

Spring 2019

## “Good Orthodoxy” and the Legacy Of Barnette

Erica Goldberg  
*University of Dayton Law School*

Follow this and additional works at: <https://ecollections.law.fiu.edu/lawreview>



Part of the [Civil Rights and Discrimination Commons](#), [Constitutional Law Commons](#), [First Amendment Commons](#), and the [Religion Law Commons](#)

---

Online ISSN: 2643-7759

### Recommended Citation

Erica Goldberg, *“Good Orthodoxy” and the Legacy Of Barnette*, 13 FIU L. Rev. 639 (2019).  
DOI: <https://dx.doi.org/10.25148/lawrev.13.4.6>

This Article is brought to you for free and open access by eCollections. It has been accepted for inclusion in FIU Law Review by an authorized editor of eCollections. For more information, please contact [lisdavis@fiu.edu](mailto:lisdavis@fiu.edu).

# “GOOD ORTHODOXY” AND THE LEGACY OF *BARNETTE*

Erica Goldberg\*

I.	Introduction: What Would <i>Barnette</i> Do?.....	639
II.	Why the “Good Orthodoxy” Might Be Bad .....	644
	A. Cake Baking, Photograph Making, and Union Dues Taking ..	645
	B. Public Universities and Diversity Statements .....	649
III.	Approaching Modern Applications of <i>Barnette</i> .....	656
	A. Defining Speech .....	657
	B. Impermissible Motives, Dignitary Interests, and Unanimity of Opinion.....	664
IV.	Conclusion .....	666

## I. INTRODUCTION: WHAT WOULD *BARNETTE* DO?

In the much-revered *West Virginia State Board of Education v. Barnette*,<sup>1</sup> the Supreme Court overturned precedent to hold that public schools cannot force students to stand and salute the flag.<sup>2</sup> Justice Jackson noted in his majority opinion that the state cannot require “[c]ompulsory unification of opinion.”<sup>3</sup> Dissenters and those with minority opinions and belonging to minority religions cannot be compelled, under the First

---

\*Assistant Professor of Law, University of Dayton Law School. Thanks to the faculty at the University of Cincinnati Law School for their helpful comments and participation in the faculty exchange during which a draft of this Essay was presented. I was also greatly enriched by the comments and contributions of the other participants in this fantastic symposium at Florida International University. Thanks as well to Dallan Flake and Leah Litman for reading portions of the draft.

<sup>1</sup> 319 U.S. 624 (1943). Although *Barnette* is a celebrated opinion among legal scholars, the recent controversy over professional athletes kneeling for the pledge of allegiance demonstrates that many, including President Donald Trump, take issue as a policy matter with those who refuse to salute the flag. See Erica Goldberg, *#TakeAKnee, Unity, and Public Versus Private Power*, CROWDED THEATER (Sept. 25, 2017), <https://inacrowdedtheater.com/2017/09/25/takeaknee-unity-and-public-versus-private-power/>. Of course, First Amendment rights often, and by design, protect speech the public disapproves of as a policy matter.

<sup>2</sup> *Barnette*, 319 U.S. at 642 (“We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.”). The Supreme Court overturned *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940), an 8-1 decision.

<sup>3</sup> *Barnette*, 319 U.S. at 641.

Amendment, to participate in rituals as a symbolic way of forcing the population to espouse or project the same views.<sup>4</sup>

At the 75th anniversary of *Barnette*, this bedrock principle is being tested in a very different context. Our current age is one of great fracture, and some claim that laws enacted to protect the vulnerable may marginalize and perhaps take away rights from the group that is generally considered the oppressor.<sup>5</sup> Notably, to protect minority groups and those who have historically been oppressed, the state and federal governments have enacted legislation or undertaken state action that some claim compels them to espouse views with which they disagree. Laws designed to protect the historically marginalized are increasingly being challenged as compelling a new kind of orthodoxy.<sup>6</sup>

As examples, Christian bakers are required to create custom-made wedding cakes for same-sex couples, even if they profess to be opposed to same-sex marriage,<sup>7</sup> and state antidiscrimination laws also require photographers to photograph same-sex weddings.<sup>8</sup> Public employees were required to contribute funds to unions, even if they are not union members, despite their political objection to the union's activities.<sup>9</sup> And, in the realm of free speech culture and perhaps First Amendment doctrine, public university professors and students at various universities are required to make statements and otherwise prove their commitment, within and outside of the classroom, to a particular, somewhat politicized understanding of diversity.<sup>10</sup>

---

4 *Id.* at 642 (“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.”).

5 Laws enacted to punish and deter sexual abuse of children come to mind. Recently, the Supreme Court struck down as a First Amendment violation a North Carolina law prohibiting anyone on the sexual offender registry from accessing social media websites such as Facebook and Twitter. *See Packingham v. North Carolina*, 137 S. Ct. 1730, 1733–36 (2017).

6 Another way of looking at this dynamic, as described by one scholar, is as a tension between disfavored minority and elite minority. *See* Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915, 1992 (2016) (describing misunderstandings about “minority-rights enforcement”). Whether a group is in the majority or minority does not materially affect my analysis here, but “disfavored-minority-elite-minority” is another possible way of understanding the cases I present. *See id.*

7 *See Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018). The Court decided *Masterpiece Cakeshop* on the potentially *sui generis* ground that the Colorado Civil Rights Commission showed animus towards religion, leaving for another day the compelled speech question. *Id.* at 1732; *see also infra* Part III.0I am not as convinced as the Supreme Court that statements by the Commission regarding the historical use of religion to justify bigotry are evidence of religious animus.

8 *Ellaine Photography v. Willock*, 309 P.3d 53, 59 (N.M. 2013).

9 *See* Transcript of Oral Argument, *Janus v. Am. Fed’n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018) (No. 16-1466).

10 *See* George Leef, *Professors Shouldn’t Be Forced to Pledge Allegiance to “Diversity”*, FORBES (May 10, 2017, 3:00 PM), <https://www.forbes.com/sites/georgeleef/2017/05/10/professors-shouldnt-be-forced-to-pledge-allegiance-to-diversity/#1b7719cd11cc> (discussing how diversity statements are used to

This new era of compelled speech presents some meaningful differences with the classic *Barnette* paradigm. *Barnette*, written during World War II, addressed the impropriety of the government’s demanding nationalist sentiment. The majority based its decision on the constitutional impermissibility of coercing government-mandated unanimity of values,<sup>11</sup> especially in light of the fact that: (1) government coercion to “attain unity” for any belief causes increases strife among a population, as the stakes for who gets elected become very high;<sup>12</sup> (2) forced loyalty to particular values leads to deadly consequences, especially under authoritarian regimes;<sup>13</sup> and (3) *Barnette* does not involve a “collision” of rights—“the sole conflict is between authority and the rights of the individual.”<sup>14</sup>

The new “good orthodoxy”<sup>15</sup> cases do not involve the government’s command to show respect for its authority but involve instead states’ attempts to protect the very marginalized who might be (and indeed have been) targets of an authoritarian regime. Thus, these modern cases do involve a collision of rights and present a much lesser threat of the deadly consequences of an authoritarian regime.

At the same time, these modern cases create potentially new marginalized groups, and new minority viewpoints, that may deserve protection from governmental overreach that creates “[c]ompulsory unification of opinion.”<sup>16</sup> The new “good orthodoxy” may implicate the primary motivator of the *Barnette* Court: an aversion to mandated uniformity

---

“weed out” scholars with a classical liberal view of pluralism emphasizing the universality of human experience over an ideology favoring group-based victimization and entitlements) (citing OR. ASS’N OF SCHOLARS, THE IMPOSITION OF DIVERSITY STATEMENTS ON FACULTY HIRING AND PROMOTION AT OREGON UNIVERSITIES (2017), [http://www.oregonscholars.org/wp-content/uploads/2017/01/DiversityStatements\\_Rev16Mar17.pdf](http://www.oregonscholars.org/wp-content/uploads/2017/01/DiversityStatements_Rev16Mar17.pdf)).

<sup>11</sup> *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 640 (1943) (“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.”).

<sup>12</sup> *Id.* at 641 (“As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be.”).

<sup>13</sup> *Id.* (“Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.”).

<sup>14</sup> *Id.* at 630 (“The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin.”). Perhaps this language was used to ensure that the First Amendment wasn’t marshalled in a way that threatened New Deal legislation. See Kessler, *supra* note 6, at 1970–71. Jackson used similar language in a dissent in a later case when he wrote that, “I think the limits [on religious freedom] begin to operate whenever activities begin to affect or collide with liberties of others or of the public.” *Id.* at 1978 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 177 (1944) (Jackson, J., dissenting) (alteration in original)).

<sup>15</sup> By placing “good orthodoxy” in quotations, I do not mean to suggest that the goals or even the policies of those seeking to promote the rights of historically marginalized groups are not good, but to question whether orthodoxy of views is ever a good thing.

<sup>16</sup> *Barnette*, 319 U.S. at 641.

of opinion, or even simply a show of unanimity of opinion,<sup>17</sup> and the political strife that may ensue.

