannot compel them to speak, even in furtherance of the same employment-related goals of workplace peace and order.⁵⁹

I do not provide an answer to this hypothetical or to the NFL problem (state action aside); the solution turns on four issues related to *Barnette* and its connection to these later employee-speech cases.

First is how courts reconcile *Janus* and *Garcetti*—whether government can compel job-related speech as easily as it can restrict it or whether employees enjoy greater protection against compulsions, even as part of their official job functions.

Second is how to understand what the objecting players or employees are doing by kneeling or sitting during the anthem or pledge. Are they opting out of the government message, avoiding a speech compulsion? Or are they engaging in affirmative expression of their own? To the extent there is a distinction, it could determine whether a case falls on the *Garcetti* or *Janus* side of the employee-speech line. Perhaps it does not matter. The First Amendment protects "symbolic counter speech," in which a protester uses a symbol or ritual to protest that ritual, collapsing the line between expressing one's own message and opting-out of the government's message.⁶⁰ Different protesters have presented different messages by opting out. Kaepernick framed his kneeling as protesting police violence against the African-American community, while a group of University of Mississippi basketball players in 2019 kneeled in response to an ongoing pro-Confederacy rally on campus, framing it as a protest against racism and hate groups.⁶¹

Third is how much deference a court gives to the NFL or the government in defining the job and what constitutes part of the job. The head of my hypothetical government office believes the pledge is essential to reminding employees of their public and constitutional obligations. The NFL has

⁵⁷ *Id.* at 2459–60.

⁵⁸ *Id.* at 2464 (quoting *Barnette*, 319 U.S. at 633).

⁵⁹ *Id.* at 2493 (Kagan, J., dissenting).

⁶⁰ Howard M. Wasserman, *Symbolic Counter-Speech*, 12 WM. & MARY BILL RTS. J. 367, 390–91 (2004).

⁶¹ Nathanael Gabler, *Ole Miss Players Kneel in Response to Pro-Confederate Rally*, N.Y. TIMES (Feb. 23, 2019), <https://www.nytimes.com/2019/02/23/sports/ole-miss-anthem-protest-kneel.html>.

(infamously) made patriotism and support for the military a staple of the league and its games and would argue that player participation is essential to that message.⁶²

Fourth is whether, under *Garcetti*, there is a private or citizen analogue to the pledge and to patriotic songs and rituals. Is patriotic ritual something that government could try to impose on private people as on government employees? That is, is compelling a patriotic ritual akin to testifying and giving false evidence, something government could attempt to impose on a citizen, such that the objecting employee acts as a citizen? Or is it akin to issuing marriage licenses, such that she acts only as a public employee when compelled to participate in the ritual?

III. COMPELLED EXPRESSION IN 2018

The timing of this symposium was fortuitous because of the rebirth of compelled expression as a subject of First Amendment debate. The diamond-anniversary year saw the Court tackle three cases in which *Barnette* and compelled expression formed the core of the argument, if not the resolution.

The first was *Janus*.

The second was *National Institute of Family & Life Advocates v. Becerra*.⁶³ Plaintiffs were crisis pregnancy centers, clinics operated by anti-choice organizations that provide counseling and medical services for pregnant women, but without mentioning or providing the option of abortion. California imposed two sets of regulations—licensed clinics were required to post information about free and low-cost abortion services available from the State, while unlicensed clinics were required to post information in advertisements and other places that they were not licensed to provide medical services.⁶⁴

A 5-4 Court declared California's regulations invalid. The Court applied strict scrutiny, declining to apply a lower level of scrutiny because the regulated speakers were medical professionals.⁶⁵ The Court emphasized the under-inclusiveness of the regulations and that California had other means to disseminate information about available services without compelling the centers to utter the government's objectionable message.⁶⁶

⁶² Melanie Schmitz, *How the NFL Sold Patriotism to the U.S. Military for Millions*, THINKPROGRESS (Sept. 25, 2017), <https://thinkprogress.org/nfl-dod-national-anthem-6f682cebc7cd/>.