Justice Frankfurter's dissent in *Barnette*, which seems not to have stood the test of time, also captures the view of those who wish to compel the new, good orthodoxy. Justice Frankfurter believed that Justice Jackson's majority was overstepping its role and creating exceptions for religious groups who refuse to salute the flag, even though these religious groups have ample opportunities to express their views. This powerful dissent would have held that the state laws requiring the flag salute were "not in fact disguised assaults upon such dissident views."<sup>18</sup> Many of the objections currently lodged at the current crop of good orthodoxy cases were lodged against the *Barnette* majority opinion by Justice Frankfurter, yet those objections have not altered the enduring importance of *Barnette*.<sup>19</sup>

Unification of opinion around values such as inclusion and tolerance are surely a better form of orthodoxy than forced patriotism. However, any attempt to compel allegiance to a particular view has potentially unconstitutional—and potentially dangerous—consequences. Consider academia, where not all professors agree with particular approaches to diversity or inclusion and do not wish to espouse a conception of diversity based on targeting particular groups for protective, and perhaps remedial, treatment. Their academic freedom, and their ability to debate important, open issues involving university priorities and use of the classroom may, depending on the way the diversity statements are assessed and the pressure placed on faculty members to echo the university's views on the topic, be undermined when universities require them to submit diversity statements in order to receive promotion and tenure.<sup>20</sup>

The compelled unanimity of opinion on a range of topics has, according to some, created ideological hegemony at our institutions of higher learning, leading to students who are more intolerant to and incapable of engaging with dissenting views. And yet, the school's ultimate purpose is noble and important: tolerance and diversity for both those professors who have

---

<sup>17</sup> See *id.* at 633 ("It is also to be noted that the compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind. It is not clear whether the regulation contemplates that pupils forego any contrary convictions of their own and become unwilling converts to the prescribed ceremony or whether it will be acceptable if they simulate assent by words without belief and by a gesture barren of meaning.").

<sup>18</sup> *Id.* at 653.

<sup>19</sup> After Justice Kavanaugh's confirmation changed the political balance on the Supreme Court, the sentiments of Justice Frankfurter's dissent, arguing for more judicial restraint, have experienced a bit of a resurgence, although not in the context of questioning the wisdom of *Barnette* itself. See Samuel Moyn, *Resisting the Juristocracy*, BOS. REV. (Oct. 5, 2018), <http://bostonreview.net/law-justice/samuel-moyn-resisting-juristocracy>.

<sup>20</sup> See *infra* Part II.0

traditionally not been included in academia’s ranks and those students who felt they could not participate freely in class.

Consider also *National Institute of Family and Life Advocates v. Becerra*, a compelled speech case from October Term 2017.<sup>21</sup> *Becerra* held, among other things, that requiring anti-abortion crisis pregnancy centers to alert patrons to the fact that the state can provide low cost abortions violated the centers’ First Amendment rights against compelled speech. *Becerra* does not fit as neatly into the “good orthodoxy” paradigm because the medical services aspects of the case complicate any pure issues involving civil rights versus civil liberties. That said, as Justice Kennedy notes in his concurrence, California’s belief that its forced disclosure requirements are “forward thinking” demonstrates the problems with states believing that imposing hegemony of thought can ever truly be progressive.<sup>22</sup>

This Essay addresses whether the courts should analyze compelled speech cases differently where states have enacted laws to promote equality values instead of the compelled nationalism in *Barnette*. The paper uses compelled speech by commercial actors, dues collected from government employees, and academia to illustrate the new ways states may unfairly penalize viewpoints while serving historically marginalized populations, who also need solicitude. I contrast the situation in *Barnette* to the current good orthodoxy context, where new groups of dissenters, holding minority opinions, are being created by laws designed to protect historically oppressed minority groups. Ultimately, I conclude that there is no such thing as good orthodoxy. Laws truly compelling speech in order to protect members of minority groups should be considered as constitutionally suspect as laws compelling speech to bolster majority opinion.

However, the difference between *Barnette* and a case like *Masterpiece Cakeshop* cannot be ignored. *Barnette* leaves open whether its opinion should be read narrowly or broadly, and one way to honor *Barnette* is to carefully define what counts as protected speech. Some of the good orthodoxy cases do not involve pure speech and should not be analyzed as analogous to *Barnette*’s objection to forcing citizens “publicly to profess any statement or belief or to engage in any ceremony of assent to one.”<sup>23</sup> Some of the new compelled speech cases merit strict scrutiny, and some do not. This Essay will detail how to distinguish the two types of cases.

In those cases of “pure, protected speech”<sup>24</sup> that do deserve strict scrutiny, I argue that the dignitary interests of minority groups protected by

---

21 See 138 S. Ct. 2361 (2018).

22 *Id.* at 2379 (Kennedy, J., concurring).

23 *Barnette*, 319 U.S. at 634.

24 In First Amendment analysis, a continuum describes the spectrum from pure, protected speech to unprotected conduct. Verbal expressions in traditional media, such as art or political philosophy, are

state laws should not be considered as part of the strict scrutiny analysis. The very dignitary interests states are serving are the desire for individuals to proclaim that members of vulnerable minority groups deserve equal treatment. These dignitary interests are important and go beyond mere offense to a sense of equal status in the eyes of members of the community. However, the compelling interest the state asserts, when it uses the term dignitary interest, is the desire to compel uniformity of opinion or at least compel the appearance of uniformity of opinion. However, for cases that do not involve pure speech—such as expressive conduct cases—if states have other, conduct-related reasons for enacting their nondiscrimination and public accommodations laws, those interests will likely be able to overcome the intermediate scrutiny applicable to expressive conduct.

Part II of this Essay catalogues modern examples of potential applications of *West Virginia v. Barnette*—public accommodations laws affecting expression, compelled union dues, and forced diversity statements in academia. That Part further discusses reasons that cases involving a state law’s protection of the historically underserved should be treated the same as, and reasons these scenarios should be treated differently from, *Barnette*. Part III articulates my own proposal: that courts treat “good orthodoxy” cases involving protection of the vulnerable the same as traditional compelled speech cases, but only when the targeted expression is pure speech, which will be the case less often in these modern cases.

## II. WHY THE “GOOD ORTHODOXY” MIGHT BE BAD

After confronting a history rife with racism, forced internment, and both governmental and private discrimination against racial and ethnic minorities, women, and the LGBT community, states and the federal governments have

---

the classic examples of pure speech. Symbolic communication made through conduct—like burning a draft card or having a parade—is expressive conduct, which receives intermediate scrutiny. *See infra* Part III.A. Conduct is fully regulable behavior, even if it communicates something. Murder is unprotected, entirely regulable conduct, even if the murderer is also expressing hatred for the victim. The main, and most appreciated, goal of the conduct of murder to end the person’s life, not to communicate a message or change the way the victim thinks or feels. However, even if a murder designed to terrorize a population were considered expressive conduct, not unprotected conduct, the government can easily survive intermediate scrutiny in its prohibition of murder. *Id.* Further, even some types of verbal expression become unprotected when they veer into the realm of conduct, such as threats that leave listeners in fear of physical harm or harassment that deprives a listener of her ability to maintain her job or receive her education. Erica Goldberg, *Free Speech Consequentialism*, 116 COLUM. L. REV. 687, 721–22 (2016) (discussing how certain categories of speech are unprotected because the harms they impose closely resemble conduct harms); *see also id.* at 742 (discussing courts’ treatment of harassment). There are other exceptions to First Amendment protection for pure speech, or other types of speech that receive reduced First Amendment protection, but these categories are either considered historically unprotected by the courts or created for reasons other than their content or message. *See id.* at 693, 713, 717 (discussing ways in which unprotected categories of speech are created).

begun to pay more attention to the needs of minority groups. Governments trying to remedy the effects of systemic bigotry, which contributes to accumulated disadvantages and socio-cultural biases,<sup>25</sup> 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. In this Part, I catalog some of the laws or government policies that compel adherence to the currently accepted ideology in potentially unconstitutional ways.

A. *Cake Baking, Photograph Making, and Union Dues Taking*

In the commercial sector, business owners and employees have begun advancing compelled speech arguments against the application of laws designed to protect historically underprivileged groups.

Non-discrimination and public accommodations laws, originally enacted during the civil rights era, prevent discrimination on the basis of membership in particular groups, including on the basis of sexual orientation.<sup>26</sup> These laws have been critical in allowing people to move freely throughout the country and participate productively in the marketplace without worrying that they will not be able to find places of lodging, restaurants, and other necessary goods and services due to their membership in particular disfavored minority groups.<sup>27</sup>

Some religious people have claimed these laws compel their acceptance and participation in certain practices to which they have a moral objection. As examples, the Supreme Court recently decided *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, a case involving whether a self-styled “cake artist” may refuse to create a custom-designed cake for a same-sex wedding.<sup>28</sup> The Supreme Court did not address the compelled speech issue, leaving it open for future cases.<sup>29</sup> In what would likely have been a better

---

<sup>25</sup> See Barbara Reskin, *Imagining Work Without Exclusionary Barriers*, 14 YALE J.L. & FEMINISM 313, 330 (2002).

<sup>26</sup> See generally Elizabeth Sepper, *The Role of Religion in Public Accommodations Laws*, 60 ST. LOUIS U. L.J. 631 (2016) (offering an account of the purpose and variety of states’ public accommodations laws and their interaction with religion).

<sup>27</sup> *Id.* at 662–65 (describing the individual, collective, and democratic purposes served by antidiscrimination laws). Antidiscrimination laws also serve to communicate messages of equal dignity and to prevent people from experiencing humiliation, *id.* at 664, although those purposes are more constitutionally suspect when they infringe upon an individual’s expressive rights. See *infra* Part III.B.

<sup>28</sup> 138 S. Ct. 1719, 1723 (2018).