⁶³ 138 S. Ct. 2361 (2018).

⁶⁴ *Id.* at 2368–70.

⁶⁵ *Id.* at 2372.

⁶⁶ *Id.* at 2375–76.

The third, and highest-profile, was *Masterpiece Cakeshop v. Colorado Civil Rights Commission*,⁶⁷ involving application of a state public-accommodations law (prohibiting discrimination because of sexual orientation) to a baker who refused to make a custom cake for a same-sex wedding.⁶⁸ This case was the centerpiece for all papers on the *Modern Context* panel.⁶⁹

The case was briefed, argued, and commented on in free-speech terms. Parties, amici, and commenters debated whether a cake is expressive; whether a baker is different than other wedding vendors, such as photographers; whether it matters whether the cake is bespoke or contains a written message; and who sends the message. But the Court resolved the case on narrower, religious grounds—seizing on stray comments by one Commission member, the Court found that the decision sanctioning bakery owner Jack Phillips was tainted by religious animus.⁷⁰ But the dispute over Phillips’ practices and these broader issues is not over. Several months after the Supreme Court’s decision, a new customer filed a new complaint with the Commission when Phillips refused to bake a cake celebrating the anniversary of the customer’s male-to-female transition.⁷¹ Phillips filed a § 1983 action in federal court, seeking damages and an injunction halting the new Commission proceeding.⁷²

The Court thus resolved three compelled-expression (or compelled-expression-adjacent) cases, resolving all in favor of the party asserting the First Amendment right. We may wonder why there has not been more celebration of *Barnette* and the First Amendment.

First, *Barnette* emphasized that the case involved no collision of rights. The Jehovah’s Witness students’ right to opt-out did not collide with the rights of others to engage with the flag; the only collision was between government authority and individual right. But the 2018 cases did involve such collisions—with the rights of customers denied service at the cake shop,

⁶⁷ 138 S. Ct. 1719 (2018).

⁶⁸ *Id.* at 1723–24.

⁶⁹ See generally Kendrick, *supra* note 14; Goldberg, *supra* note 14; Greene, *supra* note 14.

⁷⁰ *Masterpiece Cakeshop*, 138 S. Ct. at 1736–37.

⁷¹ Nic Garcia & Kirk Mitchell, *Masterpiece Cakeshop Owner Sues Hickenlooper, Claiming Religious Persecution Despite Supreme Court Ruling*, DENVER POST (Aug. 15, 2018), <https://www.denverpost.com/2018/08/15/masterpiece-cakeshop-hickenlooper-lawsuit/>; Amy B. Wang, *Baker Claims Religious Persecution Again—This Time After Denying Cake for Transgender Woman*, WASH. POST (Aug. 15, 2018), <https://www.washingtonpost.com/news/acts-of-faith/wp/2018/08/15/baker-claims-religious-persecution-again-this-time-after-denying-cake-for-transgender-woman/>.

⁷² Verified Complaint, *Masterpiece Cakeshop Inc. v. Elenis*, No. 1:18-cv-02074, 2018 WL 3870105 (D. Colo. Aug. 14, 2018).

with the rights of women denied full and honest information about reproductive health.

Second, *Barnette* may be a victim of what Jack Balkin labels the “ideological drift” of the First Amendment,⁷³ in which the political right has discovered the freedom of speech as a source of liberty, while the political left has made the freedom of speech secondary to other values, such as equality and women’s rights. Modern commentators have converted Balkin’s idea into the critique of “weaponizing the First Amendment,” in which claimants wield free speech to stop or undermine economic and regulatory policy.⁷⁴ Justice Kagan dropped the term in her *Janus* dissent.⁷⁵

Erica Goldberg argues in this volume that *Barnette* “codes as a left-leaning case”—the Court protected a marginalized and oppressed minority group and resisted right-wing pushes to enforce patriotic orthodoxy in time of war. And *Barnette* as precedent has been used to liberal ends such as protecting flag burning⁷⁶ and allowing Jehovah’s Witnesses to cover license plates.⁷⁷ But *Janus* and *Becerra* (and the free speech arguments in *Masterpiece*) wielded *Barnette* to different ideological ends, with the prevailing speakers seeking to avoid the compulsion to espouse left-leaning views.