<sup>29</sup> Justices Thomas and Gorsuch are the only Justices who provided thoughts on the free speech issue. See *id.* at 1740 (Thomas, J., concurring).



vehicle to decide the free speech issue, the Supreme Court previously denied certiorari in *Ellaine Photography v. Willock*, about whether a professional photographer has a First Amendment right to refuse to take photographs at same-sex weddings.<sup>30</sup> A new iteration of *Masterpiece Cakeshop*, which involves a request to bake a pink and blue birthday cake that also celebrates a woman's coming out as transgender, is also percolating through the litigation process.<sup>31</sup>

In another context, states have authorized unions to require "fair share fees," so that unions can perform their task of negotiating on behalf of employees.<sup>32</sup> The history of unions is one of giving historically marginalized workers better protections and conditions against powerful employers.<sup>33</sup> Now, some claim that these union dues compel employees to support political causes with which they disagree.<sup>34</sup> Even non-union members must pay dues that fund a union's working against efficiency measures such as merit-based pay, for example. Employees may disagree with this stance, which they describe as political, especially for public sector unions, where each negotiation affects public policy and the public fisc.<sup>35</sup> Here, the proffered compelled speech exists in the form of compelled union dues used to support union activity. Even a non-union employee in states requiring fair share fees must contribute "money for the propagation of opinions which he disbelieves."<sup>36</sup>

Many believe these types of good orthodoxy cases do not implicate the First Amendment right against compelled speech. To these scholars, the expansive use of the First Amendment in the commercial and employment

---

<sup>30</sup> See Brief for American Unity Fund et al. as Amici Curiae Supporting Respondents at 4, *Masterpiece Cakeshop Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) (No. 16-111), [http://www.scotusblog.com/wp-content/uploads/2017/11/16-111\\_bsac\\_american\\_unity\\_fund.pdf](http://www.scotusblog.com/wp-content/uploads/2017/11/16-111_bsac_american_unity_fund.pdf) (arguing that although cakes are not speech, application of public accommodations laws to traditional media like photography would violate the First Amendment).

<sup>31</sup> See Erica Goldberg, *The Resurrection of Masterpiece Cakeshop – A Different Free Speech Issue and a Different Legal Landscape*, CROWDED THEATER (Sept. 17, 2018), <https://inacrowdedtheater.com/2018/09/17/the-resurrection-of-masterpiece-cakeshop-a-different-free-speech-issue-and-a-different-legal-landscape/>.

<sup>32</sup> Aaron Tang, *Public Sector Unions, The First Amendment, and the Costs of Collective Bargaining*, 91 N.Y.U. L. REV. 144, 146–47 (2016) (explaining that the purpose of these fees is "to ensure sufficient financial support for unions in pursuit of the collective benefits that effective workplace representation can produce, both for public sector workers and the quality and efficiency of public services writ large.").

<sup>33</sup> See Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 5 (2016) (describing unions as a "core equalizing institution in politics and the economy.").

<sup>34</sup> See *Janus v. AFSCME*, Council 31, 138 S. Ct. 2448, 2461 (2018).

<sup>35</sup> This was the basis for the First Amendment challenge. *Id.*

<sup>36</sup> Tang, *supra* note 32, at 146 (quoting Thomas Jefferson's idea that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical," Irving Brant, *JAMES MADISON: THE NATIONALIST 1780-1787* 354 (1948)).

sectors represents a so-called “new *Lochner*,” where business interests or political groups are using the First Amendment as a sword to advance their policy goals, instead of as a shield to simply protect their First Amendment rights against unconstitutional policy.<sup>37</sup> Power, not reason, is the Court’s currency on these issues, some argue,<sup>38</sup> and these First Amendment claims are a pretext for partisan advocacy for policy goals. Business organizations and think tanks bringing these First Amendment claims are advancing radically new First Amendment positions because of their business interests, they claim. Religious objections to neutrally applicable laws on the claim that the religious objector does not want to take part in a sexually immoral activity are not truly religious, but political, some argue.<sup>39</sup> Indeed, “complicity-based conscience claims are asserted in society-wide conflicts by mobilized groups and individuals acting in coalitions that reach across religious denominational lines and in coordination with a political party.”<sup>40</sup>

Further, in the clash of rights between religious objectors and members of historically persecuted communities, some argue to “beware of the false equivalence.”<sup>41</sup> Tolerance for religion does not have to mean allowing religious people to discriminate against others.<sup>42</sup> There is a compelling argument that the right not to be discriminated against—claimed by the same-sex spouses in *Masterpiece Cakeshop*—is more legitimate than the right to discriminate claimed by the baker, even given evidence that one’s right to discriminate is being taken away due to religious animus.<sup>43</sup>

---

<sup>37</sup> See Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133, 136 (2016) (arguing that using the First Amendment to achieve deregulatory goals in the style of *Lochner* “benefits from a cross-ideological coalition formed around earlier uses of the First Amendment while allowing *Lochner* itself to remain in the anticanon.”).

<sup>38</sup> See Garrett Epps, *The Bogus ‘Free Speech’ Claim Against Unions*, ATLANTIC (Feb. 14, 2018), <https://www.theatlantic.com/politics/archive/2018/02/the-bogus-free-speech-argument-against-unions/553205/>. Epps believes that *Janus* is a way for the Supreme Court to dismantle the political power of unions, separate from any legitimate First Amendment claims. *Id.*

<sup>39</sup> Douglas Nejaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2522 (2015) (“[C]omplicity-based conscience claims have become a locus of mobilized political action seeking law reform designed to preserve traditional sexual morality.”).

<sup>40</sup> *Id.* at 2542–43.

<sup>41</sup> See, e.g., Carolina Mala Corbin, *Masterpiece Cakeshop: Beware the False Equivalence*, TAKE CARE (Feb. 12, 2018), <https://takecareblog.com/blog/masterpiece-cakeshop-beware-the-false-equivalence>.

<sup>42</sup> *Id.* (“Tolerating discrimination and tolerating the desire not to be discriminated against are simply not the same.”).

<sup>43</sup> In *Masterpiece Cakeshop*, the majority opinion partially based its holding in favor of the baker on evidence that the Civil Rights Commission made some inflammatory and potentially animus-based comments about religion when deciding whether Colorado’s public accommodations law applied to Jack Phillips. Diann Rice, one of the Commissioners, commented that:

Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the Holocaust . . . I mean, we can list hundreds of

However, religious adherents may have mobilized as a political group because their First Amendment rights are being marginalized by the new, good orthodoxy. Further, the Court's dismantling economic regulation that affects speech has long been well intertwined with upholding First Amendment liberties, and, indeed, cannot be easily reduced to partisan lines.<sup>44</sup>

Importantly, the motivation for filing a lawsuit may not be dispositive in determining the interpretation of the constitutional provision at stake. Even if political, not legal, incentives motivate litigants, the Court retains its duty to resolve the legal merits of the dispute using legal frameworks. Of course, if an actor's motive means his conduct is not truly expressive, this may affect the resolution of the First Amendment claim. If a Christian baker does not generally consider his cakes to be expressive vehicles, but simply does not want to serve members of the LGBT community, this should factor into the First Amendment analysis. However, determining a litigant's true motivation is difficult, and, if conduct expresses a generally appreciable message, casting aspersions on a litigant's motive should not defeat a free speech claim.

False equivalence arguments, between the right to discriminate and the right to be free from discrimination, are also unavailing because the true clash of rights in a case like *Masterpiece Cakeshop* is between the civil right to have the state prevent private parties from discriminating against you (represented by the public accommodations laws) and the liberty of avoiding the state's coercing you to perform labor that you wish to avoid, which may amount to compelled speech (represented by the First Amendment). The Christian baker does not want "tolerance" for his ability to discriminate; he is instead asserting his civil liberty against state coercion in the form of compelled speech.<sup>45</sup>

Further, as Professor Richard Epstein argues, the state's requiring someone to choose between his livelihood and his religion is actual coercion, whereas there is no legal coercion when a buyer can access goods elsewhere,

---

situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use . . . their religion to hurt others.

Richard A. Epstein, *Linguistic Relativism and the Decline of the Rule of Law*, 39 HARV. J.L. & PUB. POL'Y 583, 585 (2016) (citing Alliance Defending Freedom, *Revealed: Colo. Commissioner Compared Cake Artist to Nazi* (Jan. 12, 2015), <http://www.adfmedia.org/News/PRDetail/9479>).

<sup>44</sup> See Kessler, *supra* note 6, at 1918, 1924–25, 1989.

<sup>45</sup> Although some have argued that this is a case about religion, and the Supreme Court ultimately decided this specific case on those grounds, *Masterpiece Cakeshop* is truly a speech case, precisely because of the interaction between *Barnette* and *Employment Division v. Smith*, 494 U.S. 872, 878–79 (1990), which held that neutral, generally applicable laws that burden speech do not violate the free exercise clause. See Jay S. Bybee, *Common Ground: Robert Jackson, Antonin Scalia, and a Power Theory of the First Amendment*, 75 TUL. L. REV. 251, 313–16 (2000); see also *infra* Part III.A.

just not at her preferred seller.<sup>46</sup> There is no rights-based harm, according to Epstein, from refusing to serve someone in a competitive marketplace because we do not have the right to someone else’s labor. That person can go elsewhere for a cake, unlike the seller, who must choose between his religion and his livelihood.<sup>47</sup>

If the clash of rights is framed this way, a case like *Masterpiece Cakeshop* looks a lot more like *Barnette*. If LGBT individuals can simply get cakes elsewhere, then what Colorado’s public accommodations law is doing is forcing a Christian baker to acknowledge the “dignity” of the LGBT community, which looks like more of a forced ceremony of tolerance and respect in the same way saluting the flag is a show of national unity and pride. However, if instead, public accommodations laws serve necessary economic functions, where “some citizens are singled out to bear significant costs of another’s religious exercise”<sup>48</sup> or exercise of First Amendment rights, these “good orthodoxy” cases look very different than *Barnette*.

Ultimately, the Court in *Masterpiece Cakeshop* based its opinion on the case-specific religious animus demonstrated by the Colorado Civil Rights Commission. Concurrences by Justices Kagan and Gorsuch articulated different views as to how a civil rights commission must treat blank cakes, if the commission allows other bakers to refuse to create anti-gay cakes.<sup>49</sup> The compelled speech elements were not resolved in the majority opinion, and this Essay will later address how future Courts should handle these issues.<sup>50</sup>

### B. Public Universities and Diversity Statements

Both the constitutionally-afforded rights and constitutionally-permitted powers of the university, and the context in which university decision-making takes place, illuminate why requiring professors to write diversity statements may implicate some of the concerns articulated in *Barnette*.

Public universities enjoy academic freedom, but the state institutions must also respect the academic freedom rights of their professors, derived

---

<sup>46</sup> Epstein, *supra* note 43, at 585–86 (“The ability to attribute coercive behavior to the victims of coercion is one dire consequence of this massive breakdown in the English language.”).

<sup>47</sup> *Id.* at 586 (“Note the relative sacrifices. In a competitive market, dozens of other cake shops can, and will, serve this couple. But the proprietor who is forced to either go out of business or suffer reeducation has no such luxury in responding to government commands.”).

<sup>48</sup> Nejaime & Siegel, *supra* note 39, at 2521.

<sup>49</sup> See Erica Goldberg, *SCOTUS Term: The Scope of Masterpiece Cakeshop Will Be Determined by the Concurrences*, PRAWFSBLAWG (June 4, 2018), <http://prawfsblawg.blogs.com/prawfsblawg/2018/06/scotus-term-the-scope-of-the-masterpiece-cakeshop-decision-will-be-determined-by-the-concurrences.html>.

<sup>50</sup> See *infra* Part III.A.

from both the First Amendment and professional norms.<sup>51</sup> This tension becomes apparent in the context of issues surrounding diversity measures to include members of historically underrepresented groups. The Supreme Court has held that public universities' academic freedom rights allow them to implement affirmative action plans that involve some racial discrimination against majority applicants in order to create diversity that enhances classroom discussion and the classroom experience.<sup>52</sup> Thus, despite the Equal Protection Clause of the Fourteenth Amendment, affirmative action may properly be employed to further the legitimate pedagogical goals of an institution.<sup>53</sup> As an extension of this, and to serve important pedagogical values, public universities often ask professors to demonstrate that they are fostering an environment that allows underrepresented minorities to feel welcome and included.

Many public universities require diversity statements as part of the faculty hiring or promotion process. As examples, the University of California San Diego asks that professors provide a statement to "describe your past efforts, as well as future plans to advance diversity, equity and inclusion. It should demonstrate an understanding of the barriers facing women and underrepresented minorities and of UC San Diego's mission to meet the educational needs of our diverse student population."<sup>54</sup> At Virginia Polytechnic Institute and State University, "candidates should include a list of activities that promote or contribute to inclusive teaching, research, outreach, and service."<sup>55</sup> The University of Cincinnati has announced that "[f]aculty and administrative/professional applicants will be asked to submit a personal statement summarizing his or her contributions (or potential

---

<sup>51</sup> Professional and constitutional academic freedom rights are not entirely coextensive. Private universities and public universities generally respect ethical academic freedom rights, whereas public universities must respect academic freedom to the extent it is enshrined in the First Amendment. *Grutter* tells us that institutions have their own academic freedom rights which may conflict with individual professor's and student's academic freedom rights. See Erica Goldberg & Kelly Sarabyn, *Measuring "A Degree of Deference": Institutional Academic Freedom in a Post-Grutter World*, 51 SANTA CLARA L. REV. 217, 221-23 (2011) (offering some solutions to "the conflict between the institutional academic freedom rights of the university and the individual academic freedom rights of its faculty" that analyze whether a decision is truly academic and which party possesses the academic expertise to resolve the decision).

<sup>52</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 324 (2003).

<sup>53</sup> *Id.* at 325 ("Rather, '[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.'" (quoting *Univ. of Cal. v. Bakke*, 438 U.S. 265, 315 (1978))).

<sup>54</sup> Center for Diversity & Inclusion, *Contributions to Diversity Statements*, UNIV. OF CAL. SAN DIEGO, <http://facultydiversity.ucsd.edu/recruitment/contributions-to-diversity.html>.

<sup>55</sup> OFFICE OF THE EXEC. VICE PRESIDENT AND PROVOST, VIRGINIA TECH GUIDELINES FOR PROMOTION AND TENURE DOSSIERS FOR 2015-2016 (2015), [https://www.provost.vt.edu/content/dam/provost\\_vt\\_edu/promotion\\_tenure/promotion\\_and\\_tenure\\_guidelines\\_2015-16.pdf](https://www.provost.vt.edu/content/dam/provost_vt_edu/promotion_tenure/promotion_and_tenure_guidelines_2015-16.pdf)

contributions) to diversity, inclusion and leadership.”<sup>56</sup> Some universities allow professors to fulfill the diversity statement’s goals by belonging to a historically underrepresented group.<sup>57</sup>

Although *Grutter* held that serving and maintaining a diverse population is a legitimate pedagogical goal of an academic institution, many have argued that mandated diversity statements force professors to swear loyalty to a particular view of diversity that maps onto political ideology in a way that resembles the unconstitutional loyalty oaths that professors had to sign in the 1940s and 1950s.<sup>58</sup> Universities, they argue, should not (and perhaps cannot if they are public universities) mandate that every professor share the same views of the importance of specific types of diversity that track membership in underrepresented groups, as opposed to emphasizing or prioritizing diversity of ideas or experiences, or even other legitimate, critical academic values that may exist in tension with the stated goal of diversity.<sup>59</sup> Even more so, universities should not force professors to proclaim allegiance to a particular ideological, and perhaps partisan, view of how to foster diversity and inclusion, one that favors focusing on group membership, group benefits and penalties, and generalizations about how membership in particular groups affects our status, interactions, and opportunities.<sup>60</sup> Requiring professors to demonstrate adherence to a particular view of diversity in their scholarship is even more troubling, from an academic freedom perspective.

There are ways to require these sorts of statements that may not be constitutionally problematic. Some implementations of this goal, however, may cross a constitutional line into mandating hegemony of viewpoint on how to resolve racial inequalities.<sup>61</sup> At some point, the measures designed to

<sup>56</sup> See Brittany Harris, *A Point of View: Hiring for Inclusion*, INCLUSION SOLUTION (June 23, 2016), <http://www.theinclusionsolution.me/a-point-of-view-hiring-for-inclusion/>; Jon Miltimore, ‘Diversity and Inclusion’ Statements Required on Campus, INTELL. TAKEOUT (July 12, 2016), <https://www.intellectualltakeout.org/blog/diversity-and-inclusion-statements-required-campus>.

<sup>57</sup> See OREGON ASSOCIATION OF SCHOLARS, *supra* note 10 (“At Carnegie Mellon University . . . candidates can also pass the litmus test if they ‘represent a historically underrepresented group in [their] field based on [their] race, ethnicity, or gender.’”).

<sup>58</sup> See Walter E. Williams, *College Diversity Statements the New Loyalty Oath*, REFLECTOR.COM (Apr. 10, 2017), <http://www.reflector.com/Op-Ed/2017/04/10/Metastasizing-Academic-Cancer.html?fullsize=1&item=>. According to Williams, “[c]ollege diversity agendas are little more than a call for ideological conformity. Diversity only means racial, sex and sexual orientation quotas. . . . The last thing that diversity hustlers want is diversity in ideas.” *Id.*

<sup>59</sup> See Colleen Flaherty, *Making a Statement on Diversity Statements*, INSIDE HIGHER ED (Nov. 12, 2018), <https://www.insidehighered.com/news/2018/11/12/former-harvard-deans-tweet-against-required-faculty-diversity-statements-sets-debate>.

<sup>60</sup> See Leef, *supra* note 10 (“[I]nstead of having to pledge support for America in its battle against communism, the new pledge is support to the ‘diversity’ agenda in its battle against a color-blind nation where people are evaluated on their own merits rather than group membership.”).

<sup>61</sup> Professors Robert Post and Erwin Chemerinsky have debated in popular media the extent to which the First Amendment is relevant at public universities. See Robert C. Post, *There Is No First*

foster the legitimate pedagogical goal of diversity evolve into advancing a partisan view of how to achieve particular social justice aims, not how to educate. The context in which diversity statements are required heightens the ways in which these mandated statements may be compelled speech.

Universities are already criticized, often by their own leaders, for imposing ideological hegemony and creating students who are intolerant of opposing views.<sup>62</sup> Forced attendance at certain events where students must accept and participate in political or ideological accounts of the world have been criticized by civil libertarians and by students.<sup>63</sup> Some professional schools have been denounced as indoctrinating students within a particular ideology, and politicians capitalize on these concerns to remove funding from state universities, further threatening academic freedom.<sup>64</sup>

To be sure, the punishing of professors and students for views the administration finds objectionable spans the political spectrum.<sup>65</sup> However, academia in general is much more liberal than the general population. Law school professors are even more liberal than the population of lawyers, which is already more liberal than the average American.<sup>66</sup> Some studies indicate

---

*Amendment Right to Speak on a College Campus*, VOX (Dec. 31, 2017, 11:33 AM), <https://www.vox.com/the-big-idea/2017/10/25/16526442/first-amendment-college-campuses-milo-spencer-protests>; Erwin Chemerinsky, *Hate Speech Is Protected Free Speech, Even on College Campuses*, VOX (Dec. 26 2017, 4:33 AM), <https://www.vox.com/the-big-idea/2017/10/25/16524832/campus-free-speech-first-amendment-protest>. Although there are some open questions at the margins, the Supreme Court, at least, has described some aspects of university life as involving a limited public forum, and some as involving a traditional public forum. In either of these types of forum, a state university cannot discriminate on the basis of viewpoint. *See, e.g.*, *Rosenberger v. Rector*, 515 U.S. 819, 830 (1995) (barring viewpoint discrimination in the application of a student activities fee that funds publications).