Goldberg describes recent cases as examples of “good orthodoxy,” in which government does not command people to respect its authority, but seeks to protect historically marginalized groups:

Governments trying to remedy the effects of systemic bigotry, which contributes to accumulated disadvantages and socio-cultural biases, do so both by changing their own treatment of these groups and by prohibiting private individuals from engaging in certain types of discrimination. These measures are then applied in ways that some now argue stifle their rights and interfere with the important right to express dissenting and counter-cultural opinions.⁷⁸

The competing sides of the *Becerra* Court debated that line between good and bad orthodoxy. Justice Kennedy wrote a concurring opinion joined

⁷³ J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 383 (1990).

⁷⁴ See, e.g., Amy Kapczynski, *The Lochnerized First Amendment and the FDA: Toward a More Democratic Political Economy*, 118 COLUM. L. REV. ONLINE 179, 180 (2018).

⁷⁵ *Janus*, 138 S. Ct. at 2501 (Kagan, J., dissenting).

⁷⁶ *Texas v. Johnson*, 491 U.S. 397, 399 (1989).

⁷⁷ *Wooley v. Maynard*, 430 U.S. 705, 707-08 (1977).

⁷⁸ Goldberg, *supra* note 14.

by Chief Justice Roberts and Justices Alito and Gorsuch.⁷⁹ Kennedy recognized that California saw its regulations as “forward thinking,” as a creative way to protect public health and welfare and to provide truthful information to women seeking medical services. But regardless of the government’s goal, it is never forward-thinking to force individuals to become “instruments” of the government’s message, because “[g]overnments must not be allowed to force persons to express a message contrary to their deepest convictions.”⁸⁰

In dissent in *Becerra*, Justice Breyer struck a theme that compelled sauce for the goose should be compelled sauce for the gander. The Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey* had declared valid a state law requiring doctors to provide patients with information about adoption and abortion alternatives prior to terminating a pregnancy.⁸¹ Several states mandate that doctors read scripts to patients that are ideologically tinged and medically dubious.⁸² Breyer argued that if the laws of some states can lawfully require doctors to tell women about adoption, the laws of other states can require medical counselors to tell women about abortion services.⁸³

IV. CONCLUSION

Seventy-five years later, *Barnette* has returned to the center of political, public, and constitutional debates. It is not clear where issues will land or who will be celebrating. But one of the Court’s great First Amendment decisions will be at the heart of the debate.

I hope you find the following exploration of that decision edifying and provocative.

⁷⁹ *Becerra* featured an odd divide. Justice Thomas wrote the majority opinion, joined by the Chief, Kennedy, Alito, and Gorsuch. The latter four, but not Thomas, joined Kennedy’s concurring opinion. It is not clear why Kennedy’s concerns could not be included in Thomas’ majority or why Thomas retained the majority despite the other four signing onto a unique idea.

⁸⁰ Nat’l Inst. of Family and Life Advocates v. *Becerra*, 138 S. Ct. 2365, 2379 (2018) (Kennedy, J., concurring).

⁸¹ 505 U.S. 833, 884 (1992).

⁸² See, e.g., Claudia E. Haupt, *Professional Speech*, 125 YALE L.J. 1238, 1247 (2016); Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007).

⁸³ *Becerra*, 138 S. Ct. at 2385–86 (Breyer, J., concurring); see also Transcript of Oral Argument at 11–12, Nat’l Inst. of Family and Life Advocates v. *Becerra*, 138 S. Ct. 2361 (2018) (No. 16-1140).