<sup>62</sup> *See, e.g.*, John Etchemendy, Speech before the Stanford Board of Trustees: ‘The Threat From Within’, (Transcript of excerpt available at <https://news.stanford.edu/2017/02/21/the-threat-from-within/>). In a speech the former provost of Stanford University noted that, “Over the years, I have watched a growing intolerance at universities in this country – not intolerance along racial or gender lines – there, we have made laudable progress. Rather, a kind of intellectual intolerance, a political one-sidedness, that is the antithesis of what universities should stand for.” *Id.*

<sup>63</sup> *See* Carrie Pritt, *Diversity for the Sake of Democracy*, QUILETTE (Jan. 24, 2017), <http://quillette.com/2017/01/24/diversity-for-the-sake-of-democracy/>.

<sup>64</sup> *See* Kevin Sullivan & Mary Jordan, *Elitists, Crybabys, and Junky Degrees*, WASH. POST (Nov. 25, 2017), [https://www.washingtonpost.com/sf/national/2017/11/25/elitists-crybabies-and-junky-degrees/?utm\\_term=.df497fd4e233](https://www.washingtonpost.com/sf/national/2017/11/25/elitists-crybabies-and-junky-degrees/?utm_term=.df497fd4e233).

<sup>65</sup> *See, e.g.*, Adam Steinbaugh, *Professor Fired For Defending Black Lives Matter on Fox News Files Lawsuit*, FIRE (Apr. 10, 2018), <https://www.thefire.org/professor-fired-for-defending-black-lives-matter-on-fox-news-files-lawsuit/>; The Editorial Board, *A Jesuit School Gets Dogmatic: Is Marquette’s Promise of Academic Freedom Worth Anything?*, WALL ST. J. (Jan. 7, 2018, 4:56 PM), [https://www.wsj.com/articles/a-jesuit-school-gets-dogmatic-1515362173?mod=rss\\_opinion\\_main](https://www.wsj.com/articles/a-jesuit-school-gets-dogmatic-1515362173?mod=rss_opinion_main).

<sup>66</sup> Adam Bonica, Adam Chilton, Kyle Rozema, & Maya Sen, *The Legal Academy’s Ideological Conformity*, J. LEGAL STUD. (forthcoming 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2953087](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2953087). The study’s authors argue that although the legal academy is more liberal than the population of lawyers, even after controlling for relevant identity characteristics, any solution to this problem may compromise other values. *Id.* (discussing “some

that this is due to viewpoint discrimination in hiring, demonstrated by the fact that conservative academics outperform the median academic.<sup>67</sup> It is only human to judge as more academically rigorous or useful the ideas with which one agrees,<sup>68</sup> but academics must either fight against this urge or lose their claim to academic credibility. Further, at public universities, viewpoint discrimination in hiring violates the First Amendment.<sup>69</sup>

Academic institutions, in other contexts, are increasingly perceived to have failed to impart broad-mindedness and intellectual openness on their students, perhaps due to social justice aims these institutions believe are more important. In our current polarized political climate, students routinely call for speakers, especially those with more conservative views, to be disinvited from speaking on campus, even when invited by student groups at public universities with their own First Amendment rights.<sup>70</sup> Many of these calls conflate people with ideas that are more conservative, or less obviously progressive, even on economic issues, with people who are overtly racist or white supremacists.<sup>71</sup>

---

suggestive evidence that a tradeoff between ideological balance and diversity-oriented hiring prerogatives likely exist”).

<sup>67</sup> James C. Phillips, *Why Are There So Few Conservatives and Libertarians in Legal Academia? An Empirical Exploration of Three Hypothesis*, 39 HARV. J.L. & PUB. POL’Y 153, 196–97 (2016). For an alternative take, see Michael Vitello, *Liberal Bias in the Academy: Overstated and Undervalued*, 77 MISS. L.J. 507, 510 (2007) (acknowledging “that law faculties may be further left than the legal profession as a whole, but the data do not support the conclusion that law faculties tilt far to the left.”).

<sup>68</sup> Indeed, an empirical study of political contributions concludes that legal scholarship displays a political bias, thus undermining the “objectivity” of legal scholarship and the academic endeavor. See Adam S. Chilton & Eric A. Posner, *An Empirical Study of Political Bias in Legal Scholarship*, 44 J. LEGAL STUD. 277 (2015). Of course, those who donate to political campaigns may be more likely to display political bias in their legal scholarship than those wishing to avoid partisan affiliations. See *id.* at 291–92 (noting the likelihood “that most nondonors have political commitments, and as a result we decided to take an alternative approach to identifying the ideology of the law professors in our sample. The approach we elected to use was to code their ideology using information available on their curriculum vitae (CVs).”).

<sup>69</sup> At least some aspects of a public university have been considered by the Supreme Court to be a public forum, and viewpoint discrimination is impermissible even in a limited public forum. See Epstein, *supra* note 43.

<sup>70</sup> The calls to disinvite Christina Hoff Sommers when invited by the Lewis and Clark Law School Federalist Society are illustrative. Lewis and Clark is a private university and is not constitutionally required to respect students’ free speech rights, but the example shows an increasing intolerance to any views deemed to oppose the interests of women or historically oppressed minority groups. Christina Hoff Sommers, due to her views about how to tackle the wage gap or handle campus sexual assault cases, was labeled a “fascist” by several affinity student groups. See Christina Sommers (@CHSommers), TWITTER (Mar. 5, 2018, 8:55 AM), <https://twitter.com/CHSommers/status/970704358001094656>.

<sup>71</sup> These calls likely do not represent the majority of students, but chanting “liberalism is white supremacy” as a way of shouting down a speaker from the American Civil Liberties Union at a planned event reflects an atrophying free speech culture on campus. See *The Intolerant Fifth: Free Speech at American Universities Is Under Threat*, ECONOMIST (Oct. 12, 2017), <https://www.economist.com/united-states/2017/10/12/free-speech-at-american-universities-is-under-threat>.



Articulating any sort of causal claim about the increasing intolerance of students and the lack of intellectual diversity on university campuses is difficult and beyond the scope of this paper. This context is important, however, for understanding the First Amendment concerns associated with requiring prospective or current faculty to articulate their views about diversity in order to be hired or retain their positions.

Without detracting from any legitimate academic mission of the university, some professors may believe in a more classical liberal understanding of racial justice and nondiscrimination, in which members of all groups have shared, universal rights, and where too much of an emphasis on achieving group-based diversity, making group-based generalizations, or targeting group-based remediation is both divisive and unfair. The Oregon Association of Scholars argues that the “threat to academic freedom and research excellence is acute,” when diversity statements are imposed upon university faculty, because these statements function as an “ideological litmus test.”<sup>72</sup> Indeed, university professors advising on how to craft a diversity statement have told prospective applicants that they need not apply if they do not share the university’s particular definition of and approach to diversity.<sup>73</sup> According to the White Paper of the Oregon Association of Scholars:

While in theory, the concepts of diversity, equity, and inclusion could be interpreted in ways consistent with different political viewpoints, in practice they have been consistently and exclusively defined by university officials to emphasize the values and assumptions of left-wing viewpoints in society. These can be summarized as an emphasis on group identity; an assumption of group victimization; and a claim for group-based entitlements. Classical liberal approaches, that emphasize the pluralism of a free society, the universalism of human experiences, and the importance of equality before the law, have been regarded as invalid. So too have conservative approaches that focus on shared values and the sacredness of the private realm and individual morality. More broadly, the idea of a university as a place where leading scholars are protected from any ideological imposition is also rejected.<sup>74</sup>

These objections cannot be dismissed on the ground that professional speech can be more heavily regulated than other speech, or that faculty

---

<sup>72</sup> OREGON ASSOCIATION OF SCHOLARS, *supra* note 10, at 5.

<sup>73</sup> *Id.* at 4–5.

<sup>74</sup> *Id.* at 4.

members are frequently asked to express views, through voting or otherwise, that are ultimately not accepted by an institution. First, academic freedom principles dictate that the lower constitutional scrutiny afforded the speech of government employees is likely inapplicable to university professors.<sup>75</sup> The teaching and scholarship of professors are more tightly connected to critical First Amendment ideals than the speech of, for example, a doctor, which is bound up in the conduct of performing a medical examination.<sup>76</sup>

Second, diversity statements are different than the expression of a faculty member’s opinion that the administration ultimately rejects, such as a vote on hiring or a curricular issue or a controversial statement at a faculty meeting. The faculty member must complete the diversity statement, whereas she can always abstain from voting or refrain from speaking—and there is great pressure to echo the views of the administration, in part because of the mandatory nature of the statements. A faculty member understands that her job depends on successful communication on the form, yet she is also being asked for her opinion on a heavily contested and political issue.

Objections to mandated diversity statements can perhaps be dismissed as advanced by those seeking to undermine the university’s legitimate mission of enhancing diversity, sanctioned by *Grutter*. However, if a public university’s true goal in requiring these sorts of diversity statements is to increase minority presence in order to remedy past discrimination, that political goal is not permitted under *Grutter*, which explicitly based its holding on a diversity of viewpoints and experiences rationale as the compelling interest justifying state discrimination.<sup>77</sup> If a university’s true goal is to serve a variety of students in order to expose students to a diverse range of ideas, the permissible compelling interest in *Grutter* that validated race-based affirmation action despite Equal Protection challenges by those applicants discriminated against in admissions, most are not doing a

---

<sup>75</sup> According to the Supreme Court in *Garcetti v. Ceballos*:

There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court’s customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.

547 U.S. 410, 425 (2006).

<sup>76</sup> See *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967) (“Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.”).

<sup>77</sup> *Grutter v. Bollinger*, 539 U.S. 306, 323–24 (2003) (describing the precedents’ rejection of “an interest in remedying societal discrimination because such measures would risk placing unnecessary burdens on innocent third parties ‘who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered’” (citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 310 (1978))).

commendable job, given the lack of political, intellectual, and ideological diversity at most universities.

Universities may be basing their diversity statements on either an unconstitutional or a pretextual purpose. Or, universities may simply be ensuring that all students are treated fairly, given data showing race- and gender-based implicit bias in evaluating individuals. However, forcing professors to articulate specific views placing a high priority on specific types of diversity to advance a specific understanding of diversity, using specific, often remedial measures that target students for disparate treatment does appear to implicate the concerns articulated in *Barnette*. Professors should be empowered to articulate meaningful disagreements on this important topic, in order to find the right solutions for best educating students and advancing knowledge, the legitimate pedagogical goals of a university. Even if the university is permissibly committed to a particular goal, it must leave room for other professors to disagree—or progress will come to a halt in the service of good orthodoxy.

In the next section, I explore arguments for and against applying *Barnette* to cases like the ones above, where the state's laws or university policies are designed to promote the rights of minorities, not the populist cause of nationalism.

### III. APPROACHING MODERN APPLICATIONS OF *BARNETTE*

Compelled unanimity of opinion is unconstitutional under *Barnette*. The government can articulate its own message, and it has greater leeway to control professional speech that is related to professional conduct and the provision of professional services,<sup>78</sup> and commercial advertising.<sup>79</sup> However, the government generally cannot require private parties to profess views upon

---

<sup>78</sup> The Supreme Court has not provided guidance on the standard with which professional speech should be judged, and lower courts have split on the issue. See Erika Schutzman, *We Need Professional Help: Advocating for a Consistent Standard of Review When Regulations of Professional Speech Implicate the First Amendment*, 56 B.C. L. REV. 2019, 2023 (2015) (“Some courts have held that professional advice does not even qualify as speech under the First Amendment, while others have found that professional advice receives the heightened First Amendment protection of intermediate scrutiny.”). Claudia Haupt argues that professional speech is worthy of First Amendment protection, regardless of the profession, based on “three core elements: (1) a knowledge community’s insights, (2) communicated by a professional within the professional-client relationship, (3) for the purpose of providing professional advice. The first element concerns the role of knowledge communities.” Claudia Haupt, *Professional Speech*, 125 YALE L.J. 1238, 1247–48 (2016).

<sup>79</sup> Even in the context of commercial advertising, however, some messages the government wishes the seller to convey may be struck down as unconstitutional. See *Zauderer v. Office of Disciplinary Council of the Supreme Court of Ohio*, 471 U.S. 626, 651 (1985) (“We recognize that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech. But we hold that an advertiser’s rights are adequately protected as long as disclosure requirements are reasonably related to the State’s interest in preventing deception of consumers.”).

which the state wishes to communicate consensus. The scenarios described in the previous Part all implicate the imposition of a “good orthodoxy,” to varying degrees.

However, the “collision of rights” aspect of the good orthodoxy cases described above distinguishes them from *Barnette*. One way to acknowledge this distinction is to conclude, consistent with First Amendment protections, that the expression of pure, protected speech,<sup>80</sup> which merits strict scrutiny, does not violate anyone’s rights, thus avoiding a collision, even if the speech is offensive and corrosive to historically marginalized groups.<sup>81</sup> But laws affecting expressive conduct (not pure speech) that undermine the civil rights of others may survive constitutional scrutiny, as long as speech and expression are not greatly curtailed, and as long as the legislation is not designed to achieve a good orthodoxy. This paradigm requires courts to (1) recognize when speech is pure speech versus expressive conduct, (2) determine whether laws affecting expressive conduct are too restrictive, and (3) consider whether the motive of the legislature has aspects that are intended to compel unanimity of opinion.

#### A. *Defining Speech*

Although some frame the issues presented in *Masterpiece Cakeshop* as primarily implicating religious liberty,<sup>82</sup> at heart, similar cases should be considered compelled speech cases. *Masterpiece Cakeshop* involved what the Supreme Court deemed explicit religious animus and disparate treatment on the basis of religion, but similar cases involving expressive rights and public accommodations laws need not necessarily implicate religious animus. Those cases should be considered, at heart, about free speech rights. *Barnette* itself established a framework where protections against compelled speech and unanimity of opinion apply equally to religious claimants and those espousing any other ideology.<sup>83</sup> Justice Jackson’s majority opinion

---

<sup>80</sup> As noted earlier, I mean to distinguish this type of speech from expressive conduct or speech that falls within an unprotected or less protected category. See Nat’l Inst. of Family and Life Advocates v. Becerra, 138 S. Ct. 2361, 2379 (2018) (Kennedy, J., concurring).

<sup>81</sup> This accords with First Amendment jurisprudence, where even speech that is degrading to particular identity groups is protected. See, e.g., *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017) (finding unconstitutional as a First Amendment violation the Lanham Act’s “disparagement clause,” which denies trademarks to marks that demean particular groups).

<sup>82</sup> Indeed, the very narrow opinion ruled on religious liberty grounds, see *supra* Part II.A., but the difficult questions about the interaction between public accommodations laws and the First Amendment remain open.

<sup>83</sup> Bybee, *supra* note 45, at 328–29 (arguing that, because of the jurisprudence of Justices Jackson and Scalia, “the First Amendment protects religious exercise from regulation as a religious exercise, speech from regulation as speech, and press from regulation as press, but that the First Amendment does not grant special privileges to persons exercising such freedoms.”).

opted not to hold that religious adherents receive an exemption from generally applicable laws; instead, the opinion held that the state does not have the power to compel certain forms of expression, regardless of the identity of the speaker.<sup>84</sup> If the state cannot require the Jehovah's Witnesses to salute the flag, it cannot require anyone to salute the flag.<sup>85</sup>

Thus, the religious aspects of *Barnette* are immaterial to the majority's reasoning, and *Barnette* is explicitly about state power to regulate speech for all. Given that the essence of issues presented in cases like *Masterpiece Cakeshop*, and in a case like *Janus*, involve free speech rights, not religious liberty, a court confronting a similar case must first decide whether the legislation at issue affects pure speech or expressive conduct (or, simply conduct, in which case there is no First Amendment protection at all). Content-based restrictions on pure speech must survive strict scrutiny,<sup>86</sup> a highly protective standard that should not be lightly diluted even in the service of important civil rights goals.<sup>87</sup> Restrictions on expressive conduct receive intermediate scrutiny, rendering laws valid so long as they are appropriately tailored to an important government interest and do not overly burden expression.<sup>88</sup>

Distinguishing pure speech from expressive conduct, at the margins, is not an easy task.<sup>89</sup> Articulating a pithy formula for distinguishing pure speech

---

<sup>84</sup> *Id.* at 329–30. According to the Court in *Barnette*:

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

W. Va. State Bd. of Educ. v. *Barnette*, 319 U.S. 624, 634–35 (1943).

<sup>85</sup> Bybee, *supra* note 45, at 328–30.

<sup>86</sup> *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2231 (2015) (“Because the Town’s Sign Code imposes content-based restrictions on speech, those provisions can stand only if they survive strict scrutiny, ‘which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.’”) (internal quotations omitted).

<sup>87</sup> The balancing framework’s subjectivity can erode free speech rights, making it all the more important that strict scrutiny remain strict. *See Goldberg, supra* note 24, at 688 & n.2 (arguing that the indeterminacy of harms balancing in First Amendment law “has the potential to undermine strong free speech protections and our faith in neutral principles underlying the First Amendment.”).

<sup>88</sup> *See United States v. O’Brien*, 391 U.S. 367, 377 (1968) (“[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.”). Expressive conduct occurs when “‘speech’ and ‘non-speech’ elements” combine in a single act. *Id.* at 376.

<sup>89</sup> Something like writing a poem is obviously pure speech, and something like burning a draft card or nude dancing clearly involves expressive conduct, but activities like cake making and photograph taking for commercial purposes fall somewhere in between these delineated extremes.

from expressive conduct may prove impossible, but factors the courts could consider include the extent to which the expression is part of other heavily regulated conduct; the extent to which the medium is generally used to communicate a range of ideas, facts, and opinions; the intent of the speaker; and the extent to which reasonable people perceive the conduct as expressive. Courts examining behavior that may be expressive conduct analyze whether the government is regulating the conduct in order to control the content<sup>90</sup> and whether a reasonable observer would attribute a specific message to the speaker.<sup>91</sup>

The *Masterpiece Cakeshop* majority opinion did not address whether a blank cake is pure speech or expressive conduct. Justice Thomas’s concurrence, joined by Justice Gorsuch, would have held that a blank cake is expressive conduct; he would have applied strict scrutiny to the Commission’s decision regardless because, according to this concurrence, “Colorado would not be punishing Phillips if he refused to create any custom wedding cakes; it is punishing him because he refuses to create custom wedding cakes that express approval of same-sex marriage.”<sup>92</sup>

Instead, I believe the *O’Brien* test applied to expressive conduct is the appropriate test for the cake at issue in *Masterpiece Cakeshop*. Colorado’s public accommodations law does not target viewpoint but ensures equal access of goods and services in the marketplace regardless of sexual orientation.<sup>93</sup> A blank wedding cake does contain expressive elements, and

---

<sup>90</sup> In *Texas v. Johnson*, the Supreme Court assumed flag burning was expressive conduct and held that the government may not regulate this activity for the purpose of controlling the message. 491 U.S. 397, 407 (1989). “It is, in short, not simply the verbal or nonverbal nature of the expression, but the governmental interest at stake, that helps to determine whether a restriction on that expression is valid.” *Id.* at 406–07.

<sup>91</sup> *Id.* at 404 (“In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether an intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.”) (internal quotation marks omitted).

<sup>92</sup> *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1746 (2018) (Thomas, J., concurring).

<sup>93</sup> Justice Thomas believes that in *Masterpiece Cakeshop*, the state’s compulsion was related to the suppression of expression, because the Commission “would not be punishing Phillips if he refused to create any custom wedding cakes; it is punishing him because he refuses to create custom wedding cakes that express approval of same-sex marriage.” *Id.* I do not believe this is the correct locus for analysis. The law at issue’s purpose, including as applied to this case, is to secure goods for same-sex couples as easily as opposite-sex couples, and this purpose is unrelated to the suppression of expression. However, I agree with Justice Thomas that purposes of preventing cake sellers from “denigrating the dignity of same-sex couples, asserting their inferiority and subjecting them to humiliation, frustration, and embarrassment,” *id.*, is related to the communicative element of the expressive conduct and may not be considered in the *O’Brien* analysis. For further discussion on this point, see *infra* Part III.B.

the history and use of the wedding cake connect it to a rich and symbolic expressive tradition.<sup>94</sup>

However, this type of expressive conduct may withstand *O'Brien* scrutiny—especially if a civil rights commission's goal is not to compel a particular message but to ensure equal access to the marketplace. In future cases involving different levels of expression of the cake, the *O'Brien* test should yield different results depending on how much speech is being suppressed. This would represent a reading of *O'Brien* where, the greater the intrusion on expression, the larger the interest the government would need to withstand constitutional scrutiny, as opposed to the reading that appears on the face of the test—which is that if there is any intrusion on speech, the government must simply tailor that intrusion narrowly to serve its significant interest without unduly intruding upon expression.<sup>95</sup>

Cakes as art span an expressive continuum. The writing on a cake, if conveying a unique message,<sup>96</sup> likely should be considered pure speech, as should expressive media like photographs and paintings that do not involve heavily regulated conduct elements involving the preparation and cooking of food. On the other end of the spectrum, the pre-fabricated cakes produced without a customer in mind should be considered pure conduct. A blank cake, produced in a custom-made, artistic way, likely contains enough expressive elements to be expressive conduct, not pure conduct.

Although a blank, custom-made wedding cake is expressive conduct, important legislative goals unrelated to the suppression of expression will withstand *O'Brien* scrutiny. A blank custom-made cake contains so many conduct-like elements, is produced by a heavily regulated industry, and is usually produced for consumption, not artistic communication. Plus, the application of the expressive conduct test demonstrates that very little speech appreciable by a reasonable observer would be compelled by requiring bakers to offer cakes on the same terms to all customers. This application of the expressive conduct test further illustrates why a blank cake should not be considered speech, but expressive conduct, in the first place. As a result, if *Masterpiece Cakeshop* had not been decided based on a religious animus

---

<sup>94</sup> See Brief for Petitioners at 6–7, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 3913762 at \*1 (describing history of creating “special” wedding cakes and their role in the cake-cutting ceremony).

<sup>95</sup> This would give some teeth to the *O'Brien* inquiry, which is currently being applied in many jurisdictions in a highly deferential way. See *Ben's Bar v. Village of Somerset*, 316 F.3d 702, 714 (7th Cir. 2003) (concluding that *O'Brien* is nearly indistinguishable from the deferential time, place, and manner scrutiny of content-neutral restrictions on speech).

<sup>96</sup> Whether “Happy wedding!” is truly a unique message if written on almost every cake is a difficult question, but “I support this same-sex (or opposite-sex) union,” or “I don't support this same-sex (or opposite-sex) union,” should likely be considered pure speech or expressive enough to survive *O'Brien* scrutiny.

rationale, I believe that an expressive conduct paradigm should have upheld Colorado’s public accommodations law—if the purpose of the law was unrelated to the suppression or compulsion of expression.

Professors Volokh and Carpenter argue in an amicus brief that the use of non-traditional media removes First Amendment protection entirely unless conduct is “intended to and likely to convey a . . . message.”<sup>97</sup> Their brief does not directly track the differences between pure speech and expressive conduct, but I agree with their approach that a custom-designed, non-prefabricated wedding cake may implicate free speech protections if it communicates a clear message.<sup>98</sup> In my view, those types of cakes should be considered expressive conduct, not removed entirely from the ambit of First Amendment protection.

Applying the *O’Brien* scrutiny in the way I have proposed would invalidate laws that restrict more speech, such as cases involving more traditional media of expression or cases where the cake contained a true message or symbolic design details.<sup>99</sup> The intermediate scrutiny of *O’Brien* would allow the application to nondiscrimination laws in cases like *Masterpiece Cakeshop* but would leave open the possibility of a different result in cases that implicated and compelled more speech.

Future courts dealing with cases of expressive conduct must also decide whether a reasonable observer would attribute a cake to the baker, or simply to the purchaser, before even applying expressive conduct protections. As Justice Gorsuch notes in his concurrence in *Masterpiece Cakeshop*, the approach courts use to decide whether, for example, a custom-made cake is protected speech must stay consistent across all cakes.<sup>100</sup> Serious First

---

<sup>97</sup> See Brief for American Unity Fund & Profs. Dale Carpenter & Eugene Volokh as Amici Curiae in Support of Respondents, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 4918194, at \*14 (arguing that articles sold to consumers that use media traditionally associated with expression should be considered pure speech).

<sup>98</sup> Volokh and Carpenter appear to argue that many custom-made cakes will not communicate a clear message, and I would disagree with that application of their approach. *Id.* at \*19.

<sup>99</sup> Only one of the concurrences in *Masterpiece Cakeshop* address how the case would be decided if words were written on the cake. See *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1744 (2018) (Thomas, J., concurring). I can imagine a cake that says, simply, “Congratulations,” might be treated differently, for First Amendment purposes, than a cake that says, “Congratulations on your same-sex union” because the baker in the first scenario is not forced to write something he wouldn’t articulate on cakes to opposite-sex couples. However, this argument is better suited to whether a baker impermissibly discriminated based on customer identity or permissibly refused service based on ideological message, which is not protected by Colorado’s public accommodations law.

<sup>100</sup> See *id.* at 1736–37 (describing how the Commission treated bakers’ refusals to create cakes denigrating same-sex marriage differently than Petitioner’s refusal to create a cake celebrating same-sex marriage). But see Erica Goldberg, *The Scope of the Masterpiece Cakeshop Decision Will Be Determined by the Concurrences*, CROWDED THEATER (June 4, 2018), <https://inacrowdedtheater.com/2018/06/04/the-scope-of-the-masterpiece-cakeshop-decision-will-be-determined-by-the-concurrences/> (outlining Justice



Amendment issues would arise if a civil rights commission deemed a cake's message to be attributable only to the customer in some cases, like those involving bakers refusing to create cakes for same-sex weddings, but attributable to the baker in other cases, such as if a baker refused to create a cake with a message that denounced same-sex marriage. I believe it is fair to attribute the message on a cake to the creator of the cake; any other position would likely create a circularity problem where the compulsion renders the speech not compelled under the First Amendment.

Whether a law compels or targets actual speech should be the crux of good orthodoxy cases. Neither the majority nor the dissent in *Janus*, which held that union dues for public sector unions constitutionally compel speech, truly grapple with whether the union dues contributed are, indeed, speech but base their decisions instead on what level of scrutiny attaches to employee speech as manifested through union dues.<sup>101</sup> The majority invokes *Barnette* several times to demonstrate the perils of forcing people to serve as a mouthpiece for the state's message,<sup>102</sup> and the dissent chastises the majority for overturning a law simply based on its policy wishes.<sup>103</sup> The dissent makes a compelling argument that perhaps a lower level of scrutiny should have attached to these contributions because of their connection to the employment setting and the duties of the employee. The majority is correct that union dues are clearly the speech of the employee, not the employer, undermining the agency-based rationales for why employee speech is often entitled to less First Amendment protection.<sup>104</sup>

Ultimately, the operative question, unaddressed by the majority, should have been about when mandated dues are the speech of the dues payer. The Court should have more closely and directly analyzed whether mandating

Kagan's conclusion that there is a principled way to distinguish bakers who refuse to sell cakes denigrating same-sex marriage from the situation in *Masterpiece Cakeshop*).

<sup>101</sup> See, e.g., *Janus v. Am. Fed'n of State, Cty., & Mun. Emps.*, 138 S. Ct. 2448, 2465 (2018) (discussing the differences between the deferential scrutiny suggested by the dissent and the scrutiny applied by the majority).

<sup>102</sup> *Id.* at 2463–64.

<sup>103</sup> *Id.* at 2501 (Kagan, J., dissenting) (accusing the majority of “weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy.”). For a discussion of why this type of cynicism may be unjustified and is corrosive to our First Amendment regime, see Erica Goldberg, *First Amendment Cynicism, the Janus Dissent, and the Soul of the First Amendment*, CROWDED THEATER (July 3, 2018), <https://inacrowdedtheater.com/2018/07/03/first-amendment-cynicism-the-janus-dissent-and-the-soul-of-the-first-amendment/>.

<sup>104</sup> *Janus*, 138 S. Ct. at 2474 (majority opinion). According to Justice Alito:

When an employee engages in speech that is part of the employee's job duties, the employee's words are really the words of the employer. . . . But when a union negotiates with the employer or represents employees in disciplinary proceedings, the union speaks for the *employees*, not the employer.

*Id.*

that public-sector employees give money to a private organization is more similar to paying taxes, or even paying a private continuing education organization,<sup>105</sup> or more similar to classic instances of compelled speech like forced donations to a political party. Mandatory union dues seem different than continuing legal education, which is truly intended to improve an employee’s job performance and thus is more similar to the less-protected employee speech, but this is a hard question that should have been the focus of the *Janus* decision. Separating compelled speech from unprotected funding or conduct is paramount in good orthodoxy cases.

In academia, diversity statements have speech-like elements, in that they are written statements by academics, describing their teaching, and, at some schools, their scholarship. The required statement commits a professor to a particular view and approach to scholarship and teaching. As a result, the diversity statement requirement compels the statement in itself, which professes particular views a professor may feel pressured into expressing, and also requires future conformity with the statement in the professor’s teaching and scholarship. Both the compulsion to make the statements and the effects on teaching and scholarship, based on a school’s preferred approach to a politicized topic, implicate aspects of *Barnette*.

Diversity statements, however, also memorialize the conduct-aspects of the professor’s employment. Universities should have the right to ensure that professors are not discriminating against students or unfairly disadvantaging some based on unconscious biases. The simple request for professors to fill out diversity statements by public schools may not be constitutionally problematic, if a reasonable range of responses and viewpoints are permitted.

There are situations where diversity statements may become, and perhaps have become, problematic, based on professional and even constitutional protections for academic freedom. Under at least professional and ethical standards of academic freedom—let alone constitutional ones—faculty members deserve wide latitude to comport their classrooms as they see fit, craft reasonable policies involving class participation, and design the curriculum to best present the material, without implementing diversity-based remediation, so long as they do not discriminate against students. The institution also has latitude to create diversity-based programming and foster an atmosphere of inclusion, and where the university’s and the professor’s

---

<sup>105</sup> An amicus brief analogizes agency fees to taxes and continuing education classes. *See* Brief for Professors Eugene Volokh & William Baude as Amici Curiae in Support of Respondents, *Janus v. Am. Fed’n of State, Cty., & Mun. Emps.*, 138 S. Ct. 2448 (2018) (No. 16-1466), 2018 WL 527958 at \*4–5, \*13 (comparing compelled union dues to taxes and to private organizations to which employees must contribute funds).

prerogatives conflict, schools should leave a reasonable range of experimentation for professors.<sup>106</sup>

The Constitution does become relevant if professors at public schools are compelled to echo the school's political viewpoint on issues involving diversity. The institution may take a particular position on the best way to promote diversity, but faculty must be permitted to disagree. If a professor believes that a focus on group differences or group remedies is illiberal, and that efforts to achieve diversity become discriminatory and infringe on individual students' rights, the professor cannot be compelled to express a different view. This honors the professors' First Amendment rights, ensures that their scholarship is not compromised by forced espousal of views to which they do not ascribe, and leaves room for the school's position to evolve.<sup>107</sup>

*B. Impermissible Motives, Dignitary Interests, and Unanimity of Opinion*

When pure speech and expressive conduct conflict with laws protecting historically marginalized groups, *Barnette* counsels against allowing certain governmental motives to override free speech concerns. *Barnette*'s antipathy towards a forced orthodoxy should mean that certain motives—like the state's desire to use individual's speech to vindicate others' dignitary interests—are insufficient to override First Amendment concerns. The state may regulate harmful conduct such as discrimination, which also implicates dignitary concerns as well as causing economic harm. However, when the state regulates speech or expressive conduct, its motive cannot be mandating that others communicate a message of tolerance that affirms the dignity of others. That motive, even for what the state believes to be a worthy cause

---

<sup>106</sup> Hard cases in this context span the political spectrum. For example, a graduate-level teacher who championed calling on students in an order based on their membership in certain historically marginalized groups, saying she calls on white men “[only] if I have to,” see Don Sweeny, *This Instructor Calls on Black Women First and White Men Last. Critics Want Her Fired*, MIAMI HERALD (Oct. 23, 2017, 2:11 PM), <https://www.miamiherald.com/news/nation-world/national/article180416296.html>, has adopted a strategy that I do not believe is protected by academic freedom, in that she is actively discriminating against students in her classroom to remedy social injustice issues outside of the classroom. See Goldberg & Sarabyn, *supra* note 51 (arguing that academic freedom should exist when a professor is acting academically, not politically, and defending the distinction). If a university wants to prohibit professors from engaging in open discrimination against students, instead of just trying to equalize speaking opportunities, it should have that prerogative.

<sup>107</sup> Schools change policies on issues as fundamental as whether to require mandatory standardized admissions tests, and professors' opinions on these issues should be at the forefront of these changes.

(and perhaps especially because the state believes it to be a worthy cause),<sup>108</sup> tracks the compelled unanimity of opinion that *Barnette* rejects.

The government cannot vindicate dignitary interests by capitalizing on the communicative value of speech to force others to communicate a message of equal dignity. If an artist does not believe that, as an example, Jewish people’s beliefs are as wholesome, or as correct, as Christian people’s beliefs, the government cannot force that artist to depict messages of tolerance. The government cannot force individuals to communicate a message that others are worthy of equal dignity, even if that message is right, even if that message represents the foundation of our country, and even if the government may itself communicate that message and regulate conduct in order to promote that message. The concrete, material effects of the regulation can be considered when applying intermediate scrutiny to expressive conduct,<sup>109</sup> but courts should not invalidate statutes based the dignitary harm caused by speech. In most cases, when pure speech is involved, strict scrutiny should defeat the statute so as to avoid dilution of the strict scrutiny standard that would jeopardize our full panoply of First Amendment rights. Thus, even if pure speech has concrete, material effects, speech compulsion or prohibition should not survive strict scrutiny even if these types of regulations would survive intermediate scrutiny.

At oral argument, the Justices in *Masterpiece Cakeshop* should thus not have focused on dignitary interests—as hard as this is to do.<sup>110</sup> Dignity, as an interest, is so amorphous as to invite viewpoint-based discrimination, antithetical to our viewpoint-neutral free speech regime, by courts and legislatures. Further, an opposition to speech that undermines others’ dignity for particular reasons or based on particular characteristics is a viewpoint-based consideration in and of itself. Speech that harms another’s dignity does so because the listener is profoundly offended and invalidated by the message, or viewpoint, expressed. The Court ruled in *Matal v. Tam* that the Patent and Trademark Office may not refuse to issue trademarks that disparage other individuals or groups because the disparagement clause is a

---

<sup>108</sup> Justice Kennedy’s concurrence in *NIFLA v. Becerra* reflected this sentiment, when he remarked that “[t]he California Legislature included in its official history the congratulatory statement that the Act was part of California’s legacy of forward thinking. But it is not forward thinking to force individuals to be an instrument for fostering public adherence to an ideological point of view they find unacceptable.” *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2379 (2018) (Kennedy, J., concurring) (internal quotation marks and citations omitted).

<sup>109</sup> Concrete, material effects include the inability of a certain minority group to obtain access to goods and services, an effect produced regardless of the communicative effect of the speech, if a particular group is discriminated against in the provision of goods and services.

<sup>110</sup> Justice Kennedy, for example, asked about whether deciding the case in favor of *Masterpiece Cakeshop* would lead to results that are “an affront to the gay community.” Transcript of Oral Argument at 27, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018) (No. 16-111).

viewpoint-based restriction on speech.<sup>111</sup> Under the Equal Protection Clause of the Fourteenth Amendment, the state may not target particular groups in ways that undermine their dignity and autonomy, but, without state action, private individuals are allowed to express ideas that offend others to the very core.

This argument becomes more complicated when discussing requiring professors to create diversity statements. Affirming the equal dignity of every student, regardless of status characteristics, is a critical part of a professor's job and creates an environment where students can best learn. Professors who actively and explicitly make statements to students reflecting racial- or gender-based animus are doing their students a disservice, and the school can rightly intervene. That said, professors who simply hold different views on affirmative action, or speak out against perhaps over-compensatory diversity measures, should not be deemed to be undermining the dignity of their students. In an academic setting, students need to tolerate views that upset them, or even disturb them to their core, especially from other students, and perhaps even from professors.

#### IV. CONCLUSION

Understanding the modern compelled speech cases in light of *Barnette* can be helpful in bridging the growing political divide between the right and the left on free speech issues. *Barnette*, a case involving opposition to certain types of forced patriotism, codes as a left-leaning opinion by those who, for simplicity, categorization, or other political purposes, reduce judicial opinions to left-right outcomes. Cases similar to *Masterpiece Cakeshop* will code as right-leaning invocations of the First Amendment. However, the appreciation that forced unanimity of opinion comes in many forms, and undermines the expressive rights of many different groups, may force partisans to think about these cases at a higher level of abstraction, above the outcome in any particular case.

The key to ensuring that individuals across the political spectrum can accept both the reasoning and the results in any given opinion will be drawing clear, meaningful, nonpartisan lines between speech and conduct that safeguard our ability to express unpopular sentiments while preserving laws that mainly target conduct and benefit groups who have been historically oppressed by our country's laws.

---

<sup>111</sup> *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017) (holding that the Patent and Trademark Office violated the First Amendment when it refused to grant a trademark to the band The Slants on the basis that the trademark was disparaging to individuals of Asian descent